

# WORKER CLASSIFICATION ISSUES FOR NON-PROFIT ORGANIZATIONS

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# DISCLAIMER

**This presentation is for informational purposes only, and is not intended to provide legal advice. The presentation also may not include all relevant information for any particular legal situation. If you have specific questions, please consult an attorney.**

# TOPICS TO BE COVERED

- Exempt v. Nonexempt Employees
- Independent Contractors v. Employees



# WHY IT MATTERS

- Increased regulatory enforcement
  - Federal Department of Labor
  - State agencies
  - Revenue generator
- Increased likelihood of litigation
  - More claims for unemployment
  - More claims for potential legal violations
- Repercussions of misclassification extend beyond a single worker and across a range of payment, tax, and benefit obligations
- Misclassifications can result in payment of liquidated damages, interest, penalties, and significant administrative hassle

# EXEMPT V. NONEXEMPT EMPLOYEES

- Employees are subject to minimum wage and maximum hour requirements of federal and state law *unless* they meet the requirements of being exempt
- State law requirements and definitions may be different than federal law and impose additional obligations or protections
- Employees cannot waive their rights under the wage and hour rules

# EXEMPT EMPLOYEES: BASIC REQUIREMENTS

- Receive a minimum salary payment
- Are paid on a salary basis
- Have job duties that fit within one of the exemption categories



# SALARY TEST

- For most employees, the minimum salary level required for exemption is \$455 per week
- The \$455 per week may be paid in equivalent amounts for periods longer than one week:
  - Biweekly: \$910
  - Semimonthly: \$985.83
  - Monthly: \$1,971.66
  - Annually: \$23,660



# SALARY TEST: HIGHLY COMPENSATED

- Total annual compensation of at least \$100,000
- At least \$455 per week paid on a salary or fee basis
- Perform office or non-manual work
- Customarily and regularly perform **any one** or more of the exempt duties (as opposed to **primary** duty) identified in the standard tests for the executive, administrative or professional exemptions
- \$100,000 may be pro-rated for employees who do not work the full year
- Employer may use any 52-week period as the year

# SALARY BASIS TEST: A TRAP FOR THE UNWARY

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs *any* work unless exception applies
- Need not be paid for any workweek when no work is performed
- Effect of improper deductions: possible loss of exemption, 2-3 years of retroactive unpaid overtime



# SALARY BASIS TEST: DEDUCTIONS FROM SALARY

- An employee is not paid “on a salary basis” if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available



# SALARY BASIS TEST: EXCEPTIONS TO “NO PAY DOCKING” RULE

- Absence from work for one or more full days for personal reasons, other than sickness or disability
- Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing paid leave for these types of absences
- To offset any amounts received as payment for jury fees, witness fees, or military pay

# SALARY BASIS TEST: EXCEPTIONS TO “NO PAY DOCKING” RULE

- Penalties imposed in good faith for violating safety rules of “major significance”
- Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
- Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
- Unpaid leave taken pursuant to the **federal** Family and Medical Leave Act



# SALARY BASIS TEST: EXAMPLES OF IMPROPER DEDUCTIONS

- Deduction for a partial-day absence to attend a parent-teacher conference
- Deduction of a day of pay because the employer was closed due to inclement weather
- Deduction of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty
- Deduction for a two day absence due to illness when employer does not have a sick leave policy and no federal FMLA leave is available
- Deductions for loss or damage to employer's property



# SALARY BASIS TEST: PAYROLL PRACTICES THAT DO NOT VIOLATE THE POLICY

- Taking deductions from exempt employees accrued leave
- Requiring exempt employees to keep track of and record their hours worked
- Requiring exempt employees to work a specified schedule
- Implementing bona fide, across-the-board schedule changes

# SALARY BASIS TEST: SAFE HARBOR

- The exemption will not be lost if the employer:
  - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
  - Reimburses employees for any improper deductions; and
  - Makes a good faith commitment to comply in the future
- *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints
- “Clearly communicated” policy should be in writing and distributed to all employees at time of hire in employee manual



# SALARY TEST AND SALARY BASIS TEST: EXCEPTIONS

Neither the Salary Test nor the Salary Basis Test applies to teachers, lawyers, doctors, outside sales employees and certain computer-related occupations paid at least \$27.63 per hour



# EXEMPT ADMINISTRATIVE EMPLOYEES

- Primary duty is 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; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance



# EXEMPT ADMINISTRATIVE EMPLOYEES: MANAGEMENT OR GENERAL BUSINESS OPERATIONS

- Consider the type of work performed by the employee
- Work must be directly related to assisting with the running or servicing of the business
- Does not include working on a manufacturing production line or selling a product in a retail or service establishment
- Distinguish administrative work from production work



# EXEMPT ADMINISTRATIVE EMPLOYEES: MANAGEMENT OR GENERAL BUSINESS OPERATIONS

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration



# EXEMPT ADMINISTRATIVE EMPLOYEES: DISCRETION AND INDEPENDENT JUDGMENT

- Involves comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered
- Must be exercised with respect to “matters of significance,” which refers to the level of importance or consequence of the work performed
- Must have authority to make an independent choice, free from immediate direction or supervision, but decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed
- Must involve more than the use of skill in applying well-established techniques, procedures, or specific standards



# EXEMPT ADMINISTRATIVE EMPLOYEES: DISCRETION AND INDEPENDENT JUDGMENT FACTORS TO CONSIDER

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices
- Whether the employee carries out major assignments in conducting the operations of the business
- 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

# EXEMPT ADMINISTRATIVE EMPLOYEES: DISCRETION AND INDEPENDENT JUDGMENT FACTORS TO CONSIDER

- Whether the employee has authority to commit the employer in matters that have significant financial impact
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval
- Whether the employee has authority to negotiate and bind the company on significant matters
- Whether the employee provides consultation or expert advice to management

# EXEMPT ADMINISTRATIVE EMPLOYEES: DISCRETION AND INDEPENDENT JUDGMENT FACTORS TO CONSIDER

- Whether the employee is involved in planning long- or short-term business objectives
- Whether the employee investigates and resolves matters of significance on behalf of management
- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances

# EXEMPT EXECUTIVE EMPLOYEES

- Primary duty of management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly direct the work of two or more other employees; and
- Has authority to hire or fire, or suggestions and recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight

# EXEMPT EXECUTIVE EMPLOYEES: “MANAGEMENT”

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Directing the work of employees
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work among employees
- Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used; or the merchandise to be bought, stocked and sold
- Providing for the safety and security of employees or property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

# EXEMPT EXECUTIVE EMPLOYEES: OTHER KEY REQUIREMENTS

- A “customarily recognized department or subdivision” must have a permanent status and continuing function
- There must be supervision of two or more full-time employee equivalents normally and recurrently, on more than an occasional basis, but not constantly
- Final decision making authority is not required, but frequency and reliance on recommendations are considered



# EXEMPT PROFESSIONAL EMPLOYEES: LEARNED PROFESSIONAL

- Primary duty must be the performance of work requiring advanced knowledge
- The advanced knowledge must be in a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction



# EXEMPT PROFESSIONAL EMPLOYEES: LEARNED PROFESSIONAL- ADVANCED KNOWLEDGE

- Work is predominantly intellectual in character
- Includes work requiring the consistent exercise of discretion and judgment
- Advanced knowledge is generally used to analyze, interpret, or make deductions from varying facts or circumstances
- *Not* work involving routine mental, manual, mechanical, or physical work
- *Cannot* be attained at the high school level



# EXEMPT PROFESSIONAL EMPLOYEES: LEARNED PROFESSIONAL- FIELD OF SCIENCE OR LEARNING

Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences

# EXEMPT PROFESSIONAL EMPLOYEES: LEARNED PROFESSIONAL- SPECIALIZED INTELLECTUAL INSTRUCTION

- Specialized academic training is a prerequisite for entering the profession
- Usually have a specialized degree, but can be obtained through a combination of work experience and intellectual instruction if perform the same work
- Not enough that have general knowledge or degree or if usually acquire skill through experience

# EXEMPT PROFESSIONAL EMPLOYEES: LEARNED PROFESSIONAL- EXAMPLES

- Doctors
- Nurses
- Lawyers (but not paralegals)
- Accountants (but not bookkeepers)
- Engineers (but not engineering technicians)
- Teachers



# EXEMPT PROFESSIONAL EMPLOYEES: CREATIVE PROFESSIONAL

Primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



# EXEMPT PROFESSIONAL EMPLOYEES: CREATIVE PROFESSIONAL- NATURE OF WORK

- Work must require invention, imagination, originality, or talent
- Work *does not* include:
  - Work that primarily depends on intelligence, diligence, and accuracy
  - Work that can be produced by a person with general manual ability and training



# EXEMPT PROFESSIONAL EMPLOYEES: CREATIVE PROFESSIONAL- JOURNALISTS

- Employees of newspapers, magazines, television, and other media are not exempt if they:
  - Collect, organize, and record information that is routine or public
  - Do not contribute a unique interpretation or analysis
  - Their work product is subject to substantial control
- Journalists may be exempt if they:
  - Perform on-air in radio or television
  - Conduct investigative interviews
  - Analyze or interpret public events
  - Write editorials, opinion columns, or commentary



# EXEMPT COMPUTER PROFESSIONALS: DUTIES

- Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing duties described below;
- Primary duty must consist of:
  - 1) Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - 2) Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs based on and related to user or system design specifications;
  - 3) Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  - 4) A combination of the above, the performance of which requires the same level of skills
- Intended to apply to high level design and system architecture, not your office “techie”

# EXEMPT COMPUTER PROFESSIONALS: OTHER EXEMPTIONS

- Certain computer professionals may also be exempt under the administrative or executive exemption. For example, systems analysts and computer programmers generally meet administrative exemption and programmers who manage the work of two or more programmers may meet executive exemption requirements.
- These computer professionals must meet the salary and salary basis requirements for administrative and executive exemptions.

# EXEMPT COMPUTER PROFESSIONALS: SALARY

The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour.



# EXEMPT OUTSIDE SALES

- The employee's primary duty must be making sales; and
- The employee must be customarily and regularly engaged **away** from the employer's place or places of business.



# INDEPENDENT CONTRACTORS: INSUFFICIENT BASES FOR CLASSIFICATION

- The assignment is short-term or temporary
- The individual will only work part-time
- We do not want to provide benefits
- We do not want to add this person to our regular staff and create an ongoing relationship
- We want to “try out” this individual before adding him/her to payroll
- The individual is leaving the organization, but will be providing the same services for a short period of time
- These individuals are “interns” or “fellows” and just receive a stipend
- We call them “consultants” and give them a consulting contract
- The individual works outside of our main office

# EMPLOYEES V. INDEPENDENT CONTRACTORS: THE IRS TEST

- If an organization has the **right** to direct not only **what** work shall be done (the result), but also to control **how** that work is to be performed (the means and method), the individual is an employee
- Multiple factors are evaluated and weighed in each particular business' circumstances



# EMPLOYEES V. INDEPENDENT CONTRACTORS: PRIMARY FACTORS

- Behavioral control
- Financial control
- Relationship of the parties

# EMPLOYEES V. INDEPENDENT CONTRACTORS: BEHAVIORAL CONTROL

- Facts which illustrate whether there is a right to direct or control how the worker performs the specific tasks for which he or she is engaged
- Consider whether the individual receives direction or whether the organization has the right to provide instructions about:
  - When and where to do the work
  - What tools or equipment to use
  - What workers to hire or to assist with the work
  - Where to purchase supplies and services
  - What work must be performed by a specified individual
  - What order or sequence to follow.
- Consider whether evaluations or training provided by the organization are directed towards how work should be performed

# EMPLOYEES V. INDEPENDENT CONTRACTORS: FINANCIAL CONTROL

- Facts which illustrate whether the organization has the right to direct or control how the business aspects of the worker's activities are conducted
- Independent contractors usually have
  - unreimbursed expenses
  - an investment in their facilities or equipment
  - other clients, business, or work
  - the ability to make a profit or incur a loss
  - a flat fee arrangement or standard hourly rate
- Employees usually are
  - reimbursed for their expenses
  - provided with facilities and/or equipment
  - only working for one or two entities
  - paid regular wages



# EMPLOYEES V. INDEPENDENT CONTRACTORS: RELATIONSHIP OF PARTIES

- Facts which illustrate how the parties perceive their relationship
- Independent contractors usually
  - have a written consulting agreement
  - receive no benefits
  - work on a specified project
  - perform work that is not integral to the organization's operations
- Employees usually
  - receive an offer letter and are covered by an employee handbook
  - receive benefits
  - work on an indefinite basis
  - perform work that is part of the organization's regular business activities