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## Legal Nonprofit Tells Supreme Court OT Math Ruling Wrong

By **Max Kutner**

Law360 (September 14, 2021, 2:02 PM EDT) -- The U.S. Supreme Court should weigh in on whether employers must include per diem payments when calculating the regular rate for overtime pay, a legal nonprofit said in a friend-of-the-court brief, supporting a health care staffing company's bid to review a Ninth Circuit ruling.

In an amicus brief docketed Monday, the Atlantic Legal Foundation argued that the appellate panel should have relied on a U.S. Department of Labor regulation indicating per diems should not factor into overtime math, instead of an agency handbook's interpretation of the regulation, backing AMN Services LLC's writ petition.

"The Ninth Circuit erred by relying on the handbook as the pretext for essentially rewriting an important, broadly applicable, duly promulgated DOL overtime calculation regulation upon which countless businesses and industries rely," the foundation, a public interest law firm, said in its brief.

The appellate panel had failed to follow the Supreme Court's 2019 holding in [Kisor v. Wilkie](#) that courts should defer to agency interpretations of regulations only when the regulations are ambiguous, the firm argued.

"Where, as here, a duly promulgated federal regulation is unambiguous, it is improper for a court to modify the regulation's plain meaning by relying upon an internal agency handbook," the Atlantic Legal Foundation said.

Under the DOL regulation for expense reimbursements, the per diem payments AMN made to traveling clinicians should be excluded from the overtime calculations, the firm argued.

But the handbook said, "If the amount of per diem or other subsistence payment is based upon and thus varies with the number of hours worked per day or week, such payments are not a part of the regular rate in their entirety."

"The handbook should be afforded no weight at all," the firm said.

That is partly because the Ninth Circuit panel failed to consider whether the regulation was ambiguous, the firm argued, calling this a "judicial sleight-of-hand."

AMN filed its writ petition in August, arguing that the high court should weigh in on whether the per diem allowances for travel expenses should be excluded from the regular rate for overtime calculations.

Under the Fair Labor Standards Act, "when calculating an employee's 'regular rate' of pay, an employer may exclude 'reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer,'" AMN said in its petition.

The Ninth Circuit panel's "decision threatens employers with massive unanticipated liabilities and upsets longstanding business practices" and "harms workers who will either see their taxable income increase or be saddled with burdensome record-keeping requirements," the petition said.

The clinicians behind the case waived their right to respond to the petition.

AMN is seeking to undo the Ninth Circuit panel's **February ruling** that the company needed to include the per diem benefits in the overtime math because it considered the payments as wages for other workers.

The company in March **asked for a rehearing**, arguing that the FLSA allows employers to withhold payments for certain expenses, a bid the American Staffing Association and the National Association of Travel Healthcare Organizations supported.

In May, the full Ninth Circuit **denied the request**, and AMN **asked the court** to delay the effective date of the February ruling while the company sought Supreme Court review. The court denied the request.

The dispute stems from a lawsuit former AMN traveling clinicians Verna Clarke and Laura Wittmann filed in 2016. They accused the company of violating the FLSA and California labor law by not paying proper overtime.

In 2018, the district court granted AMN's bid for summary judgment. The clinicians appealed and the Ninth Circuit panel reversed the summary judgment ruling and remanded the case.

Worker-side legal observers **saw the February ruling** as clarifying the distinction between pay for hours worked versus a benefit for costs incurred by employees.

Lawrence S. Ebner of the Atlantic Legal Foundation, who filed the amicus brief, said the Ninth Circuit panel had defied Supreme Court precedent by giving deference to an agency interpretation of an unambiguous regulation.

"We hope that our involvement as an amicus curiae will help persuade the Supreme Court to hear the appeal, and in so doing, reinforce its stringent criteria concerning judicial deference to agency interpretations of agency regulations," Ebner said in a statement Tuesday.

Counsel for AMN and the clinicians did not immediately respond to requests for comment.

An AMN spokesperson declined to comment.

An Atlantic Legal Foundation spokesperson did not immediately respond to a request for comment.

AMN is represented by Paul D. Clement, George W. Hicks Jr. and Kevin M. Neylan Jr. of Kirkland & Ellis LLP and Sarah Kroll-Rosenbaum and Joel D. Bertocchi of Akerman LLP.

The clinicians are represented by Kye D. Pawlenko of Hayes Pawlenko LLP.

The Atlantic Legal Foundation is represented in-house by Lawrence S. Ebner.

The case is AMN Services LLC v. Verna Clarke et al., case number 21-296, in the U.S. Supreme Court.

--Additional reporting by Daniela Porat. Editing by Neil Cohen.