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Worker Misclassification: Challenges of Determining Exempt vs. Non-Exempt Employees

Conducting Self-Audits, Identifying Vulnerabilities, Correcting Errors, and Minimizing Liability Under FLSA and State Law

WEDNESDAY, JULY 21, 2021

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Today's faculty features:

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WORKER MISCLASSIFICATION: Challenges of Determining Exempt vs. Non-Exempt Employees

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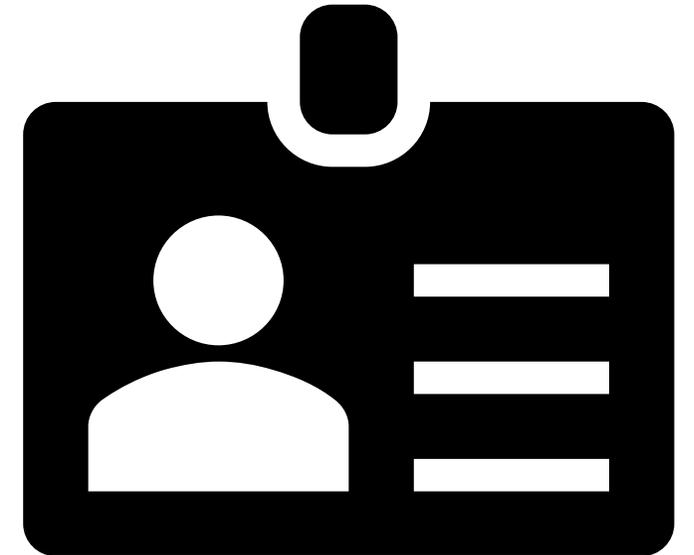
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What is an Employee?

In order for the FLSA to apply to a worker, the worker must be an “employee” of the employer. The FLSA defines “employ” as including to “suffer or permit to work.”

Any Person who performs services for your organization is an employee if you can control what will be done and how it will be done (this is true even if the person is given freedom of action).



EXEMPT vs. NON-EXEMPT EMPLOYEES

Fair Labor Standards Act



- Exempt: They are exempt from the FLSA. That means that an exempt employee is **not** entitled to overtime pay by the FLSA.
- Non-Exempt: They are **not** exempt from the FLSA. So, they must be paid overtime (in any week over 40 hours is overtime in Utah) and are protected by FLSA regulations.
 - Note: Some states like Nevada and California require overtime pay for any day in which more than 8 hours are worked.

WHAT IS AN EXEMPT EMPLOYEE?

- Must earn a minimum of \$684 a week (or \$35,568 per year)
- Must be paid in the form of a salary, instead of on an hourly basis
- High level of responsibility (executive, administrative, professional, creative professional) as well as computer-related occupations, outside sales employees and FLSA highly compensated employees (employee earns more than \$100k per year, primarily performs office or non-manual work, performs one of the exempt duties of an executive, administrative or professional employee)

WHAT IS AN EXEMPT EMPLOYEE?

Executive Exemption

- Manage your small business
- Direct two or more full-time employees
- Ability to hire, fire, promote, or change the status of other employees

Administrative Exemption

- Perform office or non-manual work related to the general business operations or management
- Use their own discretion when performing tasks without reporting to someone else

Professional Exemption

- Job duties require advanced knowledge in the field of science or learning (law, medicine, engineering)
- Certified in their particular field (college degree, license)

Creative Professional Exemption

- Utilize invention, imagination, originality, or talent in an artistic or creative field.

What Does it Mean to Be An Exempt Employee

Exempt employees normally must receive their full salary for any week in which they perform any work, without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform *no* work at all for the organization.

Deductions from pay cannot be made as a result of absences due to these circumstances:

- Jury duty
- Attendance as a witness
- Temporary military leave
- Absences caused by the employer
- Absences caused by the operating requirements of the business

These deductions may be permissible as long as they are consistent with other company policies and practices:

- Absences of one or more full days for personal reasons other than sickness or disability (partial days must be paid) (Note: the vacation or PTO policy should be clear on when such a deduction would occur, such as when the employee has exhausted all vacation or PTO);
- Absences of one or more full days due to sickness or disability (Note: this would be an option only if company policy provides compensation for loss of pay due to sickness or disability. This exception can apply when the employee is not yet eligible for PTO or has exhausted paid leave benefits);
- Fees received for jury or witness duty or military leave may be applied to offset the pay otherwise due to the employee for the week;
- Penalties imposed by infractions of safety rules of major significance;
- Unpaid disciplinary suspensions of one or more full days in accordance with disciplinary policy;
- Deductions for the first and last week of employment, when only part of the week is worked by the employee, as long as this practice is consistently applied to all exempt employees in the same circumstances.
- Deductions for unpaid leave taken in accordance with a legitimate absence under the Family Medical Leave Act.

WHAT IS AN NON-EXEMPT EMPLOYEE?

No set definition of “Non-Exempt.” So, if an employee does not earn more than \$684 per week, or \$35,568 annually and does not fit within one of the exceptions (executive, administrative, professional, etc.), then they are likely non-exempt. This means they are:

- Hourly employees who must be paid overtime at 1 and ½ times the employee’s regular rate for time over 40 hours in seven-day period (Utah’s rules. Other states, like California and Nevada, have different rules).
- Must be paid minimum wage (Utah follows federal standard, which is currently \$7.25 an hour).

WAGE AND HOUR UPDATE: Trump vs. Biden Rules

- On March 5, 2021, the Senate (58-42) voted down an amendment to the Covid-19 relief bill that would have increased the minimum wage to \$15 per hour by 2025. Federal minimum wage remains \$7.25 an hour.
- On March 11, 2021, the U.S. Department of Labor's Wage and Hour Divisions announced its proposals to rescind the Trump-era rules on independent contractor classification. There will likely be a more stringent DOL on independent contractor classification and expect increased audits from the DOL.
- DOL rejected the Trump administration's proposed rules governing tip-credit employees performing non-tipped duties. Now, the DOL limits the 20 percent of allowable non-tipped duties to only those duties that "directly support" the tip producing work. The DOL has narrowly defined what duties directly support tip-producing work. Additionally, if the tipped employee performs such work continuously for 30 minutes or more, full minimum wage must be paid for that time.

How to Conduct a Wage and Hour Audit: A Checklist

- Generally, the audit process involves working with legal counsel to review documentation relating to employee pay, such as job descriptions, payroll records, and leave policies.
- An audit should also include interviews with HR personnel and higher-level management to gain a clear understanding of employee pay systems and employee classifications.
- The primary goal of the audit should be to complete a comprehensive review of employee payroll policies and screen for any possible wage and hour exposure.



What's on the Checklist

- Review exempt employee classifications.
- Review overtime and regular rate of pay calculations
- Review timekeeping and record policies
- Review classifications (intern, independent contractor vs. employee)
- Review job descriptions, offer letters, employee handbook.
- Review leave policies (PTO, vacation, accrual, pay out)

Pitfalls to Watch:

- Make sure your job descriptions accurately reflect the work being done. Make sure they are up-to-date. Can you justify the applicable exemptions?
- Train employees about overtime policies. Make sure your overtime policy is in writing in your employee handbook. Does it need supervisor approval? Does it need to be approved in writing? Make sure employees know what the policy is regarding overtime, how to report it and make sure no one will agree to “free time.”
- Train employees about wage and hour issues. If you have more than 50 employees, make sure they know about FMLA leave, how to request it and what they are entitled to receive.
- Train employees on applicable DOL regulations such as timekeeping, recordkeeping; show them the required legal postings. Make sure they have acknowledged receipt of your employee handbook.



How to Handle Wage and Hour Investigations

- Be prepared, which means you have already conducted your audit, your policies are updated and consistent and you have a record of them all (as well as dates of the audits and revision history)
- Usually, it will be a surprise and you receive notification from the Department of Labor or Utah Department of Workforce Services' investigator that you will be investigated.
- The investigator will ask for documents and records:
 - Official information: legal name, organizational chart, federal EIN, executive team, number of employees.
 - List of all employees with address, phone number, hire/termination date, hourly rate of pay/salary, job title, exempt/non-exempt and 1099 contractors (independent contractors)
 - Payroll and time records for each employee for each pay period for the past two years showing hours worked, rate of pay, gross pay, deductions, net pay
 - A full payroll register for last pay cycle for each pay frequency
 - Birth dates of all employees under age 18
 - Family and Medical Leave Act ("FMLA") policy or handbook outlining leave policy and a copy of the current FMLA public notice.
 - The investigator will also review the required FMLA notices and where they are displayed and may ask employees and supervisors questions on whether they were aware of FMLA policies and how to request leave.
 - The investigator may ask to see your required federal and state posters as well as employees about them.
- The investigation can take up to 4-6 months before you receive results.
- Results may find that there were misclassification issues, wage issues (under minimum wage, no overtime). If there are, the DOL or DWS can assess back wages that can be significant.
- They will be back!

Watch Out for Pitfalls Regarding Non-Exempt Employees Working Remotely

Non-Exempt Employees

- Hourly employees must be paid for each hour worked and 1 ½ times the regular rate of pay for hours worked in excess of 40 in a workweek
- Can ask employees to track time.
- If employer directs employee to clean area, get tested, get vaccinated, then employer needs to compensate employee for worktime
- If employer requires temperature, screening or interviewing, this is compensable worktime and must be paid
- Watch breaks and mealtime (if employee is at desk and working, then breaks must be compensated; otherwise, employee needs to step away from work area).



QUESTIONS?
COMMENTS?

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Questions? Comments?



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