



LABOR AND EMPLOYMENT LAWS

AFFECTING THE INSURANCE INDUSTRY



Labor & Employment Issues for Insurers

- Classification as exempt v. non-exempt
- Classification as independent contractor v. employee
- Miscalculating work time: overtime, breaks, working remotely, bonuses, etc.



FLSA Myths

- Salaried workers can't receive overtime pay.
 - Salary does not equal exempt.
 - Exempt employees can receive additional pay.
- If I work on commission, I am not entitled to overtime.
 - 100% commission does not equal exempt.



FLSA Myths

- I can't be forced to work overtime.
 - Employees over 16 have very few limits on the number of hours they work.
- My employer can't force me to use vacation or PTO.
 - Untrue— unless a CBA or contract provides otherwise, an employer can compel employee to use paid leave.



- Wage and hour suits for year ended March 31, 2014: *8,126*
- Up 14% from 2013
- 7th consecutive year of increase
- 438% increase since 2000



I.



“White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption – often called the “541” or “white collar” exemption – applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees



Three Tests for Exemption

Salary Level

Salary Basis

Job Duties



Minimum Salary Level:

- For most employees, the minimum salary level required for exemption is \$455 per week.
- Must be paid “free and clear.”
- The \$455 per week may be paid in equivalent amounts for periods longer than one week.



Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the *quality* or *quantity* of the work performed
- Must be paid the full salary for any week in which the employee performs **any** work (with certain exceptions = FMLA/paid sick leave)
- Need not be paid for any workweek when no work is performed



Docking

- GENERAL RULE:
 - White collar exempt employee's salary cannot be subject to docking or actually docked (ability/policy for docking may be sufficient to lose exemption).

- EXCEPTIONS:
 - If the employee is out a full day for personal reasons (*new*)
 - For sickness or illness in accordance with a bonafide plan, policy or practice for full days
 - Penalties for violations of safety rules of major significance – the penalty can be any amount (*new*) (Be careful!)
 - Penalties for violations of work place conduct rules (*new*) (Be careful!)
 - Deductions for FMLA unpaid leave (*new*)



Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees (or FTE)
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight



20% Owner Executives

- The executive exemption also includes employees who:
 - Own at least a bona fide 20% equity interest in the enterprise
 - Are actively engaged in management of the enterprise
- The salary level and salary basis requirements do not apply to exempt 20% equity owners.



Administrative Duties

- Primary duty is 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance



Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction: M.D., J.D., Ph. D., Engineering...



FLSA Individual Liability:

- FLSA definition of “employer” is broad enough to create personal liability.
- Personal liability – based upon totality of circumstances.
 - Did the individual have control over the decision that created the FLSA violation?



Question: Are Allstate insurance “neighborhood office” agents exempt or non-exempt?

- Factors

- 1) Guaranteed minimum level of compensation but could be paid more depending upon their sales
- 2) Received an office expense allowance but most exceeded this allowance



Salary

- **Agents argued** they were **not** paid a salary because compensation fluctuated based upon number of policies sold and deductions for office expenses.
- **Court disagreed** – so long as there is non-deductable minimum, additional compensation on top of that is acceptable.
 - Also, deductions for office expenses were within agents control and were not based upon “quality or quantity” of work performed.



Judgment

- **Agents argued** that because Allstate “closely regulated” the products they sold, how they sold them, and the manner that they provided customer service, they did not exercise sufficient judgment.
- **Court disagreed** – oversight by Allstate does not necessarily mean that a worker does not exercise discretion and independent judgment.



Ruling

- Allstate’s “neighborhood agents” were exempt administrative employees.

(Allstate faced overtime liability to 2,300 agents who opted into the suit.)



Farmers Insurance Exchange Adjusters

- Farmers classified some adjusters as exempt, others as non-exempt.
- Court focused on adjusters' ability to compare, evaluate, and choose between possible courses of action and whether they had the power to make an independent choice, free from immediate supervision, with respect to matters of significance.



Farmers Insurance Exchange Adjusters

- Adjusters who handled simple, routine losses of less than \$3,000 and who relied on computer software to estimate damages were **not** exempt.
- Adjusters who addressed more complicated claims involving witness credibility determinations and complex coverage issues **were exempt**.
- Court held Farmers' misclassifications to be "willful" because Farmers was put on notice through prior litigation (3 years rather than 2-plus penalties).



Exempt Administrative Employee

- Talbert v. American Risk Insurance Co., (5th cir, 2010)
 - Assistant Claims Adjuster – Employee



- The primary focus of the dispute is whether Talbert’s “primary duty include[d] the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. §541.200 (3). “In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” 29 C.F.R/. §541.202(a).
- “The term ‘matters of significance’ refers to the level of importance or consequences of the work performed.” *Id.*



- The regulations provide that insurance claims adjusters “generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.” 29 C.F.R. § 541.203 (a).



- As an in-house claims adjuster, Talbert's duties include: interviewing the insureds, reviewing the factual information from contractors and field adjusters to prepare damage estimates, making recommendations regarding the coverage of the claims, modifying reserves (subject to review). Talbert would also negotiate settlements and make recommendations to the claims manager regarding the claim. If litigation ensued, Talbert as an assistant claims adjuster would be expected to participate and make recommendations regarding the litigation; however, Talbert was terminated less than six months after he was hired and therefore he was never required to participate in litigation.



- ARI depended on Talbert, as a licensed insurance adjuster, to use his independent judgment and discretion to make recommendations concerning ARI's response to their insured's claims. In the vast majority of cases, the recommendations of ARI's assistant claims adjusters are approved.



In opposition to the motion for summary judgment, Talbert argued that he was not required to exercise discretion or independent judgment:

- In handling these claims, coverage was typically a foregone conclusion. *(not always and still part of his job)*
- He rarely interviewed the insured when processing claims. In fact, appraisers hired by ARI would typically interview the insured, take pictures of the property damage, and take whatever measurements were necessary. He usually only reviewed the statements and pictures taken by the appraisers and determined whether the measurements complied with the applicable standards. *(still was part of his job)*
- He had no independent authority to settle claims. Every claim handled by him during his employment with Defendants was subject to review by Fred Behzadi who had authority to settle the claim. *(recommendations are sufficient)*



- He was prohibited from speaking to any attorney retained by a policy holder. In fact, if an attorney became involved, he was instructed to forward the claim to Fred Behzadi who would review it and take over further handling of the claim. *(but would have assisted in litigation)*
- If a policyholder sued his employer over a claim, he was not involved in developing or approving litigation strategy, hiring experts or negotiating settlement. *(but would have assisted)*
- Throughout his employment with Defendants, he spent very little time interacting with policyholders and was, at all times, closely supervised by his employer. When he did interact with policyholders, it was only because they were upset that they had not been paid for their losses.

Court held Talbert was exempt.

Take-Away: It is actual duties that matter.



II.
Independent Contractors
v.
Employees



Why do employees misclassify Independent Contractors?

- Avoid overtime pay
- Avoid workers comp insurance expense
- Avoid unemployment comp insurance expense
- Avoid state and federal employment taxes



Down-side of Misclassifications

- DOL and IRS fines and penalties
- FLSA suits
- Employee suits
- Personal liability
- Attorney fees



No Bright-line Test

- IRS/DOL and states each use their own test



U.S. Supreme Court – FLSA “Economic Realities”

Factors:

- (1) The extent to which the worker’s services are an integral part of the employer’s business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for this customers or clients? Does the worker perform a discrete job that is one part of the business’ overall process of production? Does the worker supervise any of the company’s employees?);
- (2) The permanency of the relationship (example: How long has the worker worked for the same company?);
- (3) The amount of the worker’s investment in facilities and equipment (examples: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?);
- (4) The nature and degree of control by the principal (examples: Who decides on what hours to be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?);
- (5) The worker’s opportunities for profit and loss (examples: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?); and
- (6) The level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise (examples: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site?



“Right to Control” – Typically used by IRS for purposes of wage withholdings.

- Does the employer have the right to control the manner in which the worker accomplishes the task as opposed to merely having the right to specify the outcome of the task?



IRS 20 Factor Test

- This test analyzes the degree of control over manner and method of work
 - Instructions
 - Training
 - Integration
 - Services rendered personally
 - Hiring, supervising and paying assistants
 - Continuing relationship
 - Set hours of work
 - Full-time required
 - Working on employer premises
 - Order or sequence set
 - Oral or written reports



IRS Factors, cont.

- Payment by hour, week and month
 - Payment of business and/or traveling expenses
 - Furnishing tools and materials
 - Significant Investment by the worker
 - Opportunity to realize profit or loss
 - Opportunity to work for more than one business at a time
 - Making services available to the general public
 - The business' right to discharge
 - Workers' right to terminate
-
- **NO SET NUMBER TO BE AN EMPLOYEE**



These Will **NOT** Protect You If You Misclassify

- Employee wanted to be treated as in independent contractor
- Employee signed a written independent contractor agreement (but can help)
- Paid only in commission
- Has little supervision
- Received 1099 v. W-2



Best Practice

- Enter into a written agreement with independent contractor before work begins.
 - Identify individual as an independent contractor.
 - Specify scope of engagement. (The less supervision, the better.)
 - Specify results to be obtained.
 - Specify that worker will provide tools and materials.
 - Do NOT require daily or weekly reports.
 - Do NOT specify work hours or work schedule.
 - Specify method of payment (set fee or cost-plus v. hourly/salary).
- Ensure that there are differences between the way you handle employees vs. the way you handle independent contractors.
- Ensure that there is consistency between similarly-situated employees/contractors.
- Audit position compared to IRS 20 Factor test.



Typical IRS analysis of producer—agency

- Type of instruction: if agency tells producer how, where and when he is to work and with whom = employee
- Degree of instruction: if agency gives detailed instructions about how, where, when and with whom producer is to work = employee
- Training: if agency provides periodic ongoing training = employee
- Evaluation system: if agency has program to periodically evaluate producer = employee



- Method of payment: 100% commission = independent contractor
- Unreimbursed expenses: if agency does not pay producer's travel and other expenses = independent contractor
- Significant investment: if producer provides his own facilities, office, supplies, and other materials = independent contractor
- Opportunity for profit/loss: if producer is subject to risk of economic loss = independent contractor



- Services available to market: if producer makes his services available to general public on a regular basis = independent contractor
- Written contracts = independent contractor; agreement helps but is not conclusive
- Benefits: if agency provides producer with benefits (life, health, 401K, paid vacation or sick leave) = employee
- Key activity of agency: if producer performs normal business functions of agency = employee



Daskam v. Allstate

(Independent Contractor or Employee)

- Ct. noted agent had the right and opportunity to “turn his one-man shop into a multi-agent, multi-office business” and had a “transferrable interest in the business, a circumstance unheard of in a normal employee-employer relationship.”
- Employee argued that he did not grow his operation or transfer his interest into another business venture.
- Ct. held that the plaintiff could not “create an employment relationship ... by choosing not to exercise opportunities made available to him ...”



- Allstate emphasized plaintiff's rights under his I.C. agreement rather than what he had actually done.
- Key to Allstate's victory was evidence of what other workers achieved under their I.C. agreements. Showed what plaintiffs could have done under I.C. agreement.
- Language of I.C. stating the rights of the worker was also key.



Miscellaneous



Hours Worked: Issues

- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time
- Sleep Time



Waiting Time

Counted as hours worked when

- Employee is unable to use the time effectively for his or her own purposes; and
- Time is controlled by the employer

Not counted as hours worked when

- Employee is completely relieved from duty; and
- Time is long enough to enable the employee to use it effectively for his or her own purposes



On-Call Time

On-call time is hours worked when

- Employee has to stay on the employer's premises
- Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes
- "Waiting to be engaged" or "Engaged to wait"



Meal and Rest Periods

- Meal periods are not hours worked when the employee is relieved of duties for the purpose of eating a meal (at least 30 minutes).
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid. (Use 20 minutes to be safe – personal liability)



Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless

- Attendance is outside regular working hours
- Attendance is voluntary (truly voluntary)
- The course, lecture, or meeting is not job related
- The employee does not perform any productive work during attendance



Travel Time

- Ordinary home to work travel is not work time.
- Travel between job sites during the normal work day is work time.
- Special rules apply to travel away from the employee's home community.



Overtime



TRAIN, TRAIN, TRAIN

- Manages on all key concepts
 - Exempt v. non-exempt
 - Must pay for all hours worked
 - No “volunteering”
 - What is compensable time
 - Time keeping system
 - How to handle questions/complaints
- All Employees
 - Your wage and hour policies
 - “Safe Harbor” policy
 - Their record-keeping obligations
 - How to question wages



Can an employee accept a severance payment and still file a discrimination claim?

YES—

- EEOC: any severance agreement that limits employee's right to file EEOC charge is unenforceable and illegal
- EEOC has filed several suits in the past 12 months over these types of agreements.



End