Exempt or Non-Exempt? Overcoming Latest Employee Misclassification Challenges

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

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EXEMPT OR NON-EXEMPT? EMPLOYEE MISCLASSIFICATION CHALLENGES

Positions Most Vulnerable to FLSA Claims

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April 16, 2014
FLSA EXEMPTIONS: EMERGING CLASS ACTION THREAT

AT-RISK POSITIONS

- Financial Services Industry
- I.T. Workers/Computer Programmers
- Sales Staff
- Clerical/Administrative/Executive Secretaries
FLSA SECTION 13(a)(1), GENERALLY

• Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for individuals employed as bona fide executive, administrative, professional, and outside sales employees. Sections 13(a)(1) and 13(a)(17) also exempt certain computer employees.
  – To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week.
  – Job titles do not determine exempt status.
  – In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the DOL’s regulations.
FINANCIAL SERVICES

• 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, loan originators, etc.).
FINANCIAL SERVICES

• “DC Circuit Won’t Give En Banc Hearing to Loan Officers Decision,” Oct. 11, 2013 at: http://wagehourlaw.foxrothschild.com
  – The US Department of Labor’s “white paper” on the status of mortgage loan officers as non-exempt employees was voided by the DC Circuit Court of Appeals.
  – This decision upheld a 2010 DOL Administrative interpretation which held that the majority of loan officers were not included within the administrative exemption of the Fair Labor Standards Act.
FINANCIAL SERVICES

• Prior to the DOL’s issuance of its 2010 White Paper (guidance statement) on the matter, employees were deemed exempt as administrative if their duties included 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.
FINANCIAL SERVICES

- Per the DOL’s 2010 White Paper, except in certain circumstances, mortgage loan officers will not qualify for the administrative exemption under the Fair Labor Standards Act.
- If mortgage loan officers perform supervisory duties, they may still fall under the executive exemption, but the most commonly urged exemption for them, i.e. administrative, is now foreclosed.
- The DOL concluded that “mortgage loan officers typically have the primary duty of making sales on behalf of their employer; as such, their primary duty is not directly related to the management or general business operations of their employer or their employer’s customers.”
  - Mortgage loan officers will not qualify for the administrative exemption because their primary duty is production work, i.e. sales.
FINANCIAL SERVICES

- **Casas v. Conseco Financial Credit Corp.** (D.Mn. 2002) 146 LC ¶ 34,502
  - Loan originators who were responsible for soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer’s financial needs were production rather than administrative employees; these duties established that they were primarily involved with “the day-to-day carrying out of the business” rather than “the running of [the] business [itself]” or determining its overall course or policies.
I.T. WORKERS/COMPUTER PROGRAMMERS

• Computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field who meet certain tests regarding their job duties may be exempt from minimum wage and overtime requirements of the FLSA.

  – To be exempt, these employees must be paid at least $455 per week on a salary basis or paid on an hourly basis, at a rate not less than $27.63 per hour.
I.T. WORKERS/COMPUTER PROGRAMMERS

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

- Employee must be paid at least $455 per week on a salary basis or paid on an hourly basis, at a rate not less than $27.63 per hour;
- 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;
  - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, or of programs related to user or system design specifications; or
  - The design, documentation, testing, creation or modification of computer programs related to machine operating systems.
  - A combination of the aforementioned duties, the performance of which requires the same level of skills.
I.T. WORKERS/COMPUTER PROGRAMMERS

• The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

• Exemption also does not apply to employees whose work is highly dependent upon computers, but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations.
I.T. WORKERS/COMPUTER PROGRAMMERS

• **Young v. Cerner Corp.** (W.D. Mo. 2007) 155 LC ¶ 35,350
  - A Level 6 software engineer who performed defect resolution and transformed data using Informatica was an exempt computer professional: her assertion that she never created or modified “source code” was immaterial to the application of the computer exemption because the regulations do not use the term “code” and her duties still consisted of using systems analysis techniques, design, testing, and modifying of programs.

• **Clarke v. JP Morgan Chase Bank NA,** (S.D.N.Y. 2010) 159 LC ¶ 35,732
  - A highly certified IT “guru” who consulted with various users to determine hardware, software, or system functional specifications, handled remediation issues, tested software in live environments to provide feedback to the engineering department, spent ten percent of his time on such special projects as server upgrades or back up migration projects, drafted a troubleshooting guide for the desktop support team, and was the final authority for escalated computer problems was an exempt computer professional.

• **Hunter v. Spring Corp.** (D.D.C. 2006) 153 LC ¶ 35,209
  - An employer failed to established that a Managed Network Operation Engineer II was an exempt computer professional: the exemption applies to jobs with a substantially higher technically proficient help-desk employee whose primary duty was customer service.
I.T. WORKERS/COMPUTER PROGRAMMERS

• FLSA Computer Exemption to Get Revised: A Good Thing For Employers” Nov. 17, 2011 at: http://wagehourlaw.foxrothschild.com

• On October 20, 2011, the US Senate introduced the Computer Professionals Update Act. This legislation expanded the coverage of the exemption to those who work in a “computer or information technology occupation, including, but not limited to, work related to computers, information systems, components, networks, software, hardware, databases, security, internet, intranet or websites, as an analyst, programmer, engineer, designer, developer, administrator or other similarly skilled worker.”

• Additionally, employees who direct the work of individuals performing these duties would be exempt.
SALES

• To qualify for the outside sales exemption, all of the following tests must be met:
  – Employee’s primary duty must be making sales (as defined in 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.
SALES

• The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by the FLSA.
SALES

• Primary duty:
  – Principal, main, major or most important duty that the employee performs.

• 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.

• 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.
EXECUTIVE EMPLOYEE EXEMPTION

• To qualify for the executive employee exemption, all of the following tests must be met:
  – The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
  – 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.
EXECUTIVE EMPLOYEE EXEMPTION

- 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;
    - Planning and controlling the budget; and
    - Monitoring or implementing legal compliance measures.
EXECUTIVE EMPLOYEE EXEMPTION

- 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.

- Highly compensated employees performing office or non-manual 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 identified in the standard tests for exemption.
EXECUTIVE EMPLOYEE EXEMPTION

• “Possible Obama White Collar Exemption Revisions Don’t Worry Me!” Mar. 18, 2014 at: http://wagehourlaw.foxrothschild.com
  • The Obama Administration is going to direct the Department of Labor to toughen up the exceptions to federal overtime requirements through regulation. This could be by raising the salary threshold, currently $455 per week and/or augmenting the existing or establishing new elements of exempt status.
  • On the issue of salary, I have always thought the $455 per week was too low, especially if the employee(s) performed subordinate duties, which injected the issue of the primary duty test into the equation. In that context, to me, the low salary, coupled with the significant amount of non-exempt work, almost suggested a non-exempt finding by an agency or court. Higher salary thresholds already exist, e.g. New York ($640) and California (600), which I believe should be the “basement” for exempt employee salaries, to show that there is a bright line between manager and subordinate.
EXECUTIVE EMPLOYEE EXEMPTION

• *W & H Opinion Letter No 2230, July 21, 2000*
  – A guard shift supervisor, who performed supervisory duties only two to three hours per guard shift, was not an employee whose primary duty was managerial, and was not a bona fide executive employee.

• *Ale v. Tennessee Valley Authority (6th Cir 2001)* 144 LC ¶ 34,387
  – A magistrate judge properly determined that shift supervisors’ primary responsibility was performing clerical duties. Although they did spend some of their time supervising employees, this supervision was not managerial in nature, and thus, they did not qualify for the overtime exemption.

• *McClain v. McDonald’s Corp. (ED Penn 2007)* 153 LC ¶ 32,246
  – An assistant manager was exempt; evidence overwhelmingly showed that management was her primary function, even though she engaged in about 58 percent non-exempt work.

• *Schreckenbach v. Tenaris Coiled Tubes, LLC (S.D. Tx. 2013)* 163 LC ¶ 36,091
  – An employee who was the only salaried employee who worked the night shift and who oversaw 20 hourly employees was properly classified as an exempt executive employee in his position as night shift coordinator for a manufacturing company.
EXECUTIVE EMPLOYEE EXEMPTION

• W & H Opinion Letter No 2223, (June 14, 2000)
  – House managers of residential homes mentally retarded individuals were exempt executive employees where, even though they spent less than 50 percent of their time performing managerial duties, those duties were of substantially greater importance to the employer than their nonmanagerial duties, they had substantial discretion in performing their duties and the employer exercised very minimal supervision over them.

  – A store Manager who was responsible for supervising 60 employees and was the highest ranking employee at the store, did not successfully argue that his responsibilities were preempted by micromanaging administrators so as to negate his obvious exemption from FLSA overtime provisions. The fact that a district manager could override certain decisions by the manager did not undermine the manager’s day to day authority to manage for purposes of exempt overtime status; nor did the fact that the manager spent much of his time performing general tasks take him out of the exempt category. The employer demonstrated by a preponderance of clear evidence that the manager’s primary duties were managerial, exempt tasks.

• W & H Opinion Letter No 2223, (June 14, 2000).
  – House managers of residential homes mentally retarded individuals were exempt executive employees where, even though they spent less than 50 percent of their time performing managerial duties, those duties were of substantially greater importance to the employer than their non-managerial duties, they had substantial discretion in performing their duties and the employer exercised very minimal supervision over them.
EXECUTIVE EMPLOYEE EXEMPTION

  • Where the support for the class, including, but not limited to affidavits and testimony, is simply too insufficient to evidence the requisite commonality for a class to exist. Although the court recognized that plaintiffs have a light burden, a class of plaintiffs cannot be certified on the basis of thin support, such as a single page report submitted by a consultant.
  • In the case highlighted here, the plaintiff alleged that he and others routinely performed a variety of non-exempt tasks, including cleaning/sweeping, unloading trucks and taking out the garbage. If these tasks comprised a major portion of their work time, their exemption would be undermined. However, failure to support these actions doomed the case.
To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee’s primary duty must be the performance of office or non-manual 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.
ADMINISTRATIVE EMPLOYEE EXEMPTION

- 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.
ADMINISTRATIVE EMPLOYEE EXEMPTION

• 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 implies that the employee has 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.
ADMINISTRATIVE EMPLOYEE EXEMPTION

• An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.
ADMINISTRATIVE EMPLOYEE EXEMPTION

• *W & H Opinion Letter No 1973, (January 18, 1996).*
  – Because as an executive secretary, an employee’s primary duties required her only to perform routine clerical work, as opposed to work, as opposed to work directly related to the employer’s management policies or general business operations of an employer and did not require her to exercise the requisite level of discretion and independent judgment set forth in the pertinent regulations, an employer could not classify the secretary as an exempt administrative employee within the meaning of the FLSA.

• *W & H Opinion Letter No. 1966, (October 25, 1995).*
  – Where the extent of discretion and independent judgment that a municipal employer’s assistant/deputy clerk-treasurer was required to exercise fell within closely prescribed limits, and the skills necessary to perform the tasks involved could be acquired after a short period of training and on-the-job experience, the employer could not classify the clerk-treasurer as an exempt administrative employee within the meaning of the FLSA.

• *W & H Opinion Letter No. 2059, (October 20, 1997)*
  – Because an administrative assistant’s primary duties required only that she follow prescribed procedures, determine which procedures to follow, or determine whether specified standards were met, as opposed to formulating company policy or exercising wide-ranging authority to commit her employer to substantial financial or similar responsibility, the assistant’s duties did not display the necessary “discretion and independent judgment” for her employer to classify her as an exempt “administrative” employee.
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Employee Misclassification Challenges
Current Trends & Vulnerable Positions

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Workers in the News

- Research assistants: In 2011 Hofstra University agreed to pay almost $500,000 to undergrad and grad student assistants. Al-Maqabih v. Univ. of Cincinnati College of Medicine, 11-cv-531 (S.D.Oh. 2013): grad student not employee because relationship was educational, stipend was considered scholarship


Cheerleaders: In 2014 cheerleaders for the Cincinnati Bengals and Oakland Raiders filed complaints, claiming that they earn less than minimum wage and are subjected to extensive control. US Department of Labor stated in that cheerleaders are exempt under seasonal exemption.
Workers in the News: Personal Services

- Direct care: In 2013, Department of Labor extended FLSA protections to domestic service workers such as home health aides, nursing assistants, caregivers starting 2015.

- Personal assistants: In 2013, Lady Gaga settled a lawsuit filed by a personal assistant sued who claimed that she did not have independent judgment and discretion for administrative exemption and worked over 7000 hours of overtime in just over a year.
Workers in the News: Energy Sector

- Oil drilling workers:
  - Day rates are common in these industries.

- Tankermen:
  - Duties include loading, unloading, monitoring chemicals, inspecting barges on oil, petrochemical transportation ships.
  - “Seaman” test: duties performed “in aid of operating a vessel as a means of transportation.” E.g., barge tenders are seaman because they attend the boat.
  - Numerous lawsuits are being filed, such as *Bryant v. Enterprise Products Partners*, 11-cv-296 (S.D.Tex. 2011). In 2001, 5th Circuit found in *Owens v. SeaRiver Maritime* that a tankerman was not a seaman because most of his duties were loading and unloading petroleum products from the barges. *Coffin v. Blessey Marine Services*, 11-cv-214 (S.D. Tex. 2013): Loading and unloading are not seamen’s duties.
Sports Players, Other Employees

- Big issue for FLSA litigation is whether entity qualifies as amusement or recreational establishments that operate for fewer than 7 months per year.

- Senne v. Major League Baseball, 14-cv-608 (N.D. Cal): In Feb. 2014, minor league players sued, claiming that they are employees who work 50-70 hours per week and earn $3,000-$7,500 for an entire season.

- In 2013, San Francisco Giants with the Department of Labor agreed to pay over $500,000 to employees such as clubhouse assistants and managers.

- In March 2014, NLRB declared Northwestern football players to be employees. While this is a union issue, misclassification suits could follow.
Are Assistant Managers Exempt?

- Assistant managers in particular are increasingly common plaintiffs:
  - **Whittington v. Taco Bell**, 10-cv-1884 (D.Co.) settled in 2013 for $2.5 million. Plaintiff claimed she did extensive non-exempt work such as bussing tables, cleaning, cashier work, cooking. More suits have been filed since against Taco Bell.
  - **Hickton v. Enterprise Rent-a-Car**, MDL 2056 (W.D. Pa.). In 2013, Enterprise settled for $7.75 million with assistant rental managers based on *inter alia* little independent authority exercised by plaintiffs and little involvement with personnel decisions.
  - **Pendergrass v. City Gear**, 12-cv-1287 (M.D. Tenn). Clothing retailer settled for $1.9 million claims of managers and assistant managers based on pro-rating of salaried employees’ paychecks based on hours worked.
Managers: Which Factors Determine Status?

- **Morgan v. Family Dollar**, 551 F.3d 1233 (11th Cir. 2008): Managers not exempt because they spent 80-90% of time on manual labor, had duties proscribed by store manual, were closely supervised by district managers.

- **In re Family Dollar FLSA Litigation**, 637 F.3d 509 (4th Cir. 2011): Manager exempt because she multi-tasked between managerial and manual tasks, was the highest ranking employee at the store, her income depended on store’s success, and she had authority over other employees.

- **Madden v. Lumber One Home Center**, No. 13-2214 (8th Cir. Mar. 17, 2014): Two plaintiffs not exempt, one exempt. Court looked at level of input into personnel decisions – casual input solicited from all employees does not make an employee an executive.
Computer Workers: Rates and Duties

- Computer worker exemption requires careful consideration of both rates and duties

- Jones v. Judge Technical Services, Inc., 11-cv-6910 (E.D.Pa. 2010): Partial summary judgment for plaintiff. Computer worker exemption permits for hourly wages. However, a computer worker must be paid at least $27.63 for every hour worked, not an average of $27.63 for all hours worked.

- Heffelfinger v. Electronic Data Sys., 492 Fed. Appx. 710 (9th Cir. 2012): Two plaintiffs exempt, one not exempt. Exempt plaintiffs developed standards and procedures, affected company policy by making recommendations, monitored and managed important databases, suggested solutions to meet client needs, extensively supervised employees. Non-exempt plaintiff spent little time on administrative work, main duty was creating and modifying programs to meet business needs.
Internship should benefit the intern, not the employer, and be similar to the training that would occur in an educational environment.

Interns should not displace regular workers: educational activities, not regular work.

General benefits of any job not sufficient: resume lines, references, general on the job experience that any worker has.

Cases in a wide range of industries: movie production, magazine publishing, multimedia online content and blogging, modeling.

Lauren Ballinger:
Intern at W Magazine
Lead Plaintiff v. Conde Nast

Matthew Lieb
Intern at The New Yorker
Lead Plaintiff v. Conde Nast
Volunteers

- Department of Labor guidance:
  - Religious, charitable or other non-profits – not for-profit entities
  - Public service, religious, humanitarian objectives; usually part-time
  - Public sector employers: can accept volunteers but NOT own employees doing the same work as they are paid to do
  - Nominal fee, payment of expenses OK but not payment as compensation

- Chen v. Major League Baseball  No. 13-CV-5494 (SDNY Mar. 25, 2014): Claim of “FanFest” volunteer dismissed because “FanFest” is a seasonal business exempted by FLSA. Court did not decide whether Plaintiff could be considered employee based on nature of work.
Pharmaceutical Salespersons

- In 2012, US Supreme Court decided Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (June 18, 2012)

- Supreme Court held that pharmaceutical salespersons at issue were exempt “outside Salespersons,” even though they were prohibited by federal law from actually making sales.

- Supreme Court failed to give deference to DOL due to its changing rationale for its position and because the DOL did not give “fair warning” for the change.

- DOL had not enforced its position on pharmaceutical industry prior to 2009.

- Sales includes a “consignment for sale,” which does not involve the transfer of title.
New York Construction and Commercial Goods Transportation Fair Play Acts

- NYS Construction Fair Play Act: effective October 2010

- NYS Commercials Goods Transportation Fair Play Act: effective April 1, 2014

- Workers (construction workers, truck drivers) presumed to be employees unless the worker meets one of two tests:
  - “ABC” test: A) is free from control and direction in performing work, B) performs duties outside employer’s usual course of business and C) engages in an independently established business; OR
  - “Separate business entity” test: Meets 12 criteria, focusing on worker’s independence as to manner of work, financial independence from employer, independence as to business operations
Other Misclassification Issues

- Courts continue to affirm that immigration status not relevant to entitlement to FLSA-mandated wages: *Lucas v. Jerusalem Café*, 721 F.3d 927 (8th Cir. 2013), *Lamonica v. Safe Hurricane Shutters*, 711 F.3d 1299 (11th Cir. 2013). Awards of liquidated damages are “not free from doubt.”

Overtime and Minimum Wage Updates

- Watch for more protective state laws for both overtime classifications and minimum wage rates: New York rate increased to $8.00 for 2014 and will go up in 2015 and 2016.

Fluctuating work week applicable to misclassification cases? Compare Ransom v. M. Patel Enterps, 734 F.3d 377 (5th Cir. 2013): employees understood that they would be paid weekly salary and work variable hours; with Blotzer v. L-3 Communications, 11-cv-274 (D. Ariz. 2012): FWW improper because not intended as remedial measure, FWW application to damages “runs counter to the intent of the FLSA” and parties did not understand that FWW would be used.
Type of employees who may be affected include salaried managers of business such as fast food restaurants, discount stores, grocery stores.

In March 2014, President Obama ordered the Department of Labor to revise federal rules regarding overtime. Possible changes include:

- Raising the salary threshold from $455 per week ($23,600 per year)
- Modifying, minimizing or removing some of the exemptions
- Implementing a limitation on % of non-exempt work employee can perform
Related FLSA Trends

- On February 12, 2014, President Obama raised the minimum wage for federal contractors to $10.10 per hour starting 2015 with inflation adjustments.

- States are raising minimum wages, and there is a nationwide push to raise the federal minimum wage to $10.10 by 2016.

- President Obama requested $41m budget increase for Wage and Hour Division.

- **Integrity Staffing v. Busk**: before Supreme Court: must employees be paid for time in security screenings? In April 2014, Walgreens settled 9 consolidated lawsuits for unpaid overtime for breaks and mandatory security checks, as well as business expenses, record-keeping, and payment of final wages upon termination for over $20m.

- Fast food workers are advocating for higher wages and alleging that they are forced to pay improper expenses (costs of uniforms) and delay clocking in.
Proactive Wage and Hour Compliance Strategies: Corrective Measures

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April 16, 2014
Self Audit Strategies
1. Internal resources vs. external
3. Purposes other than wage/hour classification (e.g. assessing ADA compliance)
1. Check for potentially misclassified Independent Contractors;
2. Conduct a review of any “borderline” non-exempt and exempt positions to determine if reclassification is warranted;
3. Review salary levels and identify any current exempt employees who fall below the minimum;
4. Review payroll practices to ensure no improper deductions are taken from exempt employees' salaries;
5. Review written policies relating to deductions for exempt employees’ pay;
6. Develop, implement and publicize a Safe-Harbor Deduction Policy;

7. Train personnel regarding deduction policies;

8. Institute a reporting mechanism for employees to report payroll errors;

9. Review payroll software to make sure overtime and other calculations are correct;

10. Review timekeeping systems to make sure hours worked, meal periods and breaks are accurately recorded;
11. Develop Specific Criteria for Initial Compensation Recommendations

12. Review Compensation Recommendations Before Finalizing Decision

13. Implement or Revise Internal Complaint Procedures to Specifically Address Pay Issues

14. Conduct Periodic Statistical Analyses of Compensation Data
1. As above, consider privilege issues, both with respect to documents generated during an audit (the “questionnaire” problem) and any deliverable regarding recommendations.

Voluntary Reclassification

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Preventive Strategies and
Positive Solutions for the Workplace
Voluntary Reclassification

Refers to any change in a potentially unlawful pay practice identified internally rather than via a claim, with reclassification of exempt-classified employees as non-exempt being perhaps the most common example;

Can the change be cost neutral?

- Consider the FLSA’s authorized payment methods: fluctuating workweek, Belo contract, piece rate, fee basis, multiple rates for multiple work (but beware state law);
- Consider operational changes to come into compliance. Example: Production-based employees must work beyond their regular schedule because “opportunities” to do business arise after close of business. Solution: formalize “flex time” program (within the workweek), permitting employees to work later on a given day and take time out of their regular schedule later in the week.
Voluntary Reclassification

Have a message for affected employees regarding the policy change – even if they will make more money under the new practice, they may view any change suspiciously;

Can you answer the $64,000 question: “Why didn’t I receive overtime before?”
Which leads us to...
Paying Back Wages Voluntarily
More often than not, employers do not institute a voluntary back wage program in conjunction with a reclassification, both because they believe the challengeable practice is defensible (i.e. was not a violation of law) and making such payments to a group of any size potentially invites more questions than it answers.
If instituting such a “program,” there are a number of questions to consider:

• Will all affected workers receive payment, or only those still employed?
• What will the methodology be? For example, what will the “hours worked” assumption be for reclassified salaried workers who historically did not track hours?
• Will the company ask for a release or simply a “receipt”? 
The final reason many employers do not pursue such a program: FLSA claims remain (largely) unwaivable. Historically, FLSA waivers required court or DOL approval to be valid. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982). The Eleventh Circuit’s decision has been widely adopted, including in jurisdictions where wage/hour claims are prevalent, such as NY and CA. In 2012, the Fifth Circuit confined *Lynn’s Food* to its facts. *Martin v. Spring Break '83 Prods., LLC*, 2012 U.S. App. LEXIS 15285 (5th Cir. July 24, 2012)(no supervision required where *bona fide* dispute exists, and adversarial process protected FLSA claimants).

At present, there is uncertainty in many jurisdictions regarding the validity of a private FLSA release. *Lliguichuzhca v. Cinema 60, LLC*, 948 F. Supp. 2d 362, 364 (S.D.N.Y. 2013)(not “clear that judicial approval of an FLSA settlement is legally required”).
Seeking “Supervision” from DOL
Should I self-report to DOL?

• It’s better than dealing with a plaintiffs’ attorney

• DOL will usually require:
  
  ➢ 2 years of backpay
  
  ➢ Overtime premium based on additional half-time, barring unusual circumstances
  
  ➢ Permanent injunction (for mandatory settlement)
• DOL may exclude:
  ➢ Third year of backpay
  ➢ Liquidated damages (unless matter goes to contested litigation)
  ➢ Interest
  ➢ Overtime premium based on full additional time and a half
• Better for employee relations
How do I ensure that claims are released?

• Complaint / consent decree
  ➢ Right to file private litigation “shall terminate upon the filing of a complaint by the Secretary”

• Supervision of backpay
  ➢ An employee’s agreement to accept backpay under DOL’s supervision “shall upon payment in full constitute a waiver by such employee”
• Will DOL provide WH-58? Again, private releases of FLSA claims are generally unenforceable.

• DOL may or may not assist with a supplemental payment to address issues under state law.

• If dealing with an independent contractor issue, DOL has entered into an MOU with the Internal Revenue Service.  
  http://www.dol.gov/whd/workers/misclassification/
Other Risk Management Related to Reclassification: Insurance and Arbitration Agreements
**Other Risk Management Tools**

American Express Co. v. Italian Colors Restaurant, No. 12-133 (2013)

- Decided June 20, 2013, reversed in a 5-3 opinion of Justice Scalia
- Background: A mandatory arbitration clause contained a class arbitration waiver, requiring all disputes to be arbitrated on an individual basis
- Key Holding: The FAA prohibits courts from invalidating a contractual waiver of class arbitration because the cost of arbitrating a federal statutory claim individually exceeds the potential recovery, even if the effect of enforcing the waiver is to prevent the claim — in this case, an antitrust claim — from being brought
- Impact on Employers: Arbitration is a matter of contract and that the FAA requires arbitration agreements be “rigorously enforced” according to their terms, even for claims alleging a violation of a federal statute, unless Congress has provided otherwise
**Sutherland v. Ernst & Young LLP**, 726 F.3d 290 (2d Cir. 2013): Applying *Italian Colors* to wage/hour context, FLSA does not bar enforcement of class action waivers, even if it is “prohibitively expensive” for employee to arbitrate

- Plaintiff brought putative class action to recover overtime wages; claimed misclassification
- FLSA does not contain a “contrary congressional command” that would negate a class action waiver

Insurance (Employment Practices Liability Insurance or other)

- Coverage for defense costs
- No coverage for wage exposure
- Understand deductibles if multiple individual claims