FLSA Evolution Reflects Employer-Friendly Shift

Insights
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Wage and hour litigation is not only alive and well in the U.S., but has actually been increasing at an exponential rate in the last 10 years. This popularity is in large part due to the Fair Labor Standards Act's collective action procedure and liquidated damages penalty — as well as its penchant for ensnaring unwitting employers who happen to make simple, yet costly, mistakes.

At the same time, the FLSA and its regulations have (until recently) remained largely unchanged for over 60 years. A statute originally passed in 1938 in the Great Depression era with a goal of protecting underpaid workers and exploited children has been stretched to fit a new paradigm of 21st century working arrangements and gig economy business models that do not easily fit the 1938 mold.

In that sense, wage and hour practitioners are very often called upon to try to fit the proverbial square peg in a round hole when trying to apply the statute to their client's unique businesses and workforces. Ambiguity in the statute and regulations often put companies at a procedural disadvantage in wage and hour litigation given the burdens placed on employers in this unique area of law.

Like everything else in the Trump administration era, federal wage and hour law has been full of twists and turns for employers and workers alike. Not only has the Trump administration's U.S. Department of Labor systematically dismantled the Obama-era efforts to expand the FLSA's reach to, and impact on, workers, new lines of employer defenses to FLSA litigation have bubbled up in the courts in the wake of the U.S. Supreme Court's 2018 landmark decision in *Encino Motorcars LLC v. Navarro*.

For the first time in decades, we are seeing novel FLSA interpretations gain some traction with the courts and slowly but surely push the pendulum back in the direction of companies. At the very least, the current conditions have armed companies with more tools with which to push back against worker allegations of misclassification and unpaid overtime wages.

The DOL Has Been Hard At Work In The Last Three Years

The changes to the FLSA started with a swift withdrawal of Obama-era interpretive guidance on the FLSA's independent contractor and joint employer tests in June 2017, followed by the DOL's abandonment of the Obama-era rule seeking to double the salary threshold for the white collar exemptions less than three months later. What followed since has been a steady stream of new DOL

rules on every major aspect of the FLSA — from exemption salary thresholds and regular rate exclusions to changes to the tests utilized for determining employer status and liability.

In just over a year, the DOL has put out a total of five final rules on essential provisions of the FLSA regulations. In September, the agency issued a proposed rule attempting to enshrine a new employer-friendly test for defining who is an employee versus an independent contractor under the FLSA. The DOL's stated purpose behind this latest proposed rule is "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy."

Given that the FLSA had not been previously amended in any significant respect in over 60 years, these changes to the act are happening with record speed — changes that tip the scale in favor of employers in many respects while providing more clarity and flexibility in a historically rigid area of law.

The Courts Have Issued Landmark FLSA Decisions During The Same Timeframe

This employer-friendly momentum has also continued in the federal courts following the Supreme Court's landmark *Encino Motorcars v. Navarro* decision in 2018. In that case, for the first time, the court rejected the long-standing principle that exemptions to the FLSA should be construed narrowly.

Instead, a narrow 5-4 majority held that the exemptions should be given a fair reading. In doing so, the court effectively lessened the burden on employers in proving an exemption and put them on more even footing with workers in FLSA litigation. While the *Encino Motorcars* decision has not been the watershed moment that employers had hoped, it has resulted in renewed optimism that companies will get a fair shot in these cases.

The evidence of this newfound optimism can be found in the slew of decisions that have come out of the courts in the last few years addressing novel arguments and interpretations of the FLSA provisions. In particular, the U.S. Court of Appeals for the 5th Circuit has had a busy year.

It has issued decisions reiterating the flexibility of the duties test for the highly compensated employee exemption, such as in the April decision of *Smith v. Ochsner Health System*. At the same time, it has grappled with unique questions such as whether a day rate can meet the salary basis requirement in February's ruling in *Faludi v. U.S. Shale Solutions LLC*, and whose burden it is to show that a particular bonus must be included in the regular rate calculation in the September ruling in *Edwards v. 4JLJ LLC*.

The *Edwards* and *Faludi* cases are particularly noteworthy in that they both resulted in landmark decisions for employers that were subsequently withdrawn following requests for reconsideration *en banc* — and replaced with dismissals on other less controversial grounds. This signals that the 5th Circuit judges could be potentially divided on these interpretations of key FLSA provisions pertaining to the regular rate and white collar exemptions.

Regardless of the outcome, these cases demonstrate the willingness of companies to push back instead of simply settling and to stretch the FLSA provisions to fit the modern workforce.

These merits-based fights also come on the heels of significant wins for employers in procedural areas such as class and collective action waivers and individual Federal Arbitration Act arbitrations. Watershed Supreme Court decisions such as 2018's *Epic Systems Corp. v. Lewis* and 2019's *Lamps Plus Inc. v. Varela* have given companies the support they need to accurately determine at the outset of the relationship exactly how and where these wage and hour fights will take place.

Taken together, these developments in FLSA litigation provide business with more opportunities to potentially rein in what has become a very costly and time-consuming process.

Where Are We Headed?

While it is impossible to predict with any level of certainty what surprises lurk around the corner as we head toward 2021 and beyond, it is likely that the FLSA will continue to evolve — for better or worse — now that the Trump administration has blown the dust off of this 82-year-old statute.

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