Tips to Debunk Common HR Myths & Misconceptions

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Exempt, Non-Exempt, and Salaried: What You Need to Know

Understanding the differences between non-exempt, exempt, and salaried non-exempt employees is essential to complying with the Fair Labor Standards Act (FLSA). Below are the key differences between these classifications:

Non-Exempt Employees:

Under the FLSA, non-exempt employees must be paid at least the **minimum wage** for each hour worked and **overtime** (1.5 times the employee's regular rate of pay) whenever they work more than 40 hours in a workweek. Your state may require overtime in additional circumstances. Most non-exempt employees are paid on an hourly basis. However, employers may pay non-exempt employees on a salary basis, provided the employee's pay for each hour of work meets or exceeds the minimum wage and the employee is paid overtime whenever he or she works more than 40 hours in a workweek. Most employees are classified as non-exempt.

Exempt Employees:

To be classified as exempt, an employee must generally:

- Be paid on a salary basis;
- Be paid at least $455 per week for the administrative, professional, and executive exemptions;
- Receive their full salary in any workweek in which they perform work; and
- Meet certain duties tests. Each type of exemption has its own set of primary duties that must be performed in order for the employee to qualify for the exemption.

Exempt, Non-Exempt, and Salaried: What You Need to Know

Exempt employees aren't entitled to minimum wage or overtime. Before classifying an employee as exempt, carefully **review the tests for each exemption**.

Salaried Non-Exempt Employees:

While employers sometimes use the terms "salaried" and "exempt" interchangeably, not all employees who are paid a salary are exempt. As mentioned above, employers can pay non-exempt employees on a salary basis as long as the employee is paid at least the minimum wage for all hours worked and overtime when he or she works over 40 hours in a workweek.

Under the FLSA, calculating a salaried non-exempt employee's regular rate of pay, for overtime purposes, depends on the number of hours the employer and employee understand that the salary is intended to cover. For example, if the employer and employee understand the salary to cover 45 hours, then the employer may calculate the regular rate of pay by dividing the weekly salary by 45 hours. Some states have different rules. For example, California limits employers to dividing the weekly salary by a maximum of 40 hours.

Conclusion:

Make sure your company is calculating and paying overtime in accordance with the FLSA (and your state law) and that you apply tests for exemption correctly.

Answers to Your Toughest Overtime Questions

How can I prevent unauthorized overtime? Can I average an employee's hours over two workweeks when determining whether overtime is due? Overtime rules can be complicated. Below we answer these and other frequently asked questions:

Q: What is considered overtime—one minute, 15 minutes, or a half hour over 40 hours?

A: Under federal law, overtime is due whenever the employee works more than 40 hours in a workweek. A non-exempt employee who works 40:01 hours in a workweek is entitled to one minute of overtime pay.

Q: Our payroll is every two weeks. Does this mean I don't have to pay overtime unless employees work more than 80 hours during the payroll period?

A: The determination of whether overtime is due is based on the workweek, not the payroll period. If an employee works more than 40 hours in any workweek, you must pay overtime. You cannot average two or more workweeks to determine whether overtime is due. A workweek is a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods. **Note:** You may not change the start of the workweek to avoid overtime obligations.

In some cases, federal law permits hospitals and residential care establishments to pay time and a half the regular rate for all hours worked over eight in any workday and 80 hours in the 14-day period.

Answers to Your Toughest Overtime Questions

Q: If a non-exempt employee works overtime, can I give him paid time off instead of paying overtime?

A: This practice is commonly known as "comp time" and it is prohibited in the private sector. Non-exempt employees who work more than 40 hours in a workweek must receive overtime pay.

Q: What if a non-exempt employee specifically asks for "comp time" instead of overtime pay?

A: Employees cannot waive their right to overtime in the private sector. Even if the employee would prefer comp time instead of overtime, you must still pay overtime if they work more than 40 hours in a workweek.

Q: Can exempt employees get "comp time" if they work more than 40 hours in the workweek?

A: Bona fide exempt employees aren't entitled to overtime. With few exceptions, they must receive their full salary each pay period regardless of the quantity or quality of their work. If exempt employees work more than their regular schedule in a given workweek, the employer may (but isn't required to) give the employee time off to make up for the excess hours, provided the employee still receives their full salary in the workweek in which they were given time off.

Q: Can a non-exempt employee be given an option to have more pay per hour versus overtime pay?

A: No, employers must pay the overtime rate whenever non-exempt employees work more than 40 hours. Even if you paid the employee a much higher hourly wage for their regular work hours, the employee would still be entitled to 1.5 times their regular rate of pay for any work in excess of 40 hours in a workweek. Similarly, you may not pay non-exempt employees a flat fee (such as $200) for all overtime worked even if this works in the employee's favor.

Q: How can I prevent unauthorized overtime?

A: An important first step is to draft a policy that all overtime must receive advanced written approval, and violations of the policy may result in discipline, up to and including termination. Next, communicate that policy to employees and obtain a written acknowledgment that they received and understand the policy. Once you have the policy in place, monitor employees' hours and enforce your policy consistently. For first-time violations, many employers will issue a verbal or written warning. All disciplinary actions should be documented and kept in the employee's personnel file. Remember, you must pay any overtime worked, even if it is unauthorized.

Answers to Your Toughest Overtime Questions

Q: If a non-exempt employee is paid a salary, how do you compute the regular rate of pay for overtime?

A: When a non-exempt employee is hired with the understanding that his or her salary will cover a fixed number of hours worked, the regular rate of pay is determined by dividing the employee's salary (and certain other forms of compensation, including productivity bonuses) by the number of hours it is intended to compensate (for example, a 40-hour workweek). **Note:** Your state law may have different rules.

Conclusion:

Keep in mind that the answers above address federal law, but your state or local law may differ. Where federal, state, and local law conflict, the law more generous to the employee typically applies.

Independent Contractor or Employee? Are You Sure?

Some employers prefer to classify workers as independent contractors because they believe this can save them money. Employers generally don't pay taxes on payments to independent contractors, and aren't responsible for providing minimum wage, overtime, or benefits to independent contractors. The problem is, very few arrangements will meet the requirements of an independent contractor relationship. Misclassification, which has become an enforcement priority for federal and state agencies, can lead to substantial fines and penalties. Here are some common questions about independent contractors:

Q: What are independent contractors?

A: In general, independent contractors are service providers in an independent trade, business, or profession who offer their services to the general public under a contract or agreement. While this classification depends on the facts in each case, the determination is based largely on the degree of control the business has over a worker. The more control the business has, the more likely that individual will be considered an employee.

Q: How do I determine if a worker is an employee or an independent contractor?

A: A worker is presumed to be an employee unless he or she meets certain requirements under federal and state law. There are a number of tests used to evaluate a worker's status, but the most common is the Internal Revenue Service (IRS) Common Law Test (covered below). The **Department of Labor**, the **Equal Employment Opportunity Commission**, and several states also have independent contractor tests. While each test varies, they typically look at the right to control the worker, whether the worker's services are an integral part of the business, and the permanency of the relationship. You should carefully review each test and consult legal counsel if you have specific questions before classifying any individual as an independent contractor.

Independent Contractor or Employee? Are You Sure?

Q: What is the IRS Common Law Test?

A: The **IRS Common Law Test** has three broad categories to determine the appropriate classification of a worker:

1. **"Behavioral control"** examines whether the company has the authority to direct and control the work and looks at whether the worker receives training and instruction.
2. **"Financial control"** looks at factors such as whether the worker realizes a profit or loss, makes investments in tools and facilities, and has unreimbursed expenses.
3. **"Type of relationship"** examines the nature of the relationship. This includes whether there is a written contract between the parties, the permanency of the relationship, and whether the worker is entitled to employee-type benefits.

Q: Is there a set number of IRS factors that must be met to classify a worker as an independent contractor?

A: No one factor stands alone in making a classification determination. Weigh all factors and take into account other applicable tests when determining whether an individual is an employee or an independent contractor. Look at the entire relationship, consider the degree of control, and document each of the factors used in making a determination.

Q: A worker meets some of the IRS factors, but not others. How we should classify him?

A: When in doubt, it's a best practice to classify the worker as an employee. You may also request an official worker status determination from the IRS using **Form SS-8**. Keep in mind, however, that it ordinarily takes at least six months to get an IRS determination.

Q: How do state tests for independent contractors differ from federal tests?

A: State tests can be more difficult to satisfy, since some require that all of the criteria in their tests be met. For example, several states apply the ABC Test where a worker is presumed to be an employee unless the employer can show that the relationship meets all of the following criteria:

- The individual is free from control or direction over the performance of services; and
- The services are outside the usual course of the business, or performed outside all the places of business of the enterprise; **and**
- The individual is customarily engaged in an independently established trade, occupation, profession or business.

Independent Contractor or Employee? Are You Sure?

Q: We issue 1099 forms instead of W-2 forms to several workers. This means they are independent contractors, correct?

A: Not necessarily. A common misconception is that a worker's classification is determined by whether a Form 1099 or Form W-2 is provided to them at the end of the year. The reality is the classification determination must always be made on the basis of whether the worker meets the applicable tests for independent contractor status. If the worker fails to meet these tests, the individual is an employee and is entitled to all the rights and benefits of employees.

Q: I have a written contract with several of my workers. Does this mean they are independent contractors?

A: The contract is one of many factors to consider, but the contract alone is not sufficient to determine the worker's status.

Q: To lower costs, can I lay off a few employees and bring them back as independent contractors?

A: Unless the nature of the relationship changes to meet the requirements of independent contractor status, reinstating laid off employees and simply calling them independent contractors does not change their status.

Q: A candidate to whom we made a job offer asked that we classify and treat him as an independent contractor. Can we do this?

A: A worker cannot waive his or her employee status upon request. Rather, independent contractor tests must be satisfied to classify a worker as an independent contractor.

Conclusion:

Before classifying a worker as an independent contractor, make sure the relationship meets all applicable federal and state tests.

Never Ask These 10 Questions During an Interview

When conducting interviews, employers must avoid questions that are prohibited by law as well as questions that may reveal an applicant is a member of a protected group. Even if certain questions are not expressly prohibited by law, it's best to avoid them to ensure they don't influence your hiring decisions. Here are 10 questions to avoid, along with some suggested alternatives:

Avoid #1: How old are you? What year did you graduate? Do you plan to retire soon?

Under federal law, employers are prohibited from discriminating against applicants and employees who are age 40 and older. Many states also prohibit age discrimination, some protecting even younger workers. Avoid questions during the interview process that reveal an applicant's age.

Alternative: If there are minimum age requirements for a job in order to comply with a law or for insurance purposes, you may ask whether the applicant meets those requirements.

Avoid #2: How much did you earn in your previous job?

Some states and local jurisdictions have passed laws that restrict employers from asking about an applicant's pay history during the hiring process (under the premise that pay history may reflect discriminatory pay practices of a previous employer). Check applicable laws before asking these types of questions.

Alternative: These laws generally allow you to provide the candidate with the starting salary (or salary range) for the position and ask whether it would be acceptable if the candidate were offered the position. To err on the side of caution, you may also want to state clearly that the candidate shouldn't reveal what they earned in their previous job when answering this question.

Avoid #3: What is the origin of your name? Where is your accent from? Where were you born? Where did you grow up?

Federal and many state laws prohibit employers from discriminating against applicants and employees on the basis of national origin (based on where the individual was born or because of their ethnicity or accent). Avoid these questions since they may reveal information about an applicant's origin.

Alternative: None. However, you are permitted to ask if the applicant is authorized to work in the United States, as long as you ask this question of all candidates.

Avoid #4: Are you pregnant? Do you have or plan to have children? Are you married? Who's responsible for your children's care?

Federal law and many state laws prohibit employers from discriminating against individuals because of pregnancy. Some states also expressly prohibit employers from discriminating against applicants because of their marital and/or family status. Avoid interview questions about an applicant's pregnancy, intentions regarding pregnancy, or family and marital status.

Alternative: During the interview, explain expectations related to work hours, overtime, and travel and ask the applicant whether they can meet those requirements. Be consistent and ask these questions of all applicants (not just female applicants).

Avoid #5: Do you have a disability? Have you ever been treated for mental health issues, drug addiction, or alcoholism? How many sick days did you use last year?

The Americans with Disabilities Act (ADA) and similar state laws generally prohibit employers from asking questions during interviews that are likely to reveal the existence of a disability.

Alternative: Under limited circumstances, the ADA allows employers to engage in a dialogue regarding whether a qualified candidate would need a reasonable accommodation to perform the essential functions of the job. For more information, see **Question #15** from guidance issued by Equal Employment Opportunity Commission (EEOC).

Avoid #6: Do you have military obligations that would require you to miss work? Do you have military duties on weekends?

Under the Uniform Services Employment and Reemployment Act (USERRA) employers are prohibited from discriminating against applicants and employees due to past, present, or future membership in the uniformed services. Avoid questions about an applicant's military obligations.

Alternative: If applicants voluntarily disclose that they served in the military, such as on their resume, you may ask questions regarding relevant job-related skills acquired during their service.

Avoid #7: What religion do you practice? Do you have obligations that would prevent you from working Friday evenings, Saturdays, or Sundays?

Employers are prohibited from discriminating against individuals on the basis of religion. This includes religious beliefs (both traditional as well as non-traditional) and religious practices, such as attending religious services, praying, or wearing religious garb. Generally, you should avoid questions that elicit information about religious beliefs and practices.

Alternative: If you want to confirm an applicant is able to work the hours required for the job, state the regular days, hours, or shifts for the job and ask whether the candidate can work such a schedule. **Note:** You may be required to reasonably accommodate an employee's religious beliefs or practices, such as allowing an employee to voluntarily swap shifts with a co-worker so that they can attend religious services.

Avoid #8: Have you ever been arrested or convicted of a crime?

Questions about arrests are generally off limits. Several state and local laws also limit the use of conviction records by prospective employers. For example, some expressly prohibit questions about criminal histories until after the employer makes a conditional job offer. Check applicable laws and consult legal counsel before asking about criminal history.

Alternative: Even where criminal history inquiries are permitted, they must be used in a non-discriminatory way. According to the **EEOC**, employers should evaluate how the specific criminal conduct relates to the duties of a particular position. This generally requires an individualized assessment that looks at the facts and circumstances surrounding the offense, the number of offenses for which the individual was convicted, rehabilitation efforts, and employment or character references.

Avoid #9: Have you ever filed a sexual harassment complaint? What about a workers' compensation claim?

Under federal and many state laws, employers are prohibited from retaliating against individuals because they opposed unlawful sexual harassment or other forms of discrimination, or participated in a workplace investigation. Many states also generally prohibit discrimination against individuals because of their workers' compensation history. Questions regarding workers' compensation might also reveal the existence of a disability in violation of the ADA (see #5 above).

Alternative: None.

Avoid #10: Can you provide us with the username and password for your personal social media account?

Many states prohibit employers from asking applicants or employees for log-in information for their personal social media and Internet accounts. Be mindful of this trend and avoid asking candidates for this information.

Alternative: None.

Conclusion:

Interviews are essential to finding the right fit for a job. They can reveal important job-related information, both positive and negative, that applications and resumes don't. But, you must conduct interviews lawfully. Train supervisors and others who conduct interviews to avoid questions that are prohibited by law or are likely to reveal a protected characteristic.

Probationary Periods: Frequently Asked Questions

Employers sometimes use "probationary periods" as a time to assess whether a new hire or newly promoted employee is a good fit for the position. But, this practice is generally not recommended. Here are some frequently asked questions, along with some common misconceptions, about probationary periods.

Q: Are probationary periods a good idea?

A: Probationary periods can lead to confusion regarding whether the employment relationship is "at-will." "At-will" means that either the employee or the employer may terminate the employment relationship at any time, for any lawful reason. When employers use probationary periods, employees sometimes think that once they successfully complete a probationary period, they are no longer at risk for termination based upon their performance. This misunderstanding can lead to increased risk of wrongful termination lawsuits if the employer terminates the employee.

Additionally, the term "probationary period" may have a negative connotation for new employees. New hires may misinterpret "probationary" to mean that they are immediately placed on a disciplinary action plan at the start of their employment. This could negatively impact the employee's perception of the company.

Q: How can I help employees understand my company's probationary period policy?

Probationary Periods: Frequently Asked Questions

A: If your company requires that new employees enter into a probationary period, make sure that your policies and procedures are carefully worded and applied consistently to all new hires. Make clear that during and upon successful completion of the probationary period, the status of the new hire's employment will remain "at-will." Consider consulting with legal counsel to help ensure policies are drafted and implemented properly.

Note: Including a clear employment at-will disclaimer in your employee handbook can help clarify the employment relationship.

Q: Which states recognize at-will employment?

A: In the United States, employment relationships are presumed to be at-will in all states except Montana. In Montana, employers can generally only terminate employees for good cause once they have completed the employer's probationary period. If an employer does not establish a specific probationary period in Montana, the default probationary period is six months from the date of hire.

Q: Why would employers use probationary periods?

A: Some employers believe that probationary periods can help to assess a new hire's skills and qualifications without the burden of following certain requirements that come with the employment relationship. Some employers also misconstrue the probationary period to mean that they would be free from wrongful termination lawsuits should the relationship not work out. This, however, is not true. New hires generally have the same protections as other employees and can be terminated at any time during the employment relationship. Having a special probationary period does not change that.

Q: What about an introductory period, training period, or orientation period? Are these different?

A: Some employers use an "introductory period," "training period," or "orientation period." However, they all generally refer to the same type of initial period. And, if not handled correctly, they all run the risk of confusing employees regarding their employment status. Employers should carefully assess the benefit of having introductory periods, and if they wish to continue using them, consider working with legal counsel to develop and implement such policies.

Q: Without probationary periods, how can my company make sure new hires are a good fit?

A: An effective hiring process can help you avoid making bad hires. During the interview process, ask job-related and behavioral-based questions, and where appropriate, conduct post-offer job-related background and reference checks to help determine whether candidates have the potential to succeed in the role. Once hired, familiarize new employees with the company, and provide them with the information, tools, and support they need to succeed.

Probationary Periods: Frequently Asked Questions

Q: Without a probationary period, can my company require new hires to wait before they enroll in our health plan or are eligible for paid time off?

A: The Affordable Care Act (ACA) prohibits group health plans from applying a waiting period that exceeds 90 days for individuals otherwise eligible to enroll. Under the ACA, health plans are permitted to use "orientation periods" without violating the 90-day waiting period rule if the following requirements are met:

- The period is not more than one month.
- The 90-day waiting period begins on the first day after the orientation period.

Generally, employers may also establish reasonable waiting periods for employees to become eligible for voluntary company provided benefits, such as paid time off. **Note:** Some states and local jurisdictions have established paid leave laws that have their own eligibility requirements.

Q: If employees are terminated during their introductory period, are they disqualified from unemployment benefits?

A: The fact that an individual was terminated during an introductory period would not disqualify the employee from unemployment benefits. The same rules regarding eligibility for unemployment still apply. However, length of employment may be a factor in determining how much the employer will be impacted by the employee's unemployment claim.

Conclusion:

Make sure that your policies and procedures are carefully worded and applied consistently to all new hires. Consult legal counsel to determine whether a probationary period makes sense for your company.

Final Pay: When is it Due, What Does it Include, & More

When an employee leaves your company, you have a responsibility to ensure that he or she receives their final pay in accordance with federal and state law. Generally, these laws dictate when you must provide the employee with their final pay and what the pay must include. Here we provide answers to frequently asked questions about final pay.

Q: When is final pay due?

A: Under federal law, final pay is generally due by the next regular payday, but many states require final pay sooner. In some cases, this time frame differs depending on whether the employee initiates separation (voluntary termination) or the employer initiates separation (involuntary termination). For example, California requires final pay immediately for involuntary terminations. For voluntary terminations, the state requires final pay within 72 hours. However, if the employee provides at least 72 hours of notice, final pay is due on the employee's last day. **Note:** Some states have separate final pay deadlines and other rules for commissions, bonuses, and other special situations.

Q: Do I have to pay employees for unused vacation when they leave?

A: It depends on your state and company policy. States generally handle unused vacation and paid time off in one of three ways:

- Employers must pay employees for accrued, unused vacation time at the time of separation;
- Employers can exclude unused vacation time from final pay only if they have a written policy that explicitly states that employees will not be paid for any accrued, unused time upon separation; or

- Employers can exclude accrued, unused vacation from final pay absent a policy that says otherwise.

Q: Do I have to pay employees for unused sick leave at the time of termination?

A: Most sick leave laws don't require employers to pay employees for accrued, unused sick leave at the time of separation. However, if you bundle all leave, including sick leave, into a single paid-time-off (PTO) policy, your state may apply the same rules as it does for accrued, unused vacation/PTO (which could require payout upon separation). Check your state law to ensure compliance.

Q: An employee quit and has failed to return a company computer. Can I withhold his final paycheck until he returns it?

A: As a general rule, you may not withhold final pay until an employee returns company equipment. You must meet the applicable final pay deadline even if the employee hasn't returned company property.

Q: Instead of withholding the entire paycheck, can I make a deduction from the employee's final check to help pay for unreturned equipment?

A: The FLSA does not permit this type of deduction from exempt employees' pay. For non-exempt employees, federal law permits employers to make deductions from pay for lost/stolen/unreturned equipment provided it does not reduce the employee's pay below the minimum wage and does not cut into any overtime pay. Some states prohibit this practice or have additional requirements, so check your state law before making a deduction.

Note: Under the FLSA, employers are generally required to obtain the employee's consent before making a permissible deduction. The agreement must specify the particular items for which deductions will be made (for example, company uniforms, equipment, or employee theft) and how the amount of the deduction will be determined. It's a best practice to obtain the employee's authorization in writing and consult legal counsel before making a deduction.

Q: An exempt employee has resigned. Her last day is Wednesday. Do I have to pay her full salary for that final week even though she will only work part of it?

A: Apart from a few narrow exceptions, the FLSA requires employers to pay exempt employees their full salary for any workweek in which they perform work. However, if an exempt employee doesn't work a full workweek in their first or last week on the job, you may prorate the employee's salary for that workweek so that it only covers the days worked.

Conclusion:

Failure to provide final pay in accordance with applicable laws may result in fines. Develop policies and procedures to ensure compliance.

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