



OPERATING WITH INTEGRITY

COMMITMENT COMPLIANCE CULTURE

FLSA Exemption, Exempt, Non-Exempt & Independent Contractors

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OPERATING WITH INTEGRITY

COMMITMENT COMPLIANCE CULTURE



- New regulations
- FLSA Basics
- Minimum wage
- Overtime pay (covered, non-exempt)
- Strategic decision making

FLSA OVERTIME

29 U.S.C. Section 207(a)(1):

- “. . . no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EXEMPTION

- Job duties test
- Paid on salary basis
- Meeting the minimum salary thresholds
 - Job titles/descriptions do not determine exempt status

Salary Basis Test New Regulations

Current	Effective December 1, 2016
\$455 per week	\$913 per week
\$23,660 per year	\$47,476 per year
No automatic increase	Automatic increase to 40 th wage percentile every 3 years
Bonuses not included	May include non-discretionary bonuses for up to 10% paid quarterly

STRATEGIC PLANNING

- Raising wage rates vs. converting to hourly
- Non-monetary considerations
- Reducing base pay
- Non-discretionary commissions and bonuses
- Effect on remote workers
- Communication campaign

PRIVATE VS. FEDERAL CONTRACTS

- Effect on pricing
- For federal contractors, impact on bottom line
- Contract language
- Future costs associated with automatic increase
- Prevailing wage laws (e.g., Service Contract Act)

HIGHLY COMPENSATED EMPLOYEES

- Exemption from overtime
- Do not have to meet requirements of the typical “duties test” if:
- Primary duty is performing non-manual work;
 - Regularly performing one of the exempt duties; and
 - Meet the compensation threshold
 - Currently, \$100,000 per year
- Effective Dec. 1, 2016: \$134,004
- May consist of commissions and non-discretionary bonuses

FLSA BASICS

WHAT IS NOT INCLUDED?

- Vacation, holiday, severance, or sick pay
- Meal or rest periods
- Holidays off
- Vacations
- Premium pay for weekend or holiday work
- Pay raises or fringe benefits
- A discharge notice, reason for discharge
- Wage payment or collection procedures
- Number of hours in a day or days in a week an employee may be required or scheduled to work

COVERAGE

- Who is covered? Pretty much everyone!
- Enterprise coverage: Businesses with...
 - Two or more people employed and
 - An annual dollar volume of sales or business done of at least \$500,000
- Individual coverage:
 - Work regularly involves them in commerce between states (“interstate commerce”) or in the production of goods for commerce

WORKERS NOT COVERED

- Volunteers
- Interns
- Trainees
- Independent Contractors

INDEPENDENT CONTRACTORS

“ECONOMIC REALITIES” TEST

- DOL Administrator’s Interpretation 2015-1 addresses misclassification of independent contractors using the “economic realities” test in determining if someone is employed under the broad FLSA standard of “to suffer or permit to work”:
- Factors:
 - Integral part of the employer’s business?
 - Does managerial skill affect worker’s opportunity for profit or loss?
 - Does worker’s relative investment compare to employer’s investment?
 - Work performed require special skill and initiative?
 - Permanent or indefinite relationship?
 - Nature and degree of employer’s control?

INDEPENDENT CONTRACTORS

INTERNAL REVENUE SERVICE

- Facts that provide evidence of the degree of control and independence fall into three categories:
- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?
- No magic number

INDEPENDENT CONTRACTORS

PENALTIES

DoL

- Back wages (to meet minimum wage requirements)
- Overtime
- IRS Reporting
- Penalties

IRS

- Liable for employment taxes for that worker
- Relief Provisions. If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker. To get this relief, you must file all required federal information returns on a basis consistent with your treatment of the worker. You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977.
- Voluntary Classification Settlement Program. An opportunity to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes for eligible taxpayers that agree to prospectively treat their workers (or a class or group of workers) as employees.

INDEPENDENT CONTRACTORS

OTHER IMPACTS

- Equal Employment Opportunity
- Workers' Compensation
- Prevailing Wage Laws
- Torts
- Co-employer

MINIMUM WAGE

- \$7.25 per hour (July 2009)
- For now...
- Increased by statute
- \$2.13 per hour for tipped workers
- CPI advocacy

MINIMUM WAGE

- States, counties, and municipalities also have minimum wage laws that you must take into account
 - As of Oct. 26, 2015, 29 states and DC have minimum wages above the federal minimum wage
 - Since 2014, lawmakers in CT, DE, HI, MA, MD, MI, MN, RI, VT, WV, and DC enacted legislative increases, while voters in AK, AR, NE, and SD approved minimum wage increases through ballot measures
 - Many adjust by CPI

STATE MINIMUM WAGE EXAMPLES

- DC: currently \$11.50 per hour
 - Tied to CPI and on track to increase to \$15.00 per hour by 2020
- California: currently \$10.00 per hour
 - On track to increase to \$15.00 per hour by 2022
- New York: currently \$9.00 per hour
 - On track to increase to \$12.50 per hour by 2020 (NYC and Long Island increase to \$15.00 per hour by 2019 and 2021, respectively)

STATE LAW OVERTIME EXAMPLES

- Alaska:
 - 1.5 x for more than 8 hours in any one day
- California:
 - 1.5 x for more than 8 hours in any one day, or for first 8 hours of 7th consecutive day in workweek
 - 2.0 x for more than 12 hours in any one day, or for hours in excess of 8 on 7th consecutive day in workweek

OVERTIME

Defining your workweek

- Workweek is any fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods
- Not the same for all employers, but must be consistent
- There is no limit on the number of hours employees 16 years or older may work in any workweek
- **BUT NO COMP TIME FOR PRIVATE SECTOR**

OVERTIME

When are employees “working?”

- Hours worked ordinarily includes all the time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed workplace

OFF-THE-CLOCK OVERTIME ISSUES

- Work performed outside usual schedule and employees pressured not to record time
- Time on tasks the employer regards as non-compensable
- Disputes over accuracy of timekeeping procedures

OVERTIME

- Preliminary and Postliminary Activity
 - Must be “integral and indispensable”
 - Amazon case - the court held that, for such activities to be compensable, they must be “an intrinsic element” of the “principal activities that an employee is employed to perform” and “one with which the employee cannot dispense if he is to perform his principal activities.”
 - Principal activity for Amazon employees was packaging products for shipment

OVERTIME

- What can you do to minimize risk?
 - The problem of DOL “strict liability”
 - A CLEAR and ENFORCED overtime and timekeeping policy
 - Handbook

EXEMPTIONS FROM OVERTIME

- Exemptions from Overtime Pay Only
 - Certain **commissioned employees**
 - Auto, truck, trailer, farm implement, boat, or aircraft **sales-workers**; or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
 - **Employees of railroads and air carriers**, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans
 - Announcers, news editors, and chief engineers of certain non-metropolitan **broadcasting** stations
 - Domestic service workers living in the employer's residence
 - **Employees of motion picture theaters**
 - **Farmworkers**

EXEMPTIONS FROM OVERTIME

- Exemptions from both Minimum Wage and Overtime Pay
 - **Executive, administrative, and professional employees**
 - **Outside sales employees**
 - **Employees in certain computer-related occupations**
 - Employees of certain **seasonal** amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery
 - **Farm workers** employed by anyone who used no more than 500 “man-days” of farm labor in any calendar quarter of the preceding calendar year
 - Casual babysitters and persons employed as companions to the elderly or infirm

EXEMPTIONS FROM OVERTIME

- NOT changed by DOL's new rule
- Executive:
 - Regularly supervises 2+ full-time employees and management is primary duty of the position
- Administrative:
 - Office/non-manual work, directly related to management or general business operations of the employer, and exercise of independent judgment and discretion on matters of significance
- Professional:
 - Work is predominantly intellectual in a field of science/learning, requires specialized education, and involves exercise of discretion and independent judgment

MANAGEMENT AS THE PRIMARY DUTY

- Management duties may include:
 - Interviewing, selecting, and training employees
 - Setting rates of pay and hours of work
 - Maintaining production or sales records (beyond the merely clerical)
 - Appraising productivity
 - Handling employee complaints or disciplining employees
 - Determining work techniques; planning the work; apportioning work
 - Determining the types of equipment or materials to be used
 - Planning budgets for work
 - Providing for safety and security of the workplace

ADMINISTRATIVE DUTIES TEST

- Office or non-manual work
- Directly related to management or general business operations of the employer or the employer's customers and
- Exercise of independent judgment and discretion about matters of significance

MANAGEMENT AND BUSINESS OPERATIONS

- Operational v. Production
- Functional areas directly related to management or general business operations:
 - Human resources
 - Payroll
 - Finance
 - Accounting
 - Quality Control
 - Public Relations
 - Marketing
 - Advertising
 - Purchasing
 - Procurement

DISCRETION/INDEPENDENT JUDGMENT ON MATTERS OF SIGNIFICANCE

- Comparing and evaluating possible courses of action or making a decision after various possibilities have been considered
- Making recommendations for action (even if reviewable by a higher-level authority)
- Work involving more than skillfully applying well-established procedures or standards—beyond simply clerical, secretarial, mechanical, or routine work

PROFESSIONAL DUTIES TEST

- Work that is predominantly intellectual in a field of science or learning, requires specialized education, and involves exercise of discretion and independent judgement
- Advanced degree or performs the same work
- Position not the person
 - Work must involve use of advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances

LEARNED PROFESSIONAL EXAMPLES

- Fields of Science or Learning:
 - Doctors
 - Architects
 - Engineers
 - Lawyers
 - Accountants (not bookkeepers)
 - Actuaries
 - Scientists
 - Pharmacists

PERMISSIBLE SALARY DEDUCTIONS

- 1) Full-day absences for personal reasons, other than sickness or disability (inclement weather, disasters, etc.)
- 2) Full-day absences for sickness or disability in accordance with the employer's bona fide plan providing for leave in full-day increments
- 3) Safety violations (any increment) pursuant to written policy
- 4) Full-day disciplinary suspensions pursuant to written policy
- 5) Partial workweeks at hire or termination
- 6) Employers may require employees to use accrued paid leave, either in partial-day or full-day increments
- 7) Absences under FMLA (any increment)
- 8) Offset compensation employees receive as jury fees, witness fees, or military pay while the employees are on jury duty leave, witness leave, or military leave

SAFE HARBOR FOR IMPROPER DEDUCTIONS

- An employer will not lose the exemption for employees if the following criteria are met (unless the employer willfully continues to make improper deductions after receiving complaints):
 - Have a clearly communicated policy prohibiting improper salary deductions
 - Provide complaint mechanism in policy
 - Reimburse employees when improper deductions are made
 - Make a good faith commitment to comply in the future

FLSA PENALTIES

- Payment for unpaid overtime or minimum wages
- Liquidated damages in an amount equal to the unpaid overtime or minimum wages (subject to good faith and reasonable grounds defense)
- Class/collective actions
- Employee's attorney's fees and costs
- Possible state-law statutory penalties
- Two-year statute of limitations (three-year statute of limitations for willful violations)

ASSESSMENT AND AUDIT

- Evaluate impact on workforce
- How much overtime do your exempt employees work?
- What other policies will be affected? Email, recording time?
- What training will you need to complete?
- Are employees currently classified correctly under duties test?
- Will this affect your benefit plans?

COMPLAINTS

- Complaints by employees to the company
 - Retaliation prohibited
 - Investigate (independently, if appropriate)
 - Get help
 - Address concerns
 - Is the issue, if any, systemic?

COMPLAINTS

- When DOL becomes involved
 - Investigation phase
 - Two years back
 - Seek counsel
 - If you cannot resolve at the investigation phase, then...

RECORDKEEPING

- Poster
- Employee Information
 - Full name and social security number
 - Address, including zip code
 - Birth date, if younger than 19
 - Sex and occupation
 - Time and day of week when employee's workweek begins
 - Hours worked each day
 - Total hours worked each workweek
 - Basis on which employee's wages are paid (e.g., "\$9 per hour," "\$440 a week," "piecework")
 - Total daily or weekly straight-time earnings
 - Total overtime earnings for the workweek
 - All additions to or deductions from the employee's wages
 - Total wages paid each pay period
 - Date of payment and the pay period covered by the payment

RECORDKEEPING

- How long should records be retained?
 - Three years: payroll records, collective bargaining agreements, sales, purchase records
 - Two years: records on which wage computations are based, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages

LACTATION BREAKS

- Recently added by the Affordable Care Act
- Non-exempt employees
- “Reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”
- Fewer than 50 employees are not subject to the FLSA break time requirement if compliance would impose an undue hardship (difficulty and/or expense when compared to size, financial resources, nature, and structure of the employer’s business).
- Provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”
- Does not preempt state laws that provide greater protections to employees (for example, compensated break time, break time for exempt employees, or break time beyond 1 year after child’s birth)

YOUTH AT WORK

- Children of any age generally can work for businesses entirely owned by their parents
- Those under 16 may not be employed in mining or manufacturing
- No one under 18 may be employed in any occupation the Secretary of Labor has designated as prohibited
- 14- and 15- year-olds may be employed in restaurants and quick-service establishments outside school hours in a variety of jobs for limited periods of time and under specified conditions
- Children under 14 years of age may not be employed in non-agricultural occupations covered by the FLSA. Permissible employment for such children is limited to work that is exempt from the FLSA (such as delivering newspapers to the consumer and acting). Children may also perform work not covered by the FLSA, such as completing minor chores around private homes or casual babysitting.

BEST PRACTICES

- Clear and enforced policies
- Audit yourself:
 - Ask employees what their jobs entail
 - Question employees about overtime
 - Check email and phone use
 - Review exemptions annually and at contract renewal
 - Have the actual job responsibilities changed?
 - What does the contract require? Does it expose you to liability?

THANK YOU

QUESTIONS ?

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