

NUKK-FREEMAN
& CERRA, P.C.
EMPLOYMENT ATTORNEYS

TEAMING WITH
EMPLOYERS
TO BUILD A
BETTER
WORKPLACE

EO HUDDLE

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nfclegal.com



Questions ...

- ▶ How many employees do you have?
- ▶ What % of them are “**exempt**” from overtime?
- ▶ Do you use **independent contractors**?
- ▶ Do you use **interns**?

AGENDA FOR TODAY'S HUDDLE

- Misclassification of Non-Exempt Employees/Failure to Pay Overtime
- Independent Contractor Misclassification
- Improper Use of Unpaid Interns



STARTLING STATISTICS

- The Department of Labor (DOL) has increased its workforce with **hundreds** of additional wage and hour investigators over the past several years
- Employees today bring more than **three and a half times** as many wage & hour cases as they did 10 years ago
- Up to **90%** of all class actions (state and federal) are wage and hour claims



**Experts estimate that
70% of employers are **not** in
compliance with the FLSA**

STARTLING STATISTICS

The Settlements & Jury Verdicts Are Alarming ...

- ▶ Dick's Sporting Goods paid **\$15 million** to settle claims for unpaid overtime in 36 states
- ▶ Staples paid **\$42 million** to settle claims that it improperly classified its managers as “exempt”
- ▶ Wal-Mart paid a **\$40 million** settlement for claims that it didn't properly pay for rest/meal breaks and overtime



MISCLASSIFICATION IS HEAVILY TARGETED BY THE DOL

- **Davis v. JP Morgan Chase**: Employees claimed JPMC misclassified loan underwriters as “managers,” and thus impermissibly failed to pay them overtime.
 - **Settlement: \$42 million** (\$14 million of which was attorneys’ fees)
- **Aaron Daniels v. Premium Capital Funding**: Alleged OT violations due to misclassification as exempt employees and recordkeeping violations.
 - **Jury verdict: \$9.1 million** plus attorney’s fees and costs



SECTION ONE: **Which of Your Employees Are Really Exempt?**

“EXEMPT” vs. “NON-EXEMPT”

- Every employee in your organization must be classified as **EXEMPT** or **NON-EXEMPT**
- **EXEMPT EMPLOYEES** are paid the same amount each week (generally) and do *not* get overtime
- **NON-EXEMPT EMPLOYEES** must be paid:
 - the applicable minimum wage &
 - overtime after 40 hours in a workweek

RULE:
**Assume non-exempt unless
employee falls into an exemption!**



EXEMPT CATEGORIES

Under the FLSA, an employee can be considered exempt **ONLY** if he/she fits one of these categories:

- *Professional Exemption*
- *Executive Exemption*
- *Administrative Exemption*
- Inside Commissioned Sales Exemption
- Outside Sales Exemption
- Computer Exemption (PA does not recognize this)
- Highly Compensated Employees (PA does not recognize this)

PROFESSIONAL EXEMPTION

To qualify an employee must meet **ALL** of the following criteria:

- **Salary of at least \$455/week = \$23,660/year**
 - **NOTE:** *This salary threshold increases to \$913/week [\$47,760/year] effective December 1, 2016*

- **Primary duty:** Work predominantly **intellectual** in nature



PROFESSIONAL EXEMPTION

- **Learned Professional**
 - Work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and which includes work requiring the use of discretion or judgment on a consistent basis
- **Creative Professional**
 - Work requiring invention, imagination, originality or talent in a recognized field, or artistic or creative endeavor

Cannot Be Satisfied with a High School Education

BONA FIDE PROFESSIONAL POSITIONS - **YES!**

Accountant

Scientist

Mechanical, Chemical, Civil Engineer

Pharmacist

Architect

Actuary

BONA FIDE PROFESSIONAL POSITIONS - **NO!**

**Accounting clerks and bookkeepers
performing routine tasks**

Engineering technicians

Paralegals and legal assistants

EXECUTIVE EXEMPTION

To qualify an employee must meet **ALL** of the following criteria:

- **Salary of at least \$455/week = \$23,660/year**
 - **NOTE:** *This salary threshold increases to \$913/week [\$47,760/year] effective December 1, 2016*
- **Primary duty:** manage the organization or a recognized department or subdivision
- **Customarily** and regularly **direct** the work of *2 or more full-time employees*



EXECUTIVE EXEMPTION

- › Executive employees must possess the authority or provide significant input into the employment status of other employees:

Hiring/Firing

Promotions

Advancement

**Other status
changes**

ADMINISTRATIVE EXEMPTION

- To qualify, an employee must meet **ALL** of the following criteria:
 - **Salary of at least \$455/week = \$23,660/year**
 - **NOTE:** *This salary threshold increases to \$913/week [\$47,760/year] effective December 1, 2016*
 - **Primary duty:** Office or non-manual work directly related to management or general business operations
 - Exercise **discretion** and **independent judgment** on matters of significance



ADMINISTRATIVE EXEMPTION

- What does it mean to be “directly related to **management** or **general business operations**”?
 - **Running** or **servicing** of the business or the employer’s customers
 - **NOT producing** the product sold or **selling** the product in a retail or service location

BONA FIDE ADMINISTRATION POSITIONS - **YES!**

Human Resources Manager

- With or without direct reports – must independently interpret and/or implement personnel policies

Office Manager

- With or without direct reports – must consistently makes decisions about how the office should run without involvement from upper management

Team Leader

- With our without direct reports – must run major projects without oversight

BONA FIDE ADMINISTRATION POSITIONS - **NO!**

Human Resources Associate

- Who screens applicants

Assistant Managers

- Who may fill in for managers but whose primary duty is support without independent discretion (and no direct reports)

Inspectors

- Who rely on well-established techniques and procedures

Back office sales associates

- Who work on spreadsheets and compiling data

Administrative Assistants!

INSIDE COMMISSIONED SALES EXEMPTION

In order to qualify for this exemption, **ALL** of the following criteria must be met:

- › The employee is employed by a **retail** or **service** establishment;
- › The employee's regular rate of pay **exceeds** one and one-half times the **hourly minimum wage**; and
- › **More than half** of the employee's compensation for a representative period (not less than one month) must consist of **commissions**



OUTSIDE SALES EXEMPTION

To qualify an employee must meet **ALL** of the following criteria:

- › **Primary duty:** Making sales or obtaining purchase orders/contracts
- › Performs his/her duties **off site on a consistent basis**



COMPUTER PROFESSIONALS EXEMPTION

To qualify an employee must meet **ALL** of the following criteria:

- › **Salary of at least \$455/week or an hourly rate of at least \$27.63**
- › **Primary duty** includes one of the following:
 - Systems analysis, design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or
 - A combination of these duties, the performance of which requires the same level of skills



HIGHLY COMPENSATED EXEMPTION

To qualify an employee must meet **ALL** of the following criteria:

- › Total annual compensation of at least \$100,000 (which must include at least \$455/week)
 - **NOTE: THIS SALARY THRESHOLD GOES TO \$134,000/YEAR EFFECTIVE DECEMBER 1, 2016**
- › Primary duty: office or non-manual work
- › Customarily and regularly perform **one or more** of the **exempt** duties or responsibilities of an executive, administrative or professional



JOB DESCRIPTIONS

- Job titles ≠ Exempt status
- If the position is intended to be exempt, make sure:
 - The tasks reflect the exemption criteria and
 - The job descriptions cover the exemption criteria
- Job descriptions can be used against the Company to prove non-exempt status
- Exempt status may change over time – keep job descriptions up to date

OTHER ISSUES TO AUDIT

- › Timekeeping
- › Permissible Deductions for Exempt Employees
- › Non-Exempt Employees: What's compensable?
- › Deductions from Wages
- › Final Paycheck
- › Recordkeeping





SECTION TWO:
**Are Your Independent
Contractors Really
Employees?**

NJ TEST FOR DETERMINING IC STATUS

“ABC” Test Defined:

A

- IC must be free from your control or direction in performing the services (both in contract and in fact)

B

- The IC’s services are outside the usual course of your business or performed outside all the offices of the enterprise

C

- The IC is customarily engaged in an independently established trade, occupation, profession or business

INDEPENDENT CONTRACTORS

- "**ABC**" test is a very difficult standard for employers to meet because the IC is **presumed** to be an employee unless **all three** of these criteria are satisfied
- Agencies and courts scrutinize **independent contractor** arrangements very closely

**PRESUMPTION:
Employee Unless YOU
Can Prove Otherwise!**

THE IDEAL CONTRACTOR

Has business name & its own employees	Has FEIN and files tax returns for its business
Has other clients	Is paid by project/task (via an invoice)
Hired for defined time period and scope of work	Performs specialized work, or services outside the scope of the your regular business



THE IDEAL CONTRACTOR

Has own business cards,
office, advertising

Owns equipment used to
perform services

Maintains own insurance
(workers comp, liability,
etc.)

Given general direction;
not closely supervised

Does not receive
benefits provided to
client's employees

Sets own hours

No payroll withholdings,
issued a 1099

Takes on entrepreneurial
risks and rewards



RISK OF MISCLASSIFICATION

Financial and legal consequences can include ...

- ▶ **Back wages:** minimum wage, overtime
- ▶ **Retroactive contributions** for Workers' Compensation Insurance, Unemployment Insurance, Social Security (employer **AND** employee contributions)
- ▶ **Retroactive liability** for bonuses, health benefits, vacation pay, stock options, 401(k) contributions



RISK OF MISCLASSIFICATION

Financial and legal consequences also can include:

- Civil and Criminal **Penalties**
- **Exposure** to suits under anti-discrimination laws and other employment statutes





SECTION THREE: **Unpaid Interns: A Myth!**

UNPAID INTERNS: The “BIGFOOT” of the Employment World

It is **VIRTUALLY IMPOSSIBLE** to meet the test necessary to classify someone as an **unpaid intern** in the private sector

We strongly advise against it!

HOW TO DETERMINE WHETHER YOUR “**INTERN**” IS REALLY AN EMPLOYEE?

DOL 6-Factor Test:

1

- Training is similar to that which would be given at a vocational school or educational institution

2

- Training is for benefit of the trainee/intern

3

- Trainee/intern does not displace regular employees, but works under close observation

HOW TO DETERMINE WHETHER YOUR “**INTERN**” IS REALLY AN EMPLOYEE?

DOL 6-Factor Test:

4

- Employer derives no immediate advantage from the activities of trainees/interns; at times operations may actually be impeded

5

- Employer and trainee/intern understand intern is not being paid

6

- Trainees/interns are not necessarily entitled to a job at the completion of training period

RECOMMENDATIONS

- **Do a Rigorous Wage & Hour Audit**
 - Classification of exempt vs. non exempts
 - Ensure that independent contractors are properly classified
 - Review use of unpaid interns
- **Draft** or **Revise** Company Policies and Agreements
- Conduct **Training** to Reinforce Policies and Practices





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