



Employer Considerations in Uncertain Times



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The Fair Labor Standards Act requires that most employees be paid at least the federal minimum wage for all hours worked and over-time paid at time and one-half of regular pay for all hours worked over 40 hours in the work week. Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and over-time pay for employees employed as bona fide executives, administrators, professionals, and outside sales employees. There is also an exemption for certain highly compensated computer employees. To qualify for an exemption, the employees must generally meet certain tests regarding their job duties and be paid on a salaried basis but not less than \$450.00 per week. Although passed in 1938, the FLSA has within the last five to ten years become one of the most frequently litigated employment laws. Many employers erroneously believe that simply paying salaries or large amounts of money to employees necessarily exempts those employees from over-time pay. This is not the case.

Because the plaintiff in an FLSA case has a relatively light burden of proof and the employer has the burden of proof on a number of

issues, the claims are relatively easy to assert. Further, the statute provides for back pay for two or three years to be doubled in the case of a willful violation and attorney's fees.

The Americans with Disabilities Act Amendments Act of 2009 ("Amendment") overturned four United States Supreme Court decisions and went into effect on January 1, 2009. The Amendment's provisions operate to expand coverage under the Americans with Disabilities Act ("ADA"). Under the ADA, a "disability" is a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or being regarded as having such an impairment.⁽¹⁾ The Amendment expands coverage by, among other things: preventing mitigating measures from being considered when determining whether an individual's impairment substantially limits a major life activity; and expanding the definition of "major life activity." These amendments will likely shift the focus of ADA litigation from whether an employee is covered under the ADA to whether a covered employee is a



disabled” employee and whether employers have complied with other provisions of the act.

The Employee Free Choice Act (“EFCA”) is a proposed piece of legislation to amend the National Labor Relations Act by effectively doing away with representative elections, requiring an arbitrator to resolve unsettled contract terms and substantially increasing the monetary penalties for violating the law.

An EFCA proposal does away with the NLRB conducted elections and replaces the election process with a card check. The union would automatically be certified as the bargaining agent of employees if it obtains a majority of employee signatures on union authorization cards.

(1) 42 U.S.C. §12102.

Lenor Scheffler is an enrolled member of the Lower Sioux Community. She serves as a member and Chair of Best & Flanagan's Native American Law Practice Group. She practices in the areas of federal Indian law, tax, tribal election representation, governance, gaming law, tribal financing and business law.