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The FLSA Turns 80: How Plaintiffs Want The Law Updated

By **Braden Campbell**

Law360 (July 3, 2018, 8:05 PM EDT) -- The Fair Labor Standards Act celebrated its 80th birthday last week, and legal experts on both sides of the worker-management divide say the landmark law is showing its age.

Here, Law360 looks at how employment attorneys who represent workers say Congress should bring the statute into the 21st century.

Close Wage Loopholes

Loopholes in the FLSA's wage rules let some businesses short workers on their promised wages if they pay at least the federal minimum of $7.25 per hour, National Employment Law Project senior counsel Patricia Smith told Law360.

Sometimes this is done through deductions. Under the FLSA, businesses can make workers cover costs such as uniform cleaning fees and equipment purchases as long as these deductions don't drop the worker's total pay below the federal floor. For example, a trucking company could promise to pay a driver $20 per hour, but take half back in deductions without violating the law.

"If you're a driver, [your employer] deduct[s] gas or ... a lease, it's only a violation if your wage goes below $7.25," said Smith, who was President Barack Obama's solicitor of labor.

Some states have closed this loophole by limiting what employers can deduct from their workers' paychecks, a practice Smith said Congress should borrow for the FLSA.

Similarly, other businesses may advertise pay rates higher than the minimum wage but refuse to pay workers for all the hours they work. If an employer says it will give workers $10 an hour but only pays them for part of an eight-hour shift, there's nothing the worker or the Department of Labor can do to get back that difference, Smith said.

"The Labor Department will say, 'well you worked 40 hours and you got X amount, and that's $7.50 [an hour] … we can't help you with that,'" Smith said.

As with deductions, Congress should import state models requiring businesses to pay workers at promised rates for every hour they work, Smith said.

Raise the Minimum Wage

After years of stagnation, the FLSA's wage minimum is in dire need of an overhaul, attorneys say.

Congress in 2007 passed a law that gradually raised the hourly wage floor to $7.25 in 2009. Since then, several states and local governments have adopted wage floors higher than the federal minimum, while minimum-wage workers in other jurisdictions languish near the federal poverty line.

"At this juncture, the federal minimum wage is falling behind the eight-ball," Joseph Greenwald & Laake PA employment practice chair Jay Holland told Law360. "I don't think it would cause hardships to businesses if there were some reasonable increase … a higher minimum wage, I think, would lift all boats."

Examine the Contractor-Employee Line

In 1938, the FLSA divided the workforce into two categories: employees, who operate at their employer's strict direction and are protected by the act, and independent contractors, who are in business for themselves and exempt from the FLSA.

Eighty years later, the lines between employees and contractors have blurred, but the FLSA has stayed largely static.

"There needs to be some re-examining of the ways in which courts and regulators answer the question of 'who's an employee,'" Outten & Golden LLP attorney Melissa Lardo Stewart said. "In an increasingly complex economy, those workers who are being deemed independent contractors perhaps, under existing law, really aren't in business for themselves."

The DOL and the federal courts currently answer that question in FLSA cases using a test that asks them to weigh several factors including the worker's degree of independence, the permanence of the relationship and the importance of the worker's service to the business.

But workers' attorneys say this test breaks down when applied to the gig economy, in which workers typically make their own hours, but often work for only a single business and have little say in how they do their work. It may be time to rethink the test in favor of classifying more workers as employees, plaintiffs' attorneys say.

"It would be administratively difficult for a lot of these companies, but there has to be some clarity here and some certainty created for both employers and these individuals who are independent contractors-slash-employees," Holland said.

Boost Enforcement of Workers' Rights

Because individual workers in many cases lack the resources to challenge their employers' illegal practices, they and their attorneys have long relied on the power of class actions to enforce their rights. But that power is threatened, attorneys say.

In May, the U.S. Supreme Court **upheld employment contracts** that make workers give up their rights to file class actions in favor of individual arbitration. The court said the Federal Arbitration Act, which presumes such arbitration agreements are valid, supersedes provisions in federal labor laws letting workers band together.

After this decision, Congress should amend the FLSA or the National Labor Relations Act "to indicate that [they] override the FAA's forced arbitration provisions," Smith said.

But private enforcement is only as important as it is because the DOL's limited budget means it has to pick and choose its cases, Smith said. She noted that while she was at the agency, it only filed about 150 suits a year, compared with about 15,000 from the plaintiffs-side bar. And with private action now limited, it's on Congress to boost the DOL's enforcement budget, she said.

"Before we have to worry about improving the FLSA, we should enforce it," Smith said. "[Now] private enforcement is being limited by these types of decisions, and is there more public enforcement? No."

--Editing by Pamela Wilkinson and Aaron Pelc.

*(This is the second article in a two-part series. Click **here** to read about the updates to the FLSA that management-side employment attorneys would like to see.)*
