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The Oxford Comma Case Proves We Need New Employment Laws, Not Better Grammar

The plight of a Maine company demonstrates how ridiculous employment law is.

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March 21, 2017

You've probably heard about the company in Maine that will end up shelling out around $10 million for lack of an Oxford comma. *The New York Times* explains it as follows:

"A class-action lawsuit about overtime pay for truck drivers hinged entirely on a debate that has bitterly divided friends, families and foes: The dreaded -- or totally necessary -- Oxford comma, perhaps the most polarizing of punctuation marks.

What ensued in the United States Court of Appeals for the First Circuit, and in a 29-page court decision handed down on Monday, was an exercise in high-stakes grammar pedantry that could cost a dairy company in Portland, Me., an estimated $10 million."

Everyone is focusing on the Oxford comma part of this case, but I'd like to focus on the ridiculousness of an employment law that could result in this confusion and hinge on a grammar question.

My first question about this was: How on earth do truck drivers qualify as exempt on a federal-law level? The Fair Labor Standards Act has strict rules for who can and who cannot be exempt (that is, not eligible for overtime), and at first glance truck drivers don't seem to meet those criteria, but it turns out that labor law exempts employees who fall under the jurisdiction of the secretary of transportation through the Motor Carrier Act of 1935. That's why Maine could make its own rules.

But let's think about this -- why are we letting a 1935 law about "motor carriers" govern our employment law today? The Fair Labor Standards Act (FLSA) was enacted in 1938. Sure, there have been some revisions and some regulatory changes, but it mostly remains the same.

Our workplaces have very little in common with the workplaces of the 1930s. It's time to repeal the FLSA and replace it with something that makes sense in today's environment.

Walter Olson, who runs the popular blog Overlawyered, described his ideas for changing employment law for the libertarian think tank Cato, in which he includes repealing the "federal minimum wage, overtime, and other provisions of the Fair Labor Standards Act." Why? Well, he takes a pro-employee stance and describes how employees are hurt by the rules around minimum wages and overtime as follows:

- grocery co-ops that rely on member volunteers to stock shelves;
- developmentally disabled persons in community employment;
- workers asked to surrender company cell phones and stop using company online services after hours;
- elders for whom overnight home attendants, suddenly unaffordable under an overtime mandate, had been the alternative to nursing home care;
- restaurant, airport, and other service workers who made far more under a tip system;
- interns and first jobholders in competitive, sought-after fields like fashion journalism and political campaign work;
- drivers left with a choice of machine car wash or nothing because by-hand washes are unsustainable when a tip system gives way to a $15 minimum wage;
- disabled persons who rely on now-unaffordable personal care assistants;
- small wineries with community volunteer programs; and
- telecommuters recalled to in-office assignments only.

Employment lawyer Jon Hyman agrees that the FLSA needs an overhaul. He wrote:

"The FLSA needs to go because compliance is impossible. Congress enacted the FLSA during the Great Depression to combat the sweatshops that had taken over our manufacturing sector. In the 70+ years that have passed, it has evolved, via a complex web of regulations and interpretations, into an anachronistic maze of rules that even the best-intentioned employer cannot hope to comply with. I would bet any employer in this country a free wage and hour audit that I can find an FLSA violation in your pay practices. A regulatory scheme that is impossible to meet does not make sense to keep alive. Instead, what employers and employees need is a more streamlined system to ensure that workers are paid a fair wage."

This Oxford comma case proves Hyman's case. While this case hinged on a state law, it did so because of antiquated federal laws. In a country with over 27 million small businesses (as of 2010), we should have laws that are easy to understand. There should never, ever be court cases that can go either way or where it's easy for an employer to make a mistake.

Do I have a solution for all employment law? No. But where would I start? Well, with the assumption that employees over the age of 18 are adults and should be able to make their own

contracts with employers. The key of my proposal would be that all job offers must be in writing (electronic or on paper) and that those terms could not be changed without advance notice. Let each person decide if a job offer makes him or her better or worse off.

Let's never have an employment law hinge on our understanding of grammar from our ninth-grade English class. That's unfair for everyone.