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FLSA 75th Anniversary

The FLSA at 75: Persistent Challenges

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Some would say that being 75 makes you over-the-hill, but my parents would disagree. Seven-and-a-half decades after its enactment, the Fair Labor Standards Act likewise is alive and well and still doing what it was meant to do — protecting U.S. workers from exploitation. Today’s workplace differs in many ways from the workplaces of 1938,



but the FLSA continues to provide a framework to ensure that workers are paid, overtime is controlled and rewarded, and children in the workforce are staying safe and not missing school.

That’s not to say that it’s been smooth sailing. The mere fact that 8,000 new lawsuits were filed under the FLSA last year is a sure sign that something is rotten, and not only in Denmark. Indeed, some of the current challenges of FLSA compliance have been around for decades. Some of these can be blamed on the law itself, while others can be attributed to human nature. This brief retrospective will consider the more persistent challenges of FLSA compliance.

It’s a Free Country, Isn’t It?

One of the biggest challenges to attaining full FLSA compliance is that the law, as interpreted by the U.S. Supreme Court, is fundamentally at odds with our democratic, capitalist ideals. If I give my friend permission to punch me in the nose, that’s nobody’s business. Yet, if an employee agrees to work overtime without extra compensation or to labor off the clock to correct his mistakes, that’s illegal. Even worse, the employee who agreed to waive his right to be paid the minimum wage and overtime can turn around and sue the employer later — and for double damages, no less. It’s just not fair!

Or isn’t it? As mentioned, the FLSA was enacted to combat worker exploitation. Think of the sweatshops of a century ago. (If you’re not familiar, type “Triangle Shirtwaist Factory fire” into the search engine of your choice.) In such environments, can we ever be sure that an employee’s agreement to waive her rights was voluntary?

For similar reasons, following standard industry practices is no defense to liability under the FLSA and

other wage and hour laws. Look at news reports just a few years ago about the hundreds of millions of dollars in back wages paid out by Wall Street securities industry firms because they followed the herd. Indeed, both plaintiffs’ lawyers and U.S. Department of Labor investigators are more likely to target your company at the same time they target other employers in the same industry. Thus, if you follow the pack, you are *more*, not less, likely to get caught and to suffer the consequences.

So What Exactly Is a ‘Production Worker’?

Here’s another persistent challenge: Year-after-year, one of the areas that generates the most complaints and lawsuits is improper classification of workers as exempt — especially, when they are classified as “administrative” employees. Part of the confusion arises from something called the “Production Worker problem.”

In a nutshell, DOL regulations define an administrative employee as one whose primary duty is “the performance of work directly related to the management or general business operations of the employer or the employer’s customers” (29 C.F.R. § 541.201(a)). This has been interpreted to mean that exempt administrative employees generally must be “back office” (also called “staff”) personnel rather than being the workers who produce what the employer sells (so-called “line” personnel). The terminology used here arises from the manufacturing world, and many employers and employees in service industries don’t realize that this distinction applies to them as well. In fact, some courts have argued that the line vs. staff dichotomy — another name for the production worker problem — makes no sense in the world of services, but they are in the minority. Complicating matters further is the fact that there are exceptions, such as when the employer is selling back office services to another business. Confused? You’re not alone.

See *Persistent Challenges*, p. 1

Ignorance of the Law Is No Excuse

General ignorance of the law by employers, managers and employees is another significant and ongoing challenge. For instance, everyone knows that employees who meet certain criteria are exempt from the FLSA's minimum wage and overtime requirements. But ask 10 people at a cocktail party, and it's a safe bet that half or more will tell you that to be exempt means to be salaried. Duties test? They've never heard of it!

Among those employees and managers who have heard of the executive, administrative and professional exemptions, odds are that they can't clearly define what it takes to fit into one of those categories. Secretaries are administrative employees, right? (No, actually that's wrong.) Employees who perform "very important" duties qualify for one of the exemptions, don't they? (Wrong again! There's no such thing as the "very important employee" exemption.)

In a nutshell, the persistent challenge is that not enough people are receiving enough education about the FLSA and its requirements. Let's face it — the FLSA is a complicated law. While companies understandably would prefer that their managers devote their time to making money, they need to recognize that teaching FLSA basics is a sound investment that will

pay dividends in lower legal costs and higher employee morale.

Getting companies to be proactive about FLSA compliance remains a major challenge. Why pay someone \$25,000 to \$250,000 to perform a compliance audit before you are sued when you can wait until after you are sued and pay hundreds of thousands or millions of dollars in damages and attorney's fees? (If you think the preceding sentence made no sense, there's hope for you.) A properly done compliance audit not only can find and correct any FLSA noncompliance in your organization, it can identify rogue, or simply uninformed, managers who need better training in what the law requires so they don't cause problems down the road. Most importantly, perhaps, conducting a compliance audit can be evidence of a good faith intent to comply with the law, which may lead a court to cut in half the damages you'll pay if you are sued successfully.

An Optimistic Thought

Twenty-five years from now, when the FLSA celebrates its 100th birthday, I hope to be enjoying my retirement. I'll be older then but, like the FLSA, I hope I won't be over the hill. Maybe by then, we'll have different challenges or none at all. A lot depends on everyone involved working harder to understand and comply with the law whose birthday we're marking here. Cheers! 🏠



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