

## "Everybody Does It" Is A Bad Bet

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The boom in wage-hour complaints and lawsuits continues unabated. Long-held conventional wisdom that might be questionable or even mistaken under the federal Fair Labor Standards Act or analogous laws now faces unprecedented scrutiny. It is tempting to take comfort in platitudes like, "The whole industry pays employees that way," "Everybody I know of treats those positions as exempt," "All of my competitors classify these kinds of workers as independent contractors," and so on.

Relying upon these commonly-held views instead of looking into what the legal requirements and limitations *actually are* carries a high degree of legal risk. For example, it sometimes turns out that:

- "Everybody" has it wrong, or at least many do, such that there is broad-scale exposure to liability;
- The fact is that fewer employers than one thinks are actually doing what "everybody" is said to be doing (or maybe *nobody* else really is);
- The circumstances of others in the industry are different in a way that one either does not realize or does not realize is legally significant;
- The FLSA might permit something that the applicable law of a state or local jurisdiction does not;
- Perhaps the applicable law of a particular jurisdiction permits something that the FLSA does not;
- It might be that the law of one state authorizes something that the law of another state does not; or
- Even though a practice has long been a violation of the FLSA or a similar law, no one had previously realized it, or no one had gotten around to making an issue of it.

These and other scenarios have set up entire employer categories for a nasty wage-hour surprise. Employers should not take "Everybody Does It" to be reason enough to adopt or continue a policy or practice the legality of which they have not carefully evaluated *on their own*. Once a claim is made, courts and enforcement officials are not likely to be impressed with this explanation.