The "Opportunity Wage" Exception For Younger Workers

Insights
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Summer's approach has sparked renewed interest in the federal Fair Labor Standards Act's provision authorizing a less-than-$7.25 wage rate for certain younger employees in particular circumstances.

While there *is* such an exception, it is limited in significant ways.

How It Works

The FLSA's Section 6(g) allows an employer to pay a worker who is under 20 years old at a rate of at least $4.25 an hour for the first 90 consecutive calendar days after the worker's initial employment by that employer. Of course, the employer may *choose* to compensate the worker at a higher wage rate between $4.25 an hour and $7.25 an hour.

The U.S. Department of Labor says that the 90-day period begins to run when the employee *starts work* – *not* when the employee was made an offer or accepted the job or is otherwise considered to be "hired" – and it includes the first day of work. This timeframe is counted in *calendar days* – *not* working days; it continues to run regardless of the number of days the employee actually works.

The statute does not require that an employer provide any particular kind of training to the employee as a condition of paying the Opportunity Wage.

Section 6(g) was amended in 2016 in ways that authorize its potentially-broader application to certain employees in Puerto Rico.

Know The Limitations

An employer may not displace other workers in whole or in part (including that it can neither terminate them nor reduce their hours, wages, or benefits) in order to hire employees at the Opportunity Wage. USDOL construes this to mean that neither may an employer:

◊ Employ a worker at the lower rate until the 90-day period expires or until he or she turns 20, and then

◊ Discharge that person in order to hire another one at the Opportunity Wage.

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Liability for unlawful "displacement" can entail more than just back-wages, liquidated damages, attorney's fees, and the other, more-traditional FLSA remedies. Instead, the exposure can also consist of things like compensatory damages, reinstatement or "front-pay" for a terminated employee, punitive damages in many jurisdictions, and other potential "make-whole" measures.

Even if the 90-day period has not yet expired, the employer may not pay a worker at the lower wage rate once he or she turns 20.

Section 6(g) does not excuse an employer from complying with the FLSA's overtime or recordkeeping requirements (including the obligation to keep – and to compute FLSA-required wages on the basis of – an accurate record of all hours worked). Neither is it an exception to the FLSA's child-labor restrictions and prohibitions.

The Bottom Line

The Opportunity Wage was intended in part to encourage employers to hire "entry level" workers so as to "give them a foothold" in the job market. *Conference Report on H.R. 3448, Small Business Job Protection Act of 1996*, Vol. 142, No. 117 at H9850 (August 2, 1996). Perhaps this goal is even more important 20 years later, given that the current FLSA minimum wage is over 70% higher than when the exception was passed.

But employers who consider it must be committed to observing its requirements and limitations carefully.

Remember also that the Opportunity Wage does not override a state's or other jurisdiction's applicable minimum-wage requirement (although management should find out whether that jurisdiction has its own exception similar to the Opportunity Wage).

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