THE FAIR LABOR STANDARDS ACT: Wage and Hour Basics

The University of Texas School of Law 2018 Essential Employment Law: A Practical Course in The Basics

June 29, 2018

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I. INTRODUCTION

The paper provides an overview of the Fair Labor Standards Act and related laws in the context of the requirement of paying minimum wage, overtime, and travel time for many employees.

The Fair Labor Standards Act (the "Act" or "FLSA") was enacted in 1938 as part of President Franklin Roosevelt's "New Deal" legislation. The goal of the Act is to maintain the "minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Essentially, the FLSA provides a floor under wages and a ceiling over hours.

At present more than 130 million workers in more than seven million workplaces are protected or "covered" by the FLSA, which is enforced by the Wage and Hour Division of the U.S. Department of Labor ("DOL'). Employers covered under the Act must comply with any federal, state, or municipal laws, regulations or ordinances, or collective bargaining agreements or employer implemented policies that provide greater benefits than those established by the FLSA. While FLSA standards may be exceeded, they cannot be waived or reduced. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942).

A. Coverage

1. *Employer and Employee Relationships*

The FLSA applies to almost any relationship where there is an "employer" and "employee." The Act applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. For most companies, the test is $500,000 or more in annual dollar volume of business (*i.e*., the Act does not cover enterprises with less than this amount of business). 29 U.S.C. §203(s)(1).

However, the Act also covers the following industries regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally, or physically disabled or gifted; preschools, elementary, and secondary schools, and institutions of higher education; and federal, state, and local government agencies. 29 U.S.C. § 203(r)(2)(a).

The Act exempts some employees from its overtime pay and minimum wage provisions, and it also exempts certain employees from the overtime pay provisions alone. The determination of who is covered and who is not covered is a political determination, made by Congress as it adopted and revised the FLSA and by the DOL, which administers and enforces it.

Under the FLSA, it often occurs that some employees in an industry may be covered while others are not. 29 U.S.C. § 206 and 207. Therefore, it is necessary to determine whether each individual employee is covered under the applicable rules.

2. *Independent Contractors*

The FLSA applies only to bona fide employment relationships; independent contractors are not covered by the Act. *See* DOL WAGE AND HOUR FACT SHEET #13; 29 U.S.C. §§ 203(d), 206(a), 207(a). The definition of "employer" is broad in scope and broadly interpreted by the courts. It is one of the few statutes which can impose individual liability on various owners, corporate officers and even supervisors with direct control over the affected employees for violations. *See, e.g. Donovan v. Sabine Irrigation Co.*, 695 F.2d 190 (5th Cir. 1983). The definition of "employee" is equally broad – "any individual employed by an employer." 29 U.S.C. §203(e)(1). To employ means "to suffer or permit to work." If an employer knows or has reason to know that an employee is performing services for its benefit, the time spent by that employee likely will constitute compensable work time. As broad as these definitions are, generally the only workers who are not covered by the FLSA are those who work as independent contractors.

NOTE: The FLSA does not distinguish between work which is required, and work is simply allowed. The "suffered or permitted" principle applies to all work which is allowed, no matter the reason, provided the employer is aware that the work is being performed. 29 C.F.R. § 785.11; *Holzapfel v. Town of Newberg*, 145 F.3d 516, 524 (2d Cir. 1998).

In 2011, the DOL launched the Misclassification Initiative and entered into work-sharing agreements with the IRS and several states. One of their target areas regards the improper classification of employees as independent contractors.

Employers may seek to avoid the obligations and potential liability presented by the FLSA by classifying workers as "independent contractors," and paying them by means of a 1099, rather than through taxable payroll methods. While such classifications may be appropriate, the fact that an employer labels a worker as a contractor is not controlling. Basically, ask whether the employee is controlled by and economically dependent on your business or is he in business for himself. *Reich v. Circle C Investments, Inc.*, 998 F.3d 324 (5th Cir. 1993).

To determine whether an individual is an employee under the FLSA, courts will focus on the economic reality of the relationship and will generally consider the following factors:

- The degree of the alleged employer's right to control the way the work is to be performed (the more control you have over an individual, the more likely he will be deemed an employee);
- The alleged employee's opportunity for profit or loss;
- Whether the alleged employee provides the tools, equipment or materials required for his task or whether he employs helpers;
- The degree of permanence of the working relationship;
- Whether the service rendered requires a special skill; and
- The extent to which the alleged services in question are an integral part of the employing entity.

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First appeared as part of the conference materials for the
2018 Essential Employment Law session
"Wage and Hour: An Old Law in a Modern World"