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May 13, 2010

The Honorable Johnny Isakson
Member, Senate Committee on Health,
Education, Labor and Pensions
United States Senate
120 Russell Senate Office Building
Washington, D.C. 20510

Re: S. 3254: "Employee Misclassification Prevention Act"

Dear Senator Isakson:

Fisher & Phillips LLP is a national law firm practicing labor and employment law, representing management. We are headquartered in Atlanta.

A substantial portion of our practice has to do with advising and representing employers in connection with Fair Labor Standards Act matters. I am writing to draw your attention to the fact that S. 3254 would substantially expand the FLSA's civil money penalties to a much greater extent than one might realize.

Today, the FLSA permits U.S. Labor Department to impose a penalty of up to $1,100 for each violation of the minimum-wage or overtime provisions, but only if the violation was either repeated or willful. The Labor Department apples these on a per-employee basis, so they can entail substantial exposure in addition to any other FLSA liabilities. In a disingenuously-named section entitled "Special Penalty for Certain Misclassification, Recordkeeping, and Notice Violations", S. 3254 would broaden these per-person penalties substantially so as to affect far more than just independent-contractor questions.

For one thing, the penalty of up to $1,100 could be imposed *without regard to whether a violation is repeated or willful.* That is, infractions would be punishable in this way even if the employer had never before violated the FLSA, had the best of intentions, and had made good-faith efforts to comply. If violations were repeated or willful, then the per-person penalty ceiling would jump to $5,000. Moreover, for the first time, civil penalties would apply to violations of the Labor Department's recordkeeping requirements. These amendments would in no way whatsoever be limited to violations arising from misclassifying workers as independent contractors rather than as employees.

Of course, one might fairly ask why such changes would be ill-advised. The principal reason is that an employer can do its utmost to comply with the FLSA only to find later on that there has been an unintentional violation. This law can seem simple in the abstract, but we assure you that it is frequently difficult and complex to deal with in the real world. That I have devoted most of my time to FLSA matters during my 32 years in practice attests to the truth of this.

In addition, numerous FLSA "gray areas" remain unresolved, and for years there has been a substantial backlog of employer requests for specific explanations. Against this background, the Labor Department's Wage and Hour Division recently said that it will respond to such requests in the future only by sending generalized legal citations instead of specific answers; whether it will reply to the numerous pending questions is unclear. Furthermore, the Division's current administration has now demonstrated its willingness to change or withdraw earlier, well-publicized interpretations without prior warning, thereby adding to uncertainty and unpredictability in FLSA matters.

Particularly under these circumstances, we submit that penalizing a first-time violator in this way, and doing so irrespective of whether the employer's transgression was willful, is an unduly harsh approach to FLSA enforcement. Bear in mind that these penalties can exceed the amount of any FLSA back-wages due, and that the penalty payments flow to the Labor Department — *not* to the employees involved.

Where recordkeeping is concerned, this too is not so simple as it might seem. The FLSA's recordkeeping regulations are extensive, detailed, and often arcane. An illustration of their trap-for-the-unwary requirements is one calling for a "symbol, letter or other notation" in the records to show that certain employees are paid in a particular way, even if it is obvious how they are paid. How much will some employer someday be penalized for having overlooked this? Suffice it to say that numerous FLSA recordkeeping matters could expose an employer to substantial fines, *even if the recordkeeping violation results in no FLSA wage underpayments*.

Moreover, the Labor Department apparently will soon propose yet-more recordkeeping rules, this time relating to an obligation to prepare and internally publish elaborate written compliance plans. *See, e.g., Spring Regulatory Agenda 2010*, "Topic: Amendments to the Fair Labor Standards Act (FLSA) Recordkeeping Regulations", http://www.dol.gov/regulations/factsheets/whd-fs-flsa-recordkeeping.htm. Preliminary indications are that these prescriptions will be sufficiently ambiguous that whether an employer has complied with them will rest considerably within the eye of the beholder, *i.e.*, an investigator. While it remains to be seen, we anticipate that failing to follow these rules to the Division's shifting standards of satisfaction could be another source of civil penalties if S. 3254 becomes law in its current form.

Finally, whatever might be the merits of these penalty amendments, it is preferable that they be debated openly and for what they are, rather than having them pass in the mistaken belief that they are limited to independent-contractor matters. Frankly, one could be led to wonder whether the current state of affairs is intentional.

We hope that these remarks are of assistance to you and others on the Committee. We thank you in advance for giving them your consideration.

Sincerely,

JOHN E. THOMPSON
FISHER & PHILLIPS LLP

JET:jdi