



GREATER NEW ORLEANS
FOUNDATION

For a vibrant region.

ORGANIZATIONAL
EFFECTIVENESS

GEB
GILLIS
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FAIR LABOR STANDARDS &
COMPENSATION
CONSIDERATIONS

INTRODUCTIONS

1 MINUTE with your partner:

- Name
- Your Organization and Role
- What is your burning question regarding fair labor standards or compensation considerations?

4 MINUTES with your team:

- Name
- Your Organization and Role
- What is your burning question regarding fair labor standards or compensation considerations?

DISCLAIMERS

- Not a lawyer
- Not an advertisement
- Available for the asking

OBJECTIVES

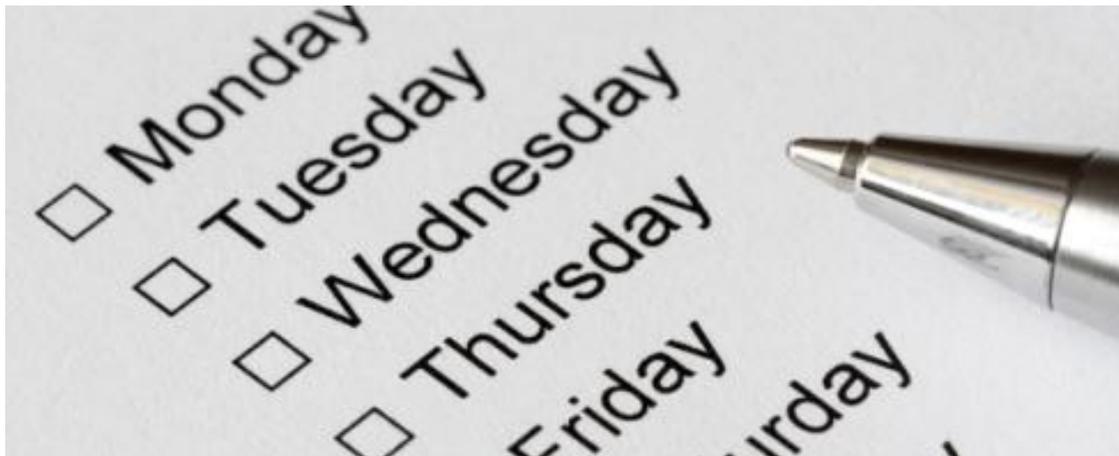
- To provide an overview of:
 - The Fair Labor Standards Act
 - Definition of compensable hours
 - Exempt vs. nonexempt employee classification
 - Independent contractor vs. employee classification
 - Use of interns & volunteers

INTRODUCTION

- Fair Labor Standards Act (FLSA)
 - Minimum wage, overtime, child labor, equal pay, compensable hours
- FLSA lawsuits are very common
 - According to DOL, 80% of companies violate FLSA

OVERTIME & DEFINITION OF WORKWEEK

- Nonexempt employees must be paid time & one-half for hours over 40
- Workweek is made up of 168 hours
 - Can begin anytime
 - Cannot be changed to circumvent the law



CALCULATING OVERTIME

- Depends on employee's *regular rate* of pay
- Can vary from week to week
- Includes all components of pay agreement

Overtime



REQUIRED DOCUMENTATION

- Full name
- SSN
- Address
- Birth date
- Sex
- Occupation
- Time & day when workweek begins
- Hours worked each day
- Total hours worked each workweek
- Basis on which employee's wages are paid
- Regular hourly pay rate
- Total daily or weekly earnings
- Total overtime earnings for workweek
- All additions to or deductions from wages
- Total wages paid each pay period
- Date of payment & pay period covered by payment

COMPENSABLE HOURS

- Time spent by a worker for benefit of employer with employer's knowledge, performing worker's principal activity or functions integral to principal activity
- Employees must be paid for all work *suffered* & all work *permitted*
 - “Working off the clock”





WAITING (ON-CALL) TIME

- On-duty
 - Employee is waiting for work to do (e.g., for repairs to be made) while on duty
 - Paid
- Off-duty
 - Employee is completely relieved from duty
 - Periods are long enough for employee to use time for own purpose
 - Employee is told in advance s/he may leave work
 - Employee is advised of time to return to work
 - Unpaid

REST PERIODS VS. MEAL PERIODS

- Rest periods
 - 20 minutes or less
 - Paid
- Meal periods
 - 30 minutes or more
 - Unpaid



NAYLOR V. SECURIGUARD, INC.

- 5th Circuit ruled in favor of the guards
- “The critical question is whether the meal period is used predominantly or primarily for the benefit of the employer or for the benefit of the employee”
- The travel time was “a meaningful limitation on employee’s freedom”
- Remaining break time was not long enough for an unpaid meal period

BREAK TIME FOR NURSING MOTHERS

- Reasonable break time for a nursing mother for up to 1 year after child's birth
- Frequency & duration will likely vary
- A place, other than a bathroom, that is shielded from view & free from intrusion



SLEEPING TIME

- On duty for fewer than 24 hours
 - Paid even if permitted to sleep
- On duty for 24 hours or more
 - Employee may agree with employer to exclude sleeping periods from hours worked
 - Sleep period must be at least 5 hours & no more than 8 hours



TRAVEL TIME

- Home-to-work travel
 - Unpaid
- Home to work on special 1-day assignment in another city
 - Paid
 - May deduct normal commuting time
- Travel that is all in the day's work
 - Paid
- Travel away from home community
 - Paid when it cuts across workday (also corresponding hours on non-working days)

EXEMPT VS. NONEXEMPT

- Nonexempt workers: must be paid overtime for time worked over 40 hours in a workweek
- Exempt workers: are not paid overtime
 - **Exempt workers must pass both a salary test and a duties test**



SALARY TEST

- Employee must be paid on a *salary basis*
- Minimum salary is \$455/wk. (\$23,660/yr.)



PROPOSED CHANGES

- 40th percentile of weekly earnings of full-time salaried workers
 - 2016 level estimation: \$970/wk. (\$50,440/yr.)
- Automatic updates to salary level annually
- Changes could be coming to duties test
- Final rule will probably be released summer/fall 2016



NO PARTIAL-DAY DEDUCTIONS FOR EXEMPT EMPLOYEES

- Employer may not deduct from salary for partial-day absences for *exempt* employees
- Salaried exempt employees often put in substantial overtime so it is unfair to penalize them for missing a nominal amount of work



DUTIES TESTS

- Job content, not title

- Categories:
 - Executive
 - Administrative
 - Learned professionals
 - Creative professionals
 - Outside salesperson
 - Computer professional

EXECUTIVE EXEMPTION

- Primary duty is management of enterprise or a department thereof
- Regularly directs work of 2 or more other employees
- Has authority to hire or fire employees or makes suggestions as to the hiring, firing, promotion of other employees



ADMINISTRATIVE EXEMPTION

- Primary duty is performance of office/non-manual work directly related to management or business operations
- Primary duty includes exercise of discretion & independent judgment in matters of significance



LEARNED PROFESSIONAL EXEMPTION

- Work must require advanced knowledge
- Advanced knowledge must be in a field of science or learning
- Advanced knowledge must be customarily acquired by a prolonged course of specialized instruction



CREATIVE PROFESSIONAL EXEMPTION

- Primary duty must be work requiring invention, imagination, originality, or talent in a field of artistic or creative endeavor
- Does not apply to work which can be produced by a person with general manual or intellectual ability & training



OUTSIDE SALESPERSON EXEMPTION

- Do not have to receive a salary
- Pay is determined by a compensation agreement
- Someone who is regularly engaged away from employer's place of business making sales



COMPUTER PROFESSIONAL EXEMPTION

- Paid a salary or an hourly wage of at least \$27.63/hr.
- Primary duty consists of:
 - Application of systems analysis techniques & procedures to determine hardware, software, or system functional specifications
 - Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs
 - Design, documentation, testing, creation, or modification of computer programs related to machine operating systems
 - Combination of the above

INDEPENDENT CONTRACTOR CLASSIFICATION

- Administrative interpretation in July 2015
- Misclassification is a growing concern
- Several possible tests
 - DOL favors 6-factor economic realities test



Employee

Independent
Contractor

ECONOMIC REALITIES TEST

1. Whether worker's job is an integral part of employer's business
2. Whether worker's managerial skill affects his/her opportunity for profit or loss
3. Whether worker's & employer's investments are comparable
4. Whether work performed requires special skills & initiative
5. Whether relationship between worker & employer is permanent or indefinite
6. Analysis of the nature & degree of employer's control over worker



INTERNS/TRAINEES

1. Training is similar to that which would be given in a vocational school
2. Training is for the benefit of the interns
3. Interns do not displace regular employees, but they do work under regular employees' close supervision
4. Employer derives no immediate advantage & may actually be impeded
5. Interns are not necessarily entitled to a job at conclusion of training
6. Employer & interns understand that interns are not entitled to wages

VOLUNTEERS

- No compensation
- Services are not the same type of services for which individual is employed & are outside regular hours
- DOL considers whether individual had clear understanding prior that s/he would not be compensated & that services were offered without pressure or coercion
 - *Only applies to nonprofits*



THE EQUAL PAY ACT: EQUAL PAY FOR MEN & WOMEN

- Same job at same levels of skill, experience, & responsibility
- Job content (not job title)
- All forms of pay are covered
- Title VII of Civil Rights Act of 1964



BENEFITS & PAYROLL PRACTICES NOT COVERED BY THE FLSA

- Breaks
- Premium, holiday, & weekend pay
- Shift differentials
- Raises
- Pensions

WAGE & HOUR VIOLATIONS – SIGNIFICANT FINANCIAL EXPOSURE

- Plaintiffs can recover double the amount of actual damages & attorneys' fees
- Litigation often involves large groups so liability exposure is often significant



COMMON ERRORS

- Misclassifying employees as exempt
- Failing to pay nonexempt employees for overtime
- Failing to pay for time worked off the clock
- Granting compensatory time off to nonexempt employees in lieu of overtime pay
- Making automatic wage deductions such as:
 - Exempt employees for partial-day absences
 - Nonexempt employees for meal breaks when they do not clock in or out

MINIMIZING ORGANIZATIONAL LIABILITY

- Perform internal audit with legal counsel
- Keep record of nonexempt employees' work time
- Require nonexempt employees to clock in & out at beginning/end of workday & before/after lunch periods
- Prevent employees from working off the clock
- Pay fixed salaries to exempt employees without improper deductions
- Train managers on FLSA

STAY IN TOUCH

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