

FAIR LABOR STANDARD ACT RULES FOR EXEMPT v. NONEXEMPT EMPLOYEES: ADMINISTRATIVE EXEMPTION

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TOPICS TO BE COVERED

- What is the FLSA & why do I care?
- Exemptions – Overview
- Administrative Exemption
- How to analyze a job description
- Information gathering for Administrative Exemption

WHAT IS THE FLSA & WHY DO I CARE?

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WHAT IS THE FLSA?

- The Fair Labor Standards Act (“FLSA”) is a federal law governing wages and hours in the workplace
- The FLSA has three major provisions:
 1. Employers must pay a statutory minimum wage
 2. Employers must pay non-exempt employees additional compensation for overtime work, at 1 ½ times the employee’s regular rate for all hours actually worked over 40 in one week
 3. Employers must keep track of hours worked by employees

WHY DO I CARE ABOUT THE FLSA?

- The number of FLSA lawsuits filed in federal court are on the rise, that's why!
 - In 1990, 888 FLSA lawsuits were filed in federal court
 - In 2015, 8,957 FLSA lawsuits were filed in federal court
- The Department of Labor has also increased its enforcement efforts
- Recent settlement figures for FLSA lawsuits have reached up to tens of millions of dollars!

DOL STRATEGIC PLAN 2011 – 2016

- Performance Goal WHD 1.5: Ensure that vulnerable workers are employed in compliance and secure sustained and verifiable employer compliance, particularly among the most persistent violators
- **Targeted Industries:** WHD's directed investigations will be concentrated in high-risk fissured industries that employ vulnerable workers or in program areas in which workers are at a higher risk of exploitation. High-risk industries include the agricultural, janitorial, construction, and hotel/motel industries

BE PROACTIVE!

- Enforcement strategy—Plan/Prevent/Protect:

Intended to be a fundamental, department-wide shift from “catch me if you can” toward requiring employers to “assemble plans, create processes, and designate people charged with achieving compliance” (i.e., “find and fix” violations before a DOL investigator knocks on your door)

- **Plan:** proposed requirement that employers create a plan for identifying and remediating risks of legal violations and other risks to workers
- **Prevent:** proposed requirement that employers implement the plan in a manner that prevents legal violations
- **Protect:** proposed requirement that employers ensure the plan’s objectives are met on a regular basis

MOST COMMON WAGE AND HOUR PROBLEMS

- Misclassification of employees as exempt
- Failure to accurately record compensable time worked
- Failure to pay for all time worked
- Failure to include all includable forms of pay in “regular rate”

EXEMPTIONS - OVERVIEW

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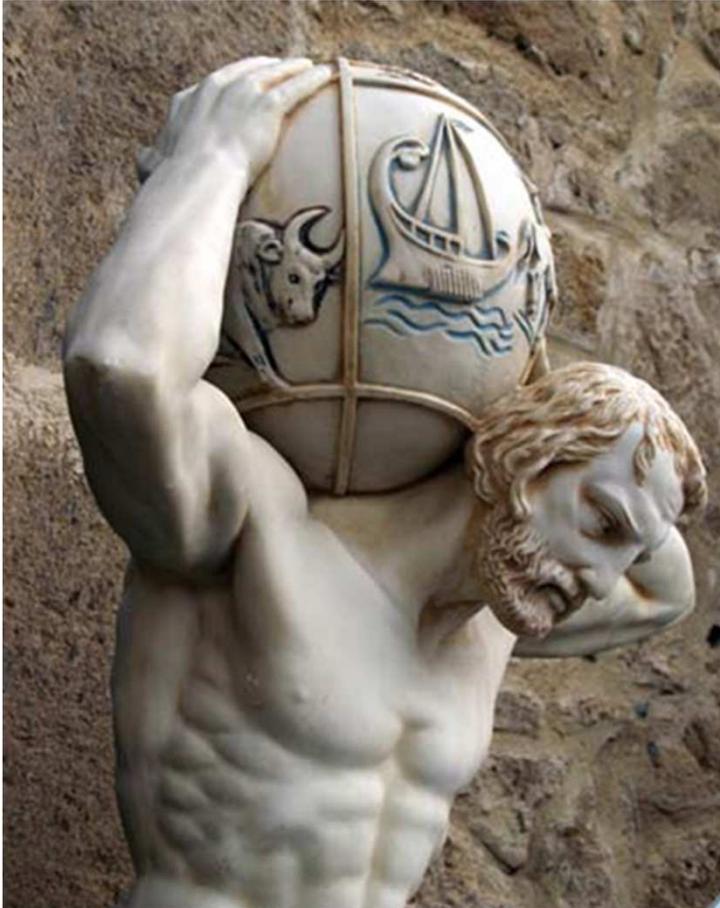
GENERAL RULE

- Employers must pay overtime at the rate of one and one-half (1½) times the “regular rate” of pay for each “hour worked” in excess of forty (40) hours in a seven-day workweek, unless the employee is exempt from the overtime provisions

“WHITE COLLAR” EXEMPTIONS

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive
 - Administrative
 - Professional, or
 - Outside Sales capacity

PROVING EXEMPTIONS – YOU BEAR THE BURDEN!



- The employer bears the burden of proving that its employees fall within the applicable FLSA exemption
 - *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 837 (6th Cir. 2002)

ADMINISTRATIVE EXEMPTION

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FOR THE ADMINISTRATIVE EXEMPTION TO APPLY, ALL OF THE FOLLOWING TESTS MUST BE MET:

1. The employee must be compensated on a salary or fee basis of at least \$455 per week
2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

29 C.F.R. § 541.200(a)

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”
- Employers who make improper deductions from an employee’s salary fail to satisfy this requirement, thereby losing the exemption and subjecting themselves to overtime liability.

CURRENT SALARY LEVEL TEST

- Current regulations require overtime for employees earning less than \$455/week (\$23,660/year)
 - ▶ Biweekly: \$ 910.00
 - ▶ Semimonthly: \$ 985.83
 - ▶ Monthly: \$1,971.66
- Former regulations required overtime for employees earning less than \$155/week (\$8,060/year)

PROPOSED SALARY LEVEL TEST

- Proposed regulations will **automatically** increase how the salary level is set from the current level (required overtime for employees earning less than \$455/week (\$23,660/year)) to an amount that is equal to the 40th percentile of weekly earnings for full-time salaried workers
- Proposed regulations will require overtime for employees earning less than \$910/week (\$50,440/year)
 - ▶ Biweekly: \$1,820.00
 - ▶ Semimonthly: \$2,101.67
 - ▶ Monthly: \$4,203.33

ADDITIONAL SALARY PROPOSALS IN CONSIDERATION

- DOL considering whether to allow a portion of a non-discretionary bonus to supplement the salary level test
- DOL also considering redefining the definition of “Primary Duty” for the purposes of classifying work as either exempt or non-exempt
- “Primary Duty” is currently defined as the job’s “principal, main, major, or most important function”
 - The current definition contains a qualitative component, but the DOL appears to want a quantitative ratio of exempt to non-exempt work
 - Example: 10% - 90% or 25% - 75%

EFFECT OF PROPOSED CHANGES AND AVOIDING DANGER ZONES

- Regulations will increase the number of employees nationwide who will qualify for overtime
- Take a **proactive**, rather than retroactive, approach to implementing proposed exemption changes
- If you currently have salaried exempt employees who are making more than \$23,660 per year, but are making less than \$50,440 per year, you should consider:
 - Consulting legal counsel for implementation strategies
 - Revisiting and revising job descriptions for effected employees to justify changing exempt/non-exempt status

PRIMARY DUTY

- “Primary Duty” means the principal, main, major or most important duty that the employee performs
- Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole

PRIMARY DUTY (CONT.)

- Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee 29 C.F.R. § 541.700(a)

PRIMARY DUTY (CONT.)

- The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee
- Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement
 - Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work
 - Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion 29 C.F.R. § 541.700(b)

DIRECTLY RELATED TO MANAGEMENT OR GENERAL BUSINESS OPERATIONS

- To meet this standard an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from selling products in a retail or service establishment or working on a manufacturing production line
- Examples: qualifying work in a functional area like tax, finance, accounting, budgeting, auditing, quality control, purchasing, procurement, advertising, personnel management, human resources, and similar activities

DISCRETION AND INDEPENDENT JUDGMENT

- In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered
- Factors to consider are:
 1. Whether the employee has authority to formulate, affect, interpret, or implement management or operating practices
 2. Whether the employee carries out major assignments in conducting the operations of the business
 3. Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business
 4. Whether the employee has authority to commit the employer in matters that have significant financial impact

DISCRETION AND INDEPENDENT JUDGMENT (CONT.)

5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval
6. Whether the employee has authority to negotiate and bind the company on significant matters
7. Whether the employee provides consultation or expert advice to management
8. Whether the employee acts on behalf of the employer with some degree of settlement authority

See 29 C.F.R. § 541.202

DISCRETION AND INDEPENDENT JUDGMENT (CONT.)

- The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources 29 CFR 541.202(e)
- Although a case-specific analysis is required, it is likely that employees who meet at least two or three of these 10 factors are exercising discretion and independent judgment 69 Fed. Reg. 22, 143

HOW TO ANALYZE A JOB DESCRIPTION

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JOB DESCRIPTIONS FOR ADMINISTRATIVELY EXEMPT EMPLOYEES

- Strengthen the likelihood of a proper administrative exemption classification by drafting an effective job description
- Words matter!
 - The words “primary duty” and a description of the position should mirror, as close as possible, the language of the Department of Labor regulations for the FLSA
- Job descriptions are not dispositive, but should still be accurate and followed

THE GOOD

PRODUCT MARKETING COORDINATOR JOB DESCRIPTION

- [25%] Responsible for design, drafting, and editing all marketing content for the promotion and sales of Company products and services in keeping with Company's vision, brand, and communications strategies. Tasks include, but are not limited to, conducting targeted campaigns, creating or updating marketing materials, working with media production manager to get materials designed and printed internally or externally, ordering mailing or email lists, meeting campaign deadlines, tracking expenses, collecting and analyzing campaign results, and maintaining an archive of campaigns.
- [20%] Responsible for researching, writing, and preparing marketing content, including gathering and/or editing content from staff as needed. Including, but not limited to, writing and editing the product promotion pieces of *Company Email News*.
- [25%] Coordinator will be responsible for monitoring key areas of the Company website and submitting accurate and up-to-date content to the web content coordinator.
- [10%] Develop policies and procedures to ensure that appropriate, current, and high-quality information is presented in marketing materials, keeping all content accurate, up-to-date, consistent, and in conformance to brand and style standards.
- [10%] Develop, communicate and enforce style standards for entire organization in marketing materials. Support the overall branding of the society by ensuring that all marketing projects are accurate, up-to-date, and in compliance with the *Company Style Guide*.
- [10%] Assist the director of member relations and marketing with the coordination of the department's marketing research program as it relates to products and services; development and implementation of an annual marketing plan for the society; researching and setting pricing of products and services, and maintain a pricing history; and other tasks to be assigned.

THE BAD

PRODUCT MARKETING COORDINATOR JOB DESCRIPTION

- [25%] Responsible for design, drafting, and editing all marketing content for the promotion and sales of Company products and services in keeping with Company's vision, brand, and communications strategies. Tasks include, but are not limited to, conducting targeted campaigns, creating or updating marketing materials, working with media production manager to get materials designed and printed internally or externally, ordering mailing or email lists, meeting campaign deadlines, tracking expenses, collecting and analyzing campaign results, and maintaining an archive of campaigns.
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INFORMATION GATHERING FOR ADMINISTRATIVE EXEMPTION

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QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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