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Recent DOL Guidance Not Entitled To Deference Post-Kisor

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Mark Wallin
Partner

In what appears to be the first decision concerning the so-called “20% rule” after *Kisor v. Wilkie*, a Virginia district court declined to give *Auer* deference to the U.S. Department of Labor (DOL)’s recent opinion letter on the topic.

As predicted in the wake of the *Kisor* decision, federal courts have begun to rely upon *Kisor* as it pertains to *Auer* deference concerning the 20% rule (or “80/20 rule”). This is a blow to employers who viewed the November 2018 DOL guidance as a positive step.

In *Spencer, et al., v. Macado’s, Inc.*, a potential collective of servers and bartenders raised a dual jobs claim and side work claim, among other things, against the defendant restaurant. The plaintiffs alleged that the restaurant violated the FLSA by requiring them to perform non-tip-producing tasks that were unrelated to their tipped duties (dual jobs). The plaintiffs also claimed the restaurant required them to spend more than 20% of their time on non-tip-producing tasks that were related to their tipped duties (side work).

The defendant moved to dismiss based upon the DOL’s recent opinion letter and its February 2019 revisions to the DOL’s Field Operations Handbook. The letter and revisions essentially eliminated the “20% rule” and clarified that the dual jobs regulation “permits the employer to take a tip credit for any time the employee spends in duties related to the tipped occupation, even though such duties are not themselves directed toward producing tips.”

Relying on *Kisor*, the U.S. District Court for the Western District of Virginia

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declined to give the DOL's recent guidance *Auer* deference, issuing a resounding defeat to the defendant. The court reasoned that new agency interpretations should not be afforded "*Auer* deference if the new interpretation 'creates unfair surprise to regulated parties,' which 'may occur when an agency substitutes one view of a rule for another.'"

The court went on to state that "'significant signs' indicate that DOL's new interpretation does not 'reflect the agency's fair and considered judgment on the matter in question.'" For instance, the court explained that "the new interpretation 'reverses 30-year-old agency policy' and that the issuance of the new interpretation 'coincided with a change in administration,' 'strongly suggest[ing] that the change is a matter of policy, not an effort to determine the meaning of the regulation.'"

The further effects of *Kisor* on the DOL's recent guidance will no doubt continue to play out in the district courts – and *Spencer* may well be a harbinger of things to come. Employers dealing with "20% rule" and "dual jobs" claims would be well served to be mindful of how this trend develops, as plaintiff employees will likely begin to rely upon the arguments made in these cases.