How Is 2017 Like 1947?

Insights
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Once upon a time, a seriously-alarmed legislature grew concerned that wage-hour claims and litigation had gotten out-of-hand.

A series of court decisions had, among other things, broadly expanded the scope of what counted as "hours worked". As a result, the lawmakers observed, the wage-hour law was "creating wholly unexpected liabilities, immense in amount and retroactive in operation . . .."

Bad And Getting Worse . . .
These legislators were convinced that, if the *status quo* persisted:

◊ "[T]he payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees;"

◊ "[T]here would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries;"

◊ "[E]mployees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay;"

◊ "[T]here would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in;"

◊ "[V]oluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created;"

◊ "[T]he courts . . . would be burdened with excessive and needless litigation and champertous practices would be encouraged;" and

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◊ [S]erious and adverse effects upon the revenues of [various] governments would occur.

. . . At Least As Bad Today

This legislature was the U.S. Congress. These quotations are drawn from the actual findings that led Congress to pass the 1947 Portal-to-Portal Act to "meet the existing emergency and to correct existing evils" by refining and limiting certain aspects of and claims under the federal Fair Labor Standards Act. *See* 29 U.S.C. § 251.

These legislative findings are written in a bygone style. Even so, they are equally apt 70 years later, as the FLSA is approaching its 80th anniversary. Consider, as just a *few* examples*:*

◊ The disruption and uncertainty that have arisen during the last 18 months (and counting) as a result of the prior administration's efforts to change the FLSA "white collar" exemptions' compensation requirements;

◊ The similar state-of-affairs with respect to employee tips, even when an employer takes no FLSA "tip credit";

◊ The last six years of turmoil caused by the prior administration's attempt to outsource the demise of "fluctuating workweek" pay plans to the courts.

The "emergency" decried in 1947 is at least as pressing today. Indeed, these concerns are even greater now, in that the FLSA has in many ways become an anachronism in the intervening years and is, as it stands, ill-suited to the realities of the 21st Century. It is partly for these very reasons that the FLSA is foremost among the current sources of employment-law claims.

The Bottom Line

The present situation is leading to broad-based, increasingly-urgent calls to amend the FLSA to move it out of the 1930s. Hat-in-hand pleas to the U.S. Department of Labor will not be enough. Fundamental changes in the FLSA *itself* will be necessary.

But here's an important question: Are Congress and the current administration listening?