

WAGE AND HOUR: A PRIMER ON FLSA COMPLIANCE

2016 Labor & Employment Law Conference

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GENERAL PRINCIPLES

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FAIR LABOR STANDARDS ACT (FLSA) SUMMARY

- Employers must pay employees the minimum wage
- Employers must pay overtime for hours worked over 40 hours in a week by employees – UNLESS an exemption applies
 - Highly Compensated Employees
 - Most common? White-collar exemptions [Section 13(a)(1)]
 - Executive, Administrative, Professional
 - Some Computer Professionals & Outside Sales employees

THREE TESTS FOR EXEMPTION APPLICABILITY

- Salary Level
- Salary Basis
- Job Duties

THE NEW RULE

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BACKGROUND

- President Obama directs DOL in 2014 to update regulations
- Proposed Rule in Summer of 2015
- More than ¼ million comments later, Final Rule May 18, 2016
- Effective December 1, 2016 to start

SALARY LEVEL TEST

- Requires overtime for employees earning less than \$913/week (\$47,476/year)
- Based on BLS 40th percentile of earnings of full-time salaried workers in lowest-wage Census Region (south)
- Former level required overtime for employees earning less than \$455/week (\$23,600/year)
- The employer may satisfy up to ten percent of the salary amount by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid quarterly or more frequently

HIGHLY COMPENSATED EMPLOYEES

- Total compensation requirement for Highly Compensated Employee exemption now \$134,004 annually (up from \$100,000)
- Based on 90th percentile of full-time salaried workers nationally

LOOSE ENDS

- Automatic updates to both salary thresholds every three years to maintain percentiles – starting 1/1/2020
- Even though comments solicited on 'duties' tests, no changes to them

APPLICATION NUTS & BOLTS

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SALARY BASIS

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SALARY BASIS TEST

- To be paid on a salary basis means that the employee “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount ... which is not subject to reduction because of variations in the quality or quantity of the work performed”
- An exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked
- Exempt employees need not be paid for workweek in which they perform no work
- An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available

PERMITTED DEDUCTIONS

- One or more full day absences
- Absence of one or more full days occasioned by sickness or disability if the deduction is made with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability
- Safety rules discipline, or suspension for violating workplace conduct rules
- For leaves covered under and chargeable to employees covered by the FMLA, the employer may deduct for partial days or work missed
- Employers may offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week
- One day or more suspension for violations of workplace conduct rules
- A proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment

MAKING IMPROPER DEDUCTIONS

- An employer who makes improper deductions from salary may lose the exemption under certain circumstances
- Factors to consider
 - The number of improper deductions
 - The time period during which the employer made improper deductions
 - The geographic location of employees whose salary was improperly reduced, & managers involved in decision-making
 - Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions

EFFECT OF IMPROPER DEDUCTIONS

- If the facts demonstrate that the employer has an actual practice of making improper deductions so as to demonstrate that the employer didn't intend to pay the employee on a salary basis, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions
- Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions

SAVED BY THE SAFE HARBOR

- To qualify for the safe harbor under the statute
 - The employer must reimburse the employee for such deductions
 - The employer has a clearly communicated policy that prohibits the improper pay deductions specified in 29 C.F.R. § 541.602(a), and includes a complaint mechanism
 - The employer makes a good faith commitment to comply in the future
- If an employer qualifies for the safe harbor
 - The employer is not required to make back-payments and the employee does not lose exempt status

TEST YOUR KNOWLEDGE

Mike, the company's Controller, is a pain. He has an accounting degree from Yale and is a CPA. He earns \$150,000 a year. The problem is, he is never around. He takes half days off all the time. The big problem is that he takes them off just when he is most needed. Recently, there have been several projects that needed his input that did not get done timely. The CEO has talked to him, but Mike says he is a salary exempt employee under the FLSA and does not have to punch a clock. The CEO just has instructed HR to dock his pay for every hour Mike misses between 9:00 am and 5:00 pm.

What can the company do?

ANSWERS

- A. You cannot do anything. Mike is within his rights as a salary exempt employee
- B. You can dock his pay the next time he fails to work between 9 am and 5 pm
- C. You have to pay him. You cannot tell a salary employee that they must work 9 am to 5 pm, but you can discipline Mike for not performing his job duties
- D. You have to pay him. You can tell Mike that he has to work 9 am to 5 pm and discipline him both for failing to work that schedule and for failing to perform
- E. You can dock his PTO time if he has PTO

HIGHLY COMPENSATED EMPLOYEES

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HIGHLY COMPENSATED EMPLOYEES

- Employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee
- Must receive at least full-standard salary amount each pay period without regard to non-discretionary bonuses/incentives, but those bonuses can count towards total compensation requirement without limitation
- Not recognized under Pennsylvania state law

HIGHLY COMPENSATED EMPLOYEES

- The highly compensated test is not available for
 - Non-management production line workers
 - Non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers
 - Other employees who perform work involving repetitive operations with their hands, physical skill and energy

DUTIES TESTS

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EXECUTIVE EXEMPTION

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EXECUTIVE EMPLOYEES

- Employees are exempt executives if these factors are met
 - Paid a salary of at least \$913 a week, exclusive of board, lodging or other facilities
 - Their “primary duty” includes
 - Managing the enterprise in which the employee is employed or a customarily recognized department or division of the enterprise
 - “Customarily and regularly” directing the work of two or more employees
 - Has authority to hire/fire other employees or make suggestions and recommendations that are given particular weight about hiring, firing, advancement, promotion, or other changes in status

“PRIMARY DUTY”

- An exempt employee’s “primary duty” is the principal, main, major or most important duty that the employee performs. It is determined on a case-by-case basis. Factors considered
 - The relative importance of the principal duties as compared with other types of duties
 - The amount of time spent performing various types of work
 - The employee’s relative freedom from direct supervision
 - The relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee
- Title alone is not enough. Look at the percentage of time that the employee spends performing exempt work. If it’s more than 50 percent of his or her time, it will generally satisfy the primary duty requirement

“CUSTOMARILY AND REGULARLY”

- A frequency that must be greater than occasional but which, of course, may be less than constant
- Includes work normally and recurrently performed every workweek
- Does not include isolated or one-time tasks

“TWO OR MORE EMPLOYEES”

- Exempt executives must direct the work of two or more full-time employees, or the equivalent, as part of their customary and regular duties
- Supervision can be distributed among more than one executive employee, but to qualify for the exemption, each executive must customarily and regularly direct the work of two or more full-time or equivalent employees
- An employee who merely assists a manager, or performs supervisory functions only on an occasional basis, is not an exempt executive
- In counting the number of employees supervised, hours worked cannot be credited more than once for different supervisors, so shared responsibility for employees in the same department does not satisfy the requirement

“PARTICULAR WEIGHT”

- Factors to consider to determine if an employee’s suggestions as to hiring, firing, etc. are given “particular weight”
 - Whether it is part of the employee's job duties to make such suggestions and recommendations
 - The frequency with which such suggestions and recommendations are made or requested
 - The frequency with which the employee's suggestions and recommendations are relied upon
- Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs
- An employee’s suggestions and recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance or is the ultimate decision

EXAMPLES OF PRIMARY DUTY-MANAGEMENT

- Interviewing, selecting and training
- Setting and adjusting pay rates & schedules
- Setting and adjusting schedules & budgets
- Directing and planning work, including supply/tool/equipment selection
- Appraising productivity and efficiency
- Determining techniques
- Administering discipline & handling grievances
- Handling safety and security
- Legal compliance

TEST YOUR KNOWLEDGE

Beth was employed as site manager at the company's Lancaster County store. Her responsibilities included supervision of other employees, scheduling of employees, delegating duties to site employees, recruiting, hiring, and training. She was also responsible for the site's overall profitability, maintenance, and safety. She spent 85% of her time operating the cash register and approximately one-half hour to one hour per day on management responsibilities. She worked approximately seventy hours per week and was compensated at an annual salary of \$50,000. She was considered an executive and not paid for overtime work. She now claims she is owed overtime because her primary duty was not managerial.

Does she have a claim?

- A. Yes
- B. No
- C. Maybe

ADMINISTRATIVE EXEMPTION

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ADMINISTRATIVE EMPLOYEES

- Workers are exempt administrative employees if they
 - Receive a weekly salary of \$913 a week exclusive of board, lodging or other facilities
 - Perform office or non-manual work “directly related” to the management or general business operations of the employer or the employer’s customers
 - Exercise “discretion and independent judgment” with respect to matters of significance in the performance of their primary duties

“DIRECTLY RELATED”

- Employees qualify as exempt administrative employees if their primary duty “directly relates” to the management or general business operations of the employer or its customers. Employees must perform work directly related to assisting in the running or servicing of the business, rather than work such as manufacturing on a production line or selling products in a retail establishment.

“DISCRETION AND INDEPENDENT JUDGMENT”

- Employee’s primary job duties must require the exercise of discretion and independent judgment in matters of significance
- The exercise of discretion and independent judgment usually involves comparing and evaluating different possible courses of action and making a decision after the various possibilities have been considered

FACTORS CONSIDERED

- Formulate, effect, interpret, or implement management policies or practices
- Carry out major assignments in conducting the operations of the business
- Perform work affecting business operations to a substantial degree
- Commit the employer in matters that have significant financial impact
- Waive or otherwise deviate from established policies and procedures without prior approval
- Negotiate and bind the employer on significant matters
- Plan business objectives
- Investigate and resolve matters of significance on management's behalf
- Represent the company in handling complaints, arbitrating disputes, or resolving grievances

ADDITIONAL CONSIDERATIONS

- The fact that employees' decisions or recommendations may be reviewed at a higher level does not mean the employees do not exercise discretion or independent judgment
- The fact that the employer will experience financial loss if the job is not performed properly does not mean that the employee holding the position exercises discretion and independent judgment in performing job duties
- Employees who use skill in applying well-established techniques, procedures or specific standards described in manuals or other sources are not engaged in work requiring the exercise of discretion or independent judgment. Clerical or secretarial work, recording or tabulating data, performing mechanical, repetitive, recurrent, or routine work, regardless of the job title, is not performing work that requires the exercise of discretion or independent judgment

ADMINISTRATIVE EMPLOYEE EXAMPLES

- Tax
- Finance
- Accounting
- Insurance
- Quality Control
- Purchasing
- Advertising
- Marketing
- Safety and Health
- Personnel Management
- Labor Relations
- Public Relations
- Government Relations
- Computer Network
- Internet or Database Administration
- Legal And Regulatory Compliance

TEST YOUR KNOWLEDGE

I am a sales guy. I am always on the road and need someone to run my six person office to ensure the sales are finalized. June is my office manager. I pay her \$1,200 a week. She runs all my internal administration. She follows a carefully crafted standard operating procedure (SOP) which details how each process is done and who does it. She can make minor deviations from the SOP, but I have to approve any major deviation. She can suggest changes in the SOP. We discuss the changes, but I have to approve all changes. She claims I have to start paying her overtime.

Isn't she a salary exempt employee?

- A. Yes, she runs the office and is an administrative exempt employee
- B. No

PROFESSIONAL EXEMPTION

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PROFESSIONAL EMPLOYEES

- Workers are exempt professional employees if these factors are met
 - Paid a salary of at least \$913 a week, exclusive of board, lodging or other facilities
 - Primary duty includes
 - Performing work requiring an advanced knowledge of science or learning customarily acquired by a “prolonged course of specialized intellectual instruction” (*Learned Professionals*)
 - Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (*Creative Professionals*)

LEARNED PROFESSIONALS

- Work requiring advanced knowledge is work that is predominantly intellectual in character, such as work that requires the consistent exercise of discretion and judgment, rather than routine mental, manual, mechanical or physical work
- Some occupations meet generally the requirements for a learned profession exemption where specific educational and licensing/certification requirements are met. Those occupations include registered medical technologists, accountants and chefs, among many others
- Any employee who is the holder of a valid license/certificate or requisite academic degree permitting the practice of law or medicine or any of their branches (including internships or residencies pursuant to the practice of the profession) and is actually engaged in the practice thereof is an exempt learned professional

PROLONGED COURSE OF INTELLECTUAL INSTRUCTION

- The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession
- The exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction (not just experience)
- The learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes

EXAMPLES OF LEARNED PROFESSIONS

- Law
- Medicine
- Theology
- Accounting
- Actuarial computation
- Engineering
- Architecture
- Teaching
- Various types of physical, chemical and biological sciences
- Pharmacy

CREATIVE PROFESSIONALS

- Examples of “a recognized field” of an artistic or creative endeavor include music, writing, acting, or the graphic arts
- The duties of employees vary widely, and exemption as a creative professional is determined on a case-by-case basis, depending on the circumstances and depending on the extent of the invention, imagination, originality or talent exercised by the employee

EXAMPLES OF CREATIVE PROFESSIONALS

- Actors
- Musicians
- Composers
- Conductors and Soloists
- Painters who at most are given the subject matter of their painting
- Cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept
- Essayists
- Novelists
- Short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers
- Persons holding the more responsible writing positions in advertising agencies
- Journalists whose work requires invention, imagination, originality or talent

SPECIAL CATEGORY: TEACHERS

- Employees who primarily teach, tutor, instruct or lecture “in the activity of imparting knowledge” and who are employed as teachers in an educational establishment are considered professional employees
- Elementary or secondary school teachers who hold teaching certificates clearly fall within the exemption. Teachers who do not hold certificates can qualify for the exemption if they are employed in a jurisdiction, private school, or institution of higher learning that does not require them to obtain certificates
- Substitute teachers are considered exempt where their primary duty is teaching and imparting knowledge in an educational establishment

MISCLASSIFICATION

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MISCLASSIFICATION

- Exempt/non-exempt v. misclassification altogether
 - DOL AI 2015-1
 - “Most workers are employees under the FLSA”
 - Suffer or permit to work standard
 - Economic realities test
 - Common law comparison

ECONOMIC REALITIES

- Six factor test
 1. Is the work an integral part of the employer's business?
 2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?
 3. How does the worker's relative investment compare to the employer's investment?
 4. Does the work performed require special skill or initiative?
 5. Is the relationship between the worker and the employer permanent or indefinite?
 6. What is the nature of the employer's control?

APPLYING THE STANDARD -- GENERALLY

- No one factor is determinative
- Other, similar formulations jurisdiction-to-jurisdiction
- Qualitative analysis, rather than quantitative
- Economic realities – rather than label given, or a 1099 – will govern

APPLYING THE STANDARD -- SPECIFICALLY

- Work can still be integral even if it's just one component of the business, done from home, or others do it
- Decisions to hire others, purchase materials, advertise, etc. reflect managerial skill and judgment, but simply working more hours, doing a particular job well, or being more technically proficient generally do not
- Simply purchasing some tools and equipment doesn't mean you're an independent contractor; comparison to employer's investment in entire operation (not one job) is required
- Even a relationship which lasts just weeks or months can be considered sufficiently indefinite. If a lack of permanence is just intrinsic to the industry, its often not enough
- Control over work performed must be meaningful and actually exercised

TEST YOUR KNOWLEDGE

A worker providing cleaning services signed agreements with Company A & Company B stating that he is an independent contractor. He sometimes brings his own, preferred cleaning equipment on their jobs, and uses his own vehicle to get to those jobs. He also advertises for his own work and some that he gets is highly specialized, but his arrangements with companies A & B are such that he accepts cleaning referrals from them through their APPS at their assigned rate, and carries out directed cleaning asks at locations where he's told to go. The frequency of those assignments vary, and he is permitted to reject a certain number of assignments each year. A dispute has arisen about whether or not the worker has been properly compensated over the last year during the weeks where he has worked more than 40 hours.

Employee or Independent Contractor?

JOINT EMPLOYMENT UNDER THE FLSA

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JOINT EMPLOYMENT

- NLRB isn't the only federal agency playing in this pond
 - DOL AI 2016-1
 - Hours aggregated and all employers jointly & severally responsible for FLSA liability
 - Fissured workplace & service economy driven
 - Sharing employees
 - Third-party management companies
 - Staffing agencies & labor providers
 - Contractors
 - Gig workers

HORIZONTAL JOINT EMPLOYMENT

- Horizontal joint employment exists when employee has employment relationships with two/more employers and those employers are sufficiently associated or related
 - Focus is on relationship between the various employers, looking at these factors
 - Are there arrangements to share the worker?
 - Does one employer act directly or indirectly in the interest of the other in relation to the employee?
 - Is one employer controlling, controlled by, or under common control with the other employer?
 - Overlapping directors/officers, or shared operations (scheduling, payroll)?
 - Does one employer supervise the work of the other's employees
 - Sharing of clients or customers, or use of employee pool lists

VERTICAL JOINT EMPLOYMENT

- Vertical joint employment exists when employee of one intermediary employer is also economically dependent on another employer who has typically contracted or arranged with the intermediary for services/functions, and receives the benefit of the intermediary employee's work
 - Focus is on economic reality of employee's relationship with the 'other' employer
 - Does the 'other' employer control/direct/supervise the work or administrative employment functions?
 - Does the 'other' employer have power to hire/fire, control pay, or other employment conditions, even if not exercised?
 - Is the relationship with the 'other' employer permanent/indefinite?
 - Is the nature of the work for the 'other' employer repetitive/unskilled?
 - Is the work done on the 'other' employer's site & integral to the business?

QUESTIONS?



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THANK YOU

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