In late-March, Congress passed the big $13 trillion budget bill. The bill is over 2000 pages long, was passed within hours of its introduction, and is loaded with legislative “riders” that have no apparent connection to governmental spending. One of these riders addresses the circumstances in which restaurants can keep servers’ tips.

The FLSA’s tip rules have been ahot topic lately. And there’s a lot of misinformation floating around out there. Here’s an explanation of what Congress just did and how we got to this place:

The Basic “Tip Credit” and Tip Sharing Rules: The FLSA sets the minimum wage at $7.25/hour. Yet, many servers, bartenders, bussers, runners, and other customer service employees are paid an hourly wage of less than $7.25. That’s because, under the FLSA, restaurants can pay these “tipped employees” as little as $2.13/hour plus customer tips. When a restaurant does this, it is taking a “tip credit” against its minimum wage obligation to the tipped employee.

As you can see, the tip credit provides a big benefit to American restaurants. The customers primarily pay the workers. That’s a sweet deal for the boss. And it really only happens here in the USA. (In Europe, by contrast, tipping is not expected because the restaurant receives a certain percentage, usually 15%-30%, of the customer’s spending. One of the times that the restaurant does not take advantage of the tip credit. The Ninth Circuit agreed with the restaurant. According to the Ninth Circuit, a restaurant that pays servers the full minimum wage could do whatever it wanted with customer tips.

The Obama Administration’s 2011 Regulation Disagreeing with Cumbie: In response to Cumbie, the Department of Labor implemented a regulation (found at 29 C.F.R. § 531.55) in 2011 that disagreed with the Ninth Circuit’s Cumbie decision. Under the 2011 regulation, tips could never be shared with kitchen staff. The restaurant disagreed, arguing that this rule applied only if it was taking advantage of the tip credit. The Ninth Circuit agreed with the restaurant. According to the Ninth Circuit, a restaurant that pays servers the full minimum wage could do whatever it wanted with customer tips.

The Ninth Circuit Upholds the 2011 Regulation: In response to the DOL’s 2011 regulation, a trade association representing the restaurant industry started a lawsuit asserting that the DOL exceeded its regulatory authority by implementing the regulation. This
NEW OMNIBUS BUDGET BILL OFFERS MIXED BAG FOR RESTAURANT EMPLOYEES

Continued from Page 1

lack of clarity is surely intended. This sentence would be much more clear without the word "inoned".

So then, in the wake of the Ninth Circuit's Oregon Restaurant opinion, the law of the land was finally clear: Even restaurants that pay the full minimum wage to servers may not require tips to be shared with managers or kitchen staff.

The Trump Administration's Proposed Regulation: Not so fast. In December 2017, the Trump Administration's DOL proposed a new regulation reversing the Obama Administration's 2011 regulation and returning the law to the Crumble-world in which a restaurant paying the full minimum wage can do whatever it wants with customer tips. This proposed regulation was met with some stiff resistance from workers' rights groups.

The 2018 Omnibus Budget Bill Settles the Dispute with a Compromise: All of this history brings us to the 2,232-page Omnibus Budget Bill passed in late-March 2018. Turning to pages 2025-2027, we find a section of the Bill headed "Tipped Employees." In a nutshell, the new legislation does the following: (1) it generally revokes the 2011 Obama regulation; (2) it allows tips to be shared with non-supervisory kitchen staff only if the restaurant pays servers the full minimum wage and does not take a tip credit; (3) it strictly prohibits tips from being shared with restaurant owners, managers, or supervisors under any circumstances; (4) it clarifies that a restaurant allowing tips to be shared with owners, managers, or supervisors must pay the aggrieved servers both the amount of the tip credit (if any) taken and the amount of the diverted tip; (5) it makes liquidated damages (aka. "double damages") mandatory if the restaurant allows tips to be shared with owners, managers, or supervisors; and (6) it provides for a $1,100-per-violation penalty where the restaurant allows tips to be shared with owners, managers, or supervisors.

My Takeaway: In my view, the 8-year saga described above demonstrates a big problem with the current state of affairs. Throughout the past three Administrations, the DOL's Wage and Hour Division has sometimes been treated like a rubber stamping process that rewards the law of the party in power rather than the law of the land. The law of the land was finally clear: Even restaurants that pay the full minimum wage to servers may not require tips to be shared with managers or kitchen staff. This law is not the "mistake" that is referred to in the text.

THIRD CIRCUIT CONTINUES TO FOCUS ON FLSA "BREAK TIME" ISSUES

Continued from Page 2

In each of the past three years, the Third Circuit Court of Appeals (which is the appellate court for all the U.S. District Courts in New Jersey, Pennsylvania, and Delaware) has issued an opinion addressing the rules for deciding when workers should be paid for "breaks." All three cases interpret the Fair Labor Standards Act (FLSA) and its detailed regulations. Since the Third Circuit only issues a handful of precedent-setting FLSA opinions each year, it's a little unusual so see three decisions addressing a common topic.

Here's a quick summary of the three "break" cases:

First, in Babcock v. Butler County, 860 F.3d 153 (3d Cir. Nov. 24, 2015), a group of County correctional officers claimed that the prison violated their FLSA rights by failing to pay them for 15 minutes of their one-hour meal break. The officers claimed they should be paid for the full hour because, during the break, they were not allowed to leave the prison and were required to remain in uniform. The Circuit Court disagreed, explaining that time spent during the one-hour meal break could not be paid only if the workers' activities during the break are for the "predominant benefit" of the employer.

The Court then observed that the restrictions on the officers' time while on break was too onerous for the law enforcement context and, as such, did not "predominantly benefit" the prison.

Next, in Smiley v. ElDuPont De Nemours & Co., 839 F.3d 325 (3d Cir. Oct. 7, 2016), workers at a manufacturing plant in Towanda, PA sought pay for time spent before and after their shifts "dronning and dolfing their uniforms and protective..." Quotations from the text are not properly formatted.

"QUARTERLY QUOTE"

"Law is a lot like jazz...it's best when you improvise." - George Gershwin

(as revised by a plaintiffs' lawyer)

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Continued from Page 1

Continued from the Ninth Circuit. In 2018, the Ninth Circuit upheld the regulation in an opinion entitled Oregon Restaurant and Lodging Assoc. v. Perez, 816 F.3d 1080 (9th Cir. 2018).

So then, in the wake of the Ninth Circuit’s Oregon Restaurant opinion, the law of the land was finally clear: Even restaurants that pay the full minimum wage to servers may not require tips to be shared with managers or kitchen staff.

The Trump Administration’s Proposed Regulation: Not so fast. In December 2017, the Trump Administration’s DOLOverturned the Ninth Circuit’s 2011 regulation and returning the law to the Crumbie-world in which a restaurant paying the full minimum wage can do whatever it wants with customer tips. This proposed regulation was met with some stiff resistance from workers’ rights groups.

The 2018 Omnibus Budget Bill Settles the Dispute with a Compromise: All of this history brings us to the 2,232-page Omnibus Budget Bill passed in late-March 2018. Turning to pages 2,025-2,027, we find a section of the Bill headed “Tipped Workers.” In a nutshell, the new legislation does the following: (1) it generally revokes the 2011 Obama regulation; (2) it allows tips to be shared with non-supervisory kitchen staff only if the restaurant pays servers the full minimum wage and does not take a tip credit; (3) it strictly prohibits tips from being shared with restaurant owners, managers, or supervisors under any circumstances; (4) it clarifies that a restaurant allowing tips to be shared with owners, managers, or supervisors must pay the agregived servers both the amount of the tip credit (if any) taken and the amount of the diverted tip; (5) it makes liquidated damaged (a.k.a. “double damages”) mandatory if the restaurant allows tips to be shared with owners, managers, or supervisors; and (6) it provides for a $1,100-per-violation-penalty where the restaurant allows tips to be shared with owners, managers, or supervisors.

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THIRD CIRCUIT CONTINUES TO FOCUS ON FLSA “BREAK TIME” ISSUES

In each of the past three years, the Third Circuit Court of Appeals (which is the appellate court for all the U.S. District Courts in Pennsylvania, New Jersey, and Delaware) has issued an opinion addressing the rules for deciding when workers should be allowed a meal break.

THIRD CIRCUIT COURT'S 2015 BREAK-TIME CASE: In its 2015 opinion, the Third Circuit issued the most far-reaching of the three break-time opinions. There, the Court endorsed and adopted the bright-line rule that breaks of at least 15 minutes must be provided to workers under the FLSA’s half-time method is sometimes referred to as the “Missee” method or the “fluctuating workweek” method. Regardless of the nomenclature, the FLSA’s half-time method is terrible for salaried workers.

Here’s how this method works: Ann is a non-exempt salaried worker who works at a convenience store and is paid hourly wages. Under the half-time method, the boss can calculate the extra pay based on a “time and one-half” rate. As a result, the employer can get away with paying the worker at half-time even though the worker was actually worked at one-time. Thus, the half-time method is terrible for salaried workers. Here’s an example: A salaried employee at a factory receives an extra $50 ($5 X 10 hours) for her 10 overtime hours. In other words, the employer receives an extra $50 ($5 X 10 hours) for her 10 overtime hours.

The Superior Court’s new Chevalier opinion addresses whether the above half-time approach is allowed under the FLSA. The Superior Court based its opinion on the worker’s argument that the FLSA’s half-time method is sometimes referred to as the “Missee” method or the “fluctuating workweek” method. Regardless of the nomenclature, the FLSA’s half-time method is terrible for salaried workers.

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So Pennsylvania workers have good reason to thank former Superior Court Judge Jeffrey Moulton for his extensive and scholarly opinion in Chevalier.

A LITTLE GOOD NEWS FOR PENNSYLVANIA WORKERS: The Superior Court’s new opinion in Pennsylvania Superior Court rejects “half-time” method of overtime calculation for salaried employees. Here is some great news for Pennsylvania workers and their advocates: The Pennsylvania Superior Court recently issued a scholarly 44-page opinion explaining that, under the Pennsylvania Minimum Wage Act (“PMWA”), Pennsylvania’s employment breaks must be calculated using a “time and one-half” rate in determining the amount of extra overtime pay owed to salaried workers. The opinion is entitled Chevalier v. General Nutrition Centers, Inc., 177 A.3d 259 (Pa. Super. 2017), and was written by former Superior Court Judge Jeffrey Moulton (who, tragically, is no longer on the bench due to Pennsylvania’s absurd system of electing appellate judges and Delaware. This is very good news for both employees and employers. FLSA's half-time method is sometimes referred to as the “Missee” method or the “fluctuating workweek” method. Regardless of the nomenclature, the FLSA’s half-time method is terrible for salaried workers. Here’s an example: A salaried employee at a factory receives an extra $50 ($5 X 10 hours) for her 10 overtime hours. In other words, the employer receives an extra $50 ($5 X 10 hours) for her 10 overtime hours.

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No one is above the law.

Workers deserve to get paid for the time they work over 40 hours in a workweek. Unfortunately, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation’s complex wage and overtime laws.

Our law firm, Winebrake & Santillo, LLC, goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth many millions of dollars to workers and their families.

The wage and overtime laws are complicated. Don’t hesitate to contact us.

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2. Third Circuit Continues to Focus on FLSA "Break Time" Issues

Quarterly Quote

"Fighting for Fair Wages"

QUARTERLY

WAGE AND OVERTIME

Winebrake & Santillo, LLC

715 Twining Road

Dresher, PA 19025

Winebrake & Santillo, LLC is very pleased to announce that Mark Gottesfeld has been made a Partner at the firm. This is a well-deserved promotion for Mark, who has done a great job since joining the firm in August 2010. Prior to joining the firm, Mark worked at a Philadelphia firm of Saltz, Mongeluzzi, Barrett & Bendesky, P.C. He is a 2006 magna cum laude graduate of Lehigh University and a 2009 cum laude graduate of the inaugural class of Drexel School of Law. At Drexel, Mark served as an editor on the Drexel Law Review.

Mark has represented our clients with earnestness, intelligence, and, most importantly, empathy. Many of our clients have commented on how much they appreciate the attention Mark pays to their cases. Mark has tried several cases to verdict, including a federal court trial in the District of New Mexico that resulted in a plaintiff’s recovery and a lengthy court opinion addressing some very important issues of federal and New Mexico overtime law.

So congratulations to Mark Gottesfeld! We are lucky to have him working at our firm.

CONGRATULATIONS TO MARK GOTTESFELD

Winebrake & Santillo, LLC

Wage and Overtime Quarterly

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Spring 2018

NEW OMNIBUS BUDGET BILL OFFERS MIXED BAG FOR RESTAURANT EMPLOYEES

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As you can see, the tip credit provides a big benefit to American restaurants. The customers primarily pay the workers. That’s a sweet deal for the boss. And it really only happens here in the USA. (In Europe, by contrast, tipping is not expected because the server receives almost all her pay directly from the restaurant.)

Traditionally, restaurants must follow certain rules if they want to take the “tip credit.” One important rule requires that tips may only be shared among restaurant employees who “customarily and regularly” receive tips. In other words, tips cannot be shared with restaurant owners, managers, supervisors, or kitchen staff.

The 9th Circuit’s Cumbie v. Woody Woe Decision: In 2010, the Ninth Circuit Court of Appeals issued an opinion in a case called Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010). In Cumbie, the restaurant did not take advantage of the tip credit. In other words, the restaurant paid the servers a minimum wage of over $725/hour. The restaurant also required the servers to share some of their tips with kitchen staff.

The servers filed a lawsuit, arguing that the restaurant violated the rule that tips not be shared with kitchen staff. The restaurant disagreed, arguing that this rule applied only if it was taking advantage of the tip credit. The Ninth Circuit agreed with the restaurant. According to the Ninth Circuit, a restaurant that pays servers the full minimum wage could do whatever it wanted with customer tips.

The Obama Administration’s 2011 Regulation Disagreeing with Cumbie: In response to Cumbie, the Department of Labor implemented a regulation (found at 29 C.F.R. §531.52) in 2011 that disagreed with the Ninth Circuit’s Cumbie decision. Under the 2011 regulation, tips could never be shared with managers or kitchen staff, even if the restaurant paid the servers the full minimum wage and did not take advantage of the tip credit.

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