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Exempt or Non-Exempt? FLSA and State Law Employment Classification Lawsuits on the Rise Identifying Vulnerabilities and Minimizing Liability for Misclassification

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Mark E. Tabakman, Partner, **Fox Rothschild**, Roseland, N.J.

Melvin J. Muskovitz, **Dykema**, Ann Arbor, Mich.

Douglas H. Duerr, Partner, **Elarbee Thompson Sapp & Wilson**, Atlanta

Thursday, July 23, 2009

The conference begins at:

1 pm Eastern

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By: Mark E. Tabakman, Esq.

EXEMPT OR NON-EXEMPT?

**FLSA AND STATE LAW
EMPLOYMENT CLASSIFICATION
LAWSUITS ON THE RISE:
IDENTIFYING VULNERABILITIES
AND MINIMIZING LIABILITY FOR
MISCLASSIFICATION**

Date: Thursday, July 23, 2009

Time: 1:00 PM



Fox Rothschild LLP
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THE NEW FEDERAL OVERTIME RULES

**PREPARED BY
MARK E. TABAKMAN, ESQ.
FOX ROTHSCHILD, LLP**



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BASIC PURPOSE OF THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act established a general minimum hourly wage for those employees who are within its coverage and not exempt from its requirements. It also provides for equal pay regardless of sex and the establishment of minimum wage rates lower than the general standard for certain classes of employment. Except for child labor restrictions, the FLSA does not impose any flat limitation on the number of hours that may be worked, but seeks rather to limit the hours by imposing additional pay, i.e. overtime.

The FLSA must always be considered in relation to state and local laws. These laws may provide for greater rights for employees. As a general rule, whichever law is stricter (for the employer) is the one that must be complied with.

In March 2003, the Department of Labor proposed to update and revise the FLSA regulations. These revisions became effective August 23, 2004.

The FLSA's "white collar" exemptions specify that executive, administrative, professional, outside sales, and computer employees are exempt from the Act's minimum wage and overtime pay laws. In order for employees to be considered exempt, they must satisfy a two-prong test: The first prong is related to their primary job duties, and the second is related to the minimum amount of salary they earn.

I. GENERAL EXEMPTIONS FOR OVERTIME REQUIREMENTS

A. Executive, Administrative, Professional Employees

Employees who are deemed "exempt" do not receive overtime, regardless of the number of hours worked.

Up until the advent of these changes, there had been both a long and short duties test under the FLSA for the white-collar exemptions. As employees who were paid a higher salary rate of \$250 per week were exempt if they met the 'short' test, which is less burdensome to meet than the 'long' test and since the dollar minimum to qualify for the short test mandated payment of only a \$250 salary per week, the long test had become a mere anachronism.

- (a) The new changes rectify this by increasing the requisite salary levels to \$455 per week.



B. The New Executive Exemption

In order for an employee to be exempt as a *bona fide executive*, he must meet all of the following tests:

1. Primary duty must be management of the enterprise, or of a customarily recognized department or subdivision. Under federal law, the employee *generally* cannot spend more than 49% of his time performing non-exempt work.
2. Customarily and regularly directs the work of at least two or more other employees.
3. Has the authority to hire and fire, or whose suggestions and recommendations as to the hiring, firing, advancement promotion or any other change in status of other employees are given particular weight.
4. Paid on a salary basis at the rate of at least \$455 per week.

(a) Clarifying the Status of Employees With Exempt and Nonexempt Job Duties

- (1) Under the current “old” regulations, an employee with a primary duty of ordinary production work is not exempt even if the employee also has some supervisory responsibilities. Thus, bargaining unit members do not become exempt simply because they are given some supervisory responsibilities. (For example, this would occur in a factory setting where a collective bargaining unit employee who works on a production line also has some responsibility to direct the work of other bargaining unit employees.)
- (2) The final regulations specifically state that the executive exemption does not apply to “blue collar” workers, that is, workers who perform work “involving repetitive operations with their hands, physical skill and energy.” These workers gain their skills and experience through apprenticeship programs and on-the-job training and are non-exempt, regardless of how highly paid they are.
- (3) The new executive exemption regulations do not apply to police, fire, and rescue workers, EMTs, and similar employees, regardless of rank or pay level. In short, investigative work is non-exempt work, notwithstanding



that, at the scene of a crime or an accident, one employee may direct other employees in collecting evidence or performing aspects of the investigation.

- (4) **The Concept of 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.
- (5) **The Concept of “Particular Weight”:** Factors to consider, when determining whether an employee’s suggestions are given “particular weight” include: 1) whether it is part of the employee’s job duties to make such suggestions and recommendations; 2) the frequency with which such suggestions and recommendations are made or requested; and 3) the frequency with which the employee’s suggestions or recommendations are relied upon.
- (6) **The Concept of “Concurrent Duties”:** Concurrent performance of exempt and non-exempt work does not disqualify an employee from being categorized as exempt, but these determinations are made on a case-by-case basis. For example, an Assistant Manager in a retail establishment may perform work such as serving customers, stocking shelves and cleaning the establishment, but if the employee’s primary duty is management, he/she will still be considered exempt.
- (7) However, in contrast, a working supervisor does not become exempt merely because he has some occasional responsibility for directing the work of nonexempt



employees on a production line. Similarly, an employee whose primary duty is an electrician does not become exempt because he orders parts and materials for the job, handles requests from the prime contractor or directs the work of other employees at the job site.

- (8) The Business Owner Exemption: The final changes exempt, as an executive employee, an individual who has a 20% ownership interest in a business and who is “actively engaged” in the management of the business.
- (9) Special Rule for Highly Compensated Employees: Under the final regulation, an employee is exempt if:
 - a. The employee is paid \$100,000 or more annually:
Note: The proposed regulation initially set this threshold at \$65,000 per annum.
 - b. Employee performs non-manual work;
 - c. Employee’s function is identifiable as executive, administrative, or professional as defined in the standard duties test.

Highly compensated employees fitting this definition do not have to meet all the elements of the standard duties test to qualify for the exemption as a highly compensated employee.

Example:

An employee who supervises two workers, but does not participate in any decisions regarding hiring or termination, would still be exempt because he/she has a duty or function that is identifiable as an executive function.

- d. The final rule permits counting base salary, commissions, non-discretionary bonuses, and other non-discretionary compensation (as long as the compensation is settled and paid out as due on at least a monthly basis) in determining whether an employee earns \$100,000 or more annually.



C. The New Administrative Exemption

In order for an employee to fall within the administrative exemption, he must meet all of the following tests:

1. Primary duty must be the performance of office or non-manual work relating to management policies or general business operations of the employer or the employer's customers. Under federal law, the employee cannot spend more than 49% of his time performing non-exempt work.
2. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance;
3. Paid on a salary basis at the rate of at least \$455 per week under federal law.

(a) The final regulations leave employers in the same quandary they were in prior to the proposal. The employer must still weigh and analyze whether the employee is exercising skill and experience, as opposed to discretion and independent judgment. Put differently, the "white collar production employee" dilemma is still with us and will still cause confusion for the DOL, the courts, and most especially, employers.

(b) *The Regulations Try To Give Guidance:* In an implicit manner, the final regulations seek to give examples of "positions of responsibility." By way of illustration, over the last several years there has been a torrent of litigation concerning the exempt status of positions in the financial services industry (mortgage brokers, originators, etc). Under the final regulations, employees will be deemed administrative if their duties include work such as collecting and analyzing information regarding a customer's income, assets, investments, or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of financial products; and servicing, promoting and marketing the employer's financial products. However, when the primary duty of an employee is *selling financial products* that employee does not qualify for the administrative exemption. Thus, the dilemma remains -- where is the line drawn between the exempt work described above, especially marketing and promoting the employer's financial products, and "straight" selling.

(c) *Team Leaders:* This has been another problematic classification for some time. Now, the final regulations specify that an employee



who heads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing a business, negotiating a real estate transaction or a collective bargaining agreement or designing and implementing productivity improvements) will meet the test, but what happens when the special project is completed. Does the employee "go back" to being non-exempt or is another level of analysis required relating to the "regular" position of the employee? Other than the examples given, what else qualifies as a "major project?" Again, the employer must make the initial decision and then is left to the second-guessing of the DOL and the courts.

- (d) *The Concept of "Matters of Significance"*: This term refers to the level of importance or consequence of the work performed. Factors to consider in determining whether an employee exercises discretion and independent judgment with regard to matters of significance include: 1) whether the employee has the authority to formulate, affect, interpret or implement management policies or operating practices; 2) whether the employee carries out major assignments in conducting the operations of the business; 3) whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; 4) whether the employee has the authority to commit the employer in matters that have significant financial impact; 5) whether the employee has authority to deviate from or waive established policies and procedures without prior approval; 6) whether the employee provides consultation or expert advice to management; 7) whether the employee is involved in planning long or short-term business objectives; 8) whether the employee investigates and resolves matters of significance on behalf of management; and, 9) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

- (1) 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 and does not include clerical or secretarial work, or performing mechanical, repetitive, recurrent or routine work.

- (e) *The Executive/Administrative Assistant Issue*: These terms can mean anything from a glorified clerk to a true executive assistant, with a myriad of job duties (and titles) in between. No real clarity



or guidance has been given on assessing these jobs. If the employee has been “delegated authority regarding matters of significance, he/she will be exempt.” Another analytical nightmare for the employer!

- (f) *Screeners vs. Decision Makers:* Here, the final regulations do give some guidance. Employees, such as an HR clerk, who merely screen employment applications to ensure that applicants meet the minimum requirements for a position, will not be administratively exempt, but the individual who established those standards (i.e. the HR Manager) or who performs both screening and interviewing functions, will be deemed exempt.
- (g) *Inspection and Investigation:* As a rule, employees who perform inspection or investigative work are non-exempt. These employees are not utilizing discretion and independent judgment, but are using skill and experience in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow or determining whether prescribed standards or criteria are met.

D. The New Professional Exemption

In order for an employee to fall within the professional exemption, he must meet all of the following tests:

1. The primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of study or specialized intellectual instruction; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
2. Paid on a salary basis a salary of at least \$455 per week.
3. *Clarification Given To Certain Occupations:* The regulations, although they were not revised as they should have been, to reflect the “modern workplace” do give clarification to the exempt status (or lack thereof) of a number of occupations which have been the subject of litigation across the country. For example, RNs are exempt, while LPNs and “other similar health care workers” are not. Accountants who are CPAs are exempt, while bookkeepers, accounting clerks and other workers who perform primarily routine work are not. Interestingly, paralegals are now officially classified as non-exempt, although some courts had recognized this job classification to be exempt. Here, the regulations draw



a distinction between a four-year degree and the two-year degree that most specialized paralegal programs require for certification.

4. *Trainees*: The FLSA exemption for executive, administrative, and professional employees does not extend to workers in training for those positions who do not actually meet the requirements of the exemption.

E. Possibility of New Professional Exemptions

The regulations explicitly note that the areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, new specialists will arise in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Thus, the possibility that the DOL will accept a new profession as “professional” exists, but how will such a professional exemption be recognized? Will there be an application or accreditation process through the DOL? Will it be an *ad hoc* determination by a field investigator? No guidance is given. This issue may become a flash point in certain fields, such as the computer industry.

F. The Thorny Issue of Primary Duty

1. Under the final regulations, the term “primary duty” means the principal, main, major or most important duty that the employee performs. The assessment of what a particular employee’s primary duty is made on a case-by-case basis, with the following factors to be considered: 1) the relative importance of the exempt duties as compared to other types of duties; 2) the amount of time spent performing exempt work; 3) the employee’s relative freedom from direct supervision; and, 4) the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.
2. Employees who spend more than 50% of their time performing exempt work will generally be considered exempt, but time alone is not the sole test. Employees who spend less than 50% of their time performing exempt work may nevertheless be considered exempt if the other factors support that conclusion.
3. Work that is “directly and closely related” to the exempt work is also considered exempt work. Tasks are “directly and closely related” if they contribute to or facilitate the performance of exempt work. Examples of such work include: 1) record keeping; 2) monitoring and adjusting machinery; 3) taking notes; 4) using a computer to create documents or



presentations; 5) opening mail for the purpose of reading it and making decisions; and, 6) using a photocopier or a fax machine.

Example:

A business consultant may take extensive notes recording the flow of work and materials through the office or plant of a client, then return to the office and personally use a computer to type up a report that suggests a particular organizational structure. This work, by itself, would be clerical, routine work that is non-exempt, but the work is necessary for analyzing the data and making recommendations, making it work that is directly and closely related to the exempt work.

4. A huge area of contention is the use of manuals and handbooks. The proposed regulations would have made allowance for the fact that, in the modern industrial, technological world, exempt employees (as well as non-exempt workers) must often utilize manuals and handbooks. Under the final regulations, in order to be considered exempt work, the use of manuals must relate to highly scientific, legal, financial, technical or other similarly complex matters that can be understood only by those with advanced or specialized knowledge. This represents an unwarranted narrowing of the original proposal and can only act to the detriment of employers seeking to properly classify employees.

G. Final Regulations Concerning Employee Salary/Compensation

1. Disciplinary and Family Leave Deductions:

- (a) The final regulations allow an exception to the docking rule for deductions from pay for disciplinary suspensions. Now, an employer is permitted to suspend an exempt employee, without pay, for reasons such as sexual harassment violations *for less than a full week*. Thus, exempt workers may now be held to the same standards of conduct as nonexempt workers.
- (b) *FMLA Deductions:* The final regulations harmonize with the Family Leave regulations on the issue of deductions and specify that deductions may be made from the salaries of exempt workers who are taking family leaves on an intermittent or reduced basis. For example, in the case of an exempt employee who usually works a forty-hour week and uses four hours of unpaid leave under the Family & Medical Leave, the employer may effect a 10% pro rata deduction and yet not undermine the exempt status of the employee.



2. Under the final regulations, an employer who makes improper deductions will be found to have destroyed the exemption if the evidence shows that the employer “did not intend to pay employees on a salary basis.” This will now be determined by an analysis of a number of factors: 1) the number of improper deductions; 2) the time period during which the employer made the improper deductions; 3) the number and geographic locations of the employees whose salary was improperly reduced; 4) the number and geographic location of the managers responsible for making the improper deductions; and, 5) whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

Thus, instead of a clear safe harbor provision, the employer must again weigh and balance a number of factors to determine if it has any potential liability on this issue. With that said, if the employer does publish and disseminate a clear policy prohibiting such deductions and includes a complaint mechanism and makes reimbursement to affected employees, the employer will not lose the exemption, unless the employer willfully violates the policy by continuing to make improper deductions. Therefore, as with so many personnel/employment issues, having proper and adequate documentation is the best (and sometimes only) defense.

3. *Clarification of the Additional Compensation Provision:* The final regulation confirms what a number of DOL Opinion Letters have held. Additional compensation to exempt employees, including, payment at a straight-time hourly rate or bonus or time and one-half, is permissible, provided that the employee is guaranteed the minimum salary of \$455 per week.
4. The final regulation states that an exempt employee’s earnings may be computed on an hourly, shift or daily basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis, regardless of the number of hours, days or shifts worked and a reasonable relationship exists between the guaranteed amount and the amount actually earned. Thus, an exempt employee guaranteed a salary of at least \$500 per week in any week in which he works and who normally works 4-5 shifts per week, may be paid \$150 per shift without violating the salary basis requirement.

H. The Computer Exemption: Final Regulation

1. To qualify for the computer exemption, *if the employee is paid by the hour*, then the employee must:
 - (a) Be paid an hourly rate of at least \$27.63 per hour and;



- (b) The employee's primary duty must consist of one or more of the following:
 - (1) Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - (2) 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;
 - (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or,
 - (4) A combination of these above-described duties, the performance of which requires the same level of skills.
- 3. This exemption does not include employees engaged in the manufacture or repair of computer equipment and others whose work is highly dependent upon computers, but who are not primarily engaged in the duties described above.
- 4. Employees not earning the required hourly rate may still qualify for any of the "white collar" exemptions provided they meet the requirements for those exemptions and are paid at least a salary of \$455 per week.

I. Outside Sales Exemption: Final Regulation

The DOL implemented this regulation as originally proposed. The employee falls within this exemption if the employee:

- 1. Has as his primary duty making sales within the meaning of Section 3(r) of the FLSA; and,
- 2. Is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
 - (a) There is no salary requirement applicable to the outside sales exemption.



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Mark is a labor and employment lawyer who handles both union and non-union matters for employers across the country. He counsels human resource professionals and in-house counsel in complying with the myriad federal/state employment laws to provide creative, practical and cost-effective solutions to employment issues and problems.

Mark concentrates in wage-hour law. He has extensive wage-hour experience and has represented more than 200 clients before the United States and many state Departments of Labor on misclassification (i.e. exemption), working time, child labor and other issues. He has deep experience in construction wage-hour law, where he represents construction contractors and sub-contractors in Department of Labor prevailing wage inspections, audits and debarment proceedings.

Mark publishes a wage-hour blog to provide the latest information and his observations on new developments in wage-hour law, such as class actions, exemption/misclassification and working time issues. His blog may be viewed at <http://wagehourlaw.foxrothschild.com>.

He has defended a number of individual plaintiff and class overtime actions brought under the Fair Labor Standards Act and various state laws. Some of his representative matters include:

- A case of first impression, *UTU, Local 1759 v. ONE Bus Company*, 111 F.Supp.2d 514 (D.N.J. 2000), in which he successfully relied upon a single United States Department of Labor Opinion Letter to defeat a class action in which the agreed-upon damages were \$750,000.
- In *Moeck v. Gray Supply Company*, another class action, he defeated a motion for conditional class certification and succeeded in having the action dismissed via summary judgment, an uncommon occurrence at such an early stage in a class action.
- In *Kavanaugh v. Grand Union*, 192 F.3d 269 (2d Cir. 1999), the Second Circuit agreed with his argument that travel time of four to six hours was "ordinary" home-to-work commutation and therefore non-compensable.
- Where the New Jersey Department of Labor made an preliminary overtime assessment of more than \$400,000, he was able, in a single meeting with Department officials, to secure complete rescission of the overtime assessment and settle the case for a nominal record keeping penalty.



Practice Areas

Labor and Employment

Education

J.D., Rutgers University School of Law,
1983

B.S., Cornell University, 1971

Bar Admissions

New Jersey

Court Admissions

U.S. Court of Appeals, Third Circuit

U.S. District Court, District of
New Jersey

Memberships

American Bar Association

New Jersey State Bar Association

Board of Directors

New Jersey Foundation for Aging,
Board of Trustees



Mark E. Tabakman, *Partner*

Mark has concentrated on the high profile, large-dollar exposure issue of exemption misclassification affecting the financial services and banking industries. He has presented at national conferences, addressed these issues in his wage-hour blog and has defended financial services employers in DOL audits.

Mark also has a strong background in traditional labor law. He has acted as Chief Spokesperson at numerous labor negotiations. He has arbitrated numerous cases involving both wrongful discharge and contract interpretation claims. He has defended employers in numerous NLRB proceedings, representational and unfair labor practice. He has also litigated several non-compete/restrictive covenant cases (on both the plaintiff and defendant side) as well as employment discrimination cases in federal and state courts.

Mark is a frequent guest speaker on wage-hour and employment law issues and has appeared on local and national television programs commenting on these matters. He authored a weekly column on labor and employment issues entitled "Making the Law Work."

Some of his representative appearances include:

- To present on recent wage-hour developments at the "Hot Legal Topics" seminar sponsored by the New Jersey Business & Industry Association (October 2009).
- Presentation on child labor issues to the statewide conference of the New Jersey Amusement Employers Association (Atlantic City, March 2009).
- Presentations at statewide conferences of New Jersey Payroll Association on new FLSA exemption regulations and current developments in New Jersey wage-hour law (May 2003, May 2004).
- Presentation at national conference of Mortgage Bankers Association on exemption and misclassification issues in the financial services industry (Washington, DC, June 2001).
- Presentation of Wage and Hour Seminar of the New Jersey Department of Labor & Workforce Development and the Essex County Employer Council (Roseland, NJ, May 15, 2008).



Mark E. Tabakman, *Partner*

Beyond Fox Rothschild

Mark is Vice Chair of the New Jersey Employer Council, a statewide employer organization devoted to providing information to employers and advocating for their concerns and interests throughout New Jersey. He is also on the Board of Trustees of the New Jersey Foundation for Aging, an organization dedicated to advocating for older citizens on a number of fronts.

Articles / Publications

- "The Department of Labor Takes Aim At The Banking Industry," *Banking Law Journal* (October 2001)
- Co-author, "Compensable Work Comes Home to Roost," *New Jersey Lawyer* (December 31, 2007)
- "The New Overtime Rules and the Dangers of Misclassification," *New Jersey Business Solutions* (January 2007)

Speaking Engagements / Presentations

- Speaker, "Travel Pay: Proven Strategies for Avoiding the Newest Wage-Hour Nightmare in a Tough Economy," *Business & Legal Reports*, Audio Conference (April 16, 2009)

THE NEW FEDERAL OVERTIME RULES

**PREPARED BY
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- (4) The Concept of 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.
- (5) The Concept of “Particular Weight”: Factors to consider, when determining whether an employee’s suggestions are given “particular weight” include: 1) whether it is part of the employee’s job duties to make such suggestions and recommendations; 2) the frequency with which such suggestions and recommendations are made or requested; and 3) the frequency with which the employee’s suggestions or recommendations are relied upon.
- (6) The Concept of “Concurrent Duties”: Concurrent performance of exempt and non-exempt work does not disqualify an employee from being categorized as exempt, but these determinations are made on a case-by-case basis. For example, an Assistant Manager in a retail establishment may perform work such as serving customers, stocking shelves and cleaning the establishment, but if the employee’s primary duty is management, he/she will still be considered exempt.
- (7) However, in contrast, a working supervisor does not become exempt merely because he has some occasional responsibility for directing the work of nonexempt



employees on a production line. Similarly, an employee whose primary duty is an electrician does not become exempt because he orders parts and materials for the job, handles requests from the prime contractor or directs the work of other employees at the job site.

- (8) The Business Owner Exemption: The final changes exempt, as an executive employee, an individual who has a 20% ownership interest in a business and who is “actively engaged” in the management of the business.
- (9) Special Rule for Highly Compensated Employees: Under the final regulation, an employee is exempt if:
 - a. The employee is paid \$100,000 or more annually: Note: The proposed regulation initially set this threshold at \$65,000 per annum.
 - b. Employee performs non-manual work;
 - c. Employee’s function is identifiable as executive, administrative, or professional as defined in the standard duties test.

Highly compensated employees fitting this definition do not have to meet all the elements of the standard duties test to qualify for the exemption as a highly compensated employee.

Example:

An employee who supervises two workers, but does not participate in any decisions regarding hiring or termination, would still be exempt because he/she has a duty or function that is identifiable as an executive function.

- d. The final rule permits counting base salary, commissions, non-discretionary bonuses, and other non-discretionary compensation (as long as the compensation is settled and paid out as due on at least a monthly basis) in determining whether an employee earns \$100,000 or more annually.



C. The New Administrative Exemption

In order for an employee to fall within the administrative exemption, he must meet all of the following tests:

1. Primary duty must be the performance of office or non-manual work relating to management policies or general business operations of the employer or the employer's customers. Under federal law, the employee cannot spend more than 49% of his time performing non-exempt work.
2. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance;
3. Paid on a salary basis at the rate of at least \$455 per week under federal law.
 - (a) The final regulations leave employers in the same quandary they were in prior to the proposal. The employer must still weigh and analyze whether the employee is exercising skill and experience, as opposed to discretion and independent judgment. Put differently, the "white collar production employee" dilemma is still with us and will still cause confusion for the DOL, the courts, and most especially, employers.
 - (b) *The Regulations Try To Give Guidance:* In an implicit manner, the final regulations seek to give examples of "positions of responsibility." By way of illustration, over the last several years there has been a torrent of litigation concerning the exempt status of positions in the financial services industry (mortgage brokers, originators, etc). Under the final regulations, employees will be deemed administrative if their duties include work such as collecting and analyzing information regarding a customer's income, assets, investments, or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of financial products; and servicing, promoting and marketing the employer's financial products. However, when the primary duty of an employee is *selling financial products* that employee does not qualify for the administrative exemption. Thus, the dilemma remains -- where is the line drawn between the exempt work described above, especially marketing and promoting the employer's financial products, and "straight" selling.
 - (c) *Team Leaders:* This has been another problematic classification for some time. Now, the final regulations specify that an employee



who heads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing a business, negotiating a real estate transaction or a collective bargaining agreement or designing and implementing productivity improvements) will meet the test, but what happens when the special project is completed. Does the employee “go back” to being non-exempt or is another level of analysis required relating to the “regular” position of the employee? Other than the examples given, what else qualifies as a “major project?” Again, the employer must make the initial decision and then is left to the second-guessing of the DOL and the courts.

- (d) *The Concept of “Matters of Significance”*: This term refers to the level of importance or consequence of the work performed. Factors to consider in determining whether an employee exercises discretion and independent judgment with regard to matters of significance include: 1) whether the employee has the authority to formulate, affect, interpret or implement management policies or operating practices; 2) whether the employee carries out major assignments in conducting the operations of the business; 3) whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; 4) whether the employee has the authority to commit the employer in matters that have significant financial impact; 5) whether the employee has authority to deviate from or waive established policies and procedures without prior approval; 6) whether the employee provides consultation or expert advice to management; 7) whether the employee is involved in planning long or short-term business objectives; 8) whether the employee investigates and resolves matters of significance on behalf of management; and, 9) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

- (1) 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 and does not include clerical or secretarial work, or performing mechanical, repetitive, recurrent or routine work.

- (e) *The Executive/Administrative Assistant Issue*: These terms can mean anything from a glorified clerk to a true executive assistant, with a myriad of job duties (and titles) in between. No real clarity



or guidance has been given on assessing these jobs. If the employee has been “delegated authority regarding matters of significance, he/she will be exempt.” Another analytical nightmare for the employer!

- (f) *Screeners vs. Decision Makers:* Here, the final regulations do give some guidance. Employees, such as an HR clerk, who merely screen employment applications to ensure that applicants meet the minimum requirements for a position, will not be administratively exempt, but the individual who established those standards (i.e. the HR Manager) or who performs both screening and interviewing functions, will be deemed exempt.
- (g) *Inspection and Investigation:* As a rule, employees who perform inspection or investigative work are non-exempt. These employees are not utilizing discretion and independent judgment, but are using skill and experience in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow or determining whether prescribed standards or criteria are met.

D. The New Professional Exemption

In order for an employee to fall within the professional exemption, he must meet all of the following tests:

1. The primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of study or specialized intellectual instruction; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
2. Paid on a salary basis a salary of at least \$455 per week.
3. *Clarification Given To Certain Occupations:* The regulations, although they were not revised as they should have been, to reflect the “modern workplace” do give clarification to the exempt status (or lack thereof) of a number of occupations which have been the subject of litigation across the country. For example, RNs are exempt, while LPNs and “other similar health care workers” are not. Accountants who are CPAs are exempt, while bookkeepers, accounting clerks and other workers who perform primarily routine work are not. Interestingly, paralegals are now officially classified as non-exempt, although some courts had recognized this job classification to be exempt. Here, the regulations draw



a distinction between a four-year degree and the two-year degree that most specialized paralegal programs require for certification.

4. *Trainees*: The FLSA exemption for executive, administrative, and professional employees does not extend to workers in training for those positions who do not actually meet the requirements of the exemption.

E. Possibility of New Professional Exemptions

The regulations explicitly note that the areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, new specialists will arise in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Thus, the possibility that the DOL will accept a new profession as “professional” exists, but how will such a professional exemption be recognized? Will there be an application or accreditation process through the DOL? Will it be an *ad hoc* determination by a field investigator? No guidance is given. This issue may become a flash point in certain fields, such as the computer industry.

F. The Thorny Issue of Primary Duty

1. Under the final regulations, the term “primary duty” means the principal, main, major or most important duty that the employee performs. The assessment of what a particular employee’s primary duty is made on a case-by-case basis, with the following factors to be considered: 1) the relative importance of the exempt duties as compared to other types of duties; 2) the amount of time spent performing exempt work; 3) the employee’s relative freedom from direct supervision; and, 4) the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.
2. Employees who spend more than 50% of their time performing exempt work will generally be considered exempt, but time alone is not the sole test. Employees who spend less than 50% of their time performing exempt work may nevertheless be considered exempt if the other factors support that conclusion.
3. Work that is “directly and closely related” to the exempt work is also considered exempt work. Tasks are “directly and closely related” if they contribute to or facilitate the performance of exempt work. Examples of such work include: 1) record keeping; 2) monitoring and adjusting machinery; 3) taking notes; 4) using a computer to create documents or



presentations; 5) opening mail for the purpose of reading it and making decisions; and, 6) using a photocopier or a fax machine.

Example:

A business consultant may take extensive notes recording the flow of work and materials through the office or plant of a client, then return to the office and personally use a computer to type up a report that suggests a particular organizational structure. This work, by itself, would be clerical, routine work that is non-exempt, but the work is necessary for analyzing the data and making recommendations, making it work that is directly and closely related to the exempt work.

4. A huge area of contention is the use of manuals and handbooks. The proposed regulations would have made allowance for the fact that, in the modern industrial, technological world, exempt employees (as well as non-exempt workers) must often utilize manuals and handbooks. Under the final regulations, in order to be considered exempt work, the use of manuals must relate to highly scientific, legal, financial, technical or other similarly complex matters that can be understood only by those with advanced or specialized knowledge. This represents an unwarranted narrowing of the original proposal and can only act to the detriment of employers seeking to properly classify employees.

G. Final Regulations Concerning Employee Salary/Compensation

1. Disciplinary and Family Leave Deductions:

- (a) The final regulations allow an exception to the docking rule for deductions from pay for disciplinary suspensions. Now, an employer is permitted to suspend an exempt employee, without pay, for reasons such as sexual harassment violations *for less than a full week*. Thus, exempt workers may now be held to the same standards of conduct as nonexempt workers.
- (b) *FMLA Deductions:* The final regulations harmonize with the Family Leave regulations on the issue of deductions and specify that deductions may be made from the salaries of exempt workers who are taking family leaves on an intermittent or reduced basis. For example, in the case of an exempt employee who usually works a forty-hour week and uses four hours of unpaid leave under the Family & Medical Leave, the employer may effect a 10% pro rata deduction and yet not undermine the exempt status of the employee.



2. Under the final regulations, an employer who makes improper deductions will be found to have destroyed the exemption if the evidence shows that the employer “did not intend to pay employees on a salary basis.” This will now be determined by an analysis of a number of factors: 1) the number of improper deductions; 2) the time period during which the employer made the improper deductions; 3) the number and geographic locations of the employees whose salary was improperly reduced; 4) the number and geographic location of the managers responsible for making the improper deductions; and, 5) whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

Thus, instead of a clear safe harbor provision, the employer must again weigh and balance a number of factors to determine if it has any potential liability on this issue. With that said, if the employer does publish and disseminate a clear policy prohibiting such deductions and includes a complaint mechanism and makes reimbursement to affected employees, the employer will not lose the exemption, unless the employer willfully violates the policy by continuing to make improper deductions. Therefore, as with so many personnel/employment issues, having proper and adequate documentation is the best (and sometimes only) defense.

3. *Clarification of the Additional Compensation Provision:* The final regulation confirms what a number of DOL Opinion Letters have held. Additional compensation to exempt employees, including, payment at a straight-time hourly rate or bonus or time and one-half, is permissible, provided that the employee is guaranteed the minimum salary of \$455 per week.
4. The final regulation states that an exempt employee’s earnings may be computed on an hourly, shift or daily basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis, regardless of the number of hours, days or shifts worked and a reasonable relationship exists between the guaranteed amount and the amount actually earned. Thus, an exempt employee guaranteed a salary of at least \$500 per week in any week in which he works and who normally works 4-5 shifts per week, may be paid \$150 per shift without violating the salary basis requirement.

H. The Computer Exemption: Final Regulation

1. To qualify for the computer exemption, *if the employee is paid by the hour*, then the employee must:
 - (a) Be paid an hourly rate of at least \$27.63 per hour and;



- (b) The employee's primary duty must consist of one or more of the following:
 - (1) Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - (2) 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;
 - (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or,
 - (4) A combination of these above-described duties, the performance of which requires the same level of skills.
- 3. This exemption does not include employees engaged in the manufacture or repair of computer equipment and others whose work is highly dependent upon computers, but who are not primarily engaged in the duties described above.
- 4. Employees not earning the required hourly rate may still qualify for any of the "white collar" exemptions provided they meet the requirements for those exemptions and are paid at least a salary of \$455 per week.

I. Outside Sales Exemption: Final Regulation

The DOL implemented this regulation as originally proposed. The employee falls within this exemption if the employee:

- 1. Has as his primary duty making sales within the meaning of Section 3(r) of the FLSA; and,
- 2. Is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
 - (a) There is no salary requirement applicable to the outside sales exemption.



**Exempt or Non-Exempt? FLSA and State Law Employment
Classification Lawsuits on the Rise**
Identifying Vulnerabilities and Minimizing Liability for Misclassification

Thursday, July 23, 2009



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Mel's practice includes defending employers in discrimination, wrongful termination, wage and hour, and other employment-related disputes in state and federal courts and before administrative agencies, negotiating union contracts, preparing employment and non-compete agreements, and employer policies, and advising employers on all facets of employer/employee relations and employment law compliance. Mel has been named in the *Best Lawyers in America 2009* in the practice area of Labor and Employment Law.

FLSA Self-Audit Strategies

- ❖ Why conduct an Audit?
- ❖ Who should conduct an Audit?
- ❖ Audit Steps
- ❖ Issues to Audit

Why Conduct an Audit?

- ❖ Significant Exposure
 - 3 year back rule
 - Liquidated damages
 - Attorneys' fees
- ❖ Class actions on the rise
- ❖ Preserve the good faith belief defense

Who Should Conduct the Audit?

Answer depends on a number of considerations

- ❖ Size of employer
- ❖ Single or multi-state employer
- ❖ Qualified in-house personnel available
- ❖ Whether audit is pro-active or in response to actual claims
- ❖ Complexity of issues

Audit Steps

Review Documents

- ❖ Job descriptions
- ❖ Company-wide policies/rules
- ❖ Department specific policies/rules
- ❖ Internal memoranda re FLSA issues
- ❖ Relevant training materials
- ❖ Posters

Audit Steps (cont'd)

Review Documents

- ❖ Timekeeping and reporting forms
- ❖ Payroll procedures
- ❖ Employee complaints
- ❖ Lawsuits
- ❖ DOL investigation

Audit Steps (cont'd)

Questionnaires

- ❖ Supervisors
- ❖ Employees

Interview

- ❖ Payroll Department employees
- ❖ Supervisors
- ❖ Employees

Sample Overtime Calculations

Report of Findings and Recommendations

Implement Necessary Changes

Issues to Audit

Non-Exempt Employees

- ❖ Minimum wage compliance
- ❖ Overtime pay compliance

Exempt Employees

- ❖ Salary Test
- ❖ Duties Test

Other Wage Related Issues

- ❖ State Law Issues
- ❖ Independent Contractor/Employee
- ❖ Fair Pay Act Claims

Non-Exempt Employees

Minimum Wage Compliance

- ❖ Deductions from pay
- ❖ Working off the clock

Non-Exempt Employees

Overtime pay compliance

❖ Hours worked

- Pre-Post shift activities
- Working off the clock
- Travel time
- Unauthorized overtime
- On-Call/standby

Non-Exempt Employees (cont'd)

Overtime pay compliance

- ❖ Regular rate
 - Shift differential
 - Longevity pay
 - Bonuses
- ❖ Retroactive increases
- ❖ Two Jobs
- ❖ Comp time/Time-off plans
- ❖ State Laws

Exempt Employees

Salary Test

- ❖ Minimum salary test
- ❖ Deductions from pay
 - Absence
 - Discipline
 - Lack of Work
- ❖ Complaint procedure

Duties Test

- ❖ 2004 Changes
- ❖ Focus on key issues/get examples
- ❖ Review DOL opinion letter and cases
- ❖ Job description
 - Not determinative
 - Actual duties control
 - Current?
 - Complete?
 - Accurate?
 - Revise as necessary

Other Wage Related Issues

State Wage & Hour Laws

Independent Contractor

- ❖ Review documents
- ❖ IRS test
 - Behavior control
 - Financial control

Lilly Ledbetter Fair Pay Act

- ❖ Discriminatory pay practices
- ❖ Impact of statute

Questions?

Thank you.

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Mr. Muskovitz' practice includes defending employers in discrimination, wrongful termination, wage and hour, and other employment-related disputes in state and federal courts and before administrative agencies, negotiating union contracts, preparing employment and non-compete agreements, and employer policies, and advising employers on all facets of employer/employee relations and employment law compliance. Mr. Muskovitz has been named in the *Best Lawyers in America 2009* in the practice area of Labor and Employment Law.

mmuskovitz@dykema.com **Experience**

Ann Arbor, Michigan

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- Staff Attorney - National Labor Relations Board (9/71-6/73)
- Assistant City Attorney - Ann Arbor City Attorney's Office (7/73-2/78)

Education

University of Michigan, B.A.

University of Michigan, J.D.

Seminars and Client Training

Mr. Muskovitz has presented seminars on or provided client training with respect to the following topics:

Admitted to Practice

Michigan 1971

U.S. District Court, Eastern

District of Michigan 1971

U.S. District Court,

Western District of

Michigan 1994

- *Termination of Employment: Best Practices*
- *Attracting and Hiring New Employees: Legal Issues and Practical Approaches for Employers*
- *The Top Five Errors Employers Make in Complying With the Fair Labor Standards Act*
- *Navigating the Family Medical Leave Act/Americans With Disabilities Act/Workers' Compensation maze*
- *Whistleblower and Retaliation Claims*
- *Military Leave Issues*
- *Avoiding the perils of conducting workforce reductions and lay-offs*
- *Identifying and Preventing Harassment and Discrimination in the Workplace*
- *Do the EEOC's new "Caregiver Guidelines" create a new protected class of employees under anti-discrimination laws?*
- *Minimizing Unemployment Compensation Costs*
- *Employee/independent contractor issues*
- *Privacy in the Workplace*

- *National Labor Relations Act and Non-Union Employers*
- *Due Process Rights of Public Sector Employees*
- *Effectuating Changes in a Union Environment During Tough Financial Times*
- *Managing Employee Health and Health Costs*
- *Workplace Safety - An Employer's Game Plan*
- *Americans with Disabilities Act and Employee Policies*
- *How is your organization affected by the recent expansion of the FMLA to cover the families of military service members and other proposed changes?*

Articles

Mr. Muskovitz has written numerous employment law articles that can be accessed via the Internet at www.dykema.com.

Professional Associations

- State Bar of Michigan; Member, Employment Law Section
- State Bar of Michigan; Member, Public Corporation Law Section
- Washtenaw County Bar Association, 1974-Present; Member
- American Bar Association, Member, Section Memberships: Labor and Employment Law, 1996-Present

Community Service

- Ann Arbor United Jewish Appeal, 1976-1986; Board Member, Administrative Chair, Fund Raising Chair
- Jewish Community Center of Washtenaw County, 1984-1992; Founding Board Member, Vice President of Finance
- Ann Arbor Chamber Orchestra, 1981-1984; Board Member
- Ann Arbor Symphony Orchestra, 1987-2008; Board Member, Vice President

Awards

- Named in *The Best Lawyers in America 2009* (Labor and Employment Law)
- Founding Member Award, Jewish Community Center of Washtenaw County
- Leadership Award, Ann Arbor United Jewish Appeal
- President's Award, Ann Arbor Symphony Orchestra



FLSA: *Correcting Errors Limiting Liability Exposure*

July 23 2009

Presented by:

Douglas H. Duerr



Douglas H. Duerr

Partner

*Elarbee, Thompson, Sapp & Wilson, LLP
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Douglas focuses on preventive advice and counseling on a wide range of employment and labor issues, while providing experienced counsel to employers in litigation and administrative proceedings. He has been practicing labor and employment law with Elarbee Thompson since 1990. Based in Atlanta, Georgia, Douglas represents and advises clients throughout the United States.



INTRODUCTION

This seminar discussion is not intended to be, and should not be construed as, the giving of legal advice or an invitation and/or agreement to enter into an attorney-client relationship. While some of the discussions may relate to actual situations and individuals, the discussion is intended to be only a general discussion of the legal principles that might apply. Before relying upon any aspect of the discussion, you should consult with an attorney. Furthermore, please be advised that no attorney-client communication privilege will apply to the discussion and that you should, therefore, not disclose any confidences. Instead, you should endeavor to ask questions regarding hypothetical situations or regarding general legal principles.

Topic Overview

- Compliance programs
- Reclassification of employees
- Payment of back wages
- Consulting with the Dept. of Labor
- Preparation for investigations

Compliance Programs

- Why have a compliance program?
 - Prevents violations
 - Detects violations
 - Opportunity to correct problems
 - Evidences good faith efforts to comply

Compliance Programs

- What are the elements of a good compliance program?
 - Should be in writing
 - Communicated to managers and employees
 - Assigns responsibility
 - Complaint mechanism with prohibition of retaliation
 - Requires payment of back pay
 - Ex. FairPay Safe Harbor Policy (29 CFR § 541.603(d))

Compliance Programs

- Should be in writing
 - Formal policy statement setting forth rights and requirements, procedures, etc.
 - Prohibit deductions that result in loss of exemptions
 - Prohibit overtime work without permission
 - Prohibit falsification of time records
 - Prohibit unpaid work (no volunteering; no comp time)
 - Language should be understandable by the average employee

Compliance Programs

- Should be communicated
 - New-hire handout
 - Employee handbook
 - Bulletin boards (physical and/or electronic)
 - Training sessions

Compliance Programs

- Assign responsibility
 - Should have training and authority
- Complaint mechanism
 - Specify person\title to receive complaints
 - Provide contact information
 - Provide a bypass or alternative
 - Investigator should have authority to collect information
 - Prohibit retaliation against complainant and witnesses

Compliance Programs

- Specify that corrections be made
 - Improper deductions, unpaid time, overtime compensation
 - Steps to prevent future violations\mistakes
- Model Salary-Basis Policy:
http://www.dol.gov/esa/whd/regs/compliance/fairpay/modelPolicy_PF.htm

What if a problem is found?

- Reclassification of employees
 - Stops accrual of liability
 - When should you do it?
 - Change duties?
 - Communications strategy
 - Pay backwages?
 - At what rate?

What if a problem is found?

- Notification of DOL?
 - Why?
 - What are the risks? Upsides?
 - How?

Preparation For Government Audit

- Do a self audit
 - What percentage of jobs classified as exempt?
 - Review pay records
 - Posters?
 - Response strategy

Questions?





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The DOL May Be Showing Up on Your Doorstep

On March 25, 2009, the Government Accountability Office (“GAO”) released a report which found that the Wage and Hour Department of the U.S. Department of Labor (“WHD”) consistently falls short in properly investigating claims of wage and hour violations under the Fair Labor Standards Act (“FLSA”). The GAO found that the WHD has an ineffective system regarding complaint intake, conciliation, and investigation. In response to the newly released report, the Labor Secretary issued a statement committing the WHD to ensuring compliance with federal labor laws and announcing that the WHD has begun the process of hiring 250 additional field investigators to carry out its enforcement responsibilities.

The two most common violations committed by employers are the failure to pay overtime to employees who the employer incorrectly designated as exempt, and the failure to pay non-exempt employees the proper amount of overtime.

To qualify as **exempt**, an employee must meet the “duties” test for the particular exempt classification and, with the exception of outside sales personnel and certain computer related positions (analyst, programmer, etc.), be paid at least \$455 per week on a salary basis. Subject to limited exceptions, exempt employees must receive their full salary for any workweek in which they perform any work, without regard to the number of days or hours worked, as long as they are available and ready to work.

The two most common exempt classifications are administrative and executive. To qualify for the **administrative exemption**, the employee’s primary duty must (1) be the performance of office or non-menial work directly related to the management or general business operations of the employer or the employer’s customers, and (2) include the exercise of discretion and independent judgment with respect to matters of significance. The FLSA regulations provide a non-exclusive list of functional areas that are generally held to be related to management or general business operations. These include finance and accounting, purchasing, marketing, health and safety, personnel management, employee benefits, computer network and database administration, and regulatory compliance. Factors to consider when determining discretion and independent judgment with respect to matters of significance include, but are not limited to, the authority to formulate or implement management policies or operating practices, the performance of work that affects business operations to a substantial degree, the authority to commit the employer in matters that have a significant financial impact, the investigation and resolution of matters of significance, and the involvement in planning business objectives.

To qualify for the **executive exemption**, the employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise, and the employee must (1) customarily and regularly direct the work of at least two or more full-time employees or their equivalent, and (2) have the authority to hire or fire employees, or the employee’s suggestions and recommendations as to the hiring and firing must be given particular weight.

Given the fact-specific nature of these determinations and the potential exposure for misclassification, an employer should review the job duties of employees that have been classified as exempt to confirm that the individuals meet the duties tests. As part of this analysis, a review, and where necessary, an update, of job descriptions should be undertaken.

With respect to **non-exempt** employees, the greatest exposure is in the failure to pay, or the underpayment of, overtime. An employer can violate the overtime payment requirement by either not paying the employee at the correct hourly rate, or by not paying the employee for all hours worked.

With respect to the first issue, an employee's hourly rate must be adjusted, and overtime recalculated, for those weeks in which an employee received additional compensation, including attendance or performance bonuses or lump sum longevity payments. With respect to the second issue, hours worked by employees who come in early or who stay late on their own initiative, and hours spent by employees working during an unpaid lunch, or off-site, must be counted if the employer is aware of and allows the practice to take place. Under certain circumstances, time spent in training or traveling for the company also needs to be counted.

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met: (a) attendance is outside of the employee's regular working hours; (b) attendance is voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance.

In regards to travel time, generally home-to-work and work-to-home travel is not counted as hours worked. This is true whether the employee works at a fixed location or at different job sites. However, time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Further, time spent by an employee driving for the benefit of the employer (such as driving several employees to an off-site training location outside of the regular workday), is counted as hours worked. The time spent riding by the passengers is not counted as hours worked if the time is outside of the regular workday and the passengers are not performing any work during the travel time.

To ensure that employees are paid for all hours they work and to prevent employees from deciding when to work additional hours, the employer should require that all employees comply with the company's record keeping policy, or implement such a policy if one does not exist. To the extent it does not have one, the employer should also implement a policy which prohibits employees from working outside their normal hours or during an unpaid lunch break without their supervisor's advance approval.

Given the rise in civil litigation and DOL enforcement actions, and the significant potential exposure in such cases, all employers should closely review their pay practices to ensure they comply with the FLSA.

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Independent Contractor or Employee?

New reasons to take a closer look

The issue of misclassification of workers is becoming much more prominent on the radar screens of federal and state government agencies and plaintiffs' attorneys. The former because of the belief that misclassification is widespread and the latter because of the significant damages that can be obtained in individual and especially in class action lawsuits. The issue can arise in a number of ways, including by an individual filing a workers' disability compensation claim, filing for unemployment compensation benefits, or filing a claim with the U.S. or Michigan Department of Labor seeking overtime compensation.

Michigan's Focus on Misclassification

For employers in Michigan, the warning call has sounded. Governor Granholm's first executive order of 2008 established an "Interagency Taskforce on Employee Misclassification" aimed at discovering classification violations by working cooperatively with local, state, and federal law enforcement agencies, including sharing information with the Internal Revenue Service.

Risks Associated with Employee Misclassification

There are a number of benefits to utilizing the services of an independent contractor to perform functions for your business. At the same time, there are considerable risks in incorrectly designating a person as an independent contractor when he or she is really an employee. Among those risks are:

Wages – A misclassified employee may be entitled to back pay for overtime.

Taxes – A misclassified employee may be entitled to back payroll tax contributions. Governments (local, state and federal) may be entitled to back income taxes.

Benefits – A misclassified employee may be entitled to workers' disability compensation and unemployment benefits. Depending on the circumstances, a misclassified employee may be entitled, retroactively, to a number of other employment benefits, including for example, reimbursement of medical expenses that would have been covered by the employer's medical insurance plan and payment for holidays and unpaid leave days.

Penalties - In addition to back pay, taxes, and benefits, an employer may be subject to significant penalties for misclassifying an employee.

Employers found by the IRS to have misclassified employees as independent contractors are subject not only to large government fines, but also to payment of employment taxes (including 100% of the employer's Social Security contributions), federal income tax not withheld, and unemployment insurance. The employer is not entitled to collect these amounts from the individual worker.

Independent Contractor Benchmarks – New IRS Test

The existence of an employer-employee relationship versus an independent contractor relationship depends, to a large extent, on the amount of control the company exerts over the worker. In determining whether a worker is an independent contractor or employee, the IRS considers all information that provides evidence of the degree of control over, and the degree of independence of, the worker. According to the IRS, facts that provide evidence of the degree of control and independence fall into three categories: (1) behavioral control; (2) financial control; and (3) the type of relationship of the parties.

Behavioral Control – Key factors in evaluating behavioral control include:

- Whether or not the employer has control over when and where the work will be done (the more control, the more likely an employee).
- Whether or not the employer provides instruction on how the work will be done (independent contractors are generally not subject to detailed instructions).
- Whether the worker uses the employer's or his/her own tools and equipment (independent contractors generally use their own tools and equipment).
- Whether or not the employer provides training to the worker (independent contractors generally do not receive training from the employer).

Financial Control – This includes various factors that show whether an employer has a right to control the business aspects of the worker's job, including:

- Extent of unreimbursed business expenses (independent contractors are more likely to have unreimbursed expenses than are employees).
- Extent of the worker's investment in equipment and facilities (independent contractors generally have a significant investment in their own equipment and/or facilities).
- Extent to which the worker's services are made available to the relevant market (independent contractors generally are available to provide their services to other businesses in the marketplace).

- Extent to which the worker can realize a profit or loss (independent contractors can make a profit or loss).
- How the worker is paid (a flat fee generally means the worker is an independent contractor; a guaranteed wage for an hourly, weekly or other period of time generally means the worker is an employee).

Type of Relationship – Do the parties relate as though the worker is an employee?
Factors that show the type of relationship include:

- Written contracts describing the relationship the parties intended to create. Although a contract may state that the worker is an employee or an independent contractor, that is not sufficient to determine the worker's status. The IRS is not required to follow a contract stating that the worker is an independent contractor, responsible for paying his or her own self employment tax. How the parties work together determines whether the worker is an employee or an independent contractor.
- Whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
- Whether or not the worker is provided a copy of the employee handbook.
- Whether or not the worker is engaged with the expectation that the relationship will continue indefinitely (independent contractors are generally engaged for a specific project or period).
- The extent to which the services performed by the worker are a key aspect of the regular business of the company (a worker who provides services that are a key aspect to the regular business activity is more likely to be under the direction and control of the employer).

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The Lilly Ledbetter Fair Pay Act - Are Employers Ready?

On January 29, 2009, President Barack Obama signed into law his first piece of legislation - the Lilly Ledbetter Fair Pay Act of 2009. In addition to the many burdens currently facing employers, this law will greatly expand their potential exposure to damages arising from pay discrimination claims. Under the Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory decision or practice; or (3) an individual is affected by the application of the discriminatory decision or practice, including each time discriminatory compensation is paid. The Act does not change any of the current prohibitions designed to keep employers from discriminating or retaliating against employees based upon race, color, religion, sex, national origin, age, or disability. Rather, it expands the time frame in which an employee may file suit and recover back pay for wage discrimination. Given the publicity surrounding this new legislation, it is anticipated that pay discrimination litigation will increase.

The Lilly Ledbetter Fair Pay Act of 2009 is explicitly intended to reverse a U.S. Supreme Court decision enforcing the 180 day deadline for filing a wage discrimination charge as set forth at Title VII of the Civil Rights Act of 1964. Under the Act at that time, the timing for the deadline began at the point of the initial act of alleged discrimination, which the Supreme Court determined to be the employer's initial pay-setting decision, even if the violation continued to affect the employee's compensation long after the 180 day period expired. Accordingly, the Court disregarded the plaintiff's claims based upon wage determinations that were made more than 180 days before she filed her discrimination charge with the EEOC.

In contrast, under the Ledbetter Fair Pay Act, each and every paycheck constitutes a new and separate act of discrimination - not just the initial decision-setting pay.

Thus, the Ledbetter Fair Pay Act allows an employee to file a wage claim at any time within 180 days of receiving a paycheck and, possibly, even a pension check. This significant expansion of discriminatory acts that restart the statute of limitations also is applicable to compensation claims raised under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Age Discrimination in Employment Act (ADEA). However, the Ledbetter Act does not require employers to repay employees for decades of discriminatory pay. In the event a violation is found under any of these Acts, the employee may collect back pay for up to two years prior to the filing of the charge.

Effectively, the Ledbetter Fair Pay Act opens the floodgates for potential litigation and places the employer in the difficult position of having to defend against "discriminatory pay" based on a pay decision possibly made many years earlier. In some cases, employers may have to defend not just their pay rates, but all other conditions of employment which are impacted by pay scales, e.g. pensions, bonuses, and severance pay. Employers may struggle to determine the reasons for such decisions. For example, key supervisors or other management employees who were

involved in pay decisions may in fact no longer work for the employer. Adding further cause for concern to employers, the Ledbetter Fair Pay Act is retroactively effective and breathes new life into pay discrimination claims filed on or after May 28, 2007.

Employers should proactively prepare for the significant repercussions that will flow from this new Act and other anticipated acts of Congress, such as the Paycheck Fairness Act, which provides for enhanced enforcement of equal pay requirements on the basis of gender. In its present form, the Paycheck Fairness Act would amend the Equal Pay Act of 1963 (EPA) by imposing harsher penalties for violations. The EPA requires employers to provide equal pay to female and male employees who perform equal work on jobs that require equal skill, effort and responsibility, and that are performed under similar working conditions. The EPA currently provides for back pay, liquidated damages, and attorney fees. Under the Paycheck Fairness Act, employers violating the EPA could be subject to compensatory and punitive damages as well. In addition to harsher penalties, the Paycheck Fairness Act would make it more difficult for the employer to defend disparate wages for female and male employees. Under current law, an employer can defend a disparate pay claim by showing that the difference in pay is “based on a factor other than sex.” The proposed legislation limits such factors to bona fide factors, such as education, training, or experience and states that the bona fide factor defense shall apply only if the employer demonstrates that such factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. Such defense would not apply where the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential; and (2) the employer has refused to adopt such alternative practice.

Steps an employer should take to minimize the risks and costs of noncompliance with the Lilly Ledbetter Fair Pay Act and other pay equity laws include the following:

- Review any current pay discrepancies to determine whether there are legitimate, non-discriminatory explanations, or whether corrections are in order.
- Update or establish compensation policies and practices to ensure that future compensation decisions are based on legitimate, non-discriminatory factors.
- Emphasize to employees the availability of an internal complaint mechanism to address inequities in pay during antidiscrimination training.
- Update or establish record-retention policies and practices to ensure that appropriate documentation supporting compensation decisions is maintained so that in the event that a pay discrimination claim is filed, the information to defend the claim is preserved.
- Train those who set starting pay for new employees and those who determine pay increases for current employees, to ensure compliance with your compensation policies and practices.

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Major Challenges Await Employers in 2009

Along with the challenging economic outlook for 2009, employers will also have to adapt to changes in both the FMLA and ADA and be ready for the possibility of several new employment laws. As employers attempt to reduce labor costs, they must also be vigilant of potential claims associated with the classification of employees and measures to avoid overtime, as well as potential wrongful discharge claims.

Amended Federal Laws

Americans with Disabilities Act Amendments Act (“ADAAA”)

The ADAAA, effective January 1, 2009, expands the scope of the Americans with Disabilities Act (“ADA”) by lowering the standards necessary for employees to be considered "disabled."

First, the ADAAA expands the EEOC’s current list of “major life activities,” for example by adding activities such as standing, lifting, and bending, reading, concentrating, thinking, and communicating, and by including certain major bodily functions such as immune system, digestive, brain, respiratory and circulatory functions.

Second, the ADAAA provides that health conditions that are episodic or in remission can be a disability if they are substantially limiting when active. The ADAAA also overturns established precedent by declaring that the determination whether an impairment substantially limits a major life activity shall be made without considering mitigating measures, such as medication or prosthetic devices.

Further, the ADAAA expands the right of employees to bring ADA claims based on impairments the employer “regarded” them as having, even if the impairments did not constitute, or the employer did not believe them to constitute, actual disabilities under the law.

Family Medical Leave Act (“FMLA”)

The FMLA was amended to include military family leave. The amendments allow an eligible employee to take (1) up to 26 weeks of leave in a one-time 12-month period to care for certain family members for recuperation from serious injury or illness incurred during active duty (“caregiver leave”); and (2) up to 12 weeks of leave in any 12-month period for a "qualifying exigency" related to the fact that the employee has a spouse, child, or parent who serves in the reserves and is on or called to active duty (“active duty leave”).

“Qualifying exigency” includes: short-notice deployment, military events, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

The caregiver leave amendment went into effect in January 2008. The active duty amendment goes into effect on January 16, 2009.

Also taking effect on January 16th are revised DOL regulations governing “regular” FMLA leave. The new regulations address numerous issues, including the definition of “serious health condition,” the scheduling of intermittent leave, new employer notice requirements and an employer’s rights in contacting an employee’s health care provider.

2009 Prospective Legislation

The election of Barack Obama and a Democrat-controlled Congress will likely lead to the introduction of labor-friendly legislation in the 111th Congress. Here are a few examples:

Employee Free Choice Act (“EFCA”)

The EFCA would require the National Labor Relations Board (“NLRB”) to certify a labor union as the exclusive bargaining representative through authorization cards signed by employees, without the benefit of a government-supervised, secret-ballot election. The EFCA requires binding arbitration if an employer and a newly certified union are unable to reach a first contract within 120 days.

The Arbitration Fairness Act

Under this proposed law, no pre-dispute arbitration will be valid or enforceable if it purports to require arbitration of, among others, employment disputes or disputes arising under any statute intended to protect civil rights.

FOREWARN Act

This act would amend the Worker Adjustment and Retraining Notification (“WARN”) Act, redefining “employer,” “plant closing,” and “mass layoff.” The definition of “employer” would expand to cover firms with 50 or more employees (down from 100) and increase the notice period for plant closings and mass layoffs from 60 to 90 days. The number of employees in a “mass layoff” would decrease from 50 to 25.

Potential Risks for Employers

In addition to the above-mentioned changes, employers need to be aware that their business decisions will come under closer scrutiny.

Independent Contractor Status

The issue of misclassification of workers as independent contractors is becoming much more prominent on the radar screens of federal and state government agencies and plaintiffs’ attorneys.

The former because of the belief that misclassification is widespread, and the latter because of the significant damages that can be obtained in class action lawsuits.

The penalty for misclassifying an employee as an independent contractor can be harsh. In addition to back pay, taxes, and benefits, an employer may be subject to significant penalties for misclassifying an employee.

Wage and Hour Claims

In tough economic times, employers may seek to avoid overtime by too liberally classifying employees as exempt from the overtime provisions of the Fair Labor Standards Act (“FLSA”). A non-exempt employee who is treated as exempt may be entitled to any unpaid overtime. Other potential wage and hour claims include those for failure to pay for all hours worked (e.g. meal and rest breaks, off-the-clock work, and travel time).

Wrongful Discharge

In a deepening recession, reductions in force will continue, and discharged or laid off employees will find it harder to find new employment. Potential claims may arise when an employee believes that the termination decision was based in part on the employee’s protected classification (age, gender, race, national origin, religion, etc.) or because the employee had exercised a statutory right (e.g., taken an FMLA leave, requested an accommodation or filed a claim for workers’ disability compensation).

In light of these actual and potential changes in the law, employers need to update their ADA and FMLA policies and procedures, train relevant personnel with respect to the new statutory requirements, and monitor the passing of new legislation. Additionally, employers should consider legal review with respect to their independent contractor/employee determinations, FLSA classifications, discharges and reductions in force.

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