The Fair Labor Standards Act of 1938

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Even though it is the oldest employment statute, there was relatively little litigation under the Fair Labor Standards Act of 1938 until the 1990's. This was true even in the 1970's and 1980's when the employment law exploded as it became apparent that the rules America designed for a manufacturing based economy were not necessarily appropriate for the changes in the workforce brought about by technology and a changing economic model. By the 1990's, these changes and the influx of the public work force into the system brought about a tremendous increase in FLSA litigation. Many issues which had either been addressed in different contexts or simply never dealt with were thrust to the forefront. Although there are some differences between public and private sector employees, many of the principles are the same and the renewed vitality of the area (not to mention the possibility of large awards) has increased attention on FLSA compliance for all employers. In the last several years, large collective actions brought under the FLSA or state wage and hour laws with settlements in the millions and the intense political debate over the first substantive regulations to the white collar exemptions which were made by the Bush administration have focused intense scrutiny on this body of law.

Most employment law practitioners do not deal with wage and hour issues on a daily basis. While seemingly simple, it also can be one of the most complex statutes. Employers ignore the risks at their peril. This paper provides both very basic information on certain aspects of the law, and including areas of concern for employers.

I. INTRODUCTION.

The Fair Labor Standards Act (FLSA or the Act) of 1938, 29 U.S.C. 201, is the federal law which governs compensation. The FLSA mandates minimum wage requirements, overtime pay, child labor prohibitions, and record keeping requirements. It applies to all employers engaged in interstate commerce. Certain employees are exempted because of the nature of their job duties. Public employers are covered as a result of the U.S. Supreme Court's 1985 decision in *Garcia v. San Antonio Metro. Transit Agency*, 488 U.S. 889, 109 S. Ct. 221 (1985), and by the 1986 amendments to the FLSA. However, the 11th Amendment protects state employers from being sued under the FLSA without the state's consent. *Alden v. Maine*, 5 W.H. Cases 2d 609 (U.S. 1999). The Act protects full and part time workers and is enforced by the United States Department of Labor's Wage and Hour Division.

II. THE BASICS.

As with most complex areas, FLSA issues can be simplified to a few basics, which provide at least a framework for analysis. The two fundamental concepts underpinning the FLSA are: (1) overtime -- if an employee works more than forty hours in any seven day period, the employer must pay the individual at least one and one-half times the employee's regular rate of pay for each hour worked in excess of forty, and (2) minimum wage -- employers must pay their employees at least the minimum wage, currently $6.55 an hour, for each hour worked. These two concepts only apply if the employee is not exempt from coverage of the FLSA.

Within these simple principles lie a myriad of complex questions. (There are also exceptions to even these basic rules for certain employers or situations. These will be discussed only as relevant.)

III. WHO IS THE EMPLOYER?

The FLSA has a broad definition of employer, "any person acting directly or indirectly in the interest of an employer in relation to the employee." 29 U.S.C. § 203(d). This definition has been used to hold individuals liable. An example is *Herman v. RSR Security Services,* 5 W.H. Cases 257 (2nd Cir. 1999). In *Herman*, an experienced labor and employment lawyer, Portnoy, joined with two individuals to operate a guard service. He served as chairman of the company and exhibited a substantial amount of control over the business. When the company was found to be falsifying its records so as to not pay overtime, he as well as the company and two other high level employees were sued as "employers".

The court applied an "economic reality test" which uses four factors to determine who the proper employer in the lawsuit was. The factors examine whether the alleged employer (1) had the power to hire and fire, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. In this case the court found the first three factors were met. As the court determined all four factors were not necessary, it determined Portnoy was individually liable.

Additionally, based on Portnoy's special knowledge of the FLSA, the court also upheld liquidated damages, doubling the amount owed. Finally, in a case of first impression, the court denied that Portnoy was entitled to indemnity or contribution from the others who were more involved in the operations of the company.

IV. EMPLOYEE, AND IF SO, OF WHOM?

The FLSA is only applicable to employees. The question of whether an individual is an employee or an independent contractor is a frequent battle ground. The wrong conclusion by the employer will leave it vulnerable to overtime claims. The decisions are very fact intensive.

In ***Herman v. Express Sixty-Minutes Delivery Services, Inc.***, 161 F.2d 299 (5th Cir. 1998), the Department of Labor (DOL) sued a courier delivery service on behalf of several of its couriers. Express contracted with various businesses, including law firms, hospitals, and laboratories, to deliver packages on a 24-hour basis in and around the Dallas-Fort Worth metropolitan area. To make these deliveries, Express employed 50 drivers as independent contractors. The DOL alleged that the couriers were employees, not independent contractors and accordingly, Express owed the drivers overtime compensation. After considering many factors, the Fifth Circuit found that the drivers were independent contractors, and so, Express was not liable for any overtime compensation.

Factors considered by the Court included the following: Potential drivers were required to attend an orientation session and sign an "Independent Contractor Agreement." Drivers made

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