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**FLSA Changes and Challenges: Here We Go Again**

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**What laws are we talking about?**

- Federal Fair Labor Standards Act ("FLSA")
  - Statute, federal regulations, DOL opinions, cases
- Tennessee does not have minimum wage or overtime requirements
  - But does have some wage laws

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## What's new?

- Senate has confirmed a new Wage & Hour Division administrator
- Executive Order seeks to close exemption "loopholes"/proposed regulations expected soon
- New minimum wage for federal contractors
- No more companion exemption

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## On the horizon...

- Increase of minimum salary requirement for exempt positions?
- No more "working supervisors"?
- Federal minimum wage increase?
- Forecast for Tennessee Legislature 2015—any state wage and hour activity in the works?

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## Concepts You Must Internalize

- Like life, the FLSA is not fair, and doesn't always make sense
- Good employers violate the FLSA all the time
- You can never be in full compliance with the FLSA. Or if you are, they'll change the rule
- Prioritize your compliance issues
- Rationally assess your risk
- Don't be the low-hanging fruit!

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## What Subjects Does the FLSA Cover?

- Minimum wage (\$7.25)
- Overtime
  - Over 40 hours in a 7-day workweek
- Recordkeeping
- Other
  - Child labor, equal pay, notice/posting

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## Challenge 1: Independent Contractor Classification Analysis

- Who is covered by the FLSA?
- Items to gather: written agreements, job descriptions, tax records, expense reimbursement documentation, observation and testimony

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## Who is Covered?

- Employees are covered. DOL assumes EVERYBODY is an employee.
  - Unpaid volunteers and interns will be subject to scrutiny
- Independent contractors are NOT covered.
  - The law, not the parties, gets to decide who is a true IC
  - Are you sure?
  - Key concepts:
    - CONTROL OF WORK
    - ECONOMIC DEPENDENCE/INDEPENDENCE

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## Challenge 2: Exempt Classification Analysis

- Certain employees are EXEMPT from timekeeping, minimum wage, and/or overtime requirements of the FLSA
- Items to gather:
  - Org charts
  - Job descriptions
  - Salary ranges for each position
  - Observation and testimony

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## “White Collar” Exemptions

- Executive, administrative, professional
- Must
  - Be paid on a salaried or fee basis
  - Perform exempt duties

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## Salaried Basis

- \$455 per week non-fluctuating salary (or fee basis)
  - Additional forms of comp may be paid but don't count towards salary
  - Look for this number to be increased
- Not subject to deductions based on quality or quantity of work
  - With a finite list of exceptions
  - Careful with ANY deductions from salary of exempt employee—get advice
  - What happens if you illegally deduct?
    - Exemption is lost
    - Enact a safe harbor policy

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## Permissible Deductions

- Deductions from non-salary comp
- Deductions from benefits (PTO, vacation, sick time)
  - With a caveat
- Deductions from salary IF specifically listed in regs

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## Permissible Deductions From Salary

- **Full day absence** due to personal reasons other than illness or accident
- **Full day absence** for illness or accident if you provide paid sick leave and employee has none available
- Any absence during first or last week of employment
- Any absence covered by FMLA
- Suspension for safety violations or serious workplace misconduct

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## “White Collar” Exemptions

- Executive, administrative, professional
- Must
  - Be paid on a salaried or fee basis
  - Perform exempt duties as primary job function

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## Primary Duty

- "principal, main, major or most important duty that the employee performs"
- Some non-exempt duties OK
- Look at relative importance of exempt versus non-exempt duties
- Are exempt duties periodic, or constant
- 50 percent "rule of thumb"

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## Executive Exemption

- Salaried basis of payment
- Primary duty of management of the enterprise in which he is employed or a customarily recognized subdivision
- Customarily and regularly directs the work of two or more employees
  - 80 person power hours
- Has authority to make or influence personnel decisions

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## Administrative Exemption

- Salaried basis
- Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Has a primary duty that includes exercise of discretion and independent judgment with respect to "matters of significance."

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## Professional Exemption

- Salaried or fee basis of payment, not less than \$455 per week
  - Exception for physicians
- Requiring knowledge of an advanced type in field of science or learning (learned professional)

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## Exemptions getting narrower...

- Upcoming regulations may narrow available exemptions
- Salary minimum will be increased
- Working supervisors viewed with disfavor
- Stay tuned...

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## Challenge 3: Timekeeping

- Time must be accurately tracked by your preferred method for all non-exempts
  - This is the first Challenge to determine whether minimum wage and overtime requirements are being met
- You must pay for all work which you knew or *should have known* was being performed (reality check)
- Your supervisory workforce needs to understand
  - What constitutes "work time"
  - No "off the clock" work is permitted, never, ever, *ever*
  - Popular phone calls I receive:
    - Training time, travel time, work from home preliminary time, smart phones
    - Break time (my favorite)
- Good written policies are critical

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## Challenge 4: Work Time Analysis

- All work “suffered or permitted” counts and must be paid
- Off the clock work is not permitted
- Reality check—what do your supervisors know?
- Hot issues
  - Mobile work force
  - Work from home
  - Preliminary and postliminary work
  - Travel and commute time
  - Break time

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## Challenge 5: Minimum Wage

- Employees must receive \$7.25 per hour regardless of method of payment
  - Divide total earnings by hours worked
  - Watch out for payroll deductions taking pay below minimum wage 
    - Such deductions for cash shortages, breakage, theft are NOT permitted if minimum wage is impacted
    - Some deductions are permitted. Get advice!
    - Watch out for state law.
- Will we be seeing minimum wage increases in 2015? Maybe
  - Many states have already enacted increases

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## Challenge 6: Overtime

- Basic rule: employees must be paid 1 ½ the regular hourly rate for all hours over 40 in a work week
  - State law may vary
  - No comp time for private employers
- Regardless of method(s) of pay
- Regular rate = Weekly Remuneration/time worked 
- Remuneration may include premium pay, commissions, bonuses.
  - Sometimes you have to do hard math
  - If your method of payment covers all straight time hours, overtime is at ½ regular rate.

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## Challenge 7: State Law Compliance Issues

- Some states have their own overtime, minimum wage, break time, deduction, and exempt classification rules (among others)
- Tennessee has rules on
  - Timing of pay
  - Withholding pay/deductions/final paychecks
  - Authorization forms

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## Challenge 8: Written Policy Review

- Good policies should address
  - Employment classification
  - How and when employees will be paid
  - How to report pay errors
    - Including specifically improper salary deductions for exempt employees
  - Timekeeping methods
  - Break time explanations
  - Any prohibitions (such as working from home)
  - Deductions which may be made (additional authorization form should be signed)
  - Off-the-clock work is prohibited

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## Challenge 9: Supervisory Training

- Cover wage and hour basics (particularly off-the-clock work), written policies, handling wage complaints
- There is individual liability under the FLSA!
- Every 2 years is ideal

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## Challenge 10: Get Advice

- Issues are complicated and outside perspective helps
- There are industry and position-specific exemptions and issues
- Good faith defenses are available
- Check out the federal WHD website <http://www.dol.gov/whd/>

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