

# **Exempt? Overtime? Independent Contractor? – Key Wage-Hour Concepts in an Interactive Session**

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**2018 Wage & Hour Challenges**  
**Trending Topics & Issue Spotting**  
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I. DOL Salary Basis Rule

- A. 2016 DOL Final Rule – raised minimum salary threshold for most exemptions to \$47,476 per year.
- B. Final Rule subject to nationwide preliminary injunction by U.S. District Court in Texas and rejected by Trump administration. Secretary of Labor Acosta has suggested possibility for new threshold (~\$33,000/year), following new notice and comment period, but not action.

*\*Remember that proper exempt classification requires employers to satisfy both salary and duties requirements. Even highly-paid employees are not exempt if their primary duties are not exempt in nature.*

II. Executive Exemption – Duties Test

- A. Employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- B. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- C. The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

*\*Employers must establish all elements of the applicable duties test to properly classify an employee as exempt. Significantly, employers should ensure that employees classified as exempt under the executive exemption actually exercise managerial authority as part of their primary duty, including authority over hiring, firing, advancement, promotion decisions. Misclassification challenges often involve claims that assistant managers or mid-level managers, for example, do not have adequate managerial responsibility as part of their primary duty.*

III. Administrative Exemption – Duties Test

- A. 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; and
- B. Employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

*\*Employers should ensure that employees classified as exempt under the administrative exemption actually support the employer's general business operations and have significant decision making authority and discretion regarding important matters. Misclassification challenges often involve claims that employees' primary duties are not truly administrative in nature, and/or they do not have sufficiently important decision making authority. These are fact-dependent inquiries that many employers have found to be counter-intuitive.*

#### IV. Outside Sales Exemption

- A. Employee's primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- B. The employee must be customarily and regularly engaged away from the employer's place or places of business.

*\* Employers who intend to rely on the outside sales exemption often encounter one of two hurdles: the employee is primarily engaged in marketing or promotional activities, rather than closing sales, and/or the employee does not spend adequate time away from their primary place of business (which could be the employer's office, or a home office, depending on the circumstances). At its most basic, the outside sales exemption does not permit exempt status for inside sales representatives, such as call center workers or others who make sales by telephone or internet solicitations.*

#### V. Independent Contractor Misclassification

- A. Employers may be subject to multiple, different tests for independent contractor misclassification.
- B. On June 7, 2017, the DOL withdrew the 2015 "Administrator's Interpretation" which had espoused the "economic realities" test for employee status. Guidance available from the DOL now states that it is "the total activity or situation which controls," and that courts have considered the following among other relevant factors:
  - 1. The extent to which the services rendered are an integral part of the principal's business.
  - 2. The permanency of the relationship.
  - 3. The amount of the alleged contractor's investment in facilities and equipment.
  - 4. The nature and degree of control by the principal.
  - 5. The alleged contractor's opportunities for profit and loss.
  - 6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
  - 7. The degree of independent business organization and operation.

C. Minnesota Rule 3315.0555 considers:

1. *Key element*: Does the company have control over the means and manner of performance?
2. *Key element*: May the company discharge the worker without incurring liability?
3. How is the worker paid?
4. Does the worker furnish his own materials and tools?
5. Who has control over the premises where the services are performed?

D. As a practical matter, employers can consider a few common themes across tests:

1. Who controls the means and manner of performing the work?
2. Who controls the worker's financial position?
3. Who has control over the worker's business relationships?

*\* Independent contractor misclassification remains a significant risk. Remember that neither a strong independent contractor agreement, nor a shared intent that the worker will be classified as an independent contractor is dispositive. Courts or agencies will look at the worker's actual situation to determine the proper classification. While classification determinations are fact-dependent, employers may be at risk of misclassification if:*

- *Contractors are compensated at fixed intervals, rather than for designated results.*
- *Contractors receive benefits.*
- *Contractors have open-ended or "at will" relationships and/or have been with the company for an extended period.*
- *Contractors contribute to the company's core business functions.*
- *Contractors must devote all or most of their professional time to performance of duties for the company.*
- *Contractors have set schedules and must work on the company's premises.*
- *Contractors are subject to frequent oversight and instruction from the company's managers.*

## VI. Co-Employment

- A. Joint employment exists when an employee is employed by two (or more) employers and the employers are responsible, individually and jointly, for that employee under the law.
- B. Exposes both employers to traditional employment obligations and liabilities – including wage & hour compliance.
- C. Vertical co-employment – may occur when an employee is placed with another entity to provide services to that entity and/or its customers (e.g., staffing agency).
- D. Horizontal co-employment – may occur when an employee works for two (or more) independent entities under common management (e.g., multiple restaurants under a common management group).

*\* The co-employment risk has been heightened in recent years as agencies, in particular, look for ways to protect employees' wage & hour rights. Although both the DOL and NLRB have backed away from the low standard for joint employment status espoused under the Obama administration, remember that neither the particular legal relationship between the businesses, nor an agreement between them that one will be considered the employer of the worker, will be dispositive. While co-employment determinations are fact-dependent, it is generally the case that the more control your company exercises over another company's employees, the greater the risk of a co-employment determination. If you work with employees of another company, look for practical ways to minimize the control you exercise over human resources matters and day-to-day work. Also consider steps to ensure the employer entity protects your company against co-employment claims.*

#### VII. Payment for Unauthorized Work Time

- A. Employers are liable to pay non-exempt employees for all time worked, if the employer “suffers or permits” the work to occur – a “knew or should have known” standard.
- B. Includes an obligation to pay for overtime hours “suffered or permitted” at an overtime rate, as applicable

*\* In many instances, non-exempt employees work without direct supervision and, as such, are on an honor system to follow employer rules regarding pre-approval of overtime and to report their time accurately. Unfortunately, employers may find themselves in disputes with employees over payment for work that was not authorized and may not have been reported. Generally speaking, employers must pay for all employee work time so long as the employer knew or reasonably should have known it was occurring – even if it was not authorized. As such, it is important for employers to have clear policies requiring accurate time reporting, and to look for obvious indicia that an employee may be working more time than is being reported. If an employee works without authorization, she should be paid for all time worked, but may be subject to discipline for violating employer policy.*

#### VIII. Remote Access for Non-Exempt Employees

- A. Employers are liable to pay non-exempt employees for all time worked, if the employer “suffers or permits” the work to occur – “knew or should have known” standard
- B. Time spent engaged in work-related activities remotely – e.g., reading/writing e-mails, work-related texts, accessing work systems through VPN, etc. – generally is considered compensable work time

*\* One particularly tricky situation for employers in terms of the “suffer or permit” standard involves non-exempt employees who have remote access to work systems, and use those systems after hours. If the employer has approved remote access, it may be difficult to prove that after-hours work was not permitted, even if not specifically requested. Employers should*

*carefully consider whether non-exempt employees should be given remote access capabilities and, if so, employers should be particularly diligent to stay on top of compensable work-time issues for those employees.*

IX. The Regular Rate

- A. The regular rate is the wage rate on which an employee's overtime entitlement is calculated. Generally, employees are entitled to receive 1.5 times their "regular rate" for all time worked in excess of 40 hours in a workweek.
- B. The regular rate is an hourly rate – that rate applies even if a non-exempt employee is paid on a piece-rate, commission or salary basis.
- C. Generally, an employee's regular rate is equal to the employee's total remuneration in a workweek divided by total time actually worked in that workweek
- D. The regular rate must be at least minimum wage

*\* Employers may find themselves tripped up by the concept of "regular rate" because it is not necessarily the same as the employee's standard hourly rate. In order to determine the regular rate, all compensation received for work performed in a workweek must be included in the calculation, such as commissions, productivity bonuses, in-kind payment, non-overtime premium payments. The proper calculation can be particularly challenging when a certain payment (e.g., commission or productivity bonus) actually relates to an employee's work across multiple workweeks. Employers may be required to retroactively revise the regular rate calculation and provide a makeup overtime payment in those instances.*

X. State and Local Obligations

- A. As a general rule, employers are required to comply with the applicable law that provides the greatest level of protection/entitlement to employees.

*\* Employers are increasingly facing new wage & hour obligations imposed by state and local governments, including local minimum wage ordinances or state-specific overtime requirements. Employers also should remember that state or local laws may affect other wage & hour issues, too. For example, Minnesota law does not permit employers to take a "tip credit" for tipped employees and does not recognize a "highly compensated employee" exemption similar to that under the FLSA. As state and local regulation continues to expand, employers should remain vigilant to all of their obligations under applicable law.*

\*\*\*This outline is not intended to be a comprehensive review of wage & hour issues readers may face, and there may be situation-specific factual or legal issues regarding these topics that are not discussed above. This outline is intended to identify trending issues to help readers spot potential problems. Nothing in this outline should be construed as legal advice. You should always consult counsel of your choice to determine risks and potential liability in your particular circumstances.\*\*\*