



## Employment Law & Compliance Matters Update

# Agenda

- 1** | #metoo: There's Been A Lot Going On!
- 2** | The Legal Impact of #metoo
- 3** | #metoo Best Practices and Practical Pointers
- 4** | Proposed Changes to EEO-1 Filing
- 5** | Proposed Changes to Join Employer Rule
- 6** | Proposed Changes to Overtime Calculations
- 7** | DOL Audits



Advocacy. Tailored Insurance Solutions. Peace of Mind

**#metoo**  
**#timesup**  
**#wherearewenow**

3

© 2019 HUB International Limited.

**1**



**There's a lot Going on!**

The Headlines

4

Advocacy. Tailored Insurance Solutions. Peace of Mind



Roy Price Quits Amazon Studios After Sexual Harassment Claim

## Sexual Assault Reports Spike in #MeToo Era

Molly Ringwald feels differently about - 'Sixteen Candles' in the wake of #MeToo

The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?

Backlash Erupts After Gillette Launches A New #MeToo-Inspired Ad Campaign

Louis C.K. Is Accused by 5 Women of Sexual Misconduct



How HBO's 'Crashing' brilliantly takes on PC culture and stand-up comedy in the #MeToo era

Harvey Weinstein: Ashley Judd's sexual harassment claim against disgraced producer dismissed by judge

Morgan Freeman Is Accused of Sexual Harassment by Several Women

Marvel Legend Stan Lee Denies Sexual Harassment Claims

R. Kelly Faces a #MeToo Reckoning as Time's Up Backs a Protest

Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment



#MeToo: Mandy Moore & half a dozen other women accuse Ryan Adams of sexual misconduct

Steve Wynn resigns from Wynn Resorts after sexual harassment allegations

Scott Baio won't be charged in sexual assault case, though D.A. may believe Nicole Eggert's claims

MONICA LEWINSKY: EMERGING FROM "THE HOUSE OF GASLIGHT" IN THE AGE OF #METOO

Moonves ousted as CBS chief

Co-founder of 'MeToo!' hummus brand says she'll change the name

5 | © 2019 HUB International Limited.

Radio Stations Cut 'Baby, It's Cold Outside'



## Google Walkout



New York Times reported Google paid Android co-founder Any Rubin \$90M after it learned of a sexual misconduct allegation

20,000 employees staged a walkout (20% of Google's total employees)

- End to forced arbitration for issues of sexual harassment and discrimination
- Commitment to end pay and opportunity inequality
- Publicly-released transparency report regarding sexual harassment at the company
- Inclusive and clear sexual misconduct reporting process
- Appointment of a Google employee representative to the board of directors
- Elevate the status of chief diversity officer, allowing the position to answer to the CEO and make recommendations to the board of directors.
- The group has also brought attention to the lack of racial and ethnic diversity and low retention rates among underrepresented groups.

Google walkout: global protests after sexual misconduct allegations



6 | © 2019 HUB International Limited.

## #MeToo and #TimesUp



## The Movement

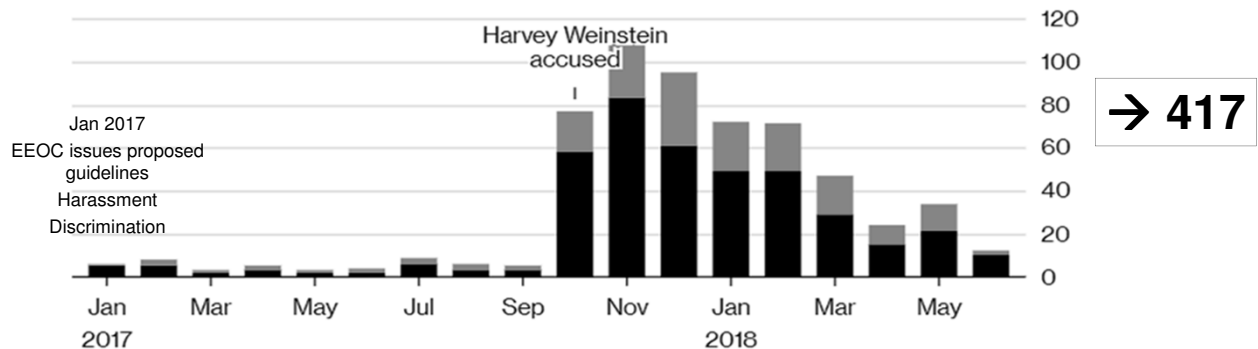
**2006 - Tarana Burke coins #metoo**



### The New Normal?

Allegations of misconduct may have peaked, but remain ahead of past trends.

■ Accused ■ Replaced



Source: Temin & Co.

## #MeToo



- On October 15, 2017, Alyssa Milano asks her Twitter followers who have been sexually harassed or assaulted to reply “me too” in order to amplify the magnitude of the problem.
- On Twitter, over 68,000 respond to her tweet directly.
- On Facebook, the hashtag is shared more than 12 million times in the first 24 hours.

## #metoo - Scope



- 417 high-profile people accused since December 2016
  - 193 were fired or left their jobs
  - 122 have been put on leave, suspended or are facing investigations
  - 69 people - no repercussions
- More than 96 million tweets from 2010 to 2017
- A recent found that the #MeToo hashtag was used more than **19 million times** on Twitter since Milano's initial tweet.
  - 55,000 uses of the hashtag per day

## #timesup



- TIME'S UP is an organization that insists on safe, fair and dignified work for women of all kinds.
- Powered by women, our TIME'S UP™ programming addresses the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential.
- Started by over 300 women in Hollywood, including Reese Witherspoon, Natalie Portman, and Shonda Rhimes.
- Time's Up Legal Defense Fund – raised \$21 million in just two months.

TIME'S  
UP

LEARN MORE • HOME RESOURCES • NEWS • GET INVOLVED • SIGN UP SHOP DONATE

# TIME'S UP

The clock has run out on sexual assault, harassment and inequality in the workplace. It's time to do something about it.

JOIN US IN 2019

11

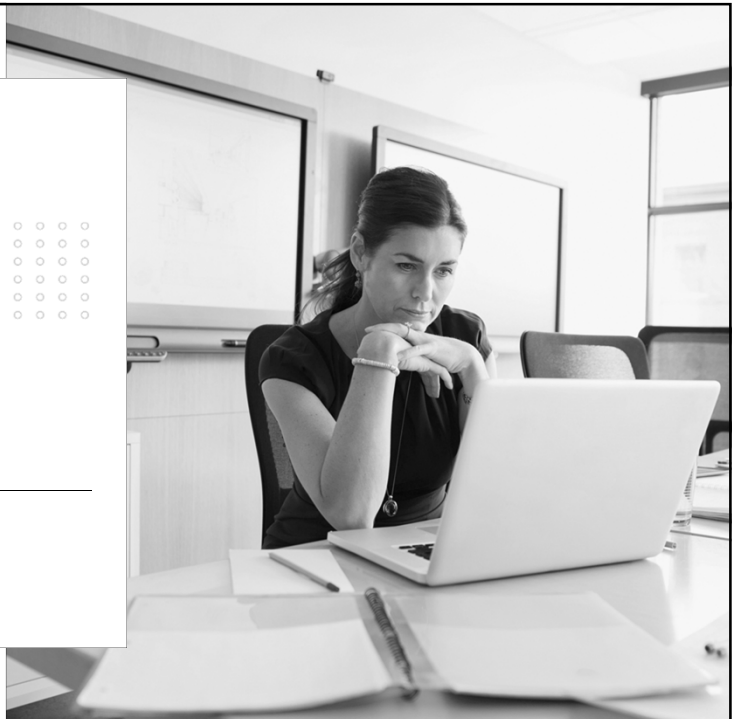
© 2019 HUB International Limited.

## 2

### The Legal Impact

12

Advocacy. Tailored Insurance Solutions. Peace of Mind





## The EEOC Stats.

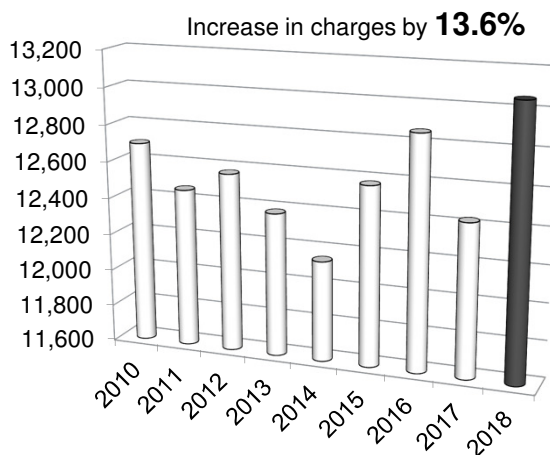
- 2016 fiscal year – 6,758 charges alleging sexual harassment
- 2017 fiscal year – 6,696 charges alleging sexual harassment
- 2018 Preliminary Data –
  - \$16 million budget increase for EEOC
  - First budget increase in 8 years → #metoo
- EEOC in process of releasing updated enforcement guidance on sexual harassment
  - Last updated in the 1990s
  - Transgender
  - Sexual Orientation
  - Gender Identity



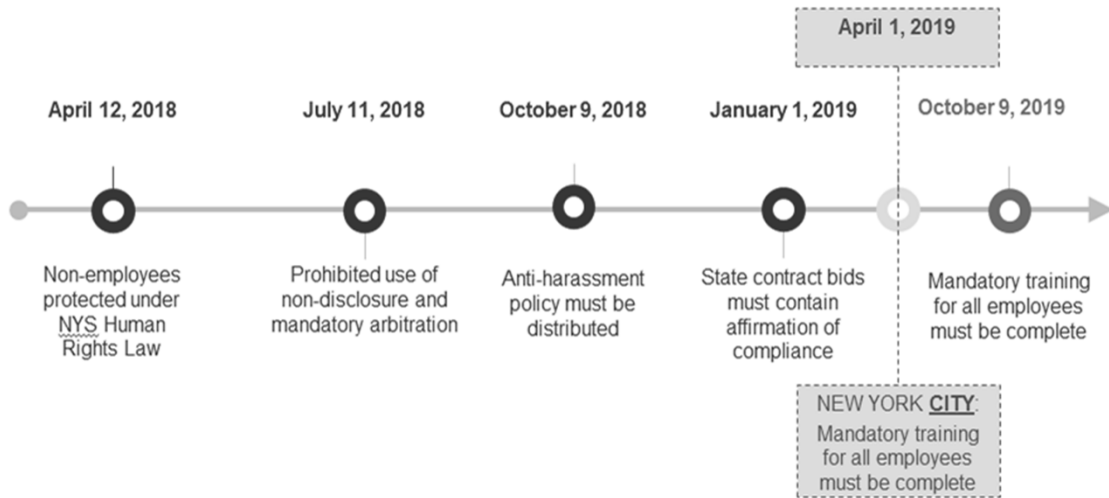
## Sexual Harassment Claims on the Rise

### 2018 EEOC Activity

- 50% more sexual harassment lawsuits than 2017
- Recovered approximately \$70 million for sexual harassment victims (\$47 in 2017)
- Sexual Harassment Charges of Discrimination up by over 13%
- *“We are at a transformative moment in our history, and the EEOC will be part of making that history.”*



## New York Timeline



# 3

## Best Practices and Practical Pointers







## Examine Workplace Culture

---

- Survey the workforce to determine the extent to which harassment is a problem within the organization
  - Consider using a third-party service
- Assess whether employees feel encouraged to report harassment
- Examine workplace culture to ensure policies and management support a culture of openness, respect, and compliance
- Identify important corporate and cultural values and align those values with company policies
- Ensure supervisory employees are aware of, promote, and act in accordance with those values



## Identify Situational Risks

---

- Does the client workforce have significant cultural and language differences?
- Does the client workforce have significant age or gender imbalances?
- Does the company value customer satisfaction over employee well-being?
- Does the office have any isolated workspaces?
- Do you have a workplace cultures that tolerates or encourages alcohol consumption?
- Are there any workplace violence risks?
  - Many times sexual harassment is also workplace violence – i.e. assault

## Review and Revise Handbook Policies



- Review and update anti-harassment/discrimination, anti-retaliation, and reporting policies
- Updated policies should include strong anti-harassment and anti-retaliation language
- Handbooks should include a clearly articulated complaint procedure with multiple avenues for reporting misconduct, including investigation

## Training!



- Empower employees with knowledge
  - No-Harassment and Discrimination training
  - Clear and accessible compliant procedures
- Emphasis an open and non-judgmental culture and environment
- Three Trainings:
  1. Employees
  2. Managers
  3. Complaint Recipients

## Responding to a Complaint

---



- Have you identified a response team?
- Do they know how to conduct a compliant intake?
  - Can they sensitively and appropriately respond to an emotionally distressed employee making a complaint?
- Do they know how to diffuse a potentially violent situation?
- Is there a compliant hotline in place
- Have we introduced an Employee Assistance Program?

## Conducting Investigations

---



- Does the response team know how to conduct an investigation?
  - What questions should they ask?
  - What format should they follow?
  - In what environment should they conduct the meetings?
- Do they know how to take notes?
- Have they considered using outside counsel?
- Will they provide a written report?
  - Do they understand the pros and cons?

## Learn From the Past



- How has your organization handled sexual harassment, misconduct, and assault allegations in the past?
  - What worked?
  - What didn't work?
  - Any pattern to charges of discrimination/lawsuits?
- Review the response plan
  - Consider the credentials and experience of the response team
  - Who is effective at handling difficult conversations with employees
- Who are your "problem" employees? Managers? Leaders?

# 4

## Proposed Changes to EEO-1 Filing



## EEO-1 Filing

- Employers with 100+ employees and some smaller federal contractors are required to file annually.
- Currently requires disclosure of number of employees in various racial, ethnicity, gender and occupational categories
- In 2016, EEOC modified requirements to require wage and hour data starting in 2018
- In 2017, requirement was pre-emptively suspended based on concerns related to burden on employers and privacy concerns

25

## EEO-1 Filing

- 2017 & 2018 Forms did not include wage and hour data
- On March 4, 2019, Federal Judge ruled that a new EEO-1 form with wage and hour data “shall be in effect”
- Problematic because 2018 filing period is open until 5/31/19 but new form with wage and hour disclosures is not available yet
- Not clear whether employers need to disclose for 2018 report; may have to amend/ supplement report
- On 4/17/19 Judge gave parties until 4/22/19 to submit additional papers.

26

# Sample EEO-1 Form

CO# DP44411  
U# DP44411

EQUAL EMPLOYMENT OPPORTUNITY  
2013 EMPLOYER INFORMATION REPORT  
CONSOLIDATED REPORT - TYPE 2

SECTION B - COMPANY IDENTIFICATION

1. LINKEDIN CORP  
2029 STIERLIN COURT  
MOUNTAIN VIEW, CA 94043

2.a. LINKEDIN CORP  
2029 STIERLIN COURT  
MOUNTAIN VIEW, CA 94043

SECTION C - TEST FOR FILING REQUIREMENT

1-Y 2-N 3-Y DUNS NO.:

SECTION E - ESTABLISHMENT INFORMATION

NAICS:

SECTION D - EMPLOYMENT DATA

JOB CATEGORIES	HISPANIC OR LATINO		NOT-HISPANIC OR LATINO												OVERALL TOTAL																
	*****MALE*****															*****FEMALE*****															
	MALE	FEMALE	WHITE	BLACK OR AFRICAN OR AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES																	
EXECUTIVE/SR OFFICIALS & MGRS	2	2	89	2	0	25	0	4	30	0	0	13	0	0	167																
FIRST-/MED OFFICIALS & MGRS	7	10	149	1	0	95	0	8	80	2	0	48	1	6	407																
PROFESSIONALS	43	26	632	17	9	620	1	32	327	13	2	314	1	9	2046																
TECHNICIANS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0																
SALES WORKERS	12	12	263	9	0	17	0	9	187	4	0	27	0	6	546																
ADMINISTRATIVE SUPPORT	8	12	32	7	0	4	0	3	70	4	0	9	0	4	153																
CRAFT WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0																
OPERATIVES	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0																
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0																
SERVICE WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0																
TOTAL	72	62	1165	36	9	761	1	56	694	23	2	411	2	25	3319																
PREVIOUS REPORT TOTAL	43	41	717	20	4	553	1	38	393	17	2	284	0	10	2123																

SECTION F - REMARKS

27

# Sample Proposed EEO-1 Form

This is the proposed EEO-1 Form to collect compensation data.

SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														Total Col A-N
		Race/Ethnicity														
		Hispanic or Latino		Non-Hispanic or Latino								Female				
				Male												
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	
Executive/Senior Level Officers and Managers 1.1	\$19,239 and under															
	\$19,240 - \$24,439															
	\$24,440 - \$30,679															
	\$30,680 - \$38,999															
	\$39,000 - \$49,919															
	\$49,920 - \$62,819															
	\$62,820 - \$80,079															
	\$80,080 - \$101,919															
	\$101,920 - \$128,959															
	\$128,960 - \$163,799															
	\$163,800 - \$207,999															
	\$208,000 and over															

28

# 5

## Proposed Changes to Joint Employer Rule



29

## Proposed FLSA Joint Employer Rule

- Hot politically contested issue
- Old Test: “Not completely disassociated” standard
- Broad (old test) vs. Narrower (new test)
- New rule would reverse the NLRB’s Browning-Ferris case
- Comments due by 6/10/2019
- Workers via Temp Agencies or Franchisee/Franchisor relationship could be impacted
- New Test: 4 factor test proposed to replace old test:
  - Hire or Fire the employees
  - Supervise and control the employee’s work schedules or conditions of employment
  - Determine employee’s rate and method of payment; and
  - Maintain the employee’s employment records

30

# 6

## Proposed Changes to Overtime Calculation



31

## Proposed Changes to Overtime Calculations

- DOL proposed changes to definition of “regular rate of pay”
- Regular Rate of Pay is used to calculate overtime rate
- Not just the hourly rate
- Complex and outdated
- Currently, non-discretionary bonus included in regular rate. If not paid weekly, must be prorated over the prior applicable workweeks which could increase overtime.
- Proposed rule removes some of the items currently included when calculating the regular rate
- Impact: reduce Overtime rates in some circumstances
- Comments due by 5/28/2019

32



## Proposed Changes to Overtime Calculations

- Proposed rule would exclude the following from calculation of regular rate:
  - Cost of providing wellness programs, on site specialist treatment, gym access and fitness classes and employee discounts on retail goods and services;
  - Payments for unused paid leave, including paid sick leave;
  - Reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
  - Reimbursed travel expenses that don’t exceed the maximum travel reimbursement allowed under FTRS regs and satisfy other regulatory requirements;
  - Discretionary bonuses;
  - Benefits plans; and
  - Tuition plans, tuition reimbursement or repayment of educational loans

33

# 7

## Proposed Changes to Exemption Rules



34

## Proposed Changes to FLSA Exemption Rules: Salary Threshold Change

### Current Salary Threshold

- \$455/ per week or \$23,660 annually
- Highly Compensated employee: \$100,000 annually
- No automatic increases

### Proposed Salary Threshold

- 2019: \$679/week (\$35,308 annually)
- 2016: \$913/week (\$47,476 annually)
- 2019: \$147,414 annually
- 2016: \$134,004 annually
- No automatic increases but DOL to review every 4 years

35

## Proposed Changes to FLSA Exemption Rules

- No Changes to duty requirements
- Litigation pending
- Comments due 5/21/2019
- Finalized rule anticipated for 2019
- Effective date unknown but anticipated to be 1/1/2020

36

## Practical Tips

### What can/ should an Employer do?

- Review salary levels and duties for all employees and confirm compliance with current rules and confirm if you have any employees who will no longer be exempt if proposed changes are adopted.
- Beware of potential morale issues or potential appearances of disparate treatment
  - Some employees will receive increase in compensation.
  - A senior female manager making slightly more than lower level male manager once salary increased to meet threshold.
- For employees who will no longer be exempt, Employer can:
  - Schedule so employee does not incur overtime hours
  - Budget for cost related to overtime hours
  - Hire additional employees in order to avoid overtime
  - Increasing employee's salary so they meet new threshold
    - If employee works overtime, the increase is not significant or there is only 1 employee in that position than this may be more cost effective
    - If the increase is \$2,500 and you have 100 employees in that position than cost of increase would be \$250,000.

37

# 8

## DOL Audits

38

## DEPARTMENT OF LABOR AUDIT

- Department of Labor (DOL) is currently doing random audits
  - Several industries targeted- healthcare(hospitals and nursing homes), construction industry
- DOL requests employee interviews and records
- What should you do if the DOL shows up at your location?
  - Be polite and courteous
  - You do not have to allow them to conduct interviews or turn over documents that day
  - Tell them you would like to contact counsel
  - Contact corporate office and counsel

39

## DEPARTMENT OF LABOR AUDIT

- Main Issues:
  - Worker Misclassification
  - Recordkeeping
  - Overtime calculations
  - Independent contractors

40

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification

- DOL asks to review information for “salaried” employees
- Why does the DOL care?
  - Overtime is due unless salaried employee is “exempt” from the wage laws
  - To be an “exempt” employee under state and federal wage laws, employee has to meet certain criteria

41

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification

Overtime = anything over 40 hours/week

Overtime pay = 1.5 x regular rate of pay

#### Main Exemptions:

- Executive Exemption
- Administrative Exemption
- Professional Exemption

42

# DEPARTMENT OF LABOR AUDIT

U.S. Department of Labor  
Wage and Hour Division

**Fact Sheet #77A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)**

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and outside sales employees. Section 13(a)(1) and Section 13(a)(7) also exempt certain computer employees. To qualify for the exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455\* per week. Sub rules do not determine exempt status. In order for an exemption to apply, an employer's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

**Executive Exemption**  
To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455\* per week.
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent, and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

**Administrative Exemption**  
To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455\* per week.
- The employee's primary duty must be 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

FD-115A

**Professional Exemption**  
To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455\* per week.
- The employee's primary duty must be the performance 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.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455\* per week.
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

**Computer Employee Exemption**  
To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455\* per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour.
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below:
- The employee's primary duty must consist of:
  - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - 3) The design, development, testing, creation or modification of computer programs related to machine operating systems; or
  - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

**Outside Sales Exemption**  
To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and
- The employee must be customarily and regularly engaged away from the employer's place of business.

**Highly Compensated Employees**  
Highly compensated employees performing office or non-manual work and paid total annual compensation of \$106,080 or more (which must include at least \$455\* per week paid on a salary or fee basis) are exempt from the

# DEPARTMENT OF LABOR AUDIT

## Worker Misclassification:

### Executive Exemption:

- Employee must be compensated on a salary basis of a rate not less than \$455 per week (new proposed \$35,308)
- Primary duty must be managing the enterprise or managing a customarily recognized department or division of the enterprise
- Must direct the work of at least 2 or more full time employees (or their equivalent)
- Must have the authority to hire or fire or employee's suggestions are given particular weight

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification

#### Administrative Exemption:

- Employee must be compensated on a salary basis of a rate not less than \$455 per week (new proposed \$35,308)
- Primary duty must be the performance of office or other non-manual work directly related to management of general business operations or customers.
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

45

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification

#### Professional Exemption:

- Employee must be compensated on a salary basis of a rate not less than \$455 per week or \$23,660 per year (new proposed \$35,308)
- Primary duty must be performance of work requiring advanced knowledge
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

46

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification – Example

- Front desk employee does great job for many years.
- She supervises 2 part time employees.
- Office gives her a “promotion” and moves her from hourly to salaried - \$1000.00 per week.
- Once on salary, she does not record her hours.

47

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification – Example

- Fired for misconduct
- She sues Office
- Says she worked 70 hours per week for 60 weeks
- Says she was not properly exempt so she should be paid overtime

48



## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification – Example

What does the law say?

- She does not fall into any exemption
- She is due overtime + liquidated damages
- Because she is not exempt – office had obligation to keep records of hours worked

49

## DEPARTMENT OF LABOR AUDIT

### Worker Misclassification – Example

$\$1,000 / \text{week} = \$25 / \text{hour}$

$\$25 / \text{hour} \times 1.5 = \$37.5 \text{ overtime rate}$

$\$37.50 \times 60 \text{ wks} \times 30 \text{ hrs} = \$67,500$

$\$67,500 \times 2 \text{ (liq. damages)} = \$135,000$

(plus attorneys' fees on both sides)

50

# DEPARTMENT OF LABOR AUDIT

## Worker Misclassification

### ○What should you do now?

- Review all exempt employees and their duties
- Do they fall directly into an exemption?
- Remember – exemption is based on actual duties, not job title
- Fact intensive – case by case basis
- Seek legal advice

51

# DEPARTMENT OF LABOR AUDIT

## RECORDKEEPING

U.S. Department of Labor  
Wage and Hour Division

**Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)**

This fact sheet provides a summary of the FLSA's recordkeeping regulations, 29 CFR Part 516.

**Records To Be Kept By Employers**

**Highlights:** The FLSA sets minimum wage, overtime pay, recordkeeping, and youth employment standards for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage and not less than one and one-half times their regular rate of pay for overtime hours worked.

**Posting:** Employers must display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division and toll-free by calling 1-866-4USWAGE or 1-866-487-5623. This poster is also available electronically for downloading and printing at <http://www.dol.gov/whd/childlabor/poster.html>.

**What Records Are Required:** Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and date of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "30 per hour," "\$440 a week," "piecework").
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. Total additions or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

**How Long Should Records Be Retained:** Each employer shall preserve for at least three years period records, including bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division's representatives, who may ask the employee to make corrections, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

FD-21

What About Timekeeping? Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

The following is a sample timekeeping format employers may follow but are not required to do so:

DAY	DATE	IN	OUT	TOTAL HOURS
Sunday	6/3/07	—	—	—
Monday	6/4/07	8:00am	12:45pm	—
		1:00pm	5:45pm	8
Tuesday	6/5/07	7:57am	11:58am	—
		1:00pm	5:00pm	8
Wednesday	6/6/07	8:02am	12:10pm	—
		1:06pm	5:05pm	8
Thursday	6/7/07	—	—	—
Friday	6/8/07	—	—	—
Saturday	6/9/07	—	—	—
<b>Total Workweek Hours:</b>				24

**Employees on Fixed Schedules:** Many employees work on a fixed schedule from which their schedules vary. The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on or off the regular work.

**Where to Obtain Additional Information:**

For additional information, visit our Wage and Hour Division Website: <http://www.dol.gov/whd> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-5623).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor  
Pension Division Building  
200 Constitution Avenue, NW  
Washington, DC 20210

1-866-4USWAGE  
TTY: 1-866-487-5623  
Contact Us

52

## DEPARTMENT OF LABOR AUDIT

### RECORDKEEPING

Employers must keep records of:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

53

## DEPARTMENT OF LABOR AUDIT

### OVERTIME CALCULATIONS

- If pay period is every 2 weeks – must calculate overtime for each work week (not based on over 80 hours for pay period).
- Example:
  - Employee works 30 hours week 1
  - Employee works 45 hours week 2
  - Overtime due week 2 for the 5 hours

54

## DEPARTMENT OF LABOR AUDIT

### INDEPENDENT CONTRACTORS

- Extremely hot topic with DOL and IRS
- How can it apply to your Office?
  - Cleaning Service – individual or company?
  - Employees working after hours doing cleaning.

55

## DEPARTMENT OF LABOR AUDIT

### INDEPENDENT CONTRACTORS

#### Example #1 - Individual cleaning person

- No other clients
- You control details of work
  - Day / Time
  - Instructions about how office is cleaned
- Person is likely an employee, not an independent contractor

56

## DEPARTMENT OF LABOR AUDIT

### INDEPENDENT CONTRACTORS

Example #1 - Individual cleaning person

○Tips:

- Change person to an employee; or
- If person works under 40 hours/week and is paid at least the minimum wage for all hours worked – keep detailed records of hours worked.
  - -Still risky; could be tax implications

57

## DEPARTMENT OF LABOR AUDIT

### INDEPENDENT CONTRACTORS

Example #2 - Regular employee works after hours to clean office

- Employee is not an independent contractor
- Employee is due overtime for all hours worked
- Must add up all hours worked in both positions
- Can destroy an exemption

58

## DEPARTMENT OF LABOR AUDIT

### INDEPENDENT CONTRACTORS

Example #2 - Regular employee works after hours to clean office

○TIPS:

- Don't do it
- Pay hourly and overtime for both positions
- Seek legal advice to fix any current issue

59

## QUESTIONS?

Lisa Griffin Hodgdon, Esq.

Nelson Mullins Broad and Cassel  
100 North Tampa Street, Suite 3500  
Tampa, Florida 33602

Carrie B. Cherveney, Esq.

Senior Vice President, Strategic Client Solutions  
Chief Compliance Officer, Employee Benefits Southeast  
HUB International Southeast



60