



"It Must Be OK – Everybody Does It!"

Insights

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It's time for a reminder: Long-held conventional wisdom that might be questionable or even mistaken under the federal Fair Labor Standards Act (or the analogous laws of other jurisdictions) continues to face unprecedented scrutiny.

It is tempting to take comfort in platitudes like, "The whole industry pays employees that way," "Everybody I know of treats those positions as exempt," "All of my competitors classify these kinds of workers as independent contractors," "Nobody includes bonuses in figuring overtime," and so on.

It is legally perilous to pay employees based upon what are thought to be commonly-held views, instead of looking into what the legal requirements and limitations *actually are*.

Absence Of *Claims* Does Not Equal Absence Of *Risk*

For example, from the perspective of the law's 77-year history, the explosion in FLSA litigation is a relatively recent phenomenon. Some ways of doing things that have been around for years might have presented real or potential FLSA problems *all along*, but for decades:

- Employers and employees did not realize this, or
- No one ever made claims about the practice(s), or
- The few claims made received little or no publicity.

The possibility that someone will make a claim or complaint about a longstanding practice is exponentially greater today than ever before. It could be that "everybody" has it wrong, or at least that many do, and that there is a broad-scale potential for liability.

It Ain't Necessarily So

In addition, it sometimes turns out that:

- Fewer employers than one thinks are actually doing what "everybody" is said to be doing, or maybe "everybody" else has stopped doing it, or maybe *nobody* else was ever really doing it; or
- Other employers' circumstances are different in an important way that one either is not aware of or does not appreciate as being legally significant; or

- The FLSA might permit something that the applicable law of a state or local jurisdiction does not; or
- Maybe one state's law allows something that another state's law does not.

The Bottom Line

These scenarios and others have set up entire employer categories for nasty wage-hour surprises. It is just a matter of time before the "next big thing" emerges as a source of exposure.

Employers should not take "everybody does it" or some similar notion to be reason enough to adopt or continue a policy or practice the legality of which they have not carefully evaluated *on their own*, under their *own* circumstances. Once a claim is made, courts and enforcement officials are unlikely to be impressed by this explanation.