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LABOR RELATIONS

Expert Analysis

Government Focus On Fair Labor Standards

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On March 13, 2014, President Barack Obama signed a Presidential Memorandum aimed at revamping overtime eligibility rules under the Fair Labor Standards Act, 29 U.S.C. 201 et seq. (FLSA), particularly with respect to the exemptions for executive, administrative and professional employees. The president has called on the U.S. Department of Labor to "modernize and streamline" existing overtime regulations to be consistent with the intent of the FLSA and address the changing nature of the workplace.

While it may be well over a year before regulatory changes become effective, they will likely trigger more wage and hour scrutiny by the Labor Department and advocates for fair employment practices. With this recent activity as a backdrop, it is a good time to review obligations of employers under the FLSA. This month's column addresses the protections afforded to employees, penalties for noncompliance and the joint employer, hot goods and successor theories of liability under the law.

Coverage

The FLSA casts a very wide net covering many American businesses. First, the FLSA covers individual employees whose work regularly involves interstate commerce (individual coverage); second, the FLSA applies if an employer is an enterprise engaged in interstate commerce (enterprise coverage). 29 USC §§206, 207. Enterprise coverage is triggered where an employer (i) has employees engaged in commerce or in the production of goods for commerce, or has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000. 29 USC §203(s).

Courts analyzing enterprise coverage have held that if a business' employees use any materials (i.e., tools or articles necessary for doing or making something) that have travelled from state to state in commerce, then the business will be covered by the FLSA. See, e.g., *Polycarpe v. E&S Landscaping Serv.*, 616 F3d 1217 (11th Cir 2010).

Protections

The FLSA establishes, among other things, minimum wage and overtime pay standards for employees in the United States who do not fall under one of the available statutory exemptions. The statute requires that non-exempt employees be paid at least the federal minimum wage, which is currently $7.25 per hour. It also requires that non-exempt employees be paid overtime pay at a rate of not less than one and one-half times the employee's regular hourly rate of pay for all hours worked over 40 in a workweek.

The FLSA offers protections to employees and not independent contractors. In addition, certain employees are exempt from the minimum wage and/or overtime pay provisions of the statute. For example, the FLSA provides an exemption for employees employed as bona fide executive, administrative, professional and outside sales employees (as defined in Labor Department regulations), and certain computer professionals are exempt from the FLSA's overtime provisions. To qualify for exemption, employees generally must meet certain tests regarding job duties and be paid on a salary basis, currently at not less than $455 per week (i.e., $23,660 per year).

Enforcement

The FLSA is enforced by the Labor Department. Even before Obama issued the March 13 Memorandum, his administration has made FLSA enforcement a priority. The proposed 2015 fiscal budget released on March 4, 2014, sets aside an additional $41 million for the Labor Department's Wage and Hour Division, intended to allow the hiring of 300 new investigators "to increase enforcement of the laws that ensure workers receive appropriate wages and overtime pay, as well as the right to take job-protected leave." In addition to Labor Department enforcement, individuals may pursue private litigation against an offending employer.

If an employer violates the FLSA's minimum wage or overtime provisions, either the Labor Department or an employee may bring an action to recover unpaid wages or overtime, an equal amount as liquidated damages, plus attorney fees and court costs. 29 USC §216(b)-(c). An employer may avoid liquidated damages by carrying its burden of proving it had reasonable grounds to believe it was not violating the FLSA and that the act or omission upon which the claim is based was taken in good faith. Willful violations may be subject to fines of up to $10,000 and, after conviction of a prior offense, prison for up to six months. 29 USC §216(a).

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The applicable statute of limitations for FLSA claims depends on the nature of the violation. If the violation was not willful, the action must be commenced within two years. If the violation was willful (i.e., the employer either knew its actions violated the FLSA or had a reckless disregard for whether its actions violated the act), the action must be commenced within three years.

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Joint Employer

Even where a business is not the direct employer of individuals who are subject to an FLSA violation, liability may be imposed under a number of theories. The joint employer theory of liability is perhaps the most common mechanism for conveying responsibility for minimum wage and overtime violations caused by a company's independent contractors. The "economic realities" test is typically used to determine whether a joint employer relationship exists. This test is meant to "expos[e] outsourcing relationships that lack a substantial economic purpose," but not to subject "normal, strategically-oriented contracting schemes" to liability. *Grenawalt v. AT&T Mobility, LLC*, No 11 CIV 2664, 2013 WL 1311165 (SDNY April 2, 2013) (finding AT&T was not a joint employer of security guards working in its stores pursuant to an outside vendor agreement).

While multiple criteria come into play in joint employer determinations, factors include whether the alleged employer: had the power to hire and fire the employees; supervised and controlled employee work schedules or employment conditions; determined the rate and method of payment; maintained employment records; maintained premises and equipment for the employee's work; had a business that could or did shift as a unit from one alleged joint employer to another; had a process of production that required employees to perform a discrete line job that was integral to the employer; was able to pass responsibility under subcontracting contracts from one subcontractor to another without material changes; and worked exclusively or predominantly with the employees. See *Barfield v. New York City Health and Hospitals*, 537 F3d 132 (2d Cir 2008) (finding hospital was joint employer and liable for FLSA violations to individual nurses who it hired through health care agencies); see also *Ansoumana v. Gristede's Operating*, 225 FSupp2d 184 (SDNY 2003) (holding drugstore was joint employer along with independent contractor to which it outsourced delivery services, and therefore jointly and severally liable for minimum wage and overtime violations committed by its independent contractor).

Hot Goods

The FLSA's "hot goods" provision generally prohibits the shipment or sale in interstate commerce of goods produced in violation of the FLSA's minimum wage and overtime provisions. The Labor Department has increasingly relied on the hot goods provision to force companies to remedy wage and hour violations at the manufacturing level by preventing the shipment of goods until FLSA violations are corrected.

The Labor Department has also imposed hot goods liability on a manufacturer based on FLSA violations by its independent contractors whose employees transported materials used in the production process. In *Wirtz v. Lone Star Steel*, 405 F2d 668 (5th Cir 1968), the defendant steel mill was found to be in violation of the hot goods provision because it should have been aware of FLSA violations by its independent contractors who transported iron ore from mines to the mill, where the mill had hearsay evidence of the violations, was aware that certain independent contractors had previously been found guilty of FLSA violations, and had the contractual right to inspect the contractors' records.

In addition, the Labor Department often motivates companies to settle minimum wage and overtime violations by requiring them to pay back wages owed to employees rather than face the prospect of being unable to ship or sell goods to their customers. In the absence of an employer agreeing to settle FLSA violations, the Labor Department may seek an injunction against the employer restraining the shipment or sale of goods.

The injunction sought by the Labor Department may obligate the employer to abide by additional compliance measures. See, e.g., *Herman v. Fashion Headquarters*, 992 FSupp 677 (SDNY 1998) (ordering hot goods injunctive relief against shipping or selling goods in violation of FLSA and requiring defendants to review FLSA provisions with and obtain compliance assurances from their contractors).

Current Compliance

Some cases recognize current compliance with the FLSA is not a defense to a hot goods injunction and consider past noncompliance as a factor in granting injunctive relief. See id. at 679 (court "may consider the defendants' past noncompliance with the FLSA" in deciding whether to grant hot goods injunction); *Chao v. Ladies Apparel Grp.*, No 01 CIV 10724, 2002 WL 1217194 (SDNY June 5, 2002) ("present compliance with the FLSA" does not "shield[] a defendant from injunctive relief" under FLSA hot goods provision).

Other cases, however, recognize that the goal of injunctive relief is to prevent future violations rather than punish past ones. See *Lone Star Steel*, 405 F2d at 670 (FLSA hot goods "[i]njunctive relief is not to punish for past violations, but to prevent future violations"); *Wirtz v. Kneece*, 249 FSupp 564 (D. S.C. 1966) (refusing to issue hot goods injunction because company was in compliance with FLSA after assuring its contractors complied with FLSA minimum wage and overtime requirements, recognizing injunctive power is to "insure compliance, not to punish").

The Labor Department, of course, is free to seek both back pay for prior violations of minimum wage and overtime requirements at the same time it pursues a hot goods injunction to preclude future violations. See *Chao v. Vidtape*, 196 FSupp2d 281 (EDNY 2002) (granting Labor Department injunction for violation of hot goods provision in addition to awarding back pay for FLSA violations).

Successor Liability

Employers may be liable for a predecessor's wage and hour liabilities under the FLSA on a successorship theory. In the recent case of *Teed v. Thomas & Betts Power Solutions*, 2013 WL 1197861 (7th Cir March 26, 2013), the U.S. Court of Appeals for the Seventh Circuit held an asset purchaser was liable to the seller company's employees for the seller company's overtime violations under the FLSA.

The court reasoned the FLSA liabilities were conveyed to the purchaser on a successor liability theory based on, among other things, the continuity between operations and work force and the fact that the purchaser was on notice of the pending FLSA claims. Notably, the court held that a disclaimer of successorship and refusal to accept such liabilities in the asset purchase agreement was not a defense.

Possible Changes

The FLSA provides minimum standards that may be exceeded by federal, state or local laws establishing higher wage requirements or narrower exemptions from coverage. For example, some states have higher minimum salary thresholds for overtime exemptions—New York's is currently $600 per week ($31,200 per year), and California's is $640 per week ($33,280 per year), rising to $720 ($37,440 per year) on July 1, 2014. Likewise, some states require that supervisors spend more than 50 percent of their time actually supervising other employees to be considered exempt. The federal standard generally considers whether supervising is a primary duty but does not impose a percentage test.

It is unclear precisely what changes the Labor Department will propose to the FLSA's overtime regulations, but they are likely to include raising the minimum salary threshold for certain exemptions (e.g., to be more consistent with states such as New York and California) and replacing the "primary duty" test with a quantitative test, similar to the percentage test used by states such as California. It is reasonable to assume the Labor Department will consider and possibly implement changes tightening the standards for exemptions generally and employers would be well served to review their current practices in anticipation.

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