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FLSA Turns 80: The Future Of Work Is Here

By **Jessica Perry and Daniel Corbett** (June 14, 2018, 1:38 PM EDT)

Originally signed by President Franklin D. Roosevelt in 1938, the Fair Labor Standards Act turns 80 this year. In this Expert Analysis series, attorneys most familiar with the statute provide different perspectives on the law's impact and development over the course of its history.


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The last couple of decades have ushered in tremendous technological changes, making commerce and communication faster, easier and more accessible. And these changes have reshaped the way we interact with one another in a variety of contexts, including the workplace. But, as often happens, the law has not kept up with the near-constant pace of change. In particular, the federal Fair Labor Standards Act[1] is in many ways woefully outdated and ill-equipped to handle the challenges of our current workplace, which bears little resemblance to the workplace at the time of the FLSA's enactment in 1938. As we mark the 80th anniversary of the FLSA later this month, it is an appropriate time to reflect on the its history and consider the ways it most needs to evolve to keep pace with these changes and allow employers to provide the flexible work arrangements that many employees want.

The FLSA and its corresponding regulations[2] set forth standards concerning minimum wages, equal pay, overtime pay, record-keeping and child labor. These basic requirements apply to employees engaged in, or producing goods for, interstate commerce, as well as other employees designated by the statute, including employees of state and local governments. These requirements also apply to foreign employees working in the United States on temporary guest worker visas.[3]

When President Franklin Delano Roosevelt signed the FLSA into law in 1938 as part of his "New Deal" legislation, the U.S. economy was hobbling through the final years of the Great Depression. The FLSA established requirements for the provision of labor and the manner in which such labor could be performed, by establishing a minimum wage, pay for overtime and a ban on child labor. When it was enacted, the new law "banned oppressive child labor and set the minimum hourly wage at 25 cents, and the maximum workweek at 44 hours."[4]

In 2004, the U.S. Department of Labor overhauled the federal regulations governing overtime eligibility,

marking the first substantive update to the FLSA in 50 years. The revised regulations made revisions to the requirements for the "white collar" exemptions, which include both compensation and duties tests. The revised regulations also introduced a new streamlined exemption for "highly compensated" employees who earn at least $100,000 per year.[5]

Ten years later, in 2014, President Barack Obama directed the DOL to update these regulations. In response, the DOL published a notice of proposed rulemaking, signaling the agency's intention to significantly increase the salary thresholds for both the "white collar overtime exemption" and the "highly compensated employee exemption." Following a high volume of public comments on the proposal, the DOL announced the publication of its final rulemaking in May 2016.[6] But before the regulations could take effect later that year, the Eastern District of Texas issued a nationwide injunction stopping the implementation of the revised regulations.[7] In 2017, the district court permanently enjoined the regulations on the basis that the proposed salary threshold increase was so great as to render the duties test a nullity.[8] The DOL under the Trump administration has indicated its opposition to the proposed regulations and, in November 2017, requested a stay of its appeal pending the outcome of the new rulemaking.[9] The DOL is anticipated to propose a more modest adjustment to the existing salary basis test than that proposed in 2015.

The Obama administration also attempted to expand the scope of who is deemed an "employer" under the FLSA, but the Trump administration has successfully curtailed these efforts as well. In January 2016, the DOL (under the Obama administration) issued new guidance on the question of who qualifies as a "joint employer" under the FLSA. The guidance set forth a broad (and sometimes ambiguous) reading of statutory provisions, regulations and case law to increase the likelihood of finding a joint employment relationship.[10] However, in June 2017, the DOL (under the Trump administration) withdrew its informal guidance on joint employment,[11] as well as a separate guidance on independent contractor misclassification from 2015 which had seized upon a broad definition of "employ" under the FLSA to conclude that "most workers are employees under the FLSA."[12] As a result, the DOL's 2014 fact sheet represents the agency's current guidance with respect to joint employment.[13] There have been other promising signs lately as well for employers. The DOL has announced that it is returning to its practice of issuing opinion letters, after having halted this practice briefly during the Obama administration.[14] These letters may allow the DOL to give more concrete guidance to employers on these thorny issues. This will likely be welcome news to employers who can not only gain clarity and insight, but can also rely on opinion letters to establish that they acted in good faith in FLSA cases.

So, faced with an 80-year-old law that has developed slowly, and in fits and starts, what should companies do? And what sorts of changes would help align the FLSA with the contemporary workplace?

The following questions highlight some opportunities for the law to catch up with recent innovations:

- ***Who is an employer?*** As explained above, the question of whether a company could be deemed an employer — whether it's of an allegedly misclassified independent contractor or as a joint employer of someone else's employee — has been subject to some uncertainty. "Gig economy" companies and businesses that rely on shared work arrangements would benefit from increased clarity and flexibility in this area. The technologies and innovations that have powered the gig economy to an industry worth hundreds of billions of dollars[15] were not even possible at the time the FLSA was enacted, and therefore the law in its current state does not adequately address the myriad of questions that arise from trying to cram a square peg into a round hole.

- ***Who is an exempt employee?*** The increasingly common salesperson today using a mobile phone and virtual meeting spaces looks nothing like the door-to-door salesperson of the 1950s. And the way that sales occur and are documented, as well as what is even bought and sold, is much different today than it was 80 years ago. So a law that requires a salesperson to physically visit the customer to make a sale or take an order is woefully outdated. And what it means to be an employee "computer field" is especially hard to define with new tech jobs and duties being created in real-time. When making determinations about which jobs will be exempt vs. nonexempt, employees face ambiguity coupled with high stakes in the form of DOL audits and class action litigation.

- ***What constitutes work?*** In 1938, "going to work" necessarily involved traveling to a physical workplace. Today, we can connect with our workplaces from anywhere in the world — from the comfort of our living room, on our commutes, and (yes, sadly) from the beach on a family vacation. This connectivity improves business productivity and gives workers (particularly millennials who have come to expect it) a great deal of flexibility. But this raises complicated questions for employers seeking to craft policies related to nonexempt employees and the use of mobile devices or laptops after hours or from remote work locations.

The answers to these questions are not simple. But the impetus behind the 1938 version of the FLSA — to strike the right balance between protecting those most vulnerable to abuse and stimulating the economy — is very much alive today. And answering some of these questions will keep the FLSA relevant into the 22nd century.

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[1] 29 U.S.C. § 201 et seq.

[2] 29 C.F.R. § 510 et seq.

[3] Castellanos-Contreras v. Decatur Hotels LLC, 488 F. Supp. 2d 565 (E.D. La. 2007) (FLSA protection available to citizens and aliens alike, and whether the alien is documented or undocumented is irrelevant), rev'd on other grounds, 622 F.3d 393 (5th Cir. 2010).

[4] See U.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. And Mgmt., "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," available at https://www.dol.gov/oasam/programs/history/flsa1938.htm#1 (providing a comprehensive history of the political context and legislative process behind the FLSA, which was originally prepared by the Historian for the U.S. Dep't of Labor in 1978).

[5] 29 C.F.R. pt. 541 (2004).

[6] 29 C.F.R. pt. 541 (2016).

[7] Plano Chamber of Commerce et al. v. Thomas E. Perez, et al., No. 4:16-cv-732-ALM (E.D. Tex. Nov. 22, 2016).

[8] Nevada v. U.S. Dep't of Labor, 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

[9] State of Nevada v. U.S. Dep't of Labor, 17-41130 (5th Cir. Nov. 2, 2017).

[10] U.S. Dep't of Labor, Wage and Hour Div., Administrator's Interpretation No. 2016-1: Joint Employment Under the FLSA and MSPA (Jan. 20, 2016).

[11] U.S. Dep't of Labor, Wage and Hour Div., "U.S. Secretary Of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance," (June 7, 2017), available at https://www.dol.gov/newsroom/releases/opa/opa20170607.

[12] U.S. Dep't of Labor, Wage and Hour Div., Administrator's Interpretation No. 2015-1: The Application Of The Fair Labor Standards Act's "Suffer Or Permit" Standard In The Identification Of Employees Who Are Misclassified As Independent Contractors, at 2 (July 15, 2015).

[13] U.S. Dep't of Labor, Wage and Hour Division, "Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act" (May 2014) ("Fact Sheet #13") at 1, available at https://www.dol.gov/whd/regs/compliance/whdfs13.pdf.

[14] U.S. Dep't of Labor, Wage and Hour Div., "U.S. Department of Labor Issues New Wage and Hour Opinion Letters" (April 12, 2018) available at https://www.dol.gov/newsroom/releases/whd/whd20180412-0.

[15] A recent study showed that on-demand workers generated more than $110 billion in the 15 largest metropolitan areas (see Understanding the Impact of the Freelance Economy, Fiverr, available at https://npm-assets.fiverrcdn.com/assets/@fiverr/freelance_impact/freelance-economy.0d569d9.pdf.)