

Employment Law Basics for HR Professionals Series

Wage & Hour Law: Misclassification and Other Common Pitfalls

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AGENDA

- Exempt/Non-Exempt Employee Classification
- Compensation and Timekeeping Issues for Non-Exempt Employees
 - › Hours worked
 - › Payments included in regular rate
- Independent Contractors and Other Non-Employees

Classifying Employees: Exempt or Non-Exempt?

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Employee Classification Basics

- General rule is all employees must be paid for all hours worked, and must be paid 1.5x their “regular rate” for hours over 40 in a workweek, UNLESS an exemption applies
- Everyone who is not exempt from overtime law is “non-exempt”
- May be paid on hourly or salaried basis
- Must maintain records of hours worked
- Employees may not waive FLSA rights (e.g. they cannot “agree” to be exempt or to not receive overtime pay)

Workweek Basis

- Overtime is determined on a workweek basis: a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods
- Need not coincide with the calendar week
- Averaging of hours over two or more weeks is not permitted
- Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned (**caveat**: bonuses, commissions)

“White Collar” Exemptions

- Executive
- Administrative
- Professional
- Each test contains a “salary basis” requirement and a duties test – both must be met for exemption to apply
- White collar exempt employees may receive same pay regardless of how many hours they work – no overtime or minimum wage requirement

Salary Basis Test

- Threshold requirement for white collar exemptions is that employee is paid on a salary basis.
- Salaried exempt employees must receive full amount of salary in any workweek they perform any work, regardless of number of days or hours
- However, a salaried employee need not be paid for any week in which no work is performed
- If employee's compensation is reduced based upon the quantity or quality of work performed, employee is not paid on salary basis
- However, FLSA does allow for extra incentive or bonus payments to salaried employees

Salary Basis - Deductions

- Deductions generally not permitted for partial week absences caused by the employer or the operating requirements of the business, or for jury duty, witness duty, or temporary (<1 week) military leave
- *However*, wage deductions may be made:
 - › Full day absences for personal reasons other than sickness or accident;
 - › Full day absences due to a sickness or disability, provided that deduction is made in accordance with a bona fide paid sick leave plan, and EE has exhausted benefits;
 - › Full day absences at beginning / end of FMLA leave; and
 - › As a penalty imposed in good faith for safety infractions of “major significance”

Salary Threshold

- Federal / NH / MA
 - > Increased on January 1, 2020 to \$684/week (\$35,568 annually)
- Maine
 - > Annualized salary must exceed 3000x the current hourly minimum wage – indexed to inflation
 - > Increased on January 1, 2023 to \$41,400 annually (\$796.17/week)

Executive Exemption

- Employee's "primary duty" is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Employee "customarily and regularly" directs the work of at least two or more other full-time employees (80 hours); and
- Employee has authority to hire or fire other employees, or the employee's suggestions and recommendations must be given particular weight
- **Caution:** Each individual treated as exempt must oversee at least 80 hours of subordinate work, not shared with another supervisor.

Administrative Exemption

- Employee's primary duty consists of 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
- Employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
- **Caution:** Office / non-manual work alone is not enough
- Best practice is to limit use to the business functions specifically identified in federal regulations:
 - › 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

“Learned” Professional Exemption

- Employee’s primary duty consists of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional Exemption

- Employee's primary work must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- Fields include music, writing, acting, graphic arts

“Highly Compensated Employees”

- Employee is paid on a salary basis at least \$684/week and total compensation of at least \$107,432 per year
- Can qualify for exemption under a less stringent duties test:
- Employee’s primary duty includes performing office or non-manual work; and
 - › Employee customarily and regularly performs at least one of the exempt duties of an executive, administrative, or professional
 - › E.g. The HCE regularly directs the work of 2 or more full-time employees but does not have hiring or firing authority
- **Caveat:** Not available in ME

Computer Professionals

- Employee is paid either a salary of \$684/week or hourly wage of at least \$27.63/hour
- Primary duty must consist of:
 - › Application of systems analysis techniques to determine hardware, software, or system specs;
 - › Design, development, analysis, creation, testing, or modification of computer systems or programs; or
 - › Combination of similar duties involving same skills
- Employee is employed as a computer systems analyst, computer programmer, software engineer, or similar
- **Caveat:** Most office IT professionals will not qualify

Outside Sales Under FLSA

- Primary duty is making sales; and
- Employee is customarily and regularly engaged away from employer's place of business
 - › Minimum wage and overtime exemption
 - › Employer's place of business includes home office

Salespersons - Maine Law

- Earnings are derived in whole or in part from sales commissions; and
- Hours and place of employment not substantially controlled by the employer
 - › Overtime and minimum wage
 - › No other exemption for salespersons

Misclassification

- Risks of mistakenly classifying an employee as exempt are substantial:
 - › Regular rate will be determined by reference to the salary;
 - › If hours not tracked, hours worked will likely be determined by employee's testimony;
 - › Employer will be required to pay 1.5 times the regular rate for all hours over 40;
 - › Employer will be required to pay an equal amount (or double in ME/MA) in liquidated damages.

Non-Exempt Employees: Compensation and Timekeeping Issues

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Non-Exempt Employees – The Basics

- Must be paid for all hours worked
- Must receive 1.5x regular rate for all hours over 40 in a workweek
- May be hourly or salaried
- Two key questions
 1. What constitutes “work” time that must be paid?
 2. What payments are included in “regular rate”?

Hours Worked: the Basics

- “Hours worked” is broadly defined to include all time during which an employee is suffered or permitted to work
- The scheduled shift does not determine hours worked
- Even work performed without employer’s consent will constitute hours worked if:
 - › employer allows employee to engage in the activity;
 - › employer derives some benefit from the activity; and
 - › the time was not *de minimis*
- “Hours worked” does not include time during which the employee performs no work, even if paid, such as earned time off, vacations, and holidays

On-Call Time

- On-call time constitutes hours worked unless the employee is free to use the time effectively for his or her own purposes
- Sample factors: (1) freedom to leave premises; (2) required response time/distance; (3) requirements for sobriety, wearing uniform, etc.; (4) actual frequency and length of work assignments
- Any time actually spent working while on-call is compensable

Rest/Meal Periods

- 20 minutes or less = hours worked
- 30+ minutes – not work time if:
 - › employee is completely relieved from duty, and
 - › employee is free to leave the duty post, although the employee may be required to remain on the premises
- 20-30 minutes: depends upon whether the employee can effectively use the time for his or her own purposes

Training Time and Meetings

- Training and meeting time are hours worked if:
 - › employee attends as part of the normal workday;
 - › attendance is explicitly or implicitly required;
 - › employee performs productive work during attendance;*or*
 - › training time or meeting is directly related to the employee's job present job and does not correspond to training offered by independent institutions of higher learning

Travel Time

- Home-to-work travel time generally is not hours worked
 - › Exception – If employee is assigned to go straight from home to an alternative work site in another city, time spent traveling in excess of normal commute is compensable
- Travel from one site to another during the workday generally is hours worked
- For out-of-town overnight travel, the following generally counts as hours worked:
 - › All time spent driving, unless employee is offered alternative transportation and elects to drive;
 - › All time spent traveling during normal working hours, including Saturdays and Sundays, except meal time; and
 - › All time spent actually working, including time spent working while in transit

Donning and Doffing

Time spent changing clothes or washing at the beginning or end of each workday must be counted as hours worked if

- › the changing of clothes or washing is indispensable to the performance of the employee's work, or
- › is required by law, or
- › is required by the rules of the employer, or
- › if compensable by contract, custom, or practice.

Employer may exclude time only if provided by the express terms of, or by custom or practice under, a bona fide collective-bargaining agreement

Other Preparatory and Concluding Activities

- Preparatory and concluding activities are working time when activities are closely related to principal activity and indispensable to performance. Examples include:
 - › Truck driver pre-shift safety inspections
 - › Meat packer knife sharpening
 - › Cleaning/set-up of machines or tools
 - › Implementing safety precautions
 - › Driving company truck from office to work site

Recording Time

- Employers may use any timekeeping method they choose, e.g. time clock, handwritten time sheet; computer or phone apps
- Must be complete and accurate – must show **actual** start and stop times
- Rounding is permitted as long as employer rounds both up and down, and no more than 15-minute increments
 - › E.g. 5:07 round down to 5:00; 5:08 round up to 5:15
- Do not need to pay employees who voluntarily arrive early or stay after shift, as long as no work is performed

Working from Home

- FLSA's "suffer or permit" to work standard is extremely broad – even if there is a clear policy requiring prior consent for work performed from home, work performed without consent will constitute hours worked if:
 - › Employer allows the employee to engage in the activity;
 - › Employer derives some benefit from the activity; and
 - › Time worked was not *de minimis*.
- Employer can be held responsible if it knows or has reason to know that an employee is working off the clock
 - › E.g., emailing or calling non-exempt employees after hours

Working from Home (cont'd)

- Clear policies in place to set remote work expectations, ideally with technological safeguards
 - › Set maximum work hours by day and/or week – no logging in before or after scheduled hours
 - › Expressly prohibit working overtime w/o prior authorization
 - › Require accurate timekeeping –actual start/stop times
 - › Make clear that all hours must be reported – no working off the clock
 - › To facilitate compliance, managers must be aware not to make work requests of remote employees after hours – consider them to have left the building

Working from Home – Tracking Time

- Variety of ways to track time
 - › Computer/app based – this is ideal for remote work
 - › Handwritten/typed time sheets scanned and submitted
 - › Email to supervisor/payroll listing daily hours
 - › Recommend daily tracking to better manage weekly hours
- Whatever method is used must be complete and accurate and show actual start/stop times

Calculating the Regular Rate

- Basis for overtime pay –NOT the same as the hourly rate and may vary from week to week
- Total included compensation during the workweek and divide by total hours worked
 - › In the case of a salary, divide by number of hours salary intended to cover – may be all hours worked (fluctuating workweek) or some lesser amount
- Must be equal to at least the applicable minimum wage

Included in the Regular Rate

Wages or salary

Commissions

Non-discretionary
bonuses

Payments received in
the form of goods
that are intended to
be part of wages (like
room and board)

Premium payments
other than for
overtime

Excluded from Regular Rate

Premium payments for overtime work or extra pay for work on Saturdays, Sundays, and holidays (may also be credited towards overtime pay)

Money or items given as a gift (e.g. holiday bonus, company tote bag)

Payments for time off (e.g. sick days, vacation, holidays, and sporadic payments for lack of work)

Payments for unused leave

Call-back pay for unanticipated extra work

Pay during meal breaks when no work performed

Reimbursements for expenses employee paid (e.g., travel reimbursements)

Bonuses that are completely discretionary

Amounts employer spends on employee benefits

Conveniences aka "perks" (e.g. gym access, health clinics, parking, EE discounts)

Regular Rate – Bonuses

- Discretionary bonuses may be excluded from the regular rate.
- Discretionary means both the fact and amount of the bonus are at the employer's sole discretion at or near the end of the bonus period; and bonus paid without expectation / promise / commitment / plan.
- Regularly given does not necessarily.
- Non-discretionary bonuses must be included in the "regular rate" and allocated to the appropriate workweek to compute additional O/T.

Allocation of Later-Made Payments

- Non-discretionary bonuses, commissions and other payments must be allocated over the workweek(s) in which they were earned.
 - › For example, quarterly bonus must be allocated over 13 weeks of the quarter.
- Will require additional overtime payment, weeks or even months after the workweek in which is was earned.

Allocation of Non-Discretionary Bonuses (Example)

- Example: Employee's earns \$2,000 annual non-discretionary bonus
 - › Employee took 2 full workweeks of vacation and worked some or all of the other 50 workweeks
- Bonus per workweek = \$40 ($\$2,000 / 50$ weeks)
- Assume that in 20 of the workweeks, the employee worked 40 or fewer hours – no additional pay owed
- For the 30 workweeks employee worked more than 40 hours, additional overtime is computed as follows:
 - › Assume employee worked 55 hours during a particular workweek
 - › Divide applicable portion of bonus by total hours worked that week ($\$40 / 55$ hours = \$.73 per hour)
 - › Because bonus covers straight time for all hours worked, only 1/2 time is required for additional overtime ($\$.73 / 2 = \$.37$ per overtime hour)
 - › Additional overtime owed = \$5.55 ($\$.37 \times 15$ overtime hours)
- Repeat this calculation for each workweek during which overtime was worked

Joint Employment

- Separate companies may be treated as one if commonly owned or closely related.
- DOL aggregates hours worked at joint employers for purposes of overtime.
 - › Example: Employee works 25 hours at ice cream shop and 25 hours at commonly owned but separately incorporated seafood restaurant. Employee will be deemed to have worked 50 hours for a joint employer, and is entitled to OT for hours after 40.
- Joint employment can be horizontal or vertical
 - › Horizontal = shared ownership or control
 - › Vertical = one company exercises control over another's employees or workplace

Employees Who Work Two or More Jobs

- If both jobs non-exempt, either:
 - › Overtime paid at rate the EE was working at the time O/T hours occurred; or
 - › Weighted average of employee's multiple rates of pay for the week based on the number of hour worked at each rate (i.e., total pay divided by the total number of hours worked in the workweek)
- If one job is exempt and one non-exempt, combine all job duties (exempt and non-exempt) and look at character of job as a whole
 - › If combined job still meets duties test and salary basis test, entire job is exempt and there is no obligation to pay any additional compensation for non-exempt job (although additional payments are allowed)

Wage Payments upon Separation - ME

- All wages due upon next payroll date
- Vacation pay
 - › Starting Jan. 1, 2023, “accrued” vacation pay under employer’s policy must be paid by employers with 10+ employees
 - › Possible ambiguity about whether PTO applies
 - › Can have rules limiting accrual / roll-over
- Earned Paid Leave governed by employer’s policy – unclear how new vacation pay statute may impact this

Wage Payments upon Separation – MA/NH

- Massachusetts:
 - › If voluntary resignation, wages due upon next payroll date
 - › If termination, wages due on last day of work
 - › Wages include vacation pay
- New Hampshire:
 - › If voluntary resignation, wages due upon next payroll date (or within 72 hours if EE gives one pay period's notice of resignation)
 - › If termination, wages due within 72 hours
 - › Employer's policy governs vacation pay

Independent Contractors and Other Non-Employees

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Employee or Independent Contractor - Why Does it Matter?

- Federal, state, and local law imposes many requirements on employers that do not exist when a business hires an independent contractor
- E.g. workers' compensation coverage, unemployment contributions, tax withholding, wage and hour compliance, anti-discrimination laws
- Penalties for misclassification can be substantial:
 - › Payment of WC benefits out of pocket
 - › Payment of unpaid UE contributions, with interest and penalties
 - › Payment of back taxes, interest, and penalties – employer remains liable
 - › Unpaid minimum or overtime wages, liquidated damages, attorneys' fees

Employee or Independent Contractor? Federal Law – Economic Realities Test

- Overall focus is on whether the worker is truly in business for him or herself, or whether worker is economically dependent on employer
- Economic Realities Test:
 1. Nature and degree of employer's control;
 2. Permanency of worker's relationship with employer;
 3. Amount of worker's investment in facilities, equipment, or helpers;
 4. Amount of skill, initiative, judgment, or foresight required for worker's services;
 5. Worker's opportunity for profit or loss;
 6. Extent of integration of worker's services into employer's business;
and
 7. Degree of independent business organization and operation.

Employee or Independent Contractor?

Maine Law

- Statutory test has been adopted for workers' compensation, unemployment, and wage and hour purposes
- Strict test with three parts – each part must be satisfied for IC status
- Services performed by an individual for remuneration are assumed to be “employment” unless:
 1. Individual is free from essential direction and control, both under the individual's contract and in fact; and

Employee or Independent Contractor?

Maine Law

2. Individual satisfies all of the following criteria:
 - › Individual has essential right to control means and progress of work except as to final results;
 - › Individual is customarily engaged in an independently established trade, occupation, profession, or business;
 - › Individual has opportunity for profit and loss;
 - › Individual hires and pays assistants, if any, and supervises details of their work (if they are employees); and
 - › Individual makes their services available to some client/customer community even if the individual's right to do so is temporarily restricted or voluntarily not exercised; AND

Employee or Independent Contractor?

Maine Law

3. Individual satisfies **at least 3** of the following criteria:
- › Individual has a substantive investment in facilities, tools, instruments, materials, and knowledge used to complete the work;
 - › Individual is not required to work exclusively for the employer;
 - › Individual is responsible for satisfactory completion of work and may be held contractually responsible;
 - › Parties have a contract that defines relationship and gives contractual rights in the event the contract is terminated early;
 - › Payment is based on factors directly related to work performed and not solely on amount of time spent on work;
 - › Work is outside the usual course of the employer's business; or
 - › Individual has been determined to be an IC by the IRS (SS-8 determination) – not common

Employee or Independent Contractor? Massachusetts Law

- Massachusetts uses “ABC” test – must satisfy **all** of the following:
 - › Work is done without direction and control of employer; and
 - › Work is performed outside usual course of employer’s business; and
 - › Contractor has independent business doing that kind of work.

Employee or Independent Contractor? New Hampshire Law

- NH requires **all** of the following 7 criteria:
 - › Person possesses own FEIN
 - › Person has control and discretion over means and manner of performance of work
 - › Person controls time of performance, subject to reaching schedule agreement with employer
 - › Person hires, pays, and supervises own assistants, if any
 - › Person holds self out to be in business or is registered with state to conduct business
 - › Person responsible for satisfactory completion of work and can be held contractually responsible
 - › Person not required to work exclusively for employer

Independent Contractors – Best Practices

- Use written agreement to describe nature of relationship
 - › Classify as IC
 - › Provide control over methods, timing, tools, hiring of employees, etc. to IC – retain right to approve results
 - › Limited time or project-based
 - › Have IC utilize own entity and invoice company for work
 - › IC should furnish own tools and pay own expenses
 - › Pay flat fee rather than hourly, daily, weekly/monthly rate or commissions
 - › Non-exclusivity
 - › Require carrying own insurance
- Avoid having IC work on site
- Avoid using IC to perform integral business functions

Volunteers

- Employees may not volunteer services to for-profit, private sector employers.
- In the non-profit arena, volunteers are not entitled to wages or OT, *provided* the services are rendered with no promise, expectation, or receipt of compensation, *except* reimbursement for expenses, reasonable benefits, and nominal fees.
- When non-profit employee also volunteers:
 - › Work must be dissimilar to regular duties and outside regular hours
 - › Volunteer services may not be expected or coerced

Interns

- Internship, even though it includes actual operation at employer's facilities, is similar to training given in an educational institution;
- Experience is for the benefit of the intern;
- Not displacing regular workers, but working under close supervision of existing staff;
- Employer derives no immediate advantage, and intern's presence may actually impede operations;
- Intern isn't necessarily entitled to a job at the end of the internship; and
- Employer and intern understand internship to be unpaid.



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