"FLSA Issues"

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Things to focus on this year

Things that derail FLSA cases early

Recent Sand Castle Cases

When wait time is not counted as work time. *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222 (5th Cir. 2017), *cert. den.*, 138 S. Ct. 1552 (2018)

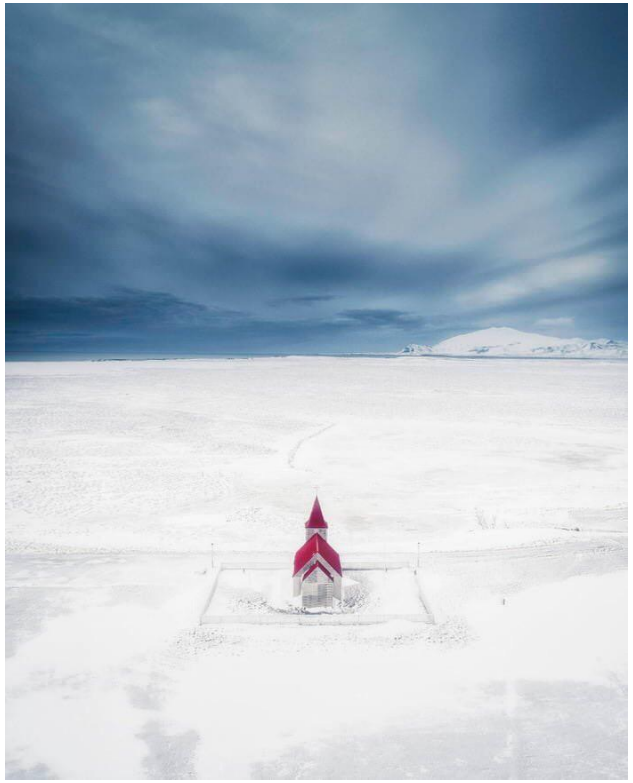
When does the fluctuating work week apply? *Hills v. Entergy Operations, Inc.*, 866 F.3d 610 (5th Cir. 2017)

No violation of § 541.602 if employer prospectively reduced salaries *Kitagawa v. Drilformance, LLC*, No. H-17-726, 2018 U.S. Dist. LEXIS 72690 (S.D. Tex. 2018)

Plaintiff's summary judgement granted on executive exemption *Livingston v. FTS International Services, LLC,* 4:16-cv-00817, No. 32 (N.D.Tex. Feb. 28, 2018)

When is a salary not a salary? *Patai v. Paton Eng'rs & Constructors (CA) LLC*, No. 4:17-CV-3104, 2018 U.S. Dist. LEXIS 109276 (S.D. Tex. Jun. 29, 2018)

The Supreme Court Rejects Longstanding "Narrow Construction" Rule for FLSA Exemptions



Increases in the off the clock cases

Which industries are experiencing decline in in FLSA cases and which ones are seeing increases?

Waiver of Class Arbitration in an Employment-Related Agreement Is Enforceable

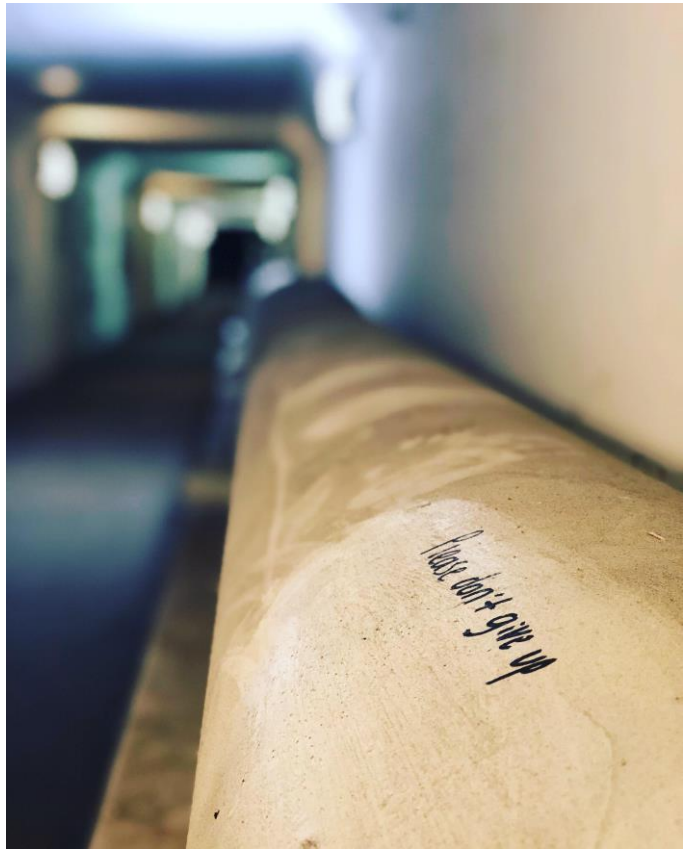
Arbitrability is a threshold question before class ruling *Edwards v. DoorDash, Inc.*, 888 F.3d 738 (5th Cir. 2018)

First to File Rule Does Not Apply to Individual FLSA Claim *Shirey v. Helix Energy Sols. Grp.*, No. H-17-2741, 2018 U.S. Dist. LEXIS 55609 (S.D. Tex. Apr. 2, 2018)

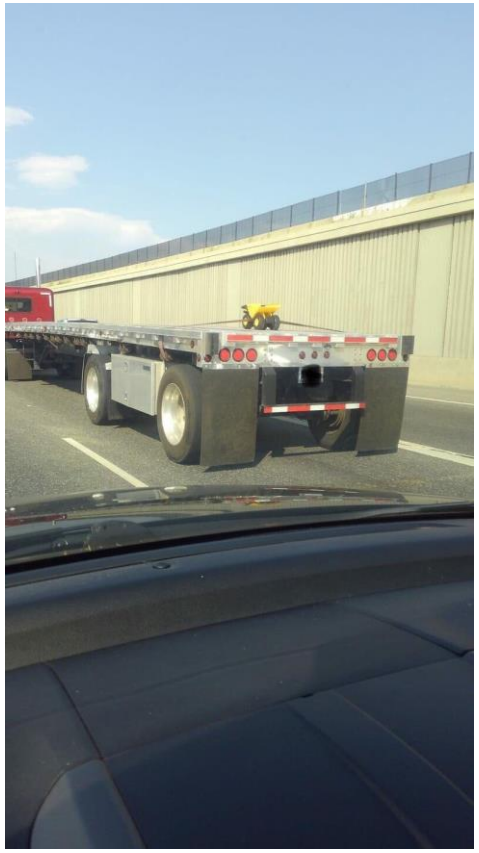
Class Certified even though the Plaintiffs and Class Members had different jobs and job duties*Song v. JFE Franchising Inc.*, No. 4:17-cv-1775, 2018 U.S. Dist. LEXIS 140979 (S.D. Tex. Aug. 20. 2018)

Court will not strike similar declarations in support of certification *Davis v. Capital One Home Loans, LLC*, No. 3:17-CV-3236-G, 2018 U.S. Dist. LEXIS 130035 (N.D. Tex. Aug. 2, 2018)

Pipelines to Arbitration is strengthening. Where do we go from here?

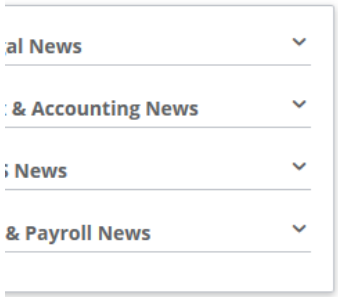


Changes in the MCA



Exception to an exception? Who has the burden of proof in a mixed-fleet case? *Carley v. Crest Pumping Techs., L.L.C.*, 890 F.3d 575 (5th Cir. 2018)

MCA does not automatically apply. *Amaya v. Noypi Movers, L.L.C.*, No. 17-20635, 2018 U.S. App. LEXIS 18862 (5th Cir. Jul. 11, 2018).



August 22, 2018

NLRB Might Strengthen Class Action Waivers

From Labor & Employment on Bloomberg Law

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By Hassan A. Kanu

A recent National Labor Relations Board decision could be the starting point for expanding the U.S. Supreme Court's ruling that employers can ban workers from filing class actions.

The board reopened a case last week in which it found a Texas restaurant violated labor law by firing a worker for filing a collective wage and hour lawsuit against the company. The NLRB's Republican majority cited the high court's ruling in *Epic Systems v. Lewis* as the basis for giving the Texas case another look. The justices in *Epic Systems* said businesses can include mandatory arbitration provisions and class action waivers in their employment contracts.

The board issued the 3-2 decision without being asked by the restaurant to revisit the case. The move indicates that some members may want to reconsider whether an employer can fire or otherwise discipline a worker for the very act of filing a class action.

What is going to happen?

3:2

NLRB Order vacating its own previous NLRB Decision and Order

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORDUA RESTAURANTS, INC.	
and	**Cases 16-CA-160901**
STEVEN RAMIREZ	
and	**16-CA-161380**
ROGELIO MORALES	
and	**16-CA-170940**
	16-CA-173451
SHEARONE LEWIS	

ORDER VACATING DECISION AND ORDER

On April 26, 2018, the National Labor Relations Board issued a Decision and Order in this proceeding, reported at 366 NLRB No. 72, in which it found that certain unfair labor practices had been committed, and severed and held in abeyance other unfair labor practice allegations. Thereafter, a petition for review was filed in the United States Court of Appeals for the Fifth Circuit, but the administrative record has not yet been filed with the court.

On May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018). In view of the Court's decision, the Board has sua sponte decided to vacate its Decision and Order pursuant to Section 10(d) of the National Labor Relations Act, to reconsolidate those allegations with the severed allegations, and to reconsider the entire proceeding.[1]

Dissent

Dated, Washington, D.C., August 15, 2018

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Members Pearce and McFerran, dissenting.

We disagree with our colleagues that *Epic Systems* warrants reopening the issues previously decided in this case. *Epic Systems* resolved the question whether an employer's maintenance of an arbitration agreement barring employees from bringing a collective action violated the Act. By contrast, in the present case the Board found that the Respondent violated the Act by discharging employee Steven Ramirez in response to his filing of a collective wage-and-hour lawsuit against the Respondent. It is well-settled that the filing of such a lawsuit constitutes protected concerted activity, and the Respondent has not contended otherwise. Thus, the Board's finding of the unlawful discharge of Ramirez is not affected by the holding of *Epic Systems*.

Dated, Washington, D.C., August 15, 2018

MARK GASTON PEARCE, MEMBER

LAUREN MCFERRAN, MEMBER

The End.