



Classifying And Compensating Employees ©

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Worker or Service Provider?

- Manpower services are provided through efforts of individuals
- An employee is a person performing services under the control of the engaging party
- An independent contractor is a person performing services for the engaging party but under the control of the third party



Attributes of an Employee

- Engaging party controls the manner and means by which the project is accomplished
 - Sets the skill required of the hired party
 - Provides the instruments and tools to be used
 - Determines when and where the work is to be performed
 - Duration of the relationship
 - Assigns additional projects
 - Assigns assistants and other workers to project
- Payment for services is by hour/week rather than project



Attributes of an Independent Contractor

- A business entity, not an individual
- IRS will examine three factors
 - Behavioral Control
 - Financial Control
 - Relationship of Parties



Behavioral Control

- Right to direct or control how work is to be performed
 - How, what, where, and in what order instructions given to worker?
 - Who supplies the tools/equipment?
 - What and who gives training to the worker?

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Financial Control

- Does worker have a significant investment in the facilities, tools, equipment used in performing the services?
- Does worker maintain a separate office or business location, or advertise services?
- Does worker incur unreimbursed expenses?
- Does worker hire and pay assistants?
- Does worker provide, or offer, services to others?
- How is worker paid – flat fee for job or hourly or weekly rate?
- Does worker have ability to make a profit or suffer a loss?

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Relationship of Parties

- What was the intent of the parties?
 - Is there a written contract?
 - Is worker provided benefits such as pension or health?
 - Can worker be discharged or leave without cause? If work incomplete is the worker liable for non-performance?
 - Are the worker's services a key component of the employer's business operations?

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Consequences of Misclassifying

- Onerous tax consequences
 - FLSA and IRS penalties (up to 100%)
 - Back wages plus interest
 - Personal liability for business owner
 - If a Form 1099 was filed the tax penalties (retroactive tax payments and FUTA payments) are reduced

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Consequences of Misclassifying

- Liabilities under
 - ERISA
 - COBRA
 - Fair Labor Standards Act
 - Family and Medical Leave Act
 - Immigration Control

Can I Have Unpaid Workers?

- Individuals can not provide services without being paid a minimum wage
- Private employers can not have volunteer labor
- Only government and nonprofit organizations may have volunteers
- Student interns, which may be performing duties on the work premises without the payment of wages, many only do so if their labor is for the benefit of the student (his education) and not the employer. Generally, these internships must be arranged through an educational institution. **The test is who is the beneficiary of the services provided – if it is the employer, the student is an employee.**

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Wage and Hour Issues

Wage and Hour Laws (Fair Labor Standards Act)

- Minimum wage
- Overtime compensation
- Child Labor
- Equal Pay

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General Wage Rule

- Employees are required to receive a minimum wage and to be paid overtime for hours worked over 40 in a work week.
- There are exceptions but these are narrowly applied.

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Many FLSA Exceptions Both to Minimum Wage and to Overtime

- Seasonal employees
- Commissioned retail sales
- Outside sales
- Teachers
- Political appointees
- Legislative employees
- Agricultural workers
- White collar workers
- Hospital workers

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"White Collar" Exemptions

- In order to qualify for a "white collar" exemption, an employee must meet the requirements of one of the six "exempt" categories.
 - Executive
 - Administrative
 - Professional
 - Computer
 - Highly compensated employees

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Nonexempt Employees

- Generally wage (hourly rate) but could be salaried.
- Pay can be deducted ("docked") based on quantity or quality of work.
- Overall hourly rate, including deductions, may not fall below minimum wage for any work period.
- Any time over 40 hours/week (overtime) is paid at 1.5 times the hourly rate.

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Three Criteria to Meet the White Collar Exemption

- **Salary Level** - \$455 per week (\$23,660 per year) excluding board and lodging.
- **Salary Basis** – guaranteed weekly amount of base pay which can not be reduced based on quality or quantity of work performed.
- **Primary Duty** – the employee’s principal, main, major, or most important duty.



Primary Duty Includes the...

- Importance to the business of the exempt duties.
- Time spent on performing exempt duties.
- Employee’s freedom from supervision in the exercise of the exempt duties.
- Employee’s salary compared with the compensation paid to nonexempt employees.



Executive Employee: Primary Duty

- Management of the enterprise or a recognized department or subdivision of the enterprise.
 - Must customarily and regularly direct the work of two or more full-time employees/equivalents.
 - Authority to hire/fire or make recommendations of significant weight on such personnel actions.
 - Primary duty must be more than “mere supervision.”



Level of Responsibility over Subordinates

- Interviewing, selecting, and training employees;
- Setting rates of pay and hours of work;
- Maintaining production or sales records (beyond the merely clerical);
- Appraising productivity; handling employee grievances or complaints, or disciplining employees;
- Determining work techniques, and the safety and security of the workplace;
- Planning the work and apportioning it among employees;
- Determining the types of equipment/materials to be used in performing work;
- Planning work unit or project budgets;
- Monitoring work for legal or regulatory compliance.



Administrative Employee: Primary Duty

- Performance of office or non-manual work directly related to the management or general business operations (of employer/ employer's customers)
- Must exercise discretion and independent judgment with respect to matters of significance related to business operations.

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Keeping the Business Running

- This is the most error-prone classification– it is not a clerical position.
- The employee's primary duty must be supporting the **business**, not making what the business makes, working on the production line or selling a product.
- Examples: HR/personnel, payroll, finance, tax, accounting, quality control, marketing and advertising (not direct sales), department store buyer.
- Not secretaries, help desk personnel, answering phones, preparing expense reports, filing.

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Practice Tips

- Does the employee have authority to formulate or interpret company policies?
- How major are the employee's assignments in relation to the overall business operations of the enterprise (buying office supplies versus buying new enterprise computer servers)?
- Can the employee sign contracts?
- Can the employee deviate from company policy without prior approval?

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Blue Collar Workers Never Exempt

Non-management employees in production, maintenance, construction, including carpenters, electricians, mechanics, plumbers, iron workers, craftsmen and engineers, are entitled to minimum wage and overtime, no matter how highly compensated.

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Professional Employee: Primary Duty

- Performance of work requiring "advanced knowledge" in a "field of science or learning" and "customarily acquired by prolonged course of specialized instruction."
- Non-manual artistic endeavor requiring "invention, imagination, originality or talent."
- Lawyer, doctor, registered nurse, physician assistant, theologian, chef, artist.

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Computer Professional: Primary Duty

- Salary – Weekly (\$455) or hourly (\$27.63).
- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

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Highly Compensated Employees

- Office or non-manual work.
- Total compensation of \$100,000 or more, but salary of at least \$455/week.
- Customarily and regularly perform at least one duty of exempt executive, administrative or professional employee.
- Not for people who "perform work involving repetitive operations with their hands, physical skill and energy."

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Do Not Defeat the Exemption By Taking Deductions from Salary

- Taking deductions from an employee's salary can convert an exempt position into a non-exempt position.
- This will result in the employee being entitled to overtime compensation, no matter whether he or she is the CEO or not.

Permitted Deductions for Exempt Employees

- Can deduct from salary for
 - A full day absence for sickness, disability, FMLA, or personal reasons if no accrued PTO, vacation or disability benefits.
 - Compensation for service on a jury, witness fees, and military pay. by the amount of payment an employee receives in the form of jury fees, witness fees, or military pay.
 - Penalty for a violation of a major safety rule.
 - Full day suspension for a violation of a workplace rule
 - Pro-rated salary adjustments for less than 40 hours worked on first or last week of employment.

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Good Records – Training The Best Defense

- Accurately analyze the job duties
- Update position descriptions, have employees and supervisors review them for accuracy – keep them on file
- Conduct management training so that managers understand that an exemption can easily be defeated by carelessness and understand the degree of independence required to maintain the exemption

Position Description

- For every employee classified as exempt there should be an accurate position description
- The position description should delineate the essential duties as well as skills and abilities
- The essential duties should be those duties listed as primary under the exemption
- The duties should describe the degree of cognitive, analytical, managerial, etc. responsibility within the tasks listed and the freedom under which they are exercised

Actual Duties Control – DOL Will Do an Audit

- Actual duties not title control
- Importance to the business and frequency of the exempt duties play a significant role
- Amount of independence and judgment regularly exercised also important
- Difference in salary in comparison to non-exempt employees
- How comingled are employees duties with those of non-exempt employees

Compensation Issues

Calculating Hours Worked

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Compensation Myths

- ❑ Myth: Salary is based on 40 hours/week
- ❑ Myth: Salaried employees are not eligible for overtime

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Comp Time

- ❑ Overtime compensation may be provided in the form of compensatory leave in lieu of overtime pay for public sector employees only.
- ❑ Most employees cannot accrue more than 240 hours of compensatory time; law enforcement officers can accrue 480 hours of compensatory time.
- ❑ Cash overtime is the only compensation permitted for overtime hours

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Seven-Day Work Period

- ❑ Overtime not due until 40 hours are exceeded in a 7-day work period
- ❑ Employer is in control of hours worked
- ❑ Can schedule adjust during 7-day work period

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Compensation Myths

- Myth: Must pay a premium for working night or weekends
- Myth: Employee cannot work more than 12 hours a day.
- Myth: Must give meal or other breaks.
- Myth: Must offer sick leave, vacation leave and holiday pay.
- Myth: "Part-time" is 20 hours/week.

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Hours Worked

- "Hours worked" is key concept in compensation
 - All hours the employee must be "on duty," devoted to the principal work activity or activities that are closely related and indispensable to the principal work.
 - Time "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."
Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944).
- All time worked must be recorded on time sheets.

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Hours Not Counted as Work

- Non-compensable time
 - time off
 - time away from the job
 - lunch breaks (30 minutes or longer)
 - other breaks (20 minutes or longer)
 - travel to and from work
 - checking in and out of the workplace
 - on-call time

Pre-Shift / Post-Shift

- Pre-shift and post-shift activities generally not compensable – however the general rule is that waiting time is considered hours worked.
- Waiting will be considered "work time" if activity is "integral and indispensable" to the principal activity.
 - Clothes-changing for safety reasons/benefit to employer ("donning and doffing")
 - Meet at a central location to gather tools, load work vehicles, go together to a work site ("shop time")
 - Police officer servicing car or caring for police dog while at home
 - Secretary having lunch while being required to answer the phone should it ring
- Compensation (or no compensation) can also be based on contract, custom or practice.

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Travel Time

- Traveling during normal work hours is considered compensable work time.
- Traveling from home-to-work travel are not hours worked
- Commuting in an employer-provided vehicle, or in activities performed by an employee that are incidental to the use of the vehicle are not hours worked if
 - the travel is within the normal commuting area for the employer's business
 - the use of the vehicle is subject to an agreement between the employer and the employee/representative.



Breaks

- Federal law does not require lunch or coffee breaks.
- Short breaks (usually lasting about 5 to 20 minutes) count as hours worked
- Not counted as hours worked
 - Lunch period of 30 or more minutes
 - Break period of 20 minutes or more
 - Provided that employee is completely relieved of all duties during that period



On-Call Time

- An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". This time is compensable.
- An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call, and this time is not compensable.



Payment Issues Record Keeping



Employer Has Duty to Keep Records

- Can not delegate to employee.
- Employees can keep their time, but if not kept accurately by employee, employer is responsible.
- Even if employees certify that time records are correct, the employer is still liable if they are not accurate.
- Failure to keep records is a violation on its own.

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Record All Overtime Hours

- All hours worked must be recorded
- If employee works overtime and employer knows it, the hours must be recorded
- Can require employees not to work overtime unless "approved" but if directive is disobeyed, hours worked must be recorded.
- It is unlawful to refuse to pay for "unauthorized overtime."

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General Record Keeping

- Found in 29 CFR §516.2(a)
 - Time of day/day of week workweek begins
 - Regular rate of pay for any week overtime compensation is due
 - Basis of pay – per hour, day or week
 - Total hours worked each workday and each workweek
 - Straight time earnings
 - Premium pay

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Simplified Recordkeeping

- Employees on fixed work schedules do not have to record time day by day, but can simply check that schedule was followed
- Weeks when deviations in schedule, must record time hour for hour each day

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Records for White Collar Employees

- Found in CFR §516.3
 - Time of day/day of week of workweek
 - Total wages paid each pay period
 - Date wages are paid
 - Basis on which wages are paid

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Other Pay Record Information

- Date of birth if under 19 years of age
- Sex and occupation of each employee
- Must keep records in central location for three years (some other information for two years)
- Records to be kept in central location at place of employment
- Employees have no right to see records

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The Failure to Keep Records Has Consequences

- Employee only has to provide a "reasonable inference" that the employee worked a certain number of hours.
- Without records to rebut, employee wins.
- Willful failure to keep the required records or falsification of records is a **criminal offense**.

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Payment Issues

Payment of Wages

- Must have regular pay periods
 - Salaried employees – at least once a month
 - Hourly employees – at least once every 2 weeks
- Upon termination of employment must pay all wages/salary due on or before the normal pay date
- No deduction from wages/salary without written and signed consent of employee
- Criminal and civil penalties (\$1,000 per violation) for failure to adhere to payment requirements.

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Method of Payment

- Payment of wages or salaries must be in lawful U.S. currency
 - Cash
 - Check payable at face value
 - Electronic automated fund transfer to account in name of employee designated by employee and with consent of employee
 - Prepaid credit or debit card (with consent of employee) or an account where employee can make one withdrawal or transfer per pay period.

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