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Practical Guidance On Wage And Hour Compliance: What Do You Really Need To Know?

An employer's guide to key wage and hour compliance issues.

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Preventive Strategies and Positive Solutions for the Workplace®

HR. Payroll. Benefits.

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About This Guide

Complex. Confusing. Out-of-Date. Impossible to be 100% compliant.

These are a few ways employers have described the Fair Labor Standards Act ("FLSA"), a federal law passed by Congress in 1938 on the heals of the Great Depression. It covers nearly every employee in the United States. It provides a floor for the payment of fair wages, overtime rights that are are intended to fairly compensate workers for long hours of work, and various other protections for workers.

In contrast to laws passed today, the FLSA contains surprisingly few details to assist employers with day-to-day compliance. Congress decided to let the Wage and Hour Division of the Department of Labor (DOL) fill in those blanks. As a result, the requirements of the FLSA have been developed and expanded for many decades by regulations and opinion letters from DOL. Moreover, courts have issued important rulings that impact employers' obligations under the FLSA.

In addition to the FLSA, there are state laws that govern the payment of minimum wages and overtime. State laws can be stricter than the FLSA. Where federal law and state law conflict, employers must comply with the law that is more protective for employees. Though a discussion of state wage and hour laws is beyond the scope of this special report, some recent state law developments will be discussed.

What does all of this mean if you are an employer? Well, for starters, it means that understanding wage and hour issues is critical. Misclassifying workers leads to a major drain on resources and astounding penalties for businesses. Taking steps to correct any issues before they turn into major legal claims can save time and money down the road. Moreover, the DOL's renewed focus on these issues ensures that wage and hour claims will remain a hot topic.

This special guide attempts to remove some of the confusion and provide timely, practical guidance on wage and hour compliance, with a particular emphasis on the (mis)classification of workers as independent contractors or as exempt from overtime.

Wages And Hours Worked

Private Lawsuits

Employees are suing more than ever. While discrimination and sexual harassment cases have historically dominated the employment litigation arena, the number of wage and hour cases has risen dramatically over the past decade. A wage and hour case is the general description for a case filed under the FLSA and/or state law concerning the alleged non-payment of full and timely wages. In 2009, workers filed 5,644 federal lawsuits under the FLSA. In 2010, that number rose to 6,081. In 2011, that number rose again to 7,008. Employers of all sizes collectively paid $221.5 million dollars to settle FLSA cases in 2011. This trend shows no signs of slowing down.

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Equally troubling, wage and hour class-action lawsuits (often called collective actions) continued to outpace all other types of workplace class actions. In terms of case filings, collective actions pursued in federal court under the FLSA outnumbered all other types of private class actions in employment-related cases. Decisions by federal and state court judges on wage and hour issues were more voluminous than in any other area of workplace litigation. There was also significant growth in wage and hour lawsuits at the state court level, especially in California, Illinois, New Jersey, New York, Massachusetts, Minnesota, Pennsylvania, and Washington.

DOL Activity

In addition to private lawsuits, DOL is also very active. On December 23, 2011, President Obama signed a nearly $1 trillion omnibus spending act into law, which provides $14.5 billion for the DOL in fiscal year 2012 (for all of DOL's divisions, including wage and hour). At the end of 2011, the agency publicly affirmed that it "will defend employee rights under [the FLSA], and the Department wants companies that play by the rules to know that [it] will take action against those that use illegal tactics to gain an unfair competitive advantage." While most businesses try their best to comply with the FLSA, wage and hour complaints continue to increase. There are typically between 25,000 and 35,000 wage and hour complaints filed with DOL each year. According to the most recent statistics, an astonishing 80% of DOL investigations of those claims result in a finding of a violation.

In addition to receiving complaints, DOL has also promised to focus on directed investigations. A directed investigation is one where DOL selects an industry or employer to be investigated, even though no complaint has been lodged with DOL. In fiscal year 2011 (October 1, 2010 through September 30, 2011), directed investigations comprised 29% of all compliance actions conducted. DOL has publicly promised to move resources to directed investigations in fiscal year 2012 and that trend will continue in future years.

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DOL is expected to conduct more targeted investigations in low-wage/high-risk industries (industries in which there may be high violation rates and low compliance rates) around the country, including the janitorial, construction, and hotel/motel industries. DOL also will continue its emphasis on investigations conducted in what it now calls "fissured" industries, which are sectors that rely on organizational methods such as sub-contracting, third-party management, franchising, and independent contracting. Construction, janitorial, home health care, child care, transportation and warehousing, meat and poultry processing, and other professional and personnel service industries are likely to be targets of this campaign.

There has also been significant growth in wage and hour lawsuits at the state court level, especially in California, Illinois, New Jersey, New York, Massachusetts, Minnesota, Pennsylvania, and Washington.

Meanwhile, DOL will continue pressing ahead in other areas too. DOL's "We Can Help" campaign educates workers about their rights under the FLSA. The campaign includes, among other features, a separate website with links to pages explaining the rights of workers and Public Service Announcements (PSAs) in both English and Spanish by Hollywood stars, including Jimmy Smits and Esai Morales. DOL has announced a new collaboration with the American Bar Association (ABA), which is a national association of lawyers. Under this initiative, FLSA complainants who are informed that the DOL is declining to pursue their complaint are provided a toll-free number to contact a newly created, ABA-sanctioned Attorney Referral System.

DOL has also unveiled a publicly accessible online enforcement database which provides free access to enforcement data collected by DOL in one location. Anyone can access the database and search by state, zip code, and company name. Users can obtain detailed information including for example the number of FLSA violations per employer, amount of back wages the employer agreed to pay, the number of employees the employer agreed to pay, the type of violation (i.e., minimum wage or overtime) and the amount of civil money penalties assessed. This information will be used by workers and their attorneys.

Point being, this is no time to be complacent. Wage and hour compliance should be a top priority for any business.

Who Are Your Employees?

"I don't need to worry about the lawsuits, DOL activity, or paying overtime because my workers are independent contractors." Think again.

To be sure, the FLSA governs pay for employees, not independent contractors or consultants. But to say that independent contractor classifications have been under attack would be an understatement. DOL has estimated that up to 30% of employers misclassify employees. The Government Accountability Office has estimated that worker misclassification costs the federal treasury $4.7 billion annually in income tax revenues.

As federal and state governments scramble for revenue, employers who misclassify employees have become an easy target. In the short run, an employer may save money classifying an employee as an independent contractor. In the long run, however, misclassification can be devastating – leading to audits, penalties, lawsuits and substantial unforeseen costs.

Federal and State Activity

DOL's misclassification initiative, launched under the auspices of Vice President Biden's Middle Class Task Force, was created to combat the misclassification of employees as independent contractors. On September 19, 2011, DOL signed a Memorandum of Understanding (MOU) with the Internal Revenue Service (IRS). Under the MOU, the agencies will work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.

"The misclassification of employees as independent contractors is an alarming trend. The practice is a serious threat to both workers, who are entitled to good and safe jobs, and to employers who obey the law and are undercut when others use illegal practices," said Secretary of Labor Hilda L. Solis on October 4, 2011. "The Department of Labor is committed to remedying employee misclassification and ensuring compliance to protect and enhance the welfare of the nation's workforce."

DOL has estimated that up to 30% of employers misclassify employees.

Additionally, labor commissioners and other agency leaders representing eleven states have signed MOUs with DOL – Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah, and Washington. The MOUs enable DOL to share information and to coordinate enforcement efforts with participating states. DOL is actively pursuing MOUs with more states as well. When DOL signed the MOU with Colorado on December 5, 2011, Nancy J. Leppink, deputy administrator of DOL's Wage and Hour Division said, "This memorandum of understanding helps us send a message: We're standing united to end the practice of misclassifying employees. This is an important step toward making sure that the American dream is still available for employees and responsible employers alike."

States are not solely relying on DOL. They are busy with their own enforcement initiatives, too. Some examples of state activity include:

- **Massachusetts:** The Attorney General (AG) has continued her aggressive enforcement efforts targeting independent contractor abuses in a range of industries, including a tax fraud case against a Dedham construction company that resulted in $100,000 in fines and restitution. The AG's office also reached

a groundbreaking $3 million settlement with a delivery company to settle claims that the company misclassified drivers as independent contractors. MA's Joint Task Force on the Underground Economy and Employee Misclassification recovered nearly $6.5 million through its enforcement efforts: $2 million in new unemployment insurance taxes; $1.6 million in overdue taxes through review and investigation; $1.8 million in fines, and $1 million in other funds recouped through civil and criminal actions.

With this level of activity at the federal and state levels, proper classification of independent contractors is a business imperative.

Two Massachusetts Contractors Plead Guilty, Sentenced in Payroll Misclassification Plan

A Massachusetts construction company and its owners pleaded guilty in state court January 10, 2012 to failing to disclose millions of dollars in misclassified subcontractor payroll in order to evade payment of workers' compensation premiums and unemployment insurance taxes (Massachusetts v. Newton Contracting Co., Mass. Super. Ct., No. SUCR2011-11262, plea and sentencing 1/10/12).

Newton Contracting Co. and its owners, Shaun Bryan and Antoinette Capurso-Bryan, pleaded guilty to 20 counts related to payroll classification as well as one count of failing to pay workers the prevailing wage. Bryan was sentenced to a two-year prison term, suspended for five years, and ordered to pay $100,000 in restitution to a workers' compensation insurer and $150,000 in fines. Capurso-Bryan was sentenced to two years of probation and ordered to pay $74,000 in fines. The defendants already had paid restitution to the state's Division of Unemployment Assistance and to employees for wage violations. The company, based in Watertown, Mass., and its owners also were debarred from bidding on or contracting for public construction projects for five years.

- **New York**: The Joint Enforcement Task Force on Employee Misclassification (JETF) identified over 18,500 instances of employee misclassification, discovered over $314 million in unreported wages, assessed over $10.5 million in unemployment taxes, over $2 million in unpaid wages, and over $800,000 in workers' compensation fines and penalties. The JETF carried out its work through coordinated assignments, systematic referrals and data sharing between agencies, as well as joint enforcement sweeps involving a coordinated visit and work site inspection by JETF members. The JETF conducted 14 joint sweeps in 2010, focusing its efforts on construction sites, restaurants, and retail establishments.

- **Connecticut:** The Department of Labor issued 23 Stop Work orders against subcontractors working on a $26 million HUD project after finding that the firms had misclassified their employees and failed to have adequate workers' compensation insurance.

- **California:** California's Attorney General, Kamala Harris, engaged stakeholders in a new "Civil Rights Enforcement Work Group," with a recommendation that an official interagency task force be established to address the problem of independent contractor misclassification. California also passed a new law that targets employers who misclassify employees as independent contractors. Employers who do so can face penalties of $15,000 to $20,000.

- **Virginia:** Senate Joint Resolution No. 345 directs the Joint Legislative Audit and Review Commission to conduct a study of employee independent contractor misclassification, including (1) a review of the status of misclassification; (2) the consequences to the

workforce; (3) the amount of revenue lost due to misclassification; and (4) recommended strategies to combat the problem. The due date for the report is the first day of the next regular session of the General Assembly.

With this level of activity at the federal and state levels, proper classification of independent contractors is a business imperative.

A worker who is improperly classified as an independent contractor may be entitled to back wages, overtime pay, liquidated damages (which are actual damages doubled), and attorneys' fees.

DOL Rules

Unfortunately, that is easier said than done. Determining whether a worker is an independent contractor or an employee is tricky. DOL does not have a single, clear rule to determine whether a worker is an independent contractor, and DOL admits that its rules differ from IRS rules. (DOL Opinion Letter No. 1856). This often makes it difficult for even the most well-intentioned employers to determine exactly how a worker should be classified. And there are penalties for guessing wrong. A worker who is improperly classified as an independent contractor may be entitled to back wages, overtime pay, liquidated damages (which are actual damages doubled), and attorneys' fees.

DOL uses an "economic reality" test to determine whether workers are properly classified. The test focuses on independence and control. A number of factors can be used to make that determination, including: 1) the degree of control exercised by the alleged employer; 2) the extent of the relative investments of the alleged employer and employees; 3) the degree to which the alleged employee's opportunity for profit and loss is determined by the employer; 4) the skill and initiative necessary for performing the work; 5) the permanency of the relationship; and 6) the extent to which the work performed is an integral part of the employer's business. Neither the presence nor the absence of any individual factor is determinative.

The fact that a worker signs a written agreement acknowledging that he is an independent contractor does not mean DOL will agree. As noted above, the agency will look at the economic reality of the situation. Nonetheless, written agreements are a good business practice. At a minimum, a good agreement should cover the following subjects:

- Services to be performed. Explain the services to be performed.
- Timing. Explain when the services are to be performed. Consider a late-penalty fee if the services are not performed on time, or a bonus if finished early.
- Payment. Explain when the payment is earned, how it is calculated, the amount (if possible), and when it will be paid.
- Insurance. Require the contractor to have appropriate insurance to cover his or her work.
- Termination. Explain how the agreement can be terminated.
- Warranties. Have the contractor warrant that the services will be performed in a high-quality, professional, and timely manner.

DOL Case Studies

DOL Opinion Letter No. 2170. A company worked with hospitals to secure organ and tissue donations. Independent contractors, called Bone Procurement Technicians (BPTs), removed organs and tissues from expired organ donors; cultured, packaged, and shipped donations as directed; reconstructed the body; and cleaned up after the completed removal. BPTs worked as needed based on days they designated. BPTs could also decline calls. The performance of BPTs was supervised by team leaders. DOL held the BPTs were misclassified as independent contractors because (i) the control exercised by the company over the BPTs for scheduling purposes was the same type of control that was exercised by an employer over regular employees working for the company; (ii) there was no investment in facilities and equipment by the BPTs – they only used company equipment on hospital premises; (iii) there were no opportunities for profit and loss by BPTs; (iv) BPTs performed all procurement activities as instructed by the company; and (v) BPTs did not exercise any initiative, judgment, or foresight in open market competition regarding the donation process.

DOL Opinion Letter No. 2225. An employee who would perform graphic design work for an employer in a freelance capacity would still be an employee and not an independent contractor, even though her freelance work would be different from her normal job responsibilities with the employer. The employee was not an independent contractor even though the employee was being asked to perform out of her private graphic design company different work than she performed in her regular job, work that is not performed in-house; the primary job responsibility of the employee was lead design on the company's monthly magazine; she also designed marketing materials, including brochures, flyers and postcards; and, the work the designer was being asked to perform in her private graphic design company is typesetting/ laying out books and manuals, and designing corresponding charts and tables.

DOL Opinion Letter No. 2240. Delivery drivers, who signed independent contractor agreements, were employees covered by the FLSA, where their work was an integral part of the employers business, they were prohibited from conducting outside business while in-service for the employer, and they did not risk major loss of capital expenditures.

DOL Opinion Letter No. 2333. Bowl builders who made manufacturing routing bowls, who were paid a predetermined lump sum but whose contract provided they may incur a loss if their project was not completed on time, and who were responsible for workers' compensation and taxes for any employees they may hire, assume the opportunity for profit and loss and thus would be independent contractors, not employees. They worked on the company's premises during an employer's normal building hours, the employer did not control the number of hours worked, nor the work methods used, and the employer did not train the builders or provide oversight.

IRS Voluntary Classification Settlement Program

On Sept. 21, 2011, IRS announced a voluntary reprieve for businesses that fear facing an IRS worker classification audit. The Voluntary Classification Settlement Program (VCSP) offers employers the opportunity to prospectively reclassify some or all of their workers as employees without being subject to an IRS audit or going through the normal administrative correction procedures. DOL has offered no such program.

Under the program, once an employer enters the program, it will have to pay only 10 percent of the previous year's employment tax liability with respect to the reclassified workers. The previous year's employment tax liability is determined under the Internal Revenue Code and includes federal income tax withholding, employee and employer social security tax, and employee and employer Medicare taxes.

In addition to the savings, the employer will not be subject to interest, penalties, back taxes or misclassification audits with respect to the

reclassified workers for previous years. The IRS waiver of misclassification audits applies only to the individual workers that have been reclassified, not the employer's workforce as a whole.

Employers are eligible for the program if they have consistently treated the workers they wish to reclassify as nonemployees or independent contractors for tax purposes. This must be proven by having filed 1099s for each of the workers for the previous three tax years. For companies in existence for less than three years or for workers in that classification employed for less than three years, the employer must provide 1099s for the period of their employment up to the date of the VCSP application.

The VCSP covers private businesses, tax-exempt organizations, and government entities.

Employers who have previously been examined by IRS or DOL for worker classification are eligible to participate, so long as the audit is complete and the taxpayer has complied with all results of the audit.

IRS has not addressed how participation in the VCSP will affect employers who may face future state or local worker classification audits for the same time period with DOL or state agencies. This issue is particularly relevant because, as discussed above, DOL and several states have signed MOUs to share information in order to combat worker misclassification.

As of January 5, 2012, IRS had only received 217 applications from employers wanting to reclassify workers as employees under the program.

Who Is Exempt From Overtime Pay?

"I don't pay overtime because my employees are paid a salary." Think again. Paying a salary, by itself, does not exempt an employer from the obligation to pay overtime.

"If he has a college degree, I don't have to pay him overtime." Also wrong. The fact that a worker has a college degree, by itself, does not relieve an employer from the obligation to pay overtime.

The ground rules are straightforward. Workers who are covered by the FLSA are entitled to a minimum wage of not less than $7.25 per hour effective July 24, 2009. Though, some states require a higher minimum wage. Overtime pay at a rate of not less than one and one-half times an employee's regular rate of pay is required after 40 hours of work in a workweek. Some states require daily overtime.

Employees in some positions can be "exempt" from the minimum wage and overtime requirement. Employees in exempt positions do not receive overtime pay no matter how many hours they work in a workweek. Since they do not receive overtime pay, there is no need for an employer to keep records of the specific hours they work.

"I don't pay overtime because my employees are paid a salary." Think again. Paying a salary, by itself, does not exempt an employer from the obligation to pay overtime.

The FLSA provides "exemptions" from minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. The FLSA also exempts certain computer employees. As discussed below, to qualify for exemption, DOL has said that employees generally must meet certain tests regarding their job duties and be paid on a salary basis of not less than $455 per week. Thus, paying a salary is only half the equation.

Why does this exempt/nonexempt distinction matter? Because there have been, and continue to be, many lawsuits related to employers' exemption decisions. Employers who classify positions as exempt must be prepared to defend each exemption decision, and they will be ordered to pay fines, overtime, liquidated damages and attorneys' fees if a position has been "misclassified" as exempt.

As with independent contractor status, determining whether an employee is exempt can be difficult. As a general proposition, DOL has said that non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and labors are notexempt. Beyond that, exemptions are determined based on each specific employment situation. Job titles alone do not determine the exempt or nonexempt status of any employee. Each determination is based on the specific job duties performed and compensation received, as discussed below.

Salary Basis Test

To qualify for exemption, employees generally must be paid at not less than $455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. As will be discussed below, exempt computer employees may be paid at least $455 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour.

Employers who classify positions as exempt must be prepared to defend each exemption decision, and they will be ordered to pay fines, overtime, liquidated damages, and attorneys' fees if a position has been "misclassified" as exempt.

Deductions from Salary

Deductions from salary are allowed:

- When an employee is absent from work for one or more full days for personal reasons other than sickness or disability;
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- To offset amounts employees receive as jury or witness fees, or for temporary military duty pay;
- For penalties imposed in good faith for infractions of safety rules of major significance;
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions;
- In the employee's initial or terminal week of employment if the employee does not work the full week, or
- For unpaid leave taken by the employee under the federal Family and Medical Leave Act.

Deductions for partial day absences generally violate the salary basis rule, except those occurring in the first or final week of an exempt employee's employment or for unpaid leave under the Family and Medical Leave Act. If an exempt employee is absent for one and one-half days for personal reasons, the employer may only deduct for the one full-day absence. The exempt employee must receive a full day's pay for the partial day worked. Other examples of improper deductions include:

- A deduction of a day's pay because the employer was closed due to inclement weather;
- A deduction of three days pay because the exempt employee was absent for jury duty;
- A deduction for a two-day absence due to a minor illness when the employer does not have a bona fide sick leave plan, policy or practice of providing wage replacement benefits; and
- A deduction for a partial day absence to attend a parent-teacher conference.

Loss of Exemption

Why do deductions matter? An employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salaries were improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions. If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Job titles alone do not determine the exempt or nonexempt status of any employee. Each determination is based on the specific job duties performed and compensation received.

Fee Basis Pay

Though rarely used, administrative, professional, and computer employees (the required duties of these exemptions are discussed below) may be paid on a "fee basis" rather than on a salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours. For example, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield $500 if 40 hours were worked.

DOL Case Studies

DOL Opinion Letter No. 2552. An employer may deduct from the pay or accrued leave time of an employee who is an exempt white-collar employee for leave taken under a state's leave act without affecting the employee's exempt status. Deductions of full-day increments are permitted without affecting the employee's exempt status, and deductions may be made from the employee's accrued leave balance for the time an employee is absent from work even if it is less than a full day, provided the employee receives the full guaranteed salary. Partial-day deductions not expressly authorized by regulation may render an employee's compensation not on a salary basis, thereby jeopardizing exempt status. Where the employee's absence is for less than a full day, payment of the employee's guaranteed salary must be made even if an employee has no accrued benefits (or a negative balance) in the leave plan.

DOL Opinion Letter No. 2564. A half-time, 20-hour per week position may be considered a salaried position, but would not qualify for an exemption due to the reduced salary. The salary requirement of $455 per week may not be prorated to reflect reduced hours and, as a result, the employee paid a salary of $288 per week does not qualify as exempt.

DOL Opinion Letter No. FLSA2006-24NA. Employer, who paid exempt managers a salary and a bonus, could deduct from the managers' bonus for bad checks or other cash shortages. DOL regulations require only that exempt employees be paid a guaranteed salary of at least $455 per week. Additional compensation above this salary amount is generally something that may be agreed upon between the employer and the employee. The prohibition against improper deductions from the guaranteed salary does not extend to such additional compensation provided to exempt employees.

Executive Exemption

To qualify for the executive exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as discussed above);
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked, and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Department or Subdivision

The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Customarily and Regularly

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Two or More

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three, or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular weight

Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional

suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Exemption of business owners

Under a special rule for business owners, an employee who owns at least a bona fide 20% equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

DOL Case Studies

DOL Opinion Letter No. 2559. Court reporter (who transcribed court proceedings) did not qualify for the FLSA's executive, administrative, or professional exemptions. The court reporter at issue did not qualify for the executive exemption because she did not regularly supervise two or more full-time employees. Also, she did not qualify for the administrative exemption (discussed below) because her primary duty did not involve the exercise of discretion and independent judgment in matters of significance. Further, the court reporter occupation does not involve a primary duty of work requiring advanced knowledge "customarily acquired by a prolonged course of specialized intellectual instruction" as required for the professional exemption (discussed below).

DOL Opinion Letter No. 2597. Bona fide store managers would not lose their exempt status under the FLSA (assuming the executive exemption applies) by participating in a seven-week training program to become eligible for promotion to the area sales manager position, even though the trainee spends little time performing exempt work during the first week, and does not likely spend more than half of the time performing exempt work during the first few weeks of training. Participation in the training program did not consist of the performance of work that would otherwise be performed by nonexempt workers. While exemptions generally apply on a workweek by workweek basis, store managers did not lose exempt status during participation in a temporary seven-week training program where the training program was not in itself an employment position with the company; the manager's primary duty continued to be that of an exempt store manager, and they returned to those duties following the training program.

DOL Opinion Letter No. 2561. District field inspectors employed by a cattle producers'/ operators' association meet the requirements of the executive exemption. The primary duty of the field inspector is management of his or her assigned district, including the supervision of market inspectors and market inspections; these activities generally consume a majority of the field inspector's time. The supervision of market inspectors includes training; apportioning work; monitoring employee performance, productivity, and compliance; conducting performance evaluations; counseling market inspectors; and handling employee complaints and grievances. The field inspector customarily and regularly supervises and directs the work of at least two full-time market inspectors. The field inspector interviews, selects, and hires new market inspectors. In addition, the field inspector's suggestions and recommendations regarding disciplinary action or termination of a market inspector are given particular weight and are typically relied upon.

Administrative Exemption

Employers sometimes assume salaried employees qualify for the administrative exemption when they do not qualify for any other exemption. Perhaps it is because of the unassuming name of the "administrative" exemption. Regardless, do not make this mistake. To qualify for the administrative exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as discussed above);
- The employee's primary duty must be the performance of office or nonmanual work, directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment, with respect to matters of significance.

Employers sometimes assume salaried employees qualify for the administrative exemption when they do not qualify for any other exemption. Perhaps it is because of the unassuming name of the "administrative" exemption. Regardless, do not make this mistake.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Directly Related to Management or General Business Operations

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Employer's Customers

An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

Discretion and Independent Judgment

In general, the exercise of 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. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has the authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after

review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.

Matters of Significance

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

DOL Case Studies

DOL Opinion Letter No. 2553. Case managers who prepare plans of care and implement services for people with disabilities were not exempt administrative employees. Their activities were more related to providing the company's ongoing, day-to-day case management services for its consumers rather than performing administrative functions directly related to managing the company's business. A case manager does not perform duties in any of the management or general business functional areas.

DOL Opinion Letter No. 2622/Administrator's Interpretation No. 2010-1. Financial service industry employees who perform the typical duties of a mortgage loan officer did not qualify as bona fide administrative employees. The administrator concluded that mortgage loan officers have a primary duty of making sales for their employers, not performing office or nonmanual work directly

related to the management or general business operations of their employer.

DOL Opinion Letter No. 2571. Product Technology Application and Marketing Analyst (PTA) employees were exempt administrative employees. The PTA's duty of working with the company's Engineering and Design Group to develop product tests and assessments related to the functional areas of quality control and research. Other duties, including assisting sales representatives and evaluating product features for potential customers, also directly related to the functional area of marketing. Therefore, the PTA's primary duties involve the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.

DOL Opinion Letter No. 2554. School Resource Officers (SROs) employed at an independent school district qualified for the administrative exemption. They performed office or nonmanual work, writing reports or performing similar desk work, performing training, and providing recommendations and advice to faculty and staff. Any field work was incidental to the office work. Their primary duty of providing for the safety and security of the students, staff, and property within the school system by planning to prevent safety and security problems and by responding immediately to deal with any disruption or criminal activity directly related to the functional areas of safety and health. Because the SROs work was in an educational setting, rather than in a police department or security company, their activities were not categorized as production. The SROs' primary duty is directly related to the management or general business operations of the employer. By serving as a liaison/facilitator between the school system and local law enforcement agencies and by developing a communication network between all parties involved, the SROs formulated and implemented management policies or operating practices.

DOL Opinion Letter No. 2006-23. Executive administrative assistant (EA) met the requirements for the administrative exemption. The EA's primary duty involved the performance of office or nonmanual work directly related to the management or general business operations of the employer. The EA assisted the union president, responded to inquiries on his behalf, handled travel arrangements and coordinated meetings for the president and union board members, and processed certain compensation items. Additionally, the EA appeared to perform some work involving a number of the typical administrative functions, including budgeting, purchasing, procurement, labor relations, public relations, and government relations.

DOL Opinion Letter No. 2568. A motor home manufacturer's purchasing agents (PAs) qualified for the administrative exemption. The PAs performed office or nonmanual work and their duties—ensuring that materials, equipment, and supplies are ordered and delivered and participating in the vendor selection process—directly related to the functional areas of purchasing and procurement. Therefore, the PAs' primary duty involved the performance of office or nonmanual work directly related to the management or general business operations of the employer. Further, the facts indicated that the PAs' principal areas of responsibility included the exercise of discretion and independent judgment with respect to matters of significance.

DOL Opinion Letter No. 2601. The sales manager for a city convention and visitors' bureau qualified as an exempt administrative employee, where he was engaged in marketing activities intended to enhance the city's image, and because he operated under minimal supervision he exercised discretion and independent judgment.

Learned Professional Exemption

To qualify for the learned professional exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as discussed above);
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Work Requiring Advanced Knowledge

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical, or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

A professional employee generally uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

DOL Case Studies

DOL Opinion Letter No. 2551. Radiology technologists (RTs) did not qualify for the professional exemption. Their primary duty, patient care and conducting examinations, did not appear to require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. Indeed, the RTs completed

a two- to three-year accredited radiology technology program, rather than three academic years of preprofessional study in an accredited college or university plus a fourth year of approved professional course work, as is the case for exempt certified medical technologists. Also, the RTs' work involves the use of advanced skills and procedures, but it is not predominantly intellectual work. It is more in the character of routine mental, manual, mechanical, and physical processes than intellectual work requiring the consistent exercise of discretion and judgment.

DOL Opinion Letter No. 2578. Service coordinators who assisted program participants with gaining access to services and develop individual service plans for them in addition to providing planning, coordination, referral and follow-up and require an associate's degree, one year of experience, or be a registered nurse do not qualify as learned professionals; because the academic requirements for service coordinators may be met with an associate's degree, the position lacked the requisite knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction and thus is not exempt.

DOL Opinion Letter No. 2583. Instructors in a cosmetology school qualified for the professional exemption. DOL noted that the professional exemption includes employees employed in secondary schools, as long as they are licensed by the state or accredited. In determining that the instructors met the exemption's requirements, DOL reasoned that the cosmetology school was accredited and the instructors were licensed by the state. In addition, the instructors were said to have a primary duty of teaching cosmetology theory and practical curriculum.

Creative Professional Exemption

To qualify for the creative professional exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as discussed above);
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

This includes such fields as, for example, music, writing, acting, and the graphic arts.

Teachers

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

Practice of Law or Medicine

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

DOL Case Study

DOL Opinion Letter No. 2581. Substitute teachers qualified for the professional exemption so long as their primary duties were to "[teach] and [impart] knowledge in an educational establishment." However, DOL cautioned that those substitute teachers whose primary duties are not related to teaching do not qualify for the exemption. Further, the DOL noted that since education and certification requirements differ for teaching professionals, substitute teachers are within the professional exemption whether or not they possess such a degree or certification.

Highly Compensated Employees

Highly compensated employees performing office or nonmanual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee.

Computer-Related Occupations Exemption

To qualify for the computer exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as discussed above) or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field (performing the duties described below).
- The employee's primary duty must consist of: the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or a combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

DOL Case Study

DOL Opinion Letter No. 2006-42. Because the primary duty of the IT Support Specialist consisted of installing, configuring, testing, and troubleshooting computer applications, networks, and hardware, the employee was not exempt. The primary duty of the employee did not involve the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications or the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

Outside Sales Exemption

To qualify for the outside sales exemption, all of the following tests must be met:

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

The salary requirements of the regulation do not apply to the outside sales exemption.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Making Sales

"Sales" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

Obtaining Orders or Contracts for Services or for the Use of Facilities

Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word "services" extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

Customarily and Regularly

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Away from Employer's Place of Business

An outside sales employee makes sales at the customer's place of business, or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone, or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

Promotion Work

Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

Drivers Who Sell

Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should

be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements, and other factors set forth in the regulation.

DOL Case Studies

DOL Opinion Letter No. 2547. A multistate real estate and construction company's sales associates were exempt outside sales employees. They marketed and sold single-family housing units to the public. Based at the company's offices located within subdivisions that are in the process of being constructed and sold, or in temporary sales trailers outside the subdivisions, sometimes as far as 10 to 20 miles away, the sales associates' primary duty was making sales. Their other duties, such as inspecting model units to make sure they are ready for buyer walk-throughs and shopping the competition, were incidental to and further the associates' outside sales. They also were customarily and regularly engaged away from the employer's place of business when selling—they left the sales office with prospects, showed them the models and available lots. While the sales office is the employer's place of business, the lots are the products to be sold by the sales associates. Once a home is under contract, the sales associate must go to the home site with the buyer for many reasons (visual inspections, demonstration of design features, etc.) and during that time is engaged in selling away from the employer's place of business.

DOL Opinion Letter No. 2615. Insurance agents whose primary duty was sales would meet the requirements for the outside sales exemption where they customarily and regularly met clients face-to-face outside of their offices, and engaged in inside sales activity only in conjunction with qualifying outside sales activity.

DOL Opinion Letter No. 2574. Salespersons who sell novelty items at promotional events and other set locations for 3-6 day periods, after first retrieving the product as well as promotional brochures, receipt books, and other supplies from the employer's place of business, who then return the proceeds as well as any unsold product to the place of business each day, qualified for the outside sales exemption. Because they remained at a fixed site for only a short period of time, these locations would not be considered the employer's place of business, thus the salespersons are customarily and regularly engaged away from the employer's place of business, as the exemption requires. The retrieval and return of product and supplies, as well as attendance at motivational sales meetings and traveling to and from the assigned location, are examples of work performed incidental to and in conjunction with salespersons' sales and so are regarded as exempt work.

What Are Some Other Recent Developments In This Area Of The Law?

Wage and hour law is constantly evolving and changing. Some key recent activity at the federal and state level is discussed below.

DOL

On December 27, 2011, DOL published a notice of proposed rulemaking that would provide minimum wage and overtime protections for nearly two million workers who provide in-home care services for the elderly and infirm. The proposal would revise the companionship and live-in worker regulations under the FLSA to more clearly define the tasks that may be performed by an exempt companion, and to limit the companionship exemption to companions employed only by the family or household using the services. In addition, DOL proposes that third-party employers, such as in-home care staffing agencies, could not claim the companionship exemption or the overtime exemption for live-in domestic workers, even if the employee is jointly employed by the third party and the family or household.

DOL proposes that third-party employers, such as in-home care staffing agencies, could not claim the companionship exemption or the overtime exemption for live-in domestic workers, even if the employee is jointly employed by the third party and the family or household.

National Labor Relations Board

To avoid a wage and hour class action, some employers require employees to waive, in writing, their right to participate in a class action. Requiring individual employees as a condition of employment to sign arbitration agreements waiving their right to bring joint, class or collective actions, both in arbitration and in the courts, violates federal labor law, the National Labor Relations Board held on January 3, 2012. The National Labor Relations Act, the Board said, confers on employees the right to pursue discrimination, wage and hour, and other workplace-related claims in a joint, class or collective fashion as "protected concerted activity." In *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), the Board held that "employers may not compel employees to waive their NLRA right collectively to pursue litigation of employment claims in all forums, arbitral and judicial."

U.S. Supreme Court

In Christopher v. SmithKline Beecham Corp., the Supreme Court will decide whether pharmaceutical sales representatives are exempt under the FLSA. Several class actions filed throughout the country by sales representatives have challenged the propriety of paying representatives by salary instead of hourly wages. The circuit courts have split. A decision is expected in 2012.

Requiring individual employees as a condition of employment to sign arbitration agreements waiving their right to bring joint, class or collective actions, both in arbitration and in the courts, violates federal labor law, the National Labor Relations Board held on January 3, 2012.

California Law

Nonresidents of California who are nonexempt employees are entitled to overtime pay under California law for work performed in California, the U.S. Court of Appeals for the Ninth Circuit has ruled, following the California Supreme Court's responses to its questions on state law. Sullivan v. Oracle Corp., 2011 U.S. App. LEXIS 24625 (9th Cir. Dec. 13, 2011).

The required compensation levels for employees exempt from overtime under the California computer professional exemption will increase by 2.5 percent from the current levels beginning January 1, 2012, the California Department of Industrial Relations announced in December 2011. This means that the minimum hourly rate of pay necessary to qualify for the exemption will increase from $37.94 to $38.89; the minimum monthly salary will increase from $6,587.50 to $6,752.19; and the minimum annual salary will increase from $79,050.00 to $81,026.25. Employers are reminded that in addition to the salary requirement, California employees also must meet a stringent duties test to qualify for the exemption.

California passed a Wage Theft Prevention Act in 2011. Effective January 1, 2012, the law increases the penalties available under existing provisions of the California Labor Code, and adds a detailed notice requirement to employees. The law's notice requirement requires private California employers of nonexempt employees not subject to certain collective bargaining agreements to provide each new hire with a notice containing:

A. The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.

B. Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.

C. The regular payday designated by the employer in accordance with the requirements of this code.

D. The name of the employer, including any "doing business as" names used by the employer.

E. The physical address of the employer's main office or principal place of business, and a mailing address, if different.

F. The telephone number of the employer.

G. The name, address, and telephone number of the employer's workers' compensation insurance carrier.

H. Any other information the Labor Commissioner deems material.

Employers also must provide a notice to existing employees within seven days where there are any changes to the above information, unless the change is conveyed through a compliant wage statement.

In December 2011, the California Division of Labor Standards Enforcement released a form notice that is compliant with the new law.

New Jersey Law

The New Jersey Department of Labor and Workforce Development adopted the federal regulations regarding white-collar overtime exemptions (discussed above), repealing existing state regulations and eliminating inconsistencies between the two regulatory schemes. This will provide employers with greater certainty regarding proper worker classifications and puts New Jersey in line with the majority of states that track certain federal overtime exemption requirements. The new regulations were effective in September 2011.

New York Law

New York's Wage Theft Prevention Act requires employers to issue to all New York employees an annual notice complying with the requirements of New York Labor Law § 195 (as amended by the Act). The statute became effective in April 2011 and the first annual notice must be provided prior to February 1, 2012. Notice can be provided electronically as long as certain requirements are met. While the law does not dictate the form of notice, the New York State Department of Labor has provided sample forms. In addition to English, the NYSDOL has provided sample forms in other languages, consistent with the requirement that the notice be provided in English and in the employee's "primary language." Failure to provide the annual notice constitutes a violation the Wage Theft Act (Section 198(1-b)) and can carry a penalty of "fifty dollars for each workweek that the violations occurred or continue to occur," among other potential remedies.

Conclusion

Timely. Practical. Informative. We hope that is how you will describe this special guide. As you can see, wage and hour law is a hot topic. With constant changes in policy and regulations by federal agencies, states and courts, it is difficult to keep up all of the new rules, determine how they affect you, and stay in compliance. ADP is well versed in regulatory developments, and it stays on top of new rules that may affect your business.

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