Avoiding Common Wage and Hour Violations
Today’s Speaker

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- VP Strategy, ComplianceHR
- Former Wage & Hour Administrator, U.S. Department of Labor
- Author of 2004 Revisions to White Collar Exemptions
Today’s Agenda

✓ Top 10 Wage & Hour Mistakes
✓ Legislative Update
Top 10 Wage & Hour Mistakes
1. IC Misclassification

Red flags for a misclassified IC:

• Work performed by IC is a core function of the business
• IC is a former employee
• IC performs same type of work as employee
• IC does not perform work for any other company
• Company controls how, when or where IC performs work
• Company provides training
• Company provides/pays for tools, equipment or business expenses
2. Overtime Misclassification

- **Executive** – supervise a total of 80 work hours/week
- **Administrative** – authority to make independent decisions on significant matters
- **Learned professionals** – need a four-year college degree in a scientific, engineering or professional field
- **Computer** – design, develop or create computer systems or programs
- **Outside Sales** – cannot sell out of their home or office, or by using the telephone or internet
3. Deductions from Exempt Salary

- An exempt employee must be paid her full salary for any week in which she performs any work – even if only a few minutes or hours of work.
- Improper deductions lead to loss of exemption:
  - Poor work performance
  - Failure to work 40 or more hours
  - Weather-related closure
  - Cash register shortages, inventory shrinkages
  - Lost or damaged company property (security badge)
4. **Automatic Meal Break Deductions**

- Uninterrupted meal periods of 30 minutes or more can be unpaid
- But automatically deducting the unpaid meal period from an employee’s work time has spawned hundreds of lawsuits and millions in liability
- **Best practices:**
  - Require employees to clock out and back in for meal breaks
  - Required employees to certify that they took their meal breaks
5. Paying by Shift or Exception

• Risky timekeeping practices
  – Paying employees based on their scheduled shift
  – “Exception” time reporting – defaulting the timekeeping record to an employee’s regular work hours unless the employee reports working more or fewer hours

• Best practices
  – Electronic timekeeping
  – Require employees to punch in and out when they begin and stop working
  – Pay to the punch, without rounding
  – Require employees to review and approve work hours
6. Pre- and Post-Shift Activities

• Work includes all activities within a workday from an employee’s first to his last principal activity
  – A “principal activity” is any activity that is an integral and indispensable part of the employee’s work

• Compensable work includes time spent
  – Booting up a computer
  – Checking emails
  – Attending a shift-change meeting
  – Changing into work clothes if the employer requires such “donning” and “doffing” to be done at work
7. Meeting and Training Time

- Employee must be paid for time spent attending meetings or in training unless all four of the following requirements are met:
  - Attendance is outside the employee’s regular working hours
  - Attendance is voluntary
  - The meeting or training is not job related
  - No productive work is performed during the training
8. Travel Time

• Employees need not be paid for time spent in their normal commute

• Employees must be paid for all other time spent traveling for work, with only limited exceptions in some states
  – Traveling between work locations in the same city
  – Traveling to another city (although some states allow the employer to deduct the normal commuting time)
  – Travel requiring an overnight stay (although some states do not require pay if travel occurs outside normal working hours, on work and non-work days)
9. Shift Differentials and Other “Extras”

• Overtime is not 1.5 times the hourly wage rate
• Overtime = “all remuneration” for employment earned in a single week divided by all hours worked in that week
• The overtime pay rate can change from week to week if an employee earns extras for working the third shift, or in a freezer or for being on call
  – For example, if an employee with an hourly rate of $10, also earns $2 an hour extra for working third shift, his overtime pay rate is ($10 + $2) * 1.5 = $18 per hour.
10. Bonuses and Commissions

- Overtime must also be paid on bonuses, commissions and prizes/awards
- Overtime due = (Bonus Amount / All Hours Worked in the Bonus Period) * 0.5 * Overtime Hours Worked in the Bonus Period.
  - For example, if an employee who worked 2,000 regular hours and 200 overtime hours in a year also received a $1,000 bonus, the employee would be owed another $45.45 in overtime pay, calculated as follows: ($1,000 / 2,200 total hours) * 0.5 * 200 OT hours.
Legislative Update
Minimum Wage - Federal

Raise the Wage Act

• Introduced by Senator Patty Murray (D-WA)
• 32 Senate and 160 House co-sponsors
• Increase MW to $12 over 5 years
• Indexed annually thereafter to % of increase in the median wage
• Gradually eliminate the tip credit wage
Minimum Wage – State/Local

- 28 states and 35 cities/counties have higher minimum wage than federal $7.25
- Fight for $15
  - California by 2022
  - New York by 2019
  - Oregon by 2023
  - El Cerrito CA by 2019
  - Emeryville CA by 2018
  - Los Angeles CA by 2020
  - Mountain View CA by 2018
  - San Francisco CA by 2018
  - Santa Monica CA by 2020
  - Seattle WA on 1/1/2017

<table>
<thead>
<tr>
<th>Current State MW</th>
<th>$</th>
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<tbody>
<tr>
<td>Alaska</td>
<td>$9.75</td>
</tr>
<tr>
<td>California</td>
<td>$10.00</td>
</tr>
<tr>
<td>Connecticut</td>
<td>$9.60</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>$10.00</td>
</tr>
<tr>
<td>Minnesota</td>
<td>$9.00</td>
</tr>
<tr>
<td>Nebraska</td>
<td>$9.00</td>
</tr>
<tr>
<td>New York</td>
<td>$9.00</td>
</tr>
<tr>
<td>Oregon</td>
<td>$9.25</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>$9.60</td>
</tr>
<tr>
<td>Vermont</td>
<td>$9.60</td>
</tr>
<tr>
<td>Washington</td>
<td>$9.47</td>
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</table>
Paid Sick Leave - Federal

Healthy Families Act

- Bill introduced by Senator Patty Murray (D-WA)
- 20 Senate and 71 House co-sponsors
- Employers with 15 or more employees
- One hour of paid leave for every 30 hours worked, up to a maximum of 56 hours per year
- Beginning earning on first day of employment; can use after 60 days of employment
- For own or a family member’s (including domestic partners) medical condition; to attend a school meeting; or for an absence related to domestic violence, sexual assault or stalking
Paid Sick Leave – State/Local

• 5 states and 16 cities/counties currently require paid sick leave
• Vermont will require 1 hour of paid sick for each 52 hours worked beginning 1/1/2017
• Expect to see more state/local paid sick leave laws in 2016

<table>
<thead>
<tr>
<th>State</th>
<th>Accrual</th>
<th>Annual Cap</th>
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<tbody>
<tr>
<td>California</td>
<td>1 hour for each 30 hours</td>
<td>48 hrs</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1 hour for each 40 hours</td>
<td>no cap, but no carryover</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1 hour for each 30 hours</td>
<td>40 hours</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1 hour for each 30 hours</td>
<td>40 hours</td>
</tr>
<tr>
<td>Oregon</td>
<td>1 hour for each 30 hours</td>
<td>40 hours</td>
</tr>
<tr>
<td>Washington D.C.</td>
<td>1 hour for each 37 hours</td>
<td>7 days</td>
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</tbody>
</table>
Scheduling - Federal

Schedules That Work Act

- Introduced by Sen. Elizabeth Warren (D-MA)
- 18 Senate and 97 House co-sponsors
- Notice of initial schedule upon hire
- Notice of schedule changes 14 days in advance
- Employees reporting to work must be paid for four hours or for scheduled hours, if less
- One hour of pay for:
  - Schedule change with less than 24 hours’ notice
  - Less than 24 hours notice to not report for work
  - Split shifts
### Proposed Legislation

- California
- Connecticut
- D.C
- Illinois
- Indiana
- Massachusetts
- Maryland
- Michigan
- New Hampshire
- New Jersey
- New York
- Oregon
- Rhode Island

### Split Shift Pay

<table>
<thead>
<tr>
<th>State</th>
<th>Pay Descriptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Bring hours worked plus 1 hour up to MW</td>
</tr>
<tr>
<td>DC</td>
<td>1 hour @ MW</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Prohibited</td>
</tr>
<tr>
<td>New York</td>
<td>1 hour @ MW</td>
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</tbody>
</table>

### Reporting Pay

<table>
<thead>
<tr>
<th>State</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>2</td>
</tr>
<tr>
<td>Connecticut</td>
<td>4</td>
</tr>
<tr>
<td>D.C.</td>
<td>4</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1</td>
</tr>
<tr>
<td>New York</td>
<td>4</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>3</td>
</tr>
</tbody>
</table>
Overtime Regulations
When will the Final Rule Be Published

My prediction – by May 16th

• DOL sent Final Rule to the White House on March 14th
  – Proposed regulations published 61 days after DOL sent to OMB
  – May 16th is 62 days after DOL sent Final Rule to OMB
• May 16th is Congressional Review Act deadline
  – Joint resolution of Congress passed within 60 legislative days of
    final rule publication, and signed by President, nullifies the rule
  – If published after May 16th, there will be time left for a new
    Republican administration to invalidate the Final Rule under CRA
• DOL must provide at least a 60-day effective date, but do not
  plan on getting more time – be prepared to comply with the new
  regulations by July 15
What is Likely to Change

• Salary Level
  – Although DOL may moderate down a bit, also unlikely to increase salary level above $50,440
  – Likely to implement automatic annual increases
  – Unlikely to allow bonuses to count towards the minimum salary level

• Duties Tests
  – Likely to move towards the California 50% primary duty rule, but not likely to bring back 80-20 rule under a long test
  – Likely to eliminate concurrent duties
Compliance Step-By-Step

1. Identify employees who need to be reclassified
2. Develop new compensation plan for the reclassified employees
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers
Identify Jobs for Review

• Jobs paid below $55,000 annual salary
  – DOL’s proposal for automatic annual increases to the salary level will soon push the level over $50,440
• Jobs with large numbers of incumbent employees
• Class action favorites
  – Accounting
  – Assistant managers
  – Sales and sales support
  – Help desk functions and other computer employees without programming duties
  – Customer service
  – Technicians
Salary Increase or Overtime

- Pull salary and incentive pay data
- Calculate the cost of increasing salary to $50,440
  - Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
  - How many hours are exempt employees are working?
  - \((\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}\)
Cost Neutral Solution

**Weekly Salary / (40 + (OT Hours x 1.5))**

- With a good estimate of expected weekly work hours, applying this formula will provide an hourly rate which will result in the same weekly and annual compensation
- Yes, it's legal – DOL gave us this formula in the preamble to the 2003 Notice of Proposed Rulemaking (68 F.R. 15576)
In fall 2016, the U.S. Department of Labor (DOL) from the Fair Labor Standards Act (FLSA) overtime ($50,440 annually). If these proposed changes to overtime pay.

To comply with the new rules, employers with exempt employees must:

1) Maintain the exemption by providing employees with an hourly rate of current salary.

2) Reclassify the employees to non-exempt and pay overtime.

This OT Cost Estimator assists you to make this decision by entering the number of hours worked each week, and with one click, it automatically calculates the estimated weekly work hours (using an hourly rate of current salary divide). The Estimator also will calculate a "cost neutral" on an hourly rate or lower salary level that, with the reclassification of the employees thus minimizing additional labor costs.

Click here to see the OT Cost Estimator in Action.

<table>
<thead>
<tr>
<th>Annual Salary</th>
<th>$35,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Bonus/Incentive</td>
<td>$1,500</td>
</tr>
<tr>
<td>Annual Commissions</td>
<td>$0.00</td>
</tr>
<tr>
<td>Other Compensation</td>
<td>$0.00</td>
</tr>
</tbody>
</table>

Estimated Weekly Work Hours: 50

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**Estimated Cost of Compliance**

Increase salary

Increase annual salary by $13,940.00 to meet the expected 2016 minimum salary.

Reclassify & Pay Overtime

Pay an additional $13,161.06 in overtime.

Reclassify Cost Neutral

Maintain your labor costs of $36,500.00 by paying an hourly rate of $12.90 or adjusting annual salary to $23,338.94.
Job Review Process

• Fact-Finding
  – HRIS Data – salaries, bonuses, direct reports, educational degrees
  – Documents – job descriptions, training materials, performance expectations
  – Interview SME managers (usually, direct supervisors)

• Analysis
  – Apply a 50% standard for primary duty
  – Assume concurrent duties test will be eliminated
ComplianceHR

- A first-of-its-kind online and intelligent solution delivering expert level risk assessments on overtime exemptions at internet scale and speed
- Results after spending 15 minutes completing an on-line questionnaire about job duties
After the Reclassification Decision

So many choices
So little time!
Compensation Plan Redesign

• Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
• Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
• How will we calculate overtime for salaried non-exempt employees?
  – Divide salary by 40
  – Divide salary by actual hours worked
  – Fluctuating workweek
• Will we continue to provide incentive compensation?
• Do we need to make changes to any benefits?
Review Policies and Processes

• Policies
  – Off-the-clock work
  – Meal and rest break
  – Travel time
  – Mobile device

• Processes
  – Timekeeping
  – Payroll changes
  – Controlling overtime hours
Communicate the Changes

• Need to communicate with senior management, managers of reclassified employees and the employees themselves

• Key decisions
  – Who will communicate the changes?
  – What will be communicated?
  – How will changes be communicated?
  – When will the changes be communicated

• Prepare talking points and FAQs
Training

• Train the reclassified employees and their managers
  – Wage & hour policies
  – Timekeeping procedures
  – Activities that are compensable work
Resources – ComplianceHR on ADP Marketplace

Navigator Suite by ComplianceHR

Intelligent Suite of Compliance Applications

Littler, the world’s largest employment and labor law practice, and software developer Neota Logic are proud to introduce ComplianceHR, an award-winning joint venture designed to combine the unparalleled subject matter expertise of Littler with the revolutionary expert software system of Neota Logic. The result? Our Navigator Suite: the first ever, online, intelligent and transformative suite of compliance applications delivering actionable, expert level guidance at internet speed and scale.

Take the Tour
Resources – **Littler Xmpt Toolkit**

The **Littler Xmpt Toolkit** is a fixed-fee toolkit designed to assist employers with:
- Understanding the proposed and final regulations
- Determining employees who will need to be reclassified
- Implementing the reclassification decision

The Xmpt Toolkit will include a Web-based portal that provides access to:

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Communications Plan Template and Materials</td>
<td>A guide to communicating the changes to employees and their managers, including talking points and FAQs.</td>
</tr>
<tr>
<td>Training Webinars and Presentations</td>
<td>Learn all you need to know on exemption requirements, hours worked, overtime pay calculations, timekeeping and payroll best practices.</td>
</tr>
<tr>
<td>Template Policies and Agreements</td>
<td>National and state-specific policies on off-the-clock work, meal and rest breaks, travel time and flexible workweek agreements.</td>
</tr>
<tr>
<td>Wage and Hour Field Guides</td>
<td>Comprehensive state-by-state guides to wage and hour laws to help answer everyday questions and identify critical areas of compliance.</td>
</tr>
<tr>
<td>Littler Wage and Hour GPS</td>
<td>A library of state-by-state surveys on a variety of wage-hour topics and substantive analysis of new legislation and regulations.</td>
</tr>
<tr>
<td>Wage and Hour Counseling</td>
<td>Four hours of attorney time with a wage and hour subject matter expert.</td>
</tr>
</tbody>
</table>
Questions?