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FOS NEWS - *Our clients come first*

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SUPREME COURT TURNS OVERTIME ANALYSIS UPSIDE DOWN

By Bailey Larsen

The Fair Labor Standards Act ("FLSA") generally requires employers to pay overtime compensation - for over 40 hours worked per week - to covered employees.

However, the law specifies 30 exceptions where overtime is not required to be paid to employees performing certain types of duties.

One exception is for

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles…if he is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles...to ultimate purchasers."

Because this exception is unique, a court decision discussing it should have little effect on most employers, right?

Think again.

In April, 2018, the U.S. Supreme Court, in a case involving the salesman exception, changed the way that all FLSA overtime exemptions will be analyzed going forward.

In *Encino Motorcars, LLC v. Navarro*, an employer presumed that automobile service advisors were exempt employees under the salesman exception, and chose not to pay them overtime for service provided over 40 hours per week.

The service advisors sued their employer, claiming that they did not fall within the exception and were therefore due payment of overtime wages.

Before the April, 2018 Supreme Court decision, courts had interpreted FLSA overtime exemptions narrowly, and service advisors had not been considered salesmen, therefore entitling them to overtime pay.

However, in *Encino Motorcars*, the Supreme Court held that automobile service providers *do* fall within the exception, and their employers, therefore, are not required to pay them overtime wages.

The important, and far reaching, distinction that was drawn by the Supreme Court in this decision is that *the Court rejected the idea that FLSA overtime exceptions should be construed narrowly.*

The Court instead required exemptions to be interpreted "fair(ly)."

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THE FIFTH—NOT ONLY FOR THE GUILTY

By Jacob Manian

The hallowed Fifth Amendment:

> "No person…shall be compelled in any criminal case to be a witness against himself."

This privilege, which applies only to individuals, protects any statement that might even *tend* to incriminate.

It extends not only to direct admissions of wrongdoing, but to any statement that "furnish[es] a link in the chain of evidence needed to prosecute the claimant for a ….crime."

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FOX HONORED

FOS's founding shareholder William Fox was honored with the "Hall of Fame" award at the Boys & Girls Clubs of Greater Milwaukee's "MVP Salute to Youth" Dinner and Celebration.

Bill is the first recipient of the "Hall of Fame" award.

Bill is a longtime Clubs Board member and a generous provider of *pro bono* services for the Clubs.

TAX REFORM ACT—A GAME CHANGER FOR PASS THROUGH ENTITIES?

By Michael Koutnik

Last year's tax reform significantly modified individual and business tax rates.

Major changes for individuals (set to expire December 31, 2025) include a reduction in rates, the roughly doubling of the standard deduction, and the removal of personal exemptions.

On the business side, the corporate rate fell (with no expiration date) from 35 percent to 21 percent - the largest reduction in U.S. corporate tax rate history.

Importantly, the tax reform made major changes for pass-through entities, whose income is taxed at the owner's individual rate, such as S corporations, partnerships, and most limited liability companies.

These entities now have a "Qualified Business Income" (QBI) deduction.

The QBI deduction allows a pass-through entity to deduct 20 percent of trade or business income earned in connection with a domestic business, which, in practice, reduces the effective rate paid by individuals.

Congress included this deduction to give pass-through entities a total tax break in line with the corporate rate reduction.

The QBI deduction is likely to be a major factor in an existing or potential business owner's consideration of whether his or her business should be run through a pass-through entity.

First, despite tax reform, traditional C corporations still face double taxation on distributed dividends. A company will be taxed at 21 percent, and taxed again at the individual's rate once distributed.

Even so, tax reform made C corporations more attractive for companies reinvesting business income in the company. Without its distribution, the income is only taxed once, at 21 percent.

An owner's structuring a business this way should seriously address exit planning, so that tax benefits accrued during the individual's ownership are not lost on a sale or other transfer.

Second, the QBI deduction is complicated, with limitations and phase outs, and clarifying regulations have not been written.

Still, an applicable QBI deduction will reduce pass-through income tax rates across the board.

Even where the resulting tax rate is higher than the C corporation rate, a pass-through entity is not subject to double taxation.

In most circumstances, pass-through entities will continue to be a logical entity choice for many businesses from a tax perspective.

If you are considering which entity is most appropriate for your new or existing business, contact your FOS corporate or tax attorney.

FOS No. 1— Twice!

FOS was named Best Contract Law Firm and Best Family Law Firm in the *Wisconsin Law Journal's* 2018 Reader Rankings.

FOS shareholder Jacob Manian received an honorable mention for firms defending DUI cases.

Supreme Court, continued from page 1

This opens a whole new can of worms, so to speak, with the Supreme Court writing, in part, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation."

The immediate impact of the ruling, of course, prevents automobile service advisors from receiving overtime pay.

More important, however, is the precedent set by this ruling as to how FLSA overtime exemptions are to be interpreted going forward.

The required "fair" rather than narrow interpretation will surely affect future FLSA overtime exemption disputes.

The contours and limits of the new standards will have to be more specifically defined in future FLSA cases.

CLAIM YOUR CHILD TAX REBATE NOW!

Due to a budget surplus, Wisconsin families with children under 18 may claim a $100 rebate per qualifying child—but you must act soon!

To claim the rebate, each child must have been under 18, and a Wisconsin resident, as of December 31, 2017. You will need the following information:

- Your (and your spouse's) social security number(s) (SSN);
- Each child's SSN and date of birth; and
- Your bank routing and account number, if you choose direct deposit.

Log on to https://childtaxrebate.wi.gov/ before June 30, 2018 to claim your rebate!

SEVENTH CIRCUIT NARROWS REASONABLE ACCOMMODATION REQUIREMENTS

By Lauren Maddente

Most employers, at some point, will receive a request, from an employee claiming to be disabled, for a "reasonable accommodation"—an accommodation which helps a disabled employee perform the essential function of his or her job.

The Americans with Disabilities Act ("ADA") requires employers to reasonably accommodate disabled employees to avoid a charge of disability discrimination.

When this occurs, the question from the employer's standpoint is whether the requested accommodation is reasonable.

In other words, what is a "reasonable accommodation"?

A recent decision from the Seventh Circuit, which is binding on courts in Wisconsin (and Indiana and Illinois), took an employer-friendly view of the issue—*at odds with most other federal Circuits*—in the context of employee requests for extended leave.

Severson v. Heartland Woodcraft, Inc. addressed whether an employer was required to grant an employee's request for a two to three month leave for recovery from back surgery.

The employer denied the request as unreasonable, terminated the employee and advised the employee to reapply for his position upon his recovery.

The Seventh Circuit affirmed the district court ruling, for the employer.

It held that the ADA's definition of "reasonable accommodation" does not include a long-term leave of two to three months. Otherwise, the Court held, the ADA would change from a disability to a medical leave statute.

Because the U.S. Supreme Court refused to hear the case, it is now the law in Wisconsin.

Severson is arguably a huge win for employers, because it limits the scenarios obligating an employer to grant employee requests for lengthy ADA leave.

For now, an employer presented with a request for an extended period of time off of work (i.e., more than a few days), may be relatively confident in denying the request under the ADA.

Employers in Wisconsin (and Illinois and Indiana) should still be cautious.

First, the Seventh Circuit's decision is contrary to the law in most other Circuits which have addressed the issue.

Second, while the Supreme Court refused to hear *Severson*, it could overrule the decision via another case.

Finally, *Severson*, as most employment cases, was highly fact intensive. There may be a unique fact set where even the Seventh Circuit might find an extended leave palatable.

The Fifth, continued from page 1

Hoffman v. United States, 341 U.S. 479.

But isn't the Fifth only for guilty people? No. It can be a lifesaver for the innocent.

Our courts have consistently emphasized that the privilege protects the innocent as well as the guilty.

One of the Fifth Amendment's "basic functions…is to protect innocent men… who otherwise might be ensnared by ambiguous circumstances." *Grunewald v. United States, 353 U.S. 391.*

Say, for example, you are under investigation for conspiring with others to commit wire fraud. You may not know anything about the fraud and have never knowingly participated in any fraud scheme.

Now suppose you are asked whether you know or have met with any members of supposed conspiracies.

Here, it would be appropriate for you to invoke the Fifth Amendment.

Why?

The mere admitting that you know or have met with members of the group could potentially "furnish a link in the chain of evidence needed to prosecute…" you.

Even if you did nothing wrong.

In addition to oral statements, the Fifth Amendment privilege can be used to avoid turning over a subpoenaed document.

The act of turning over a document can equal an admission that you know the document exists and you are producing the document in response to a specific subpoena request.

It is important to note, however, that corporations generally may not invoke the Fifth Amendment.

Like other legal areas, the Fifth Amendment privilege is subject to exceptions. And the courts have the final say on whether the privilege has been properly invoked.

The takeaway?

The Fifth Amendment privilege does not just shield a guilty witness from a direct admission of wrongdoing.

It also protects the innocent.

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YOU'VE GOT YOUR TRADEMARK—NOW WHAT?

By Laurna Kinnel

You've taken all the right steps to protect your intellectual property – contacted your FOS attorney, defined your mark's scope, and prepared and filed a trademark application for all proper international classes.

At last, your trademark registration is approved. With the hard work done, you feel like sitting back and relaxing, secure in knowing that your trademark is federally registered.

Not so fast.

Federal trademark protection, obtained from the U.S. Patent and Trademark Office ("USPTO"), does not last forever.

After a trademark has been federally registered, owners must maintain the trademark and its registration.

First, trademark owners must continue to use the mark. Because trademark rights are based on their use in commerce, the mark must, with limited exceptions, continue to be used to promote your goods or services.

Marks that are not used in commerce may be cancelled.

Second, trademark owners must "maintain" the mark by making certain filings with the USPTO at mandated times.

These include between the 5th and 6th year and between the 9th and 10th year after the mark is registered, and every 10 years thereafter.

Because these dates are so far out, it is important to have a docketing system, like the one FOS uses, for reminders of important deadlines.

Beware of scammers sending "official" notices demanding additional fees to maintain your mark – never pay a random third-party for "processing" or "recording."

Finally, trademark owners must protect the mark against infringing uses. Owners must defend marks against infringing third-party uses which could dilute or tarnish the marks.

Some trademark owners employ "watchdog" services to flag potentially infringing trademark applications.

Trademark registration helps protect valuable intellectual property – but protection does not end at registration.

Your FOS attorney can help you best protect your mark.