



The FLSA-USDOL 80-Year Bond: As Strong As Oak?

Insights

6.30.18

The federal Fair Labor Standards Act has been within the purview of the U.S. Department of Labor for 80 years now. As I understand it, the traditional gift for an 80-year marriage is "oak" on the premise that the strong oak tree takes a long period of time and commitment to reach maturity (up to 80 feet). I have to admit though, given the status of the FLSA, the supposed milestone not only does not impress me, it's unsettling.

Less unsettling is the proposal to merge the U.S. Department of Labor with the U.S. Department of Education, but not just because "DEW" isn't expected to gain traction. Rather, after reflecting on the USDOL's reported priorities during much of the FLSA's 80-year stint, the proposal actually makes some sense. Moreover, I am not sure when it comes to the FLSA that it really matters what department administers it, because the law itself is the problem.

USDOL's History (A Thumbnail Sketch of "A Brief History: The U.S. Department of Labor")

I thought this USDOL [summary](#) would provide some insights regarding the FLSA's history from the Department's perspective. It is an interesting read, and encapsulates the Department's history up to 1996 (the bulk of which was prepared for its, not so random, 75th anniversary).

According to the summary, the Department was formed, in part, in response to the Progressive Movement, "'to foster, promote and develop the welfare of working people, to improve their working conditions, and to enhance their opportunities for profitable employment.'" The Department's first secretary, William B. Wilson, "enunciated a philosophy, echoed by many Secretaries since, that the Department was created 'in the interest of the wage earners', but must be administered in fairness to labor, business and the public at large." On the whole, the summary reflects a focus on *creating opportunities*.

Education, Skills, and the Workforce

Specifically, the summary repeatedly speaks to the Department's focus on the quality of the workforce, including the need to:

- raise the educational levels of workers;
- deal with the "emerging problems of automation" (even in the 1960s);
- prepare national competency guidelines to improve education and skills; and
- overall "build[] up the skills of American workers".

The Department's priority on the whole – surprisingly similar to the U.S. Department of Education – seems to be pursuing initiatives so one can prosper in society and reflects a "teach a man to fish" approach. There also is something to be said for merging departments to consolidate efforts to prepare (everyone) for the future workplace, which (for what it is worth) also would align with Congress' own committee structures.

80 Years of – What Are We Celebrating Anyway?

It is one thing to celebrate the *enactment* of the FLSA given the descriptions in works such as Upton Sinclair's *The Jungle*, a precursor to the Progressive Movement, and quite another to celebrate the law's continued existence in much the same form today.

In contrast to the summary's references to various education/skills initiatives, the FLSA is conspicuously absent aside from its enactment and a few brief mentions. Perhaps the insignificant FLSA references (in both frequency and degree) in the USDOL's summary reflect the fact that the law, at its core, has not changed much. Indeed, the notable Portal-to-Portal Act (not referenced) might be the only example of the law being changed in a way that was meant to provide some broad clarifications.

It is fairly easy to rattle off the FLSA's general requirements, but practically speaking this law can be extremely difficult to apply. To illustrate just one aspect that many still find difficult to grasp conceptually (let alone how to apply it mathematically): 80 years later the law still says "regular" rate. Accordingly, the Department's poster states "federal minimum wage \$7.25 per hour" and "at least 1 ½ times the regular rate of pay". *But what does that tell an employee who has a higher hourly wage rate, receives on-call pay at a daily rate, earns semi-annual bonuses, receives monthly creditable discounts, and works some overtime every other workweek?*

By and large "regular" is misunderstood by many, when a term like "effective" at least might better signal *employers and employees* that there is more to this. Of course, one response to why the term "regular" rate is perfectly fine, is the numerous authorities fleshing it out. But it is unrealistic to think that employers commonly are familiar with Section 7(e) of the law, let alone all the authorities it has taken to get us to the level of (comparative) clarity we have today. Moreover, even once the parties understand that "regular" is anything but, there still are a myriad of sub-issues to consider. Unfortunately, the law has always had its complications and still has unknowns (and not just because of changes in the workplace).

So What's An Agency To Do?

Different administrations have acknowledged the need for updating, streamlining, and simplifying the FLSA. For most overarching issues though, the Department has limited authority in these regards (as demonstrated by the salary-threshold and tip-retention debacles). Take for instance the forthcoming proposed rulemaking regarding the "regular rate". The Department might have boxed itself in by focusing on one regular rate exclusion that only leaves so much room for interpretation, as we noted here.

Coming at the problem from a different angle, the current Wage and Hour Division also has expressed its intention to "educate employers about their responsibilities and drive compliance" and demonstrated as much by rolling out its PAID initiative in conjunction with digestible, unintimidating materials. The efforts are laudable, particularly given that even sophisticated decision-makers are seeking answers in the form of search engine results (preferably as succinct tweets or clips) these days. Oftentimes though, one simply cannot boil down the necessary, multi-step analysis to a one-sentence, complete answer. The Department is not going to take on the questions that would arise with respect to the illustration above, except maybe in an opinion letter. Further, efforts to simplify answers almost inevitably lead to assuming away some of the factors. In other words, even if the Wage and Hour Division miraculously addressed every question under the current law with clear (authorized) answers, it's still too complicated of a message.

The Bottom Line

So, it turns out that USDOL's overall focus, historically, might dovetail nicely with USDOL's, but I for one am not sure it matters what department administers the *FLSA* at this point. It also turns out that even if the *FLSA* and USDOL were inseparable after all these years, I just cannot celebrate until I see some sensible revisions; maturity is more than the passage of time.

If we want something to celebrate, hard work is necessary on the part of Congress, *i.e.*, thoughtful, significant *FLSA* changes rather than the exacerbation of persistent issues by proposing new legislation to expand them to more employees (the latest) or jamming in revisions in an illogical fashion (case in point: the motor-carrier exemption 2005-2010). More legislation like the Portal-to-Portal Act, and even the 2018 tip clarification, is what we need. Otherwise, the Wage and Hour Division – whatever the department, whatever the administration – can only do so much given the *FLSA*'s still unresolved complexities.