

# Back to the Future for Core Wage + Hour Concerns

By Justin R. Barnes & Eric R. Magnus

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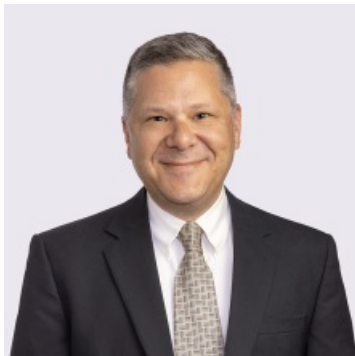
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“A corollary to the populist instincts of president-to-be Trump [i.e., his possible support for some increase to the federal minimum wage] is this issue about removing taxes on tips. This is something that could certainly happen in 2025 — and it would be the most important effect on the wage and hour practice in the entire time I have been practicing in this area.”



## Transcript

### INTRO

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#### Justin R. Barnes

*Office Managing Principal, Atlanta*

Hi everyone, thanks for joining us. My name is Justin Barnes. I'm a principal in the Atlanta office of Jackson Lewis. I am joined here by my colleague, Eric Magnus, who's also a principal in the Atlanta office of Jackson Lewis. We're going to be talking to you about the year ahead as it relates to wage and hour law. Eric, we've seen a lot of action, not just this year, but in recent years as it relates to the wage and hour laws, haven't we?

#### Eric R. Magnus

*Principal and Office Litigation Manager, Atlanta*

Indeed, we have. The past six months, the second half of 2024, were particularly eventful. We've seen what you and I are calling 'Back to the Future' basically take place now. We saw two levels of a salary increase to the federal minimum required for the white-collar exemptions. We saw one proposed in July that actually went into effect and then another one that was proposed to go into effect on January 1, 2025. Then we saw the courts completely kill all of those increases. We are now at the point where the Northern District of Texas's decision to undo the salary or vacate the salary

increases is now on appeal to the Fifth Circuit.

I don't think that any of us expect that appeal will survive the new administration coming in on January 20th and it will likely get withdrawn and we will be back to the laws that have been for the last four years which is the minimum salary of \$6.84 per week which is \$35,563 per year and it's as if nothing happened.

What are your feelings about what we've seen over the last year?

**Barnes**

Eric, I agree. It's 'Back to the Future.' I've been calling it 'Deja vu' all over again. This is like 2016 all over again. We saw the exact same thing happen in 2016 when the Obama administration tried to increase the salary thresholds under the FLSA, and then a federal judge in Texas blocked that. The same thing is happening now.

I suspect if I had to read my crystal ball, the same thing is going to happen in 2025 that we saw in 2017 out of the first Trump administration. I think that the Trump administration will not necessarily withdraw the appeal. Because the current administration has appealed the decision to vacate the salary threshold rule. I don't think we'll see the Trump administration withdraw their appeal because they do probably want to preserve their rulemaking authority. We're probably going to see the new DOL under the new administration ask for a stay of that appeal and say that they're going to issue their own rule and issue their own rule, which largely goes back to the status quo prior to July 1<sup>st</sup>. Maybe with some updates to keep up with inflation, but that's exactly what happened in 2017. What I expect to happen in 2025 is that the Biden rule will never go into effect, and it'll get replaced by a new rule issued by the Trump administration. If I had to read my crystal ball, that's what's going to happen.

Another interesting thing that's come up, Eric, is very important to the restaurant and hospitality industry and other industries that rely on use of the tip credit and have a lot of tipped employees. That's the 80-20 Rule, or as I noted recently, I guess they didn't feel like there were enough numbers in there. So, they added 30, which became known as the 80-20-30 Rule.

Tell us about that rule, Eric; what's happened to that, and what do you think is going to happen in the new year?

**Magnus**

Let's call this 'Back to the Future' too.

**Barnes**

Great movie.

**Magnus**

The history of the 80-20 Rule, which is the rule purporting to limit the amount of time that a tipped employee can spend performing duties that are not related to the earning of tips. The history of this rule goes back to 1988, and it is about as tortured as it gets. Until 2021, the rule was never elevated above sub-regulatory guidance and the Department of Labor's field operations handbook. But that sub-regulatory

guidance alone got a lot of traction in the courts and was supported by every Democratic administration that has been around since the nineties and was not supported by every Republican administration. So, we have had flip-flopping on the Department of Labor's view of the viability of the 80-20 Rule since 1988.

So, the Biden administration did what was a natural conclusion of trying to get the rule out of sub-regulatory guidance and proposed an actual rule the way you're supposed to promulgate actual rules, which was giving notice-and-comment on a final rule. It went through that entire process. The rule was promulgated. Not surprisingly, the rule was challenged.

The 2021 final rule formalized the 80-20 Rule, but also added, as Justin referred to, the 30-Minute Rule. The 30-Minute Rule is a separate rule that says that any period of thirty minutes or more in which a tipped employee is performing duties not related to the earning of tips must be paid a minimum wage, even if it doesn't breach the 20% Rule. This rule was challenged, like the salary rule that we talked about. The rule has now been vacated. The 2021 rule was determined to be not a valid interpretation of what the Dual Jobs Regulation is--- the only actual preexisting regulatory guidance there is on this. The Dual Jobs Regulation merely holds that somebody in a tipped job, when doing non-tipped work, should be paid minimum wage. Fifth Circuit has now ruled that the 80-20 Rule and the 30-Minute Rule are not valid interpretations of the Dual Jobs Regulation. Now that the rule is vacated, we are back to the position that we were in prior to the issuance of the 2020-21 rule.

In the interim, hopefully, everyone listening to this knows that the Supreme Court this past year ruled in the *Loper v. Raimondo* decision. The *Loper v. Raimondo* decision overturned the historical Doctrine of Chevron deference and held that courts should not be deferring to agency interpretations, which would include, relevantly here, the Department of Labor's interpretations of unclear statutory guidance.

The interesting thing here is that the pre-existing law to the 2021 final regulation, nearly all of it that adopts the 80-20 Rule, is based on deference to the Department of Labor's opinion under Chevron. So, it is a very, very open question as to the viability of the pre-existing 2021 case law, which will just have to be shaken out in courts.

As, not surprisingly to anyone listening to this, our position is that the 80-20 Rule is totally based on deference to the Department of Labor and should be abrogated because it is not a sensible interpretation of the regulations in the first place. This issue will have to be shaken out in the courts.

Justin, what are your thoughts about this?

**Barnes**

I agree with you, Eric. We go back to where we started before the 80-20-30 Regulation was introduced with the added instruction and benefit of the Supreme Court's decision in *Loper*. Very much uncharted territory right now in terms of where that rule lies, but I totally agree with your interpretation.

**Magnus**

To change the subject here, we've seen a lot of state law minimum wage movement,

but what do you think the prospects are for a national movement of the \$7.25 minimum wage?

### **Barnes**

That's a great question, Eric. There are two tracks that I see going on. One, as many people probably know, under the Obama administration, there was an executive order which increased the minimum wage for federal contractors. The Biden administration then tried to increase that minimum wage for federal contractors. There's been a lot of litigation over that. Courts have gone both ways on whether the executive order increasing the minimum wage for federal contractors is lawful. We expect the Trump administration to issue a new executive order fairly quickly after President Trump takes office. Now, that's on the federal contractor side.

On the non-contractor side and the \$7.25 minimum wage, what's interesting about that is typically you would think in a Republican administration, that's not going to get increased, but we have heard President-elect Trump and his campaign talk a lot, not just in this election, but also in, his prior elections about increasing the minimum wage. I think there is an appetite to increase the minimum wage beyond the current \$7.25 level. Now, that would take congressional action.

The \$7.25 minimum wage is built into the FLSA, the statute itself. So, Congress would have to take action. If President Trump strongly supports an increase in the federal minimum wage, Congress would follow suit and approve that. To be clear, even if that does happen, I don't think we'll see a drastic increase. We could see some increase just given some of the populist comments that have come out of the Trump camp on this particular issue.

### **Magnus**

A corollary issue, now that you mentioned the populist instincts of to-be President Trump, is this issue about removing taxes on tips. This is something that could certainly happen in 2025.

The most important effect it would have on the wage and hour practice is the entire time I have been practicing in this area, Justin and I and other practitioners like us have advised a lot of restaurants on ways to not have to deal with the tip credit, like service charge models or the 7-I exemption that opened up a few years ago, to banquet servers and those kinds of positions. If Congress ceases taxation of tips, I think we will see all of that work eviscerate. Nearly every restaurant will go back to the normal tip credit tip model because the employees will demand it because they won't be paying taxes on tips anymore. That is certainly something we could see in the year ahead that would be very interesting.

### **Barnes**

That's right, Eric. There are other initiatives that we could see coming out of the new Trump administration that could have an impact on wage and hour laws as well.

In addition to eliminating the tax on tips, there's also been talk out of the Trump campaign and the Trump transition team about eliminating tax on overtime wages as well. Also, the concept of allowing employers to use comp time in lieu of overtime.

Currently, only government employers can pay comp time in lieu of overtime under the FLSA. But there's been talk of amending the FLSA to allow employers to use comp time in lieu of overtime payments to pay for overtime. So, we could see some significant changes to the FLSA. I could certainly see if this comp time change were to be made, for example, for there also to be a corollary increase in the minimum wage and one fell swoop where we see some changes to the FLSA that can be touted as being employee-friendly and supporting employees.

So, everyone should stay tuned in the new year, particularly after the Inauguration to see what comes out of the DOL and what comes out of the Trump administration in the context of wage and hour loss. We certainly will, and we'll keep you updated as those come in. Thanks for joining us.

## **OUTRO**

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