

Call to Action:

Preparing Your Workforce for Proposed Changes
to FLSA Exemptions and Compliance with the
DOL's Broadened Definition of Employee



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Agenda

- ✦ DOL Guidance: Employee Misclassification
- ✦ White Collar FLSA Exemptions
- ✦ Paid Sick Leave Laws

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DOL Guidance: Misclassification

"In sum, most workers are employees"

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Reasons for Guidance

- ✦ A Growing Problem
- ✦ Numerous complaints
- ✦ Another Tool in the Department's Misclassification Initiative

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Reasons (Cont.)

- ✦ Misclassification Deprives Employees of Workplace Protections
- ✦ Misclassification Results in Lower Tax Revenue for Government
- ✦ Misclassification Creates an Uneven Playing Field for Employers Who Properly Classify Their Workers

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Economic Realities Test

- ✦ WHD Applies the Economic Realities Test to Determine Employee Status
 - ▶ Based on the FLSA
- ✦ Broader Than the Common Law "Right to Control" Test

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Economic Realities Test

- ✦ Factors Applied Broadly
- ✦ All Factors Must be Considered in Each Case
- ✦ No One Factor is Determinative
 - ▶ Particularly the control factor
- ✦ **Economic Dependence**

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Factors

- ✦ Is the Work an Integral Part of the Employer's Business?
- ✦ Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
- ✦ How Does the Worker's Relative Investment Compare to the Employer's Investment?

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Factors (cont.)

- ✦ Does the Work Performed Require Special Skill and Initiative?
- ✦ Is the Relationship Between the Worker and the Employer Permanent or Indefinite?
- ✦ What is the Nature and Degree of the Employer's Control?

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Is the Work Integral to the Business?

- ✦ A “Compelling” Factor
- ✦ A True Independent Contractor’s Work is Unlikely to Be Integral to the Employer’s Business

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Management Skills and Opportunity for Profit or Loss

- ✦ Focus on Managerial Skills
 - ▶ Not on ability to work more hours
- ✦ Does the Exercise of Managerial Skill Provide the Opportunity for Profit and Loss Even Beyond the Present Job?
- ✦ Opportunity for Loss is Particularly Telling

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Relative Investment

- ✦ What is the Worker’s Investment *Relative to the Employer’s Investment*?
- ✦ Contractors Typically Make Investments That Support Their Businesses Beyond Any Particular Job

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Special Skill and Initiative

- ✦ Business Skills, Judgment, and Initiative
 - ▶ Not technical skills
- ✦ Even Specialized Skills Do Not Indicate Workers Are in Business for Themselves
 - ▶ Especially if those skills are technical and used to perform the work at issue

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Length of Work Relationship

- ✦ If Permanent or Indefinite, Suggestive of Employment Relationship
- ✦ Independent Contractors Do Not Want the Dependence That Comes With Permanence or Indefiniteness

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Employer Control

- ✦ Do Not Overemphasize This Factor
- ✦ The Worker Must Control Meaningful Aspects of the Work Performed
 - ▶ A person conducting his or her own business
- ✦ The Worker's Control Over Meaningful Aspects Of The Work Must Be More Than Theoretical
 - ▶ The worker must actually exercise control

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Economic Realities Test

- ✦ Ultimate Determination: Whether the Worker is Economically Dependent on the Employer
- ✦ In Sum, Most Workers Are Employees

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White Collar Exemptions

Overtime Pay and More

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White Collar Exemptions

- ✦ Includes:
 - ▶ Executive
 - ▶ Administrative
 - ▶ Professional
 - ▶ Outside Sales
 - ▶ Computer Employees
- ✦ Requires:
 - ▶ Paid on a salary basis
 - ▶ Not less than \$455/week
 - ▶ Certain job duties

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Salary Level Test

- ✦ Proposed Increase To 40th Percentile of Weekly Earnings For FT Salaried Workers
 - ▶ \$970/week
 - ▶ \$50,440 annually
- ✦ Automatic Increases to Keep Pace with Inflation Without Requiring Additional Action by the DOL

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Possible Effect for Employees Newly Eligible for Overtime Pay

- ✦ Same Hours, Increase in Pay
 - ▶ Based on hours worked in excess of 40/week
- ✦ Same Pay, Decrease in Total Hours Worked
 - ▶ Due to shift of overtime hours to newly-created positions
- ✦ Pay Increase to Meet New Threshold, Job Otherwise Unaffected

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Possible Effect for Employees Newly Eligible for Overtime Pay

- ✦ Decrease Effectively Hourly Rate to Approximate Salary Before OT-eligible
- ✦ Potential Changes in Benefits
- ✦ Streamlined Management Structure

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Job Duties Test

- ✦ No Proposed Change at This Time
- ✦ Considering an Exempt-Duties Threshold

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Nondiscretionary Bonuses

- ✦ DOL is Also Considering Permitting Nondiscretionary Bonuses to Satisfy a Portion of Salary Level Test

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Paid Sick Leave Laws

A Trending, Splintered Issue

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Mandated Paid Leave

- ✦ States and Territories Including:
 - ▶ California, Connecticut, Massachusetts, Washington, D.C.
- ✦ Cities Including:
 - ▶ San Francisco, Philadelphia, Oakland, Seattle, New York City

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Complexities

- ✦ State and Local Laws and Ordinances Have Several Issues to Consider

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Practice Pointers

- ✦ Put Your Paid Leave Practices in Writing
- ✦ Give Copies to Employees
- ✦ Have Employees Sign a Form Acknowledging Receipt
- ✦ Check State and Local Laws
 - ▶ Do not overlook case law, city and county ordinances, etc.

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Multi-State Sick Leave Policies

🔗 Interplay Between Paid Sick Leave Laws

- ▶ A single, uniform policy may be problematic

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29