Assessing The Risk:

Seyfarth Shaw LLP's Weekly Tips to Avoid Wage & Hour Exposure

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TIP

Beware The Rule of the Repeating Eight

TIP: Review time records regularly to ensure they are accurate statements of employee hours worked.

Common sense tells us that employees—particularly employees who are not held to a strict shift schedule due to 24-hour operations with pass-offs from one shift to the next—will not work exactly the same hours every day. Thus, employees who record repeating 8-hour workdays are probably not recording their time accurately. Yet, it is not uncommon to review time records, particularly manually-kept time records, that show employees recording precisely 8 hours each day that they work or precisely the same start and end times (such as 9:00 a.m. to 5:00 p.m. with a lunch break from noon to 1:00 p.m.) every single day.

It is the employer's burden to ensure its employees record accurately the time that they work. Time records that defy common sense with entries showing precisely 8 hours of work each day call into serious question whether the records are accurate. When time records are inaccurate, employees' statements of their working hours are presumed to be true, even if they are exaggerated.

To avoid this issue, and the potentially large exposure that may follow if many employees are able to challenge the accuracy of their time records, the tip of the week is to review time records regularly to ensure they are accurate statements, rather than guestimates, of hours worked by your employees. If they are not, notify employees immediately that they must record their time accurately with the precise start and end time and meal break time to the minute. Alternatively, you may want to consider the use of time clocks or an electronic timekeeping system.

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Use Audit Trails To Flag Potential Timekeeping Issues

TIP: Audit non-exempt employees' time records regularly for edits to time entries that may flag potential issues.

In the previous tip we wrote about ensuring that the time records of your employees accurately reflect the hours worked each day rather than regularly showing 8 hours of work each day. A related issue is ensuring that you do not have rogue employees who are intentionally falsifying their time records or rogue managers who are making edits that call into question the accuracy of the non-exempt employees' time records.

A good way to ensure that the time records are accurate and that inappropriate edits are not being made is to review the time records on a regular basis for red-flag issues that, depending on your workforce and timekeeping procedures, could include at least the following:

- a large number of time entries or edits to time entries being made by the manager instead of the non-exempt employee;
- the majority of manager edits being made to revise down, rather than up, the total number of hours worked by the non-exempt employee;
- manager edits that revise start and stop times to scheduled shift start and stop times;
- manager edits most often being made in weeks in which the non-exempt employee would otherwise have worked in excess of 8 hours per day or 40 hours per week;
- a large number of manager edits that add in an unpaid meal break;
- one non-exempt employee regularly clocking in substantially in advance of or substantially after all of his co-workers who are working the same shift; or
- one employee regularly incurring substantially more overtime hours than the other employees with the same job duties working under the same manager.

Finding one or more of these red-flag issues does not necessarily mean that you have a rogue manager editing employees' time or a rogue non-exempt employee deliberately mis-recording his time. The edits may all have a legitimate explanation. When these red-flag issues are spotted, however, further investigation is warranted to determine their reason. Depending on the reason for the edits, discipline of the manager, non-exempt employee, or both may be warranted, additional training on proper time recording procedures may be necessary, and/or the non-exempt employee's time records and pay may need correcting.

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Assessing The Risk:

Wage and Hour Tip Of The Week

Pay Heed to the Executive Exemption's "Two or More Employees" Requirement

TIP: When assessing the FLSA's executive exemption, address all three key points on the "two or more employees" requirement.

Plaintiff's counsel and the U.S. Department of Labor rarely question the exempt status of high-level managers, such as vice presidents and department heads. But the executive exemption becomes more susceptible to challenges as you move farther down the company's organizational chart. The exemption has many requirements, and one of the frequent areas of contention is whether the manager or supervisor regularly directs the work of "two or more other employees." 29 C.F.R. § 541.100(a)(3). To help reduce challenges on this issue, employers should review organizational charts, job descriptions, and job duties to ensure compliance with these three key points:

1. Make sure the subordinates are in fact employees. A supervisor's exempt status may be challenged if the supervisor only directs the work of independent contractors. On a construction site, for example, a project superintendent often supervises the work of several subcontractors and maintains the power to hire and fire them. Even so, the U.S. Department of Labor says this arrangement does not satisfy the executive exemption. The solution? Ensure at least two of the subordinate workers are employees, and/or consider whether the administrative exemption may apply.

2. Follow the 80-hour rule. The exempt executive must supervise at least two full time employees or the equivalent. Full time generally means at least 40 hours a week, so the supervisor should direct the work of two or more employees who are collectively scheduled to work at least 80 hours a week. It could be one employee scheduled for 40 hours and two employees who are each scheduled for 20 hours. Or it could be four employees who are each scheduled for 20 hours. Other combinations will work, so long as the subordinates are collectively scheduled for at least 80 hours.

3. Follow the direct-line rule. If the supervisor does not directly supervise the subordinate, then one may challenge whether the supervisor actually directs the subordinate's work. What if, for example, the supervisor directly supervises only one subordinate, but that subordinate supervises ten others? The answer is that, if the supervisor directs the work of only one employee, even though that subordinate has the authority to supervise many others, then the supervisor's exemption status may be challenged on a technical reading of the executive exemption. So what's the solution? Ensure a direct line of supervision flows from each manager to at least two subordinate employees.

Remember, two employees is the minimum requirement. The executive exemption is less susceptible to challenge if the supervisor directs the work of several employees. Also keep in mind the executive exemption has several other requirements (e.g., among others: the employee must be compensated on a salary basis; the employee's primary duty must be the management of a customarily recognized department or subdivision; and the employee must have authority to hire/fire or the employee's suggestions on tangible employment actions such as hiring/firing, advancement, and/or promotion must be given particular weight). We will offer compliance tips on some of these issues in the future.

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Concentrate on Your Concentration of Exempt Employees

TIP: Pay careful attention to your proportion of exempt to nonexempt employees. Being heavily weighted toward the former is a potential red flag.

Last week, we reminded readers to ensure that their exempt executive employees have at least two direct reports. This week, we recommend considering the proportion of employees you treat as overtime-exempt compared to those who you do not. If the answer is "they're all exempt"—even that most are—then you should take time to consider whether some may be misclassified.

If they show up at your door, among the first things a wage and hour investigator will do is assess your ratio of exempt-to-nonexempt employees. Her premise is that the typical FLSA-compliant employer is heavily weighted towards nonexempt. Of course, some workforces may justifiably include greater numbers of exempt employees—primarily professional organizations, like engineering firms or law firms. But the norm is that exempt executives (e.g., front-line supervisors) or administrators (e.g., H.R. managers) will not outnumber those they supervise or administer. Also a red flag for the scrupulous investigator will be high populations in oft-misclassified titles, such as "analysts," "specialists," or "technicians."

What causes exempt-to-nonexempt proportions to become overblown? The answer varies by employer, but one of the most common culprits is an overgeneralized application of the FLSA's exemptions. Not all who perform complex work on a computer satisfy the computer employee exemption; not all medical staff satisfy the professional exemption; not all titles that bear the word "analyst" or "specialist" satisfy the administrative exemption. And the list goes on. The critical point is that it's not enough for a position to sound or feel exempt—unless it satisfies all of the requirements of at least one exemption, it must be paid overtime.

So how to respond? Preferably with the advice of counsel experienced in wage-hour law, you'll want to survey your universe of exempt positions and identify those most likely to present issues. There's no hard-and-fast rule, but here are just a few questions to consider:

- Are others in your industry classifying the same positions as nonexempt?
- Are any of your positions at the bottom of a reporting hierarchy comprised mostly or entirely of exempt employees?
- Are any of the exempt position titles shared by everyone in a department or across operations, despite their doing materially different work?
- Are any of the exempt positions new to the organization because of an acquisition and do they share duties with employees who you classify as nonexempt?

- Are any of the exempt positions in departments that have been overhauled or restructured?
- Are any of the exempt positions' actual duties unknown or not accurately reflected in the job description?
- Are any of the exempt positions common targets of DOL investigations or private lawsuits (e.g., low-level financial positions, assistant store managers, tech support, etc.)?

Once you and your counsel identify positions that most warrant attention, you'll need to analyze their actual duties to determine whether exempt status remains appropriate and decide how to act on your findings. There is no one-size-fits-all approach, but the goal is the same: plan and execute the most effective and efficient approach to proactively ensure FLSA compliance.

Of course, the sheer number of exempt employees across a workforce will not be determinative. It is simply one of the red flags that investigators look for. And by putting ourselves in the investigators' shoes, we can ensure that the flag does not become an actual liability.

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Outside v. Inside Sales -- Who Is Exempt?

TIP: Evaluate how and where your sales employees are working to ensure proper classification.

Otto travels regularly to his customers' offices to sell business management services. You pay him on a commission basis. Irene calls her customers from her office to sell the same services. You also pay her on a commission basis. Under federal law, Irene is entitled to overtime, but Otto is not. Why?

The outside sales exemption -- which applies to workers whose *primary duty* is selling goods or services by making personal visits to customers' homes or places of business -- was created at a time when vacuum cleaner salesmen (and other outside sales people; think Fuller Brush Man) were rampant. Their workdays were irregular and it was difficult to track their time. Employers were able to convince Congress to create an exemption that excused them from the onerous, if not impossible, task of recording their time and paying them overtime. The flexibility of these jobs, and the potential for relatively high earnings associated with a burgeoning sales-based market, benefited the employees sufficiently to justify their ineligibility for minimum wage and overtime. Hence, the outside sales exemption.

By contrast, inside sales people -- who theoretically worked regular hours under the watchful eyes of their supervisors -- did not raise the same difficulties. Their hours could easily be tracked and, in an age when face-to-face contact was prized over the impersonality of a telephone call, their potential earnings were not as great. Congress could not justify an inside sales exemption.

Certainly, times have changed. Most would now agree that inside sales people are now much more prevalent than traveling, outside sales personnel. In many cases, inside sales create much greater potential for earnings. Yet, to this day, Congress has refused to create an inside sales exemption.

This means that, unless she qualifies for another exemption, if Irene is making sales from her office, even if you are paying her hefty commissions for doing so, you must record her working time, pay her at least minimum wage, and pay her overtime when she works more than forty hours in a workweek.

The answer for Irene, as an inside sales person, could be different if she works in a *retail or service establishment*, earns more than 1-1/2 times the minimum wage, and more than half of her compensation is from commissions. In that case, under Section 7(i) of the federal Fair Labor Standards Act and accompanying U.S. Department of Labor regulations, she would be exempt from overtime, but not minimum wage. Beware, however, of states (such as California) that have their own versions of the exemption that may differ from the FLSA in material respects.

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Remote Access For Salaried Exempt Employees – A Salary Basis Risk

TIP: Audit pay practices to ensure that exempt employees are not subject to impermissible salary deductions when they work remotely on a day off.

These days, a day off may not actually be a day off. Blackberries, cell phones, and remote access make it much more difficult to leave the office behind. As a result, employers who review email, cell phone, or remote log-in records or who interview their employees or employees' managers may find that exempt employees are performing work -- sometimes a little and sometimes a lot -- on their days off.

If an exempt employee has taken a day off without pay, this "work" could present a problem. Employees classified as exempt under the FLSA's executive, administrative, and professional exemptions generally must be paid on a "salary basis." To be paid on a salary basis, an employee must be paid his or her "full salary for any week in which the employee performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a). There are occasions when an employee may take one or more full days off without pay; but even small amounts of work-related activity may cause what was to be a full day off to become a partial day of work (or put another way, a partial-day absence). Partial-day absences cannot be deducted from an employee's salary.

The FLSA's regulations provide seven specific exceptions to the FLSA's salary basis requirement. Employers should pay particular attention to these two when managing employees who might perform work on days they intend to take off without pay:

- An employer may take a full-day deduction from an employee's salary where the employee takes off one or more full days for personal reasons other than sickness or disability. The employee's choice not to work justifies the deduction.

- An employer may take a full-day deduction when an employee takes one or more full days off for sickness or disability pursuant to the employer's *bona fide* plan, policy, or practice of providing compensation for illness. A *bona fide* plan usually will replace the pay that the employee otherwise would have lost for his absence so that the employee does not realize a reduction in his salary. When the employee has exhausted his sick leave bank, the employer may reduce the employee's salary for a full-day absence.

Important Note: When an employer applies paid leave (PTO or vacation pay) to meet the salary requirement, there is no "deduction from salary" under the FLSA. Under some state laws, however, an employee's PTO bank cannot be deducted for hours that were actually worked by the employee during the day off.

In summary, to comply with the FLSA's salary basis requirement, employers should ensure that salaried exempt employees receive their full day's pay (through salary or a permitted combination of salary and PTO) for any day they take off from work, but during which they perform work on a blackberry, cell phone, remote email or any other means of communication. It can also help to train managers to respect employees' days off by not requiring or permitting work on those days. Finally, keep in mind that this tip relates primarily to the FLSA and does not delve into the details of state wage and hour laws that may have their own, more stringent salary basis requirements.

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Taking Advantage of the Safe Harbor Provision for Improper Deductions from an Exempt Employee's Salary

TIP: Have a clearly communicated policy prohibiting impermissible deductions and act fast if you learn an error has occurred.

One of the requirements of most white-collar exemptions is that the employee is paid on a "salary basis," that is, he or she is paid a salary that is not subject to deductions because of the quality or quantity of work. With few exceptions, an exempt employee receives the same pay no matter how many hours he or she puts in during a work week.

Under the salary basis rules, an employer can legitimately deduct from the weekly salary for several reasons. For example, deductions can be taken for full day absences taken by the employee for purely personal reasons other than sickness or disability, for the time the employee is on an unpaid disciplinary suspension, or for a partial week's work at the beginning or end of employment. In those cases, the employer can pay a *pro rata* share of the weekly salary reflecting the days actually worked. However, permitted deductions must be made in full day increments.

By contrast, deductions are not allowed for absences caused by, for instance, jury duty, temporary military duty, a partial-week closure of the business, or any absence that is less than one full day.

What happens if the employer violates these obviously complex rules? Say the employer deducts for two days when the employee was absent for a day and a half for personal reasons? Or, say all exempt employees are deducted during a week the business was closed for two days due to a national holiday? Unfortunately, if the facts show that the employer **did not intend** to pay on a salary basis, the exemption for the affected employees will be lost. Intent is determined by looking at factors such as the numbers of improper deductions, employees affected and managers involved in making the deductions, and the time period over which they occurred. Loss of the exemption, of course, could lead to liability for unpaid overtime and other bad consequences of improperly classifying employees.

The good news is that there are two avenues for avoiding loss of the exemption, even if improper deductions have been made. The first (so-called "window of correction") has very limited use. It applies only when the deduction was "isolated or inadvertent" (think clerical or book-keeping error). If the improper deductions are promptly reimbursed, the exemption will be saved, notwithstanding the unintentional error.

Importantly, the federal regulations also contain a "safe harbor" provision that can allow employers to save the exemption even when the improper deductions were not isolated or inadvertent. For example, if the company has a policy prohibiting improper deductions, but a manager at a facility routinely (but incorrectly) docks the pay of engineers at that facility for partial-day absences, this would lead to clearly improper deductions. However, the safe harbor rule holds that exemption will **not** be lost if **all** of the following are true: The employer (1) has in place a **clearly communicated policy** prohibiting improper pay deductions, ***including a complaint procedure,*** (2) reimburses employees for any improper deductions, (3) makes a good faith commitment to comply in the future, and (4) does not continue to violate the rules by continuing to make improper deductions after complaints have been received.

No matter which remedy may apply, being aware of these rules allows for prompt and appropriate action if improper deductions occur. One relatively painless preventative measure is to adopt, communicate and follow a "safe harbor" policy for improper salary deductions.

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Rounding, Clock-In / Out Windows, And Tardiness Policies: A Potentially Dangerous Combination

TIP: Consider how your policies and your supervisors' and managers' unwritten practices on when non-exempt employees may clock in and out may affect the fairness of an otherwise permissible rounding rule.

Under federal law and most state laws, rounding of employees' time clock entries in up to 15 minutes is permissible as long as the rounding equally benefits the employer and employee. But what if the employer has a 15-minute rounding rule and also has a policy prohibiting employees from clocking in more than 7 minutes before shift start time? Assuming an 8:00 a.m. shift start time in this scenario, an employee could clock in no earlier than 7:53 a.m. Yet, a clock-in time between 7:53 and 7:59 a.m. will, with 15-minute rounding, round to 8:00 a.m. such that the rounding will only benefit the employer. While clocking in between 7:45 and 7:52 a.m. would round the employee's starting time to 7:45 a.m. and benefit the employee, a rule that employees may not clock in more than 7 minutes before shift start time would prevent this scenario from occurring regularly, if ever. In short, while the rounding rule standing alone is permissible under federal law and most state laws, it arguably becomes impermissible when combined with a clock-in window that is smaller than the rounding window.

Clock-in windows are not the only point of potential concern. What if the employer also has a tardiness policy disciplining employees for clocking in more than a couple of minutes late such that an employee who clocks in after 8:02 a.m. for an 8:00 a.m. shift will be disciplined? When such a tardiness policy is combined with a 15-minute rounding rule and a clock-in window, the rounding will most likely benefit the employer more often than the employee, and in a greater amount, because the vast majority of employees will mind the tardiness policy and clock-in window such that they will clock in between 7:53 and 8:02 a.m.--limiting rounding in favor of the employee to a maximum of two minutes and only in those instances where they clock in late instead of early. Similar issues may arise using 10-minute or 6-minute rounding rules.

In addition, the same scenarios could play out at shift end time when rounding rules are combined with clock-out windows or policies disciplining employees for staying more than a couple of minutes past shift end time.

The issues do not end with formalized, written policies. For instance, a supervisor or manager worried about the labor costs for his or her division or having issues with employees arriving on time may implement an unwritten rule that establishes a clock-in window or tardiness policy that the company as a whole does not have or that is stricter than the policy the company has. This becomes particularly problematic if employees are working before they are permitted to clock in or after they are required to clock out and, thus, are working off the clock. For these reasons, an audit on the rounding issue should look beyond the written policies to the unwritten timekeeping practices that supervisors or managers may have created for certain divisions or teams within the company.

In short, an audit should start with a comparison the employees' time punches to the rounded time punches. (Remember that the rounding may occur in adding up the total hours for the day or week, rather than by rounding each individual time entry. In other words, if in calculating the employees' total hours for the week, the total hours are recorded to the closest whole hour, 30 minutes, 15 minutes, or tenths of an hour, rounding has occurred even if those weekly total hours calculations are based on actual, rather than rounded, time entries.) If the comparison of actual to rounded time entries suggests that rounding may be benefiting the company more often than its employees or in greater amounts than its employees, ask what the causes of the inequitable rounding are and what you can do to correct the issue while keeping your business needs in mind. For example, are managers and supervisors enacting their own unwritten practices that are creating an issue that otherwise would not exist under the formalized policies? Are the written policies of the company creating or amplifying the issue and, if so, would it make sense for your business to have restrictions on how early or late employees can clock in and out but not to round time entries? Alternatively, does it make sense to widen the windows during which employees can clock in and out to match the rounding window and would doing so actually fix the issue or be combatted by employee behavior or the unwritten rules of supervisors and managers?

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Walk Your Employees' Walk To The Time Clock

TIP: Consider carefully the placement of and number of time clocks your employees may use to avoid unintended exposure for potential off-the-clock work.

Picture the expansive factory floor, a crowded retail store, or a construction site. Now imagine a single time clock in the very back left corner. How long does it take to walk from the door where employees enter to the time clock where they clock in? What are the chances that your conscientious employees will stop during that walk to pick up trash, help a customer, remove an obstacle? What are the chances that they wait in line to clock in at that one time clock? What about clocking out and the activities they perform as they are leaving for the day?

It is the employer's burden to ensure that employee working time is recorded accurately and fully captures work time and time spent on preliminary and concluding work-related activities. Generally, activities performed before and after an employee's shift that are related to the work they perform must be counted as work time for the purpose of calculating pay. Time spent by employees cleaning their work area (or themselves), helping customers, discussing with supervisors or co-workers on the shift before or after them how the work is progressing, booting up and logging into or logging off and shutting down a computer, donning and doffing protective clothing or gear, or performing any other work-related activities may be considered by the Department of Labor or a court to constitute "work."

A time clock or time recording station that is far from the employees' points of ingress and egress and work and break sites may increase the odds that these and other pre-shift and post-shift work or work-related activities are occurring off the clock as unpaid time. Having only one time clock creates the additional challenge of employees waiting to clock in. Employees who are expected to be at their desk, post, or work site at the start of their shift may need to arrive earlier to work to be able to clock in (and potentially spend several minutes waiting in line to do so) and still be where they are supposed to be at the start of their shift.

To combat these challenges, employers should consider the following best practices:

- Have at least one clock or time keeping station close to the employee entrance / exit.
- If employees appear to be standing in a long line to clock in and out, consider adding additional time clocks in various locations, particularly where work sites and meal break areas are a good distance from points of ingress and egress.
- Implement and enforce a clear policy that no work or work-related activities should be performed before or after an employee's shift (or during meal breaks). The policy should be clearly communicated to employees. Enforcement is absolutely necessary. Supervisors and managers should be the first line of defense in monitoring and ensuring compliance with the policy.

- Notify employees that, if they perform work or work-related activities before they clock in or after they clock out, they should take appropriate steps to ensure it is included in their time. This may include completing “exception sheets,” advising their supervisors, or reporting to payroll.
- If there are long lines at time clocks appropriately located around the facility, consider whether it is possible in your work environment to stagger shift start and end times.

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Exercise Discretion in Your Use of the Administrative Exemption

TIP: Audit employee job duties to ensure that employees exempt pursuant to the FLSA's administrative exemption are exercising discretion and independent judgment with respect to significant matters.

When determining whether an employee qualifies for the administrative exemption, employers often struggle with the requirement that "the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance," as this standard is ambiguous and difficult to apply in many employment contexts. Below are four common misconceptions that employers have in applying this requirement and tips for avoiding these mistakes.

Misconception #1: Assuming that an employee who "analyzes" courses of action meets this standard, even if he does not make decisions. Exercising discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. To meet this standard, the employee must have "authority to make an independent choice, free from immediate direction or supervision." An employee who performs analysis of various courses of conduct but does not act on the analysis by making decisions or recommending courses of action does not meet this requirement. Thus, you should closely examine whether the employee actually makes or recommends decisions, rather than merely analyzing a situation.

Misconception #2: Assuming that an employee meets this test because he is knowledgeable or skilled. Even a very knowledgeable or highly skilled employee will not qualify as exempt if he is simply applying his knowledge or skill, rather than making independent evaluations and decisions. You must determine whether the employee is actually using judgment, rather simply applying knowledge or skill.

Misconception #3: Presuming that an employee satisfies this requirement, even though she closely follows procedures or guidelines, because her job is "important." The exercise of discretion and independent judgment requires more than simply following well-established techniques, procedures, or guidelines described in manuals or other sources. Again, the employee must use his own judgment, which cannot be found in a manual, to evaluate courses of action and make decisions.

Misconception #4: Discretion and independent judgment alone is enough. The inquiry does not end with the authority to make independent decisions – these decisions must be made with respect to "matters of significance." This term refers to the level of importance or consequence of the work performed. Thus, you should closely examine the types of decisions an employee makes. An employee might regularly make independent decisions regarding the type of paper used in the printers or the brand of coffee served at meetings, but those decisions are not with respect to matters of significance. In addition, an employee does not meet this requirement merely because the company will experience financial losses if the employee fails to perform the job properly. For example, an employee who operates very expensive equipment does not meet this requirement simply because improper use of the equipment may cause significant financial loss to the employer

You should, of course, also be sure to evaluate whether the employee meets the other requirements of the FLSA's administrative exemption and to consider state law exempt status requirements where they differ from the FLSA.

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Assessing The Risk:

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Trust But Verify: Authentication of Pay Records Reduces Risk of Wage Claims

TIP: Require nonexempt employees to explicitly verify the accuracy of their time and break records at submission and for any post-submission modifications.

As we have reminded you in previous tips, employers bear the burden of maintaining accurate time and break records for all nonexempt employees. Even if you have the records, there is always the risk that employees will deny their accuracy, arguing that they actually worked far longer and skipped breaks. Thankfully, you can reduce appreciably the risk of such challenges to the time records by requiring your nonexempt employees to verify the accuracy of their records. They will then be forced to contradict their verifications if they later claim to have worked more hours than are reflected in the records. Indeed, the employee's handwritten signature or initials on a statement verifying the accuracy of the time can be powerful evidence.

The substance of such a verification statement is simple. You should have a policy (separate from the verification) stating that each employee is responsible for reporting accurate time and break information, and you should include this policy language in the verification. The written verification should require the employee to attest to the accuracy of the specific time records upon which payment will be based.

The mechanics of verification should also be straightforward. Best practices include:

- requiring that the employee take affirmative action (clicking a box, typing in a response, etc.) during the verification process;
- ensuring that the underlying time and break details remain accessible to the employee for a significant time period, such as somewhere between a month and a year;
- obtaining electronic verifications when possible;
- procuring the employee's verification of the accuracy of the hours before they are submitted to payroll, which is often on a weekly or bi-weekly basis; and
- maintaining in an easily retrievable form all verification activity (as you should maintain all other relevant aspects of the time and break records) for a minimum of three years (to comply with federal law), or for longer than three years in states that have different recordkeeping requirements or have state wage payment statutes with longer statutes of limitations.

We also recommend that you plan for the handling of post-submission modifications to these records, because mistakes sometimes happen. Such verifications may be even more important for employers that utilize exception-based reporting or pre-population for work and break times, because the less involvement employees have in the reporting of the hours on which they are paid, the easier it becomes for them to credibly claim a lack of correspondence to their actual work hours.

Verifications should be obtained from both the affected employee and a manager for each post-submission modification, particularly if it results in a pay reduction. Otherwise, you might be faced with a claim that the employee's reported hours are being unlawfully undermined.

Of course, the goals of verification policies and procedures are best supported through a culture that genuinely promotes identifying and paying for all compensable time. Ideally, verifications become just one among many vibrant features in a cultural fabric that leaves employees feeling responsible for the hours for which they are paid.

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Assessing The Risk:

Wage and Hour Tip Of The Week

If it Walks Like a Duck, and Quacks Like a Duck . . . (Or, How to tell an Independent Contractor from an Employee)

Tip: Audit your independent contractor relationships to ensure that you have properly classified the individuals as independent contractors rather than employees.

Whether an individual is an employee or an independent contractor is a question with which employers often struggle – and often get wrong. This mistake can lead to serious consequences, including federal and state agency audits and class action lawsuits. Misclassified independent contractors can present significant exposure for employers.

With that in mind, how do you determine whether your independent contractors are properly classified? First, simply declaring that an individual is an independent contractor (even with an agreement!) does not make it so. To determine whether an individual is properly classified as an independent contractor under federal law, courts and the DOL will look at the economic reality of the relationship between the business and the contractor. In doing so, they consider the following factors:

- the nature and degree of the employer's control as to the manner in which the work is to be performed;
- the employee's opportunity for profit or loss depending upon his managerial skill;
- the employee's investment in equipment or materials required for his task, or his employment of workers;
- whether the service rendered requires a special skill;
- the degree of permanency and duration of the working relationship; and
- the extent to which the service rendered is an integral part of the alleged employer's business.

No one factor is controlling – the specific circumstances of the relationship at issue are key, and each case is unique. What does this mean for you? While there is no foolproof way to determine whether an individual is an employee or independent contractor, below are a few questions you should ask before designating an individual as an independent contractor.

Who controls the details of the work? You should ensure that the independent contractor determines when and how to perform his work or provide services with little direction from you.

Is the work entrepreneurial in nature? In other words, does the independent contractor have his own business and provide services to other businesses?

Are the services provided at the core of your business? Businesses sometimes use independent contractors to perform duties that some of their employees also perform. Instead, you should ensure that your independent contractors provide services that are incidental (even if important) to your core business, rather than performing the same duties as some of your employees.

Who provides the tools? When possible, you should request that your independent contractors utilize their own tools and instruments.

What is the individual's length of service? Businesses sometimes enter into agreements with independent contractors for an indefinite period of time or for a period longer than a year. Such agreements are more likely to be challenged by a worker or the DOL. To reduce the risk of a challenge, consider contracting with the individual for a defined period of time based on the services provided.

How is the individual paid? Businesses sometimes choose to pay independent contractors in a manner that resembles wages, such an hourly rate. Instead, you should ensure that amounts paid are directly linked to the services rendered, rather than to the hours the contractor works. For example, you might pay a contractor per job, project, or by the piece.

If the totality of the circumstances, taking into account the answers to these questions, suggest that an individual does the same work as an employee, is monitored like an employee, and is paid like an employee, then the individual may be an employee. As explained above, if that is the case, an independent contractor agreement cannot save the day.

You should diligently re-visit your classification of individuals as independent contractors on a periodic basis. In addition to reviewing the criteria above for eligibility under federal law, you should be sure to evaluate whether an individual is properly classified as an independent contractor under state law in states where the requirements differ from those of the FLSA, particularly since some states have independent contractor laws that are even more stringent than federal law.

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Assessing The Risk:

Wage and Hour Tip Of The Week

All Work and No Pay Makes Jack a Litigious Intern

TIP: When hiring interns who will be unpaid or paid less than minimum wage, keep in mind the guidance provided by the Department of Labor.

Plaintiffs' counsel are aggressively pursuing claims against employers on behalf of unpaid interns or those earning less than minimum wage. These lawsuits often allege that the interns act as *de facto* employees, but without receiving pay (or receiving pay that amounts to less than minimum wage and no overtime), in violation of the requirements of the FLSA and state wage laws. The Department of Labor has articulated guidelines to help employers evaluate whether interns meet the definition of "employees" or can properly be unpaid. *See Department of Labor Fact Sheet #71 (Wage and Hour Division).* While courts often follow the DOL's criteria, they are not regulatory and won't necessarily have the force of law in every case.

However, to help reduce your potential liability (not to mention avoid the watchful eye of the local DOL investigator), you should be mindful of the following factors in the DOL guidance as you administer your unpaid internship programs:

1. <u>The internship should be similar to training that would be given in an educational environment, and should benefit the intern.</u> The purpose of an internship should be to simulate an educational or training environment. This justifies non-payment (or low payment) of wages, as the benefit comes in the form of educational growth, not pay. The more that you can foster this educational aspect – by mentoring, classes, seminars, field-trips, or some other manner of imparting information to the intern – the better off you'll be. You should not simply give an intern menial work and assume that the intern is "learning" just by being there. For example, an intern for an investment bank could be shown the ropes about investment banking as a whole and the process of underwriting an IPO. Similarly, an intern for a marketing agency could be allowed to sit in on meetings about strategy, techniques, and concepts.

2. <u>The intern should not displace regular employees, and should work under close supervision of existing staff</u>. Employers are often accused of saving labor costs by hiring an unpaid intern to replace a paid employee. While the intern can certainly be asked to perform some tasks that an employee performs, that should not be the focus or the most important part of the program.

3. <u>You should derive no immediate advantage from the activities of the intern, and on occasion your operations may actually be impeded</u>. Interns are usually novices in their field, and you should not expect to use them to perform critical tasks. You should not be generating significant work assignments for the intern as you would for a regular employee. In fact, the employee overseeing the intern may actually have to take time out of his or her day to mentor the intern, often resulting in diminished productivity from that employee.

The overarching concept behind these guidelines is that an unpaid internship should be as much as possible about the education of the intern. You should not simply replace an employee (or decline to hire one) with an unpaid or underpaid intern, no matter how willing or desperate the intern may be for the experience. In order to proactively audit such programs, you should carefully review your intern programs, evaluate what interns are doing on a day-to-day basis, and analyze the benefits they receive.

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Assessing The Risk:

Wage and Hour Tip Of The Week

Avoiding "Donning and Doffing" Off-the-Clock Challenges

TIP: Carefully consider whether any time spent by employees "donning" and "doffing" clothing or protective gear at the beginning and end of a work shift constitutes compensable time.

Employers across many different industries – manufacturing, healthcare, construction, and food processing, to name a few – require employees to wear specific protective gear or other attire during their workday. However, employers often do not consider whether they must pay their employees for the time spent putting on this attire ("donning") at the beginning of the shift or changing out of it ("doffing") at the end of the shift.

Under the FLSA, "preliminary" and "postliminary" activities, such as donning and doffing of gear or attire, constitute compensable time only where they are an "integral and indispensable" part of the employee's principal work activities. When examining whether an employee should be paid for this time, you should consider the following:

1. *Is donning and doffing the attire or gear an integral and indispensable part of the employee's principal activities?* While there is some variation in courts' application of the "integral and indispensable" test, courts generally find that time spent donning and doffing is compensable where it is necessary for the employee to perform the work and is performed for the benefit of, or is required by, the employer (or is required by law or by the nature of the employee's work).

2. *How much time is involved?* Even where an employee's donning and doffing of gear is integral and indispensable to his principal activities, the time spent may not be compensable if it is *de minimis*. Courts usually consider the following three factors to determine whether time is *de minimis*:

- The practical <u>difficulty</u> of recording the time involved
- The total <u>amount</u> of time involved
- The <u>regularity</u> of the work

Because courts apply these factors to the facts of each case, there is no "bright-line" standard for how much time can be *de minimis*. Courts generally aggregate the time spent performing each task (putting on protective gear, sanitizing equipment, etc.) and have consistently held that time is not *de minimis* if it exceeds ten minutes. However, even where the time is less than ten minutes, a court may find that it is not *de minimis* if it is a regular part of the employee's shift and is easily recorded.

3. *Are the employees covered by a collective bargaining agreement that addresses donning and doffing of "clothes"?* The FLSA contains a provision allowing parties to a collective bargaining agreement to specify that time spent "changing clothes" is not compensable. However, federal courts and the DOL have taken differing views on the definition of "clothes," and in particular, whether protective gear (such as steel-toed work boots, protective gloves, and protective aprons) can be "clothes." This important issue is currently before the Supreme Court in *Sandifer v. U.S. Steel*, and we expect clarification of this issue in 2014.

The bottom line is that there is no bright-line test for determining whether employees should be paid for time spent donning and doffing, but there is a continuum. The more specialized the gear to your particular industry, the longer it takes to don and doff the gear, and the easier it is to locate time clocks near the donning and doffing area such that the time spent donning and doffing can be recorded, the more likely it is that a court or the U.S. DOL would find the donning and doffing time to be compensable under the FLSA. Thus, consider carefully where your workforce falls along the continuum in deciding whether to make donning and doffing time compensable.

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Assessing The Risk:

Wage and Hour Tip Of The Week

Many Bonus Payments Require Additional Overtime Pay

TIP: Audit bonus payments to determine if they require additional overtime payments

The Default Rule For Bonuses

As a default rule, if an employer pays a bonus to non-exempt employees, then the employer is required to calculate and issue additional overtime pay. Here's an example:

Assume an employee receives a $30 safety bonus for the week and works 60 hours during the week. To calculate the required additional overtime pay, the employer must first distill the bonus down to an hourly rate by dividing the bonus by the total hours worked ($30 / 60 hours = 50 cents). The rate for the additional overtime pay is one half of this amount (50 cents / 2 = 25 cents). In this example, the employee is entitled to the $30 safety bonus and $5.00 in additional overtime pay (25 cents x 20 hours of overtime).

The Exception: Discretionary Bonuses

Under the FLSA, employers are not required to pay additional overtime for discretionary bonuses. However, the term "discretion" is somewhat misleading. A bonus is only considered discretionary if three rules are satisfied:

- **Discretion on whether the bonus will be paid.** The employer must maintain sole discretion on whether the bonus will be paid, and it must keep that discretion up until near the end of the period upon which the bonus is based. For example, if an employer announces in January that it will pay a bonus based on February's production numbers, then the bonus generally will not qualify as a discretionary bonus. The idea here is that the employer's announcement will induce employees to work towards qualifying for the bonus or increasing the bonus amount.

- **Discretion on how the bonus will be calculated.** The employer must maintain sole discretion on how the bonus will be calculated, and it must keep that discretion up until near the end of the period upon which the bonus is based. For example, assume an employer announces that it will pay a bonus of 1% of sales revenue, but the employer makes clear that it will only pay the bonus when the company determines in its sole discretion that the bonus should be paid. This generally will not qualify as a discretionary bonus.

- **No custom or practice of paying the bonus.** The Department of Labor takes the position that a longstanding practice of paying bonuses will also require the employer to pay additional overtime based on the bonus. According to the DOL, the analysis turns on whether there is a "custom or practice of paying a bonus with regularity sufficient to imply an understanding on the part of the employees that they will regularly receive the bonus." For example, if an employer has consistently paid production bonuses for fifteen years, then that payment generally will not qualify as a discretionary bonus.

Advice For Employers

Employers should examine the nature of their bonus payments. If the bonus is something that employees have come to expect — either because it has been promised or the employer has a regular practice of paying it — then there is a good chance that the bonus is nondiscretionary under the FLSA. In such circumstances, the employer should ensure that overtime payments are correctly calculated and issued to the nonexempt employees receiving the bonus.

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Assessing The Risk:

Wage and Hour Tip Of The Week

TIP

Hi-Ho, Hi-Ho, Are Your Field Employees Working From Home Before They Go?

TIP: Limit the work-related activities your field employees can perform before they arrive at their first job assignment and after leaving their last assignment to avoid unintended exposure for potential off-the-clock work.

Meet Jack. Jack is a field employee (*e.g.*, insurance claims adjuster, cable installer, deliveryman, service repairman, salesman, *etc.*) who drives a company-owned vehicle directly from his home to his field assignments. Under the federal Employee Commuting Flexibility Act (also known as ECFA), Jack's commute time generally is not compensable if: (i) he uses a company-provided vehicle; (ii) he drives no further than the normal commuting area to his first appointment of the day; (iii) he has an agreement with his employer regarding his use of the company-provided vehicle; and (iv) he does not incur out-of-pocket expenses for driving, parking, or maintaining the company-provided vehicle.

If, however, Jack performs work-related activities from his home before beginning his commute, such as accessing information on his job assignments for the day, mapping out his route to his first appointment, or sending and responding to work-related e-mails and phone calls—then both the time Jack spends performing the work-related activities at his home and his subsequent commute time may become compensable. Jack's commute time may become compensable in this scenario even if he does not perform any work during his commute because under the "continuous workday" doctrine, once the workday begins, any subsequent activities, including commuting, count as compensable time within that same workday.

So when did Jack's workday begin and how can you tell if Jack performed sufficient work at his home to make all of his commute time compensable?

While there is no bright-line test, the more work-related activities performed at home and the longer the amount of time spent on such pre-commute activities, the more likely the pre-commute activities and the subsequent commute will be considered compensable time. The same can be said with respect to the commute home and work-related activities performed at <u>home</u> after the commute.

To minimize the risk of Jack's at-home activities and commuting time becoming compensable, employers should limit at-home activities by field employees like Jack as much as possible. The following are some best practices for doing so:

- To The Extent Possible, Prohibit Field Employees From Performing Work-Related Activities At Home: Implement policies instructing field employees that they should only send and respond to e-mails, make and receive phone calls, complete paperwork, and perform other work-related activities while in the field—i.e., after they arrive at their first appointment and before leaving their last appointment. If some very limited amount of work-related activities cannot be handled in the field, make clear to field employees that they need not perform such activities immediately before their morning commute or immediately after their evening commute.

- Provide Time During The Workday For Work-Related Activities: Leave unscheduled time in the workday for field employees to perform all of their work-related activities from the field, such as responding to e-mails and phone calls, completing paperwork, reporting to supervisors, having maintenance done on the company-provided vehicle, restocking the vehicle with supplies and tools, ordering supplies and tools, and planning out their driving route for the next day's first appointment. If your field employees have parts, supplies, tools, or other work-related items shipped to their homes, instruct them to leave the items in the unopened shipping boxes until they arrive at their first job assignment of the day.

- Provide Appointment Information To Field Employees While They Are In The Field Or Through An Automated Download Process: If possible, provide field employees with information on their first appointment, if not all appointments, before the end of their prior workday, and provide them with information on subsequent appointments for the following day as the workday progresses. Alternatively, if you have the technology to do so, provide field employees with real-time downloads of appointment information. The goal is to avoid field employees spending time at home obtaining appointment information and mapping out driving routes.

- Train Your Supervisors To Respect Field Employees' Time At Home And During Commutes As Personal Time: Train your field employees' supervisors not to call or e-mail the field employees before they arrive at their first assignment or after leaving their last assignment. Supervisor communications with field employees while they are at home or commuting could make the commute time compensable.

These best practices can help field employers minimize work-related activities at home that could extend their compensable workday to include commuting time. Of course, even with these best practices in place, employers must compensate employees for work-related activities performed at home that are of more than a *de minimis* nature (see 8/21/13 *Tip of the Week* for *de minimis* factors). Finally, keep in mind that some states have travel or commute time laws that are stricter than federal law and that may make a field employee's commute time compensable—even if all of the above best practices are followed.

Disclaimer: The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

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SEYFARTH SHAW

Assessing The Risk:

TIP

Wage and Hour Tip Of The Week

Ensuring Time Worked Counts Towards the Proper Workweek

Tip: Work performed by an employee on a single shift may fall into multiple workweeks, depending on when that workweek begins and ends.

Under the FLSA, overtime must be paid to non-exempt, covered employees for hours worked in excess of 40 hours in a "workweek." A "workweek" is a fixed and recurring period of seven consecutive 24-hour periods. In other words, whenever a workweek starts, it ends 168 hours later; the next workweek ends 168 hours after that; and the next 168 hours after that. Once established, the workweek remains fixed for a group of employees until the employer affirmatively changes the workweek. A workweek ordinarily does not change from week to week.

For a few employers, the workweek is an issue that rarely, if ever, comes up. For many others, however, ensuring that work time falls into the proper workweek for the purpose of determining whether overtime is due can be a critical undertaking. Failure to properly account for shifts that cross over workweeks can result in overtime violations.

For example, assume that an employer establishes a workweek that starts at 12:00 midnight Sunday and ends at 11:59 pm on Saturday:

- an employee works a shift that begins at 8:00 pm on Saturday and ends at 4:00 am on Sunday. The first four hours of this shift would fall into the first workweek; the second four hours fall into the second workweek. Notably, this requirement may **not** be altered by an agreement to include all time worked in the workweek in which the shift starts (or ends).

- an employee works a shift that begins at midnight Sunday, but clocks in and begins work 15 minutes prior to shift start time. Even though the shift was scheduled for workweek #2, the 15 minutes prior to the start of the shift (and workweek) would be included in workweek #1. If the employee had worked (for example) 40 hours to that point in workweek #1, she would be due 15 minutes of overtime pay for starting work early.

In both of these cases, the employer likely established a schedule intended to minimize overtime compensation. In both cases, the employer may unexpectedly have incurred those overtime costs.

Employers with shifts that cross or straddle workweek start times should ensure that their scheduling practices take into account the requirement that time worked in a particular workweek must be included in the total hours for **that** workweek, regardless of any policy or practice that hours will be counted in a specified workweek. Overtime compensation must be calculated on the hours actually worked in the workweek.

The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

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Assessing The Risk:

Wage and Hour Tip Of The Week

Determining Whether Training Time Is Compensable

TIP: Ensure that time spent by hourly employees in compensable training programs, lectures, and meetings is included in hours worked and paid accordingly.

Generally, attendance by non-exempt employees at lectures, meetings, training programs, and similar activities is hours worked under the Fair Labor Standards Act and must be included in minimum wage and overtime calculations. If certain criteria are met, however, the time spent in such activities can be excluded from work time. Specifically, attendance need not be counted as working time if the following four criteria are met:

- Attendance is outside of the employee's regular working hours;
- Attendance is in fact voluntary;
- The course, lecture, or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work during such attendance.

<u>All four</u> of these criteria must be met for the time not to be compensable. Thus, whether training or a similar activity is compensable work is driven by the specific working circumstances of the employee and the relationship between the subject matter of the training and the employee's duties.

While the first and last criteria are relatively straightforward, employers often struggle with the "voluntariness" and "directly related" requirements. Below are guidelines to keep in mind when evaluating these criteria, as well as tips regarding other questions that often arise regarding compensability of training and similar activities.

Is attendance "voluntary"? Obviously, attendance is not voluntary if it is mandatory – i.e., required by the employer. It also is not voluntary if the employee is led to believe that his working conditions or the continuance of his employment would be adversely affected by failure to attend.

Is the training "directly related" to the employee's job? Training is directly related to an employee's job if it is designed to make the employee handle his job more effectively, as distinguished from training the employee for another job, or a new or additional skill. Where a training course prepares an employee for advancement by increasing his skills, but the training is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even if the course incidentally improves the employee's skill in his regular work. For example, an hourly worker on an assembly line in a manufacturing facility might take courses in the use of a suite of office productivity software that is not relevant to the employee's current work but will help the employee become better qualified for a promotion or transfer to another position.

What if an employee attends training outside of working hours on his own initiative? If an employee, on his own initiative, attends an independent school, college, or trade school outside of normal working hours, the time is not hours worked even if the courses are related to the employee's job.

What about time spent studying outside of normal working hours for training that is itself compensable? Time spent in outside study is not compensable if it is not required by the employer. For example, time spent reading or studying at home is not compensable if time is allotted during regular working hours but some employees voluntarily do extra work at home on their own. When completion of homework is a requirement of a compensable training class, however, time spent completing assignments for such training is compensable.

Must employees be paid their regular hourly rate for compensable training? Employers must pay employees their regular rate of pay for compensable training time unless they have an agreement with employees to compensate such hours at a lower rate. Under those circumstances, the training rate must be at least the minimum wage.

In sum, employers should ensure that they understand the rules regarding compensability of time spent in training and evaluate their practices to verify that they are in compliance with these rules.

The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

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Assessing The Risk:

Wage and Hour Tip Of The Week

Making Sure Your Professionals Are Really Professionals

TIP: Make sure that employees classified as exempt under the learned professional exemption have the requisite background and degree to qualify.

Under the Fair Labor Standards Act, an employee may be exempt from overtime as a "learned professional" if his or her primary duty requires (1) advanced knowledge, (2) in a field of science or learning, (3) that is customarily acquired through a prolonged course of specialized intellectual instruction. Employers sometimes misinterpret these criteria and assume that any employee with a college certificate or degree makes the grade. As with many aspects of wage-hour law, however, application of these requirements is more complicated than it looks. To minimize the risk of misclassification, employers should keep these guidelines in mind:

1. The degree matters. Experience may serve as a stand-in for a college degree only in very limited circumstances. The examples provided by the Department of Labor – "the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry" – highlight just how rare it is that an individual without a diploma will meet the requirements of the exemption. Applying the professional exemption to any position that requires less than a four-year college degree is risky, and the safest bet is to reserve the exemption only for positions that require a post-graduate degree.

Furthermore, the professional exemption requires "specialized" learning. Accordingly, positions that require only a general four-year academic degree in any field or without any specific training or further instruction most often will not be sufficient to meet the requirements of the professional exemption.

2. The field matters. While the term "field of science or learning" as used in the professional exemption regulations generally is interpreted broadly, it is not without limit. For example, a general degree in "business" often will not suffice. Accounting, on the other hand, is specifically identified in the regulations as a field that meets this requirement.

Because the exemption requires the advanced knowledge at issue to be "customarily" obtained through prolonged educational instruction, it can be difficult to include new occupations under this exemption. Increased educational requirements may not become "customary" in a field until a significant portion of the employees in that field possess the increased education. Certification or licensure requirements may speed up that process, however. For example, the DOL has concluded that licensed funeral directors or embalmers in some states may be classified as exempt professionals because their states require them to complete certain courses relating to the funeral service profession, such as pathology, funeral home management, and grief dynamics and counseling.

3. A true professional *uses* her degree. Just having a degree is not enough; the employee's primary duties have to make use of that degree. Moreover, an employee classified as exempt under the professional exemption – just like the administrative exemption – must be trusted to exercise independent judgment and discretion. An accountant who regularly and customarily gives advice regarding tax and accounting matters, prepares tax returns, and works on audits will meet the "duties" requirements. By contrast, an accountant who simply consults a checklist to perform the job or handles only routine tasks may not.

In sum, an exempt learned professional will often look like someone who took Dad's advice: she finished her degree (and maybe even got a second one), skipped the B.A. in Pottery in favor of a more practical field, and kept using what she learned after graduation.

The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

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Assessing The Risk:

Wage and Hour Tip Of The Week

Tip Off Employees to the Tip Credit

TIP: Ensure that your tipped employees are properly "informed" of the tip credit.

Many restaurants and others in the service industry take advantage of the tip credit that is available under the FLSA to offset minimum wage obligations for tipped employees. Under the applicable regulations, an employer is required to "inform" employees that it intends to utilize the tip credit. Whether an employee has been "informed" of the tip credit can arise as an issue in litigation, and if the employer has not "informed" the employee, the tip credit is invalidated. Therefore, it is critical for employers to ensure that their employees are properly informed of their use of the tip credit.

Employers are required to inform tipped employees of the following:

- The employer's intention to use the tip credit;
- The direct cash wage that the employer is paying the tipped employee;
- The amount of tips the employer is using as a credit towards the minimum wage, which cannot exceed the difference between the minimum wage and the actual cash wage paid by the employer to the employee;
- That the amount claimed by the employer on account of the tips as a tip credit cannot exceed the amount of the tips actually received by the employee;
- That the tip credit shall not apply to any tipped employee unless the employee has been informed of the tip credit provisions; and
- That all tips received by the tipped employee must be retained by the employee except for those contributed to a valid tip pool among employees who customarily and regularly receive tips.

In addition, employers that require tip pool contributions must notify tipped employees (1) of the tip pool contribution amount or percentage, and (2) that the employer is limited to use of the tip credit to the amount of the tips the employee ultimately receives and cannot retain any of the employees' tips for any other purpose.

Although an employer is not required to provide this notice in writing, the Wage and Hour Division has indicated that employers may wish to do so "since a physical document would, if the notice is adequate, permit employers to document that they have met" the requirements. Thus, employers should consider providing written notice to all tipped employees for whom the tip credit will be applied that includes each of the required notifications listed above. In addition, employers may want to obtain a signed acknowledgment from each employee stating that he or she received the notifications. Providing written notice and obtaining acknowledgments provides employers with a record that these requirements have been met.

As an additional note, certain states have their own laws regulating tipped employees, which may provide greater protections for employees, such as limiting the tip credit to a lesser amount than the federal law allows or prohibiting the use of the tip credit altogether. Employers should ensure compliance with all applicable state laws regarding tips in addition to the FLSA.

Disclaimer: The above are "best practice" suggestions and are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

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