A Partial FLSA Wish List

Insights
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Presidential elections have typically sparked speculation about possible changes in employment laws and enforcement policies. But this seems to be especially true now, due in part to the discussion already occurring about revisions in the compensation requirements for the federal Fair Labor Standards Act's "white collar" exemptions.

Of course, a comprehensive list of desirable FLSA-related changes would be lengthy indeed. But here are at least a few worth considering:

◊ ***Reinstating Opinion Letters***

As early as 1938, employers sought, and officials of the U.S. Department of Labor's Wage and Hour Division routinely provided, official written explanations of how the FLSA works in particular situations. These "opinion letters" have been an important means by which the public develops a clearer understanding of what FLSA compliance entails. In 2010, the Division discontinued this practice on the premise that issuing opinions was not an efficient or productive use of its resources.

For reasons we have summarized elsewhere, opinion letters are in truth well worth the effort and resources necessary to produce them. They promote FLSA compliance much more broadly than the Division apparently realizes, and the agency could significantly *leverage* its resources by reviving them. Unlike the items below, the incoming administration could re-implement this practice immediately simply by reversing the 2010 change; no legislation or rulemaking would be necessary.

◊ ***Increasing The "Dollar Volume" Test For Coverage***

Perhaps the predominant basis for applying the FLSA to employers and employees today is so-called "enterprise" coverage. Practically speaking, this means that the FLSA applies to an enterprise with an annual-gross-dollar-volume of at least $500,000.

The current threshold was set in 1989. A combination of inflation and other economic developments over the past 27 years means that this figure no longer serves Congress's purpose of removing many small businesses from the FLSA's requirements altogether. Consequently, the financial, regulatory, and claims-related burdens of the FLSA fall heavily upon a much-larger segment of small employers than Congress intended.

The case can be made that a comparable figure today would be in the neighborhood of $1 million, and lawmakers could decide as a policy matter to establish an even-higher level. Substantially

raising the threshold could restore the small-employer exclusion that Congress had in mind.

◊ ***Addressing The Overtime Impact Of Incentive Compensation***

At present, FLSA overtime premium must be calculated and paid on most bonuses and other incentive payments made to employees who are subject to that law's overtime requirements. Some employers have not realized this, and the resulting collective FLSA liability in recent times has been enormous.

The added costs, complications, and potential exposure have led many employers to reduce the amounts of the incentives or recognition payments they are prepared to offer or to forgo these programs altogether. This could be remedied via an FLSA amendment excluding many, most, or even all bonuses and incentives from the FLSA's "regular rate of pay".

◊ ***Balancing Timekeeping Responsibilities***

More than ever before, some non-exempt employees claim months or years after-the-fact that their records reflect less time than they actually worked. The absence of FLSA "give" on this means that many such claims are successful, even in situations where an employer has in place a policy designed to produce accurate time records, and even when there is room to question whether an employee is being truthful. The problem is particularly acute now, given the advent of smartphones, remote-access to the virtual workplace, and an increasingly mobile workforce.

The FLSA could be changed to (as an illustration) create a presumption that the time records an *employee* keeps are accurate, provided that the employer maintains, and in practice actually observes, a reasonable written policy on recording hours worked.

◊ ***A Compensation-Based Exemption***

The FLSA's Section 13(a)(1) directs USDOL to establish the parameters for the so-called "white collar" exemptions from that law's minimum-wage, overtime, and timekeeping requirements. But historically the agency has taken the position that it is not authorized to adopt any version of a "white collar" exemption that is based *solely* upon an employee's compensation level, *i.e.*, one that does not also include a duties-related component.

Section 13(a)(1) could be modified to add a new exemption category that is based simply upon the amount of an employee's compensation.

The Bottom Line

Of course, many details must be worked through before most of these initiatives could be adopted or even proposed. Moreover, politically speaking, the FLSA has proven to be very difficult to change.

But perhaps current conditions will provide atypical motivation for a coalition drawn from employees, employers, and government representatives to wrestle the FLSA into the 21st century.