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How the FLSA Hurts Women (Part - Conclusion)

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In the last two weeks, I posted Part 1 and Part 2 of this blog series which discussed what women want from the workplace, why many women are leaving the workforce when it does not accommodate their need for flexibility, the desire for businesses to recruit women, and developing business trends and needs requiring flexibility. This final blog will discuss how the Fair Labor Standards Act (FLSA) works against businesses' being able to provide women with attractive work options, thus hurting women and businesses.

FLSA Incentives

To begin this discussion, let's talk about the incentives created by the FLSA. You might initially think the FLSA incentivizes its 1938 goals of hiring more people instead of working employees longer hours, and paying them a reasonable minimum wage for the first 40 hours worked. This, however, is far too simplistic, and no longer very true. Many more behaviors, including unintended behaviors, are incentivized by the FLSA. Before discussing those behaviors, let's get some reactions and emotions out of the way. Like it or not, both employees and businesses are motivated in large part by money. Employees want to maximize their earnings up to the point they conflict with other priorities. How this is achieved varies significantly from hard work and job choice to "working the system." Businesses, including non-profits, want to maximize cash flow and profits while minimizing expenses, all within the dictates of their priorities. No matter what some may think of these motivations, they are reality, and we must deal with reality. So here are realities regardless of opinions, emotions and reactions.

Employee Behaviors

1. Some employees maximize their opportunities for greater income by finding ways (legitimate and not so legitimate) to work over 40 hours to obtain premium overtime pay, including working (or claiming to be working) during break times, not getting work done during scheduled hours, starting work early, leaving work late, and doing work at unapproved times.

2. Some employees are very dedicated to their work and would rather mis-represent their time records rather than stop working when directed. For example, I hear about nurses all the time who would rather work through lunch because a patient needs them, no matter how many times they are directed to take a full 30 minutes for lunch. (Employers love the dedication of these employees, but their good intentions can cause havoc from a WH perspective).

3. Some employees will misrepresent the time they work when they think no one can verify their time. For example, a common employer and coworker complaint involves

employees disappearing for extended periods of time from their work locations while on the clock without a legitimate reason. (Not surprisingly, these employees cause employers to be reluctant to let these employees work by the hour from their home!)

4. Many, many employees like the prestige of being "salaried" and not punching a time clock even if they do not receive additional pay for hours over 40. These employees also do not usually get less pay for weeks in which they work less than 40 hours. I have seen countless misclassified employees get very, *VERY* upset when their employers convert them to non-exempt/hourly status in compliance with the law and make them start recording their time – a very real fact politicians refuse to acknowledge when they advocate for more classes of employees to qualify for overtime.

Employer Behaviors

1. Most employers are motivated to do everything they can to limit FLSA liability which comes with a hefty price tag of double unpaid wages, possible fees for their employee's attorney, their own attorneys' fees, and costs. There is also very little opportunity for dollar-for-dollar correction if an employer does something wrong under the FLSA.

2. Many employers limit overtime as much as possible. For some employers, this means very strict and draconian efforts requiring employees stop all work at exactly 40 hours or before, disciplining employees for working more than 40 hours without prior authorization, and disciplining supervisors for having too much overtime on their teams. Sometimes this causes employees and supervisors to change or mis-report time worked to avoid adverse action or to advance in the company. (Of course, some employees report truthfully or falsely that they worked off the clock)

3. Although most employers give breaks for employees to eat and recharge, employers are incentivized to mandate full 30-minute, uninterrupted breaks because anything less might have to be paid, exposing the employer to liability, including overtime.

4. Employers are discouraged from allowing non-exempt or borderline-exempt employees to work at home or outside the office for fear of under-reporting or over-reporting time actually worked, including checking emails or other electronic communications. This reality was amply demonstrated in November 2016 when thousands of work-from-home "exempt" employees were required by their employer to return to working in the office because the government was causing them to be reclassified as "hourly non-exempt" workers.

5. Employers are routinely advised by their attorneys to convert independent contractors to employees, even if the contractor relationship is genuinely preferred by the worker because of the flexibility and ability to be his or her own boss. The FLSA's test for correctly classifying independent contractors is very difficult to achieve with confidence (by design), and the risk of liability is very significant, especially when the business has not tracked the workers' hours.

Here is an example of how these incentives work in real life in many positions held by women.

A medical office has a great non-exempt hourly employee, Sarah, who is a physician's surgical scheduler. Upon having her third child, Sarah seeks work flexibility to be able to get her kids to

and from school and outside activities, while also taking care of her infant and earning a full-time income. Sarah and her physicians agree that her job can be performed, at least part-time, at home with her computer, electronic medical records, a phone, a scanner and a fax machine. In fact, she has performed work outside of "normal business hours" many times to get caught up. Her physicians want to do whatever they can to keep her and are willing to allow her to work in the office part time during peak patient days/hours, and work the rest of the time from home as long as her work is done in a timely manner. This would allow her to remain full time, keep health benefits for her family, and stay with the company. They try it out, love it, and find her productivity actually improves. Success!

But after Human Resources performs a routine audit of Sarah's time and pay records, HR notices that Sarah has recorded blocks of time, and the times she was actually working did not match her reports. Sarah explains it took too much time to write down every stop and start time, and she knew how much time she worked in the aggregate, so she just wrote that down in blocks of time. HR explains she must precisely record every start and stop so her records are accurate for FLSA purposes. Sarah agrees and her next time records show precise start and stop times, including several instances where she worked a few minutes, had a break of 20 minutes or less and then worked for another short period of time. HR knows that Sarah must be paid for breaks of 20 minutes or less, and when HR adds all this time back into Sarah's reported time worked, Sarah has 8 more hours of additional overtime for the week, most of which was not time Sarah was actually doing any work. Sarah explains that the short breaks were to feed the baby, pick her child up from school, and sometimes respond to emails while in line at

Starbucks. She did not expect to be paid for her short breaks between actual time worked, but HR explains that the FLSA requires her to be paid for these times, so if she takes a break from her work, she must not perform any work for at least 30 minutes. Sarah agrees and her next payroll sheet shows breaks of at least 30 minutes. Sarah's emails and electronic notes in the medical records, however, show that she worked during some of the time she reported as break time. Sarah explains that it does not make any sense for her to sit and do nothing for 10 – 15 minutes to ensure a 30 minute break when she could be getting work done. HR appreciates her situation but advises it has no choice but to give her a verbal warning for falsifying her time records. This is the first time Sarah has ever been disciplined in her life. She is beyond frustrated that her flexible job, which has been working so well, is now hindered by the time-consuming need to account for every minute accurately and ensure unnecessary, lengthy breaks, all of which affects her productivity and flexibility. She meets with her physicians and HR to see whether there are other solutions to assist her with getting her work done without the timekeeping and obstructive burdens created by the FLSA.

First Sarah asks to be put on salary for all time worked with no more obligation to record her hours. HR responds that this would not make a difference because her job duties require her to be non-exempt so she would still have to account for all time worked. She then asks to work as an independent contractor and be paid a fixed weekly rate or by the work completed. Again, HR explains that because she has performed the same work as an employee and her job is integral to the services performed by the practice, she would qualify as a true independent contractor under the standard currently being applied by the U.S. Department of Labor. Working only part-time is out of the question because Sarah would not make enough money to cover daycare expenses. With no workable options, Sarah resigns a job she loves, and her employer loses a valuable employee.

This scenario demonstrates some of the straight-forward problems the FLSA creates. It does not even touch on the crazy, illogical mental gymnastics required by the FLSA related to travel time, training time, donning and doffing (yes those are words), and other issues concerning what is compensable work, and who is entitled to overtime.

Real Change for the FLSA

As this discussion has hopefully shown, the FLSA is an 80-year-old, one-size-fits all law that works against workplace flexibility needed by many of today's businesses and workers, and flexibility particularly sought by women. In anticipation of the December 2016 FLSA regulatory changes which would have converted millions of exempt workers to non-exempt by increasing the salary threshold, Cato Institute Senior Fellow, Walter Orson, summed up the negative consequences well in the Cato Handbook for Policy Makers:

With much more of the white-collar workforce on the clock, employers will be under legal pressure to revoke telecommuting arrangements, restrict access to company cellphones and email after business hours, and disallow "comp time" setups that make a day with the kids possible. Aside from sowing widespread disruption, the rules will frustrate ambitious individuals who tend to prefer the freedom and perks of salaried status and willingly tackle long hours to learn skills and rise into management ranks.

For an illustrative list of other classes of employees who have also been hurt by the FLSA, see a discussion by Jon Hyman on his Ohio Employer's Law Blog.

Hourly jobs and the 40-hour workweek may still be the right pay structure for many jobs and be the right choice for many employees – but not for 60 to 70 percent of all jobs in 2017 and beyond! Why can't the FLSA be amended to permit other types of pay structures and work relationships that permit real flexibility while providing protections from abusive employers? As noted by my partner, Robin Shea (aka the employment law blogging queen), in her recent post, "Comp-time" for private sector employees: What's not to like? a good start would come with the passage of the Working Families Flexibility Act of 2017 which would amend the FLSA to allow employers to provide "comp time" to employees in lieu of overtime pay (this is already available, and loved, by employees in the public sector). But this is only a small start, and really only a tiny chip off the overly-rigid FLSA since it still works within the hourly pay/40 hour structure.

Real change could also include multiple permissible pay periods including days, weeks, half months, or months. The FLSA already allows for very limited versions of this such as the 8 and 80 rule for certain health care providers and exceptions to the 40 hour rule for firefighters, both in recognition that these workplaces were different from the 9-to-5 workforce. Instead of limited exceptions, why not permit similar alternatives to accommodate the current workforce and business needs and allow businesses and employees to choose the structure that works best for their twenty-first century jobs?

Further, when considering real change, why must we be married to the almighty hour, forcing compensation to be based on time worked instead of performance and achievement. The FLSA currently permits a very limited version of this with pay based on piece rate. This type of pay structure, however, is still based on hours worked because it requires a minimum hourly wage

and overtime. Why can't we permit the option of pay structures that base compensation on production instead of time?

Similarly, why can't more employees be paid salary for all time worked no matter when the work is performed, as we currently do with exempt employees. Why is the luxury of a salary limited to a small percentage of the population who the government badly defines as exempt? Critics might fear that employers will overwork or underpay salaried employees without some sort of minimum pay or time cap, but salaried exempt employees have survived this risk. When you consider that the majority of non-exempt employees are college educated, many with masters degrees, do they really need the government's protection at the expense of desired flexibility?! Are we really "protecting" all of them, or chaining all of them? We need to acknowledge that market forces can and do play a role in hiring employees. Employees are competing for jobs, but today's employees are also interviewing employers before deciding to apply for, or accept a job (thus the success of websites like Glassdoor), Today's employees are also more willing to leave bad employers. Therefore, these market forces should be a consideration in updating the FLSA.

I do not have all the answers. Real change would take hard work and thoughtful consideration to strike a good balance between flexibility, some protection against abuse for vulnerable categories of employees, and avoiding an impossibly complex law laden with more risks and expense than we have now. But comprehensive FLSA change needs to be done to match the needs of the 21st century. Real change providing for real flexibility would provide women with more attractive, lucrative, and attainable opportunities, *and* would have amazing potential to enhance business success with happier, healthier, more productive, and more diverse workforces – further benefiting working women.