Employment Practice Update

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Keeping You Informed About Employment Matters September 27, 2011

New Requirements for Employers Using the "Tip Credit"

By Christopher B. Lunny and Angela D. Miles

On April 5, 2011, the Department of Labor ("DOL") issued a final rule revising the regulations under the Fair Labor Standards Act ("FLSA"). The final rule, which took effect on May 5, 2011, is particularly significant to employers who use the FLSA "tip credit" to fulfill their minimum wage requirements.

The FLSA generally requires employers to pay employees a minimum wage of $7.25 per hour. The rule differs, however, for "tipped employees" – employees that customarily and regularly receive more than $30 per month in tips. Section 203(m) of the FLSA allows an employer to pay tipped employees below the minimum wage, provided that the wage and the employees' tips, taken together, equal at least the minimum wage.

Under the new rule, an employer must provide the following information to a tipped employee before the employer may use the tip credit:

- the amount of cash wage the employer is paying a tipped employee;
- the additional amount claimed by the employer as a tip credit;
- that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
- that all tips received by the tipped employee must be retained by the employee except for the pooling of tips among employees who customarily and regularly receive tips;
- that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

Although the rule provides that oral or written notice to employees satisfies the notice requirement, the DOL noted that it is preferable for employers to provide written notice because a physical document would permit an employer to conclusively demonstrate that it has satisfied the rule's requirements. Employers who fail to provide the required information may not use the tip credit provisions and must therefore pay the tipped employee at least $7.25 per hour in wages and allow the tipped employee to keep all tips received.

The DOL's new rule is not the only change impacting employers of tipped employees. In April of this year, the 8th U.S. Circuit Court of Appeals set a limit on the amount of time that tipped employees may spend on non-tipped work. Deferring to the DOL's Field Operations Handbook, the 8th Circuit held that tipped employees may spend no more than 20 percent of their time on "general preparation work and maintenance" duties, such as setting tables, making coffee or washing dishes. Any work done in excess of that limit violates the minimum wage provisions of the FLSA for employers taking a tip credit. The court did not address, however, exactly which of an employee's duties constituted "general preparation work or maintenance" that counted toward the 20 percent limit.

" … tipped employees may spend no more than 20 percent of their time on "general preparation work and maintenance" duties …"

Without guidance from the courts or the DOL on this issue, employers are going to have to carefully monitor the job duties they require of tipped employees. Additionally, employers should be wary of requiring tipped employees to spend significant blocks of time (30 minutes or more) on potentially non-tipped work. If you have any questions regarding the notice requirements, limits on non-tipped work, or any other requirements under the FLSA, please contact our office at (850) 425-6654.

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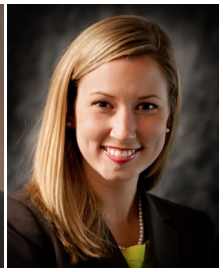

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This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.