ACCOUNTANT LAWYER ALLIANCE

Fisher Phillips

Navigating the Employment Law Alphabet Soup: A Guide for Service Firms



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ABOUT FISHER PHILLIPS

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Agenda

Employment Law: What Everyone Should Understand

Alphabet Soup: ADA, ADEA, FMLA, Title VII, OFCCP, NLRA, FLSA

Fair Labor Standards Act: What Your Clients Need to Know

Restrictive Covenants and Trade Secrets

Today's Goals

- Understand the basic law around the employment relationship
- Determine if there are any issues in your organization that you should address
- Be able to spot issues for clients who rely on your counsel
- Understand your personal agreements with your organizations
- Know where the risks are

EMPLOYMENT LAW

Employment Is a Contractual Relationship

- At-Will
- For Cause
- Contract for a Definite Term
- Terms and Conditions
  - Wages
  - Benefits
  - Policies



Some Aspects of Employment Are Legally Regulated

- Federal Law
  - Statutes
  - Regulations
  - Interpretations
  - Guidance
- State Law
  - Regulatory Agencies
- Local Law



The Consequences

- Government investigations
- Private Lawsuits
- Expending today's time on yesterday's problem
- Money



Discrimination Laws

- Federal employment discrimination laws generally cover employers with 15 or more employees
- Make it unlawful to consider various characteristics when making any employment related decisions
- State and local laws may cover smaller entities



Title VII and the ADEA

- Covers employers with 15 or more employees
- Thou shalt not discriminate against or harass an employee because of:
  - Race
  - Color
  - Gender (including pregnancy and sexual orientation)
  - Religion
  - National Origin
  - Age



The Americans with Disabilities Act

- Don’t harass or discriminate against an individual with a disability
- Reasonably accommodate



The Equal Pay Act

- Covers more employers than Title VII
- Specifically addresses gender disparities in pay only



Uniformed Service Employment and Reemployment Rights Act

- Protects members of the armed services who need leave to serve



Whistleblower Laws

- Protects employees who engage in particular forms of conduct from reprisal
  - Making a workers' compensation claim
  - Reporting discrimination
  - Reporting unlawful activity
  - Making ethics complaints



The National Labor Relations Act

- Governs unionization and union employer relationships
- Also covers a host of employee conduct in non-union settings



State and Local Laws

- Every state is different
- Often includes same discrimination but applies to smaller organizations
- Other possibilities
  - Hair Discrimination
  - Sickle Cell Trait
  - Younger than 40



Other Employment Laws of Note

- Family and Medical Leave Act
  - 50 or more employees
  - 12 weeks of unpaid leave for serious health condition, birth or adoption, certain military issues
- The Pump Act
- The Pregnancy Accommodation Act
- The Immigration Control and Reform Act
- The Occupational Safety and Health Act
- The Employee Retirement Income Security Act



How to Avoid Problems

- Focus on hiring
- Communication
- Oversight
- Documentation
- Training
- Get help
- Don’t be a jerk



What Results in Lawsuits

1. Discharges with no prior communication of issues
2. Discharges of long-term employees with no history of discipline
3. Too casual work environments
4. Messing with employee pay
5. Jerks





QUESTIONS?

FAIR LABOR STANDARDS ACT:
What You Should Warn Your Clients About

FLSA Coverage

- Enterprise → 2+ employees plus $500K in annual gross revenue (all employees covered).
- Individual → Engaged in interstate commerce or producing goods for interstate commerce.
- “Employee” → Economic Reality Test
- Problem Areas: “Independent Contractors,”
- “Volunteers,” “Trainees,” “Interns.”



Four Main FLSA Requirements

1. A minimum wage (currently $7.25 an hour).

2. Premium pay for overtime work (at a rate of 1.5 times the "regular rate" of pay for over 40 hours worked in a single workweek).

3. Certain recordkeeping, including accurate time records.

4. Limitations on the employment of minors under 18.



Minimum Wage

- Currently $7.25 Per Hour
- State and local laws may be higher.
- Tipped Employees ($2.13 cash wage plus tip credit)
- Watch Deductions That “Cut In”



Overtime

- Hours Worked Over 40 In A Work Week.
- 1.5 Times The "Regular Rate" Of Pay
- (All Pay ÷ All Hours The Pay Covers).
- Must Include Things Like Commissions, Incentive Pay, Certain Bonuses And Other Kinds Of Extra Pay.



Overtime

- Some Kinds Of Payments Can Be Excluded from the overtime calculation.
- For Example: Pay For Unworked Holidays, True Gifts, Pay For Unworked Vacation Time, “Discretionary" Bonuses.



Workweek

- Each work week stands alone!
- No Averaging of weeks.
- Exception: Some governmental agencies may provide comp time
- No comp time for private employers



Hours Worked

- Must Keep Accurate Records Of All Time A Nonexempt Employee Works Each Workday And Each Workweek.

- Includes All Time Employer Knows Or Has Reason To Know About – Not Just Time The Employer Required Or Asked The Employee To Work.

- DOL's View: If You Don't Want To Pay For The Work, You Must Prevent It From Being Done.



Overtime Policies

- “No Overtime” Policies
- Require Supervisor Approval in Advance.
- Signing Timecards



Hours Worked

- The Three Keys:
- Evaluate Which Activities Are "Hours Worked."
- Develop A System And Policies.
- Make Sure Your Supervisors Enforce The Policies.



Trouble Areas

- Meals
- Early work
- Breaks
- Late work
- On-Call
- Work at home
- Meetings/Training
- Travel



What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage, record keeping and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies

"White Collar" Exemptions

- Executive, Administrative, Professional
- Also "Computer Employees", "Highly Compensated" varieties
- Three general requirements for most of them:
  1. Paid on a "salary basis"
  2. Salary is at least a certain amount
  3. Employee performs specific kinds of work (“duties”)

Executive Exemption

- Primary duty is managing the enterprise or a customarily-recognized department or unit;
- Customarily and regularly directs the work of two or more other employees;
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight; and
- Paid on a "salary basis" at a rate of at least $648 a week (for now).

Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers;
- This work includes the exercise of discretion and independent judgment as to matters of significance; and
- Paid on a "salary basis" at a rate of at least $648 a week (for now).
- Possibly one of the most often erroneously-applied FLSA exemptions – very narrowly interpreted

Professional Exemption

- Paid on a “Salary Basis” or a “Fee Basis” at a rate of at least $648 a week, and;

- “Primary Duty” Is:

  - Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

  - Work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

- Paid on a “Salary Basis” or a “Fee Basis” at a rate of at least $648 a week, and;
- Applies to computer systems analysts, computer programmers, software engineers, or other similarly skilled workers whose primary duty Is:
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
  - The design, documentation, testing, creation or modification of computer programs related to machine operating systems.
  - A combination of these duties, the performance of which requires the same skill level.

Outside – Sales Employees

- Primary Duty Is Making Sales, Or Obtaining Orders Or Contracts For Services Or For The Use Of Facilities For Which The Customer Or Client Will Pay.

- The Employee Is Customarily And Regularly Engaged In This Activity Away From The Employer's Place Or Places Of Business.

- No pay requirement.

Salary Basis

- Employee Must Regularly Receive Each Pay Period A Predetermined Amount Constituting All Or Part Of His Or Her Compensation, Which Amount Is Not Subject To Reduction Because Of Variations In The Quality Or Quantity Of Work Performed.

- Employee Need Not Be Paid The Salary For Any Workweek In Which He Or She Performs No Work

Permissible Deductions

- Full-Day Absences For Personal Reasons.
- Full-Day Absences For Sickness, Disability, Or Accident If There Is A Bona Fide Sick-Pay Plan, Policy, Or Practice.
- To Impose A Penalty In Good Faith For Violating Safety Rules Of Major Significance.
- To Offset Amounts Received As Jury Fees, Witness Fees, Or Military Pay.

Permissible Deductions

- To Pay For-Time-Worked Proportionate Part Of The Salary For The Initial Or Terminal Week Of Employment.
- To Provide Unpaid Leave Under The Federal Family And Medical Leave Act.
- Must Be Computed In Increments Of A Day's Pay Or In Multiples Of That Amount For Each Whole Day Missed (1/5th, 1/6th, Etc.), Except For FMLA leaves.

Are They Really Exempt?

- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- Specific requirements apply
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses

Are They Really Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not "make employees exempt"

Are They Really Exempt?

- Outlines, checklists: Helpful, but aren't the final answer
- Most points can't be reduced simply to "Yes", "No"
- Quick-and-easy evaluations usually leave serious vulnerabilities
- Independent understanding and analysis of each factor and circumstance are essential

What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
  - Pay by-the-hour?
  - Pay a salary as straight-time compensation for 40 hours (or some other number)?
  - Pay a salary as straight-time compensation for all hours?

What About Bonuses for Non-Exempt?

- Nondiscretionary bonuses and incentive payments for non-exempt employees must be accounted for in overtime calculations.

- If an employee gets a $50 bonus for a week in which they worked 50 hours, then the regular rate would be $1.00 higher for overtime purposes. So you would owe an additional $0.50 hour on the 10 hours of overtime.

Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
  - Know everything that counts
  - Have a system and policies for capturing the time accurately
  - Train employees to follow
  - Train supervisors/managers to enforce
  - Periodically see whether the time records appear to be accurate

What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Find out now where you stand, especially if it's been a while since you looked
- Are you sure you are accurately recording worktime, properly computing overtime, making only lawful deductions, correct about all "contractors" . . . ?

Non-Compliance Consequences

- Back wages, plus equal amount ("liquidated damages")
- Civil money penalties up to $1,100 per person
- 2-year limitations period, 3 years if "willful"
- Court-ordered compliance in the future (possible "contempt of court" for later violations)

Non-Compliance Consequences

- Pay plaintiff's "reasonable" attorney's fees, costs (and yours)
- Possible individual management liability
- Possible criminal penalties
- Distraction and disruption
- Adverse publicity



QUESTIONS?

RESTRICTIVE COVENANTS AND TRADE SECRETS

What Is A Restrictive Covenant In The Employment Context?

- A contractual agreement that restricts the post employment activities of an employee.



"But Mr. Sanders, I babysit for you and the entire neighborhood. I can't sign a noncompete agreement!"

Why Have Them?

- Hot practice area impacted by economy
  - Transition to knowledge-based and service economy
  - Employees more likely to take risks
- Hard to replace workers with 3.4% unemployment
- The goal: protect your confidential information and key relationships

View of Issues

- The employment relationship is less stable now than it was in the past
- High level talent is in demand and recruiting for that talent is consistent and aggressive
- More companies rely on intellectual property now than ever before – knowledge is key
- Client based knowledge is also critical, especially when companies are large.

State Law

- There is currently no general federal law on restrictive covenants
- State laws on restrictive covenants vary wildly
  - California at one end, Florida at the other
  - Many being amended

Non-Competition Agreements Are Under Attack

- NLRB's General Counsel issued an opinion letter concluding most non-competition agreements were unlawful



The End of Non-Competes?

- FTC proposed rule would ban virtually all non-compete agreements
- Opines the widespread use of non-competes agreements is an “often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses.”
- Applies nearly all employers and all workers
  - Employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors



The End of Non-Competes?



Three critical components:

1. Prevent employers from entering into non-compete agreements with workers

2. Require employers to take active steps to rescind existing non-compete agreements

3. Proposes explicit notice requirements applying to current and former employees

The End of Non-Competes?

What's happening now?

- FTC is considering changes to the proposed rule based on nearly 27,000 public comments
- Vote on the final version of the proposed rule is expected in April 2024
- Non-competes can still be used in Tennessee



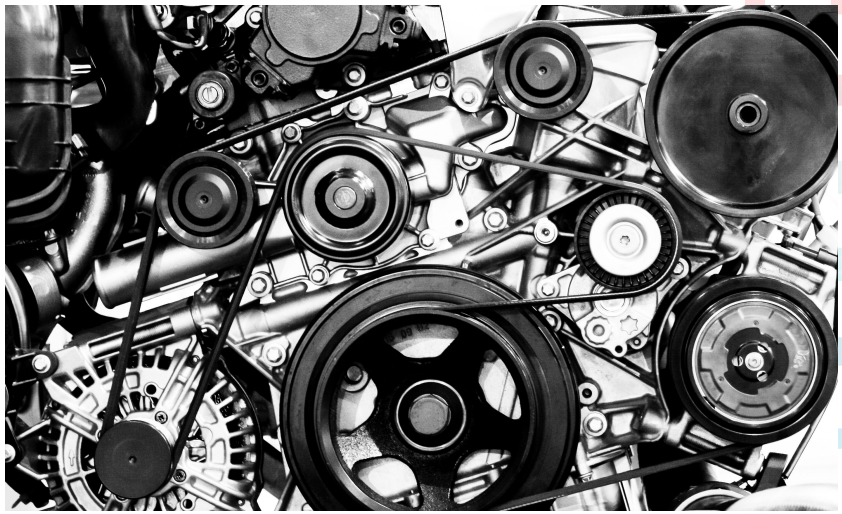
General Principles

- Many states have statutes setting the parameters for lawful restrictive covenants in the employment relationship
- May apply in the sale of a business as well
- Courts disfavor restraints on competition, but they also respect parties' freedom to contract.
- Restrictions are construed strictly in favor of employee.



Components/Types of Agreements

- Non-Compete Provisions
- Non-Solicitation of Customers
- Non-Solicitation of Employees
- Confidentiality Provisions



Non-Competition Agreement

- Prohibits an employee from engaging in a business completely
- Ordinary requirements:
  - Consideration
  - Protectable business interest (Reasonable)
    - Specialized Training
    - Access to Confidential Information
    - Special Customer Relationships
  - Temporal restriction
  - Geographic restriction
  - Scope of activities restricted

Not Legitimate Interests

- General Knowledge/Skills/Abilities
- Publicly Available Information
- Information Resulting from Reverse Engineering
- Customers that employee brings with him or her to the employment [service industry]

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Full Non-Competition Agreement

- Hardest to enforce, broadest coverage, most likely to spark employee pushback
- Critical to provide notice, especially in states with statutes
- Critical to limit to employees who would pose a serious competitive threat after employment

Customer Non-Solicit

- Prohibits an ex-employee from soliciting the former employer's customers, but allows working in the same business
- Usually has a post-employment temporal limit
- May or may not have a geographic limitation
- Defines customers
- Ordinarily limited to the same business as the former employer

Employee Non-Solicit

- Easy to enforce in most states, unlawful in some
- Increasingly important in a tight labor market
- Verbs are key
  - Solicit
  - Interview
  - Hire

Non-Disclosure of Confidential Information

- Easy to enforce
- Always a good exercise to identify your most important information
- Some newer federal quirks
  - Cannot cover terms and conditions of employment
  - Cannot prevent whistleblower activity
  - Carve-out for federal trade secret claims

Trade Secrets

- Non-public
- Valuable by virtue of being non-public
- Subject to reasonable means to protect its secrecy
  - Need-to-know basis
  - IT security
  - Physical security
  - Outgoing employee procedures



Questions?

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