



## **Key Wage and Hour Concerns for 2012 and Beyond©**

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In our October newsletter, we polled our readers regarding ‘To Pay or Not To Pay’ and posted the survey results last month. This month, we thought it appropriate to review why wage and hour issues matter and how you can protect your practices. This article will focus on four big picture issues where there are the most common mistakes that can be avoided:

- Exempt versus Non-exempt Employee
- Independent contractor versus Employee
- Off-the-clock time
- ‘Salaried, Non-exempt Employee’

Why do wage and hour issues matter? Fair Labor Standards Act (“FLSA”) and Department of Labor (“DOL”) claims have increased multifold in the past 10 years. Now many governmental agencies are sharing information about employers to facilitate detection of non-compliance (many employers have not focused sufficiently on compliance). DOL audits are becoming much more aggressive, which may result in two to three years of back pay or overtime wages, payroll taxes, administrative fees, fines and penalties. Good faith may have some bearing on how much an employer owes for violating the law, but it ordinarily does not eliminate liability. Practice owners need to address these issues *before* the DOL auditor or a private attorney is standing at your practice’s door.

### Exempt versus Non-exempt Employee

The courts construe exemptions narrowly. And for the five categories of exemptions (executive, professional, computer, administrative and outside sales) there are specific tests (both a ‘duties’ and ‘salary’ test) that must be met in order for the job function to qualify as an exempt classification. For example, an administrative exemption requires all of the following parameters to be met:

- The employee’s primary duty performing office or non-manual work is directly related to the management or general business operations of the employer or employer’s customers and
- The employee exercises discretion and independent judgment with respect to matters of significance and
- The employee gets compensated on a salary or fee basis (as defined by the regulations) at a rate not less than \$455 per week.

To validate that your practice's administrative job function meets the parameters, you should conduct a compliance audit. Ask yourself, with regards to the second bullet point, does your employee who is performing the administrative job function evaluate and compare possible courses of action and then make a decision or recommendation after considering the various alternatives? Does that employee have the right to interpret or formulate company policy or has the authority to deviate from company policy without prior approval? If not, then the employee's classification is non-exempt.

*When it comes to classifications, as a rule and if there is any doubt, classify the employee as non-exempt.*

### Independent Contractor versus Employee

Employee status triggers practice owner obligations under various federal and state statutes which do not apply to independent contractors. The responsibility for making the correct status decision falls squarely on the employer's shoulders and making an erroneous decision can result in the practice incurring financial liabilities such as payment of back payroll taxes, contributions to workers' compensation and unemployment insurance, payment of benefits, fees and penalties. This is a national enforcement priority for the DOL and a government audit may be more aggressive than in previous times.

As new employment-related statutes are enacted, the DOL continues to apply the 'common law control' test, modified by the IRS '20-factor' test and the 'economic reality' test as the 'model' independent contractor, to determine if the independent contractor you hired is classified correctly. Below are some of the high level indicators of the 'model' independent contractor for consideration:

- Performs work different from clients
- Has other clients and works own hours
- Given general direction, not closely supervised
- Receives no benefits, but provides liability insurance
- Has FEIN, files tax returns for business
- Has a written 'statement of work' agreement
- Is allowed staffing freedom
- Paid by project/task, no check withholdings and issued a 1099
- Takes on entrepreneurial risks and rewards

Practices looking to solve their staffing problems with independent contractors must carefully evaluate the legal implications of the working relationship to ensure compliance with the various statutes that govern employment relationships. These relevant factors should be reviewed from time to time to ensure that new circumstances have not created an employment relationship because a multitude of obligations flow from the determination that an individual is an employee and not an independent contractor.

### Off-the-clock Work

Off-clock work occurs when a non-exempt employee performs work-related tasks but does not report the time on his/her time record. Both voluntary (employee's choice) and involuntary (manager's order or suggestion) violate the law. This can occur both on-site as to what activities are compensable (such as pre/post-liminary activities, breaks/meals, etc) and off-site of the practice's premises (such as on-call time/'engaged to wait', attending seminars/meetings, completing paperwork at home, etc). Policies and protocols should be developed to define what tasks are integral to the employee's principal activities, what tasks are authorized to be performed remotely and how to accurately track/record daily the hours worked both on-site and remotely.

### Salaried, Non-exempt Employee

What exactly does this mean? If a salary is paid, is the employee exempt from getting overtime? No. If a salary is paid and the employee does not work the designated hours, can hourly wages be deducted for time not worked? No. So is there any reason to have a salaried, non-exempt classified employee? Yes.

The DOL defines an employee paid on a salary basis as receiving his/her full salary for any week in which he/she performs any work without regard to the number of days or hours worked or how well the job was performed. *An employee who does not meet the 'duties' test can be paid on a salary basis but still remains non-exempt and subject to FLSA requirements for overtime.* This type of compensation arrangement is advantageous for the employee because, non-exempt employees who work more than 40 hours in a week must be paid overtime, regardless of how they are paid and when a salaried, non-exempt employee works fewer than the required full-time hours, that employee still receives his/her salary. (No penalties are assessed for any hours not worked because he/she is paid on a salary basis).

But paying non-exempt staff on a salary basis is actually convenient, even efficient for some practices, particularly smaller practices that do not outsource the payroll function. For them, it is administratively easier than having to track/ record all hours worked in a week and adjusting payroll accordingly each pay period. These practices usually open and close their operations at specific times, so the chance of incurring overtime is unlikely.

FLSA is deceptively complex and that is why wage and hour concerns for your practice need to be on your radar screen every day. Legislative and regulatory changes make it even more challenging to be an employer. How can you protect yourself? Below are some 'best practices' to implement and follow consistently:

- Learn and Comply with relevant FLSA and state Wage and Hour laws/regulations.
- Adopt a culture of compliance – treat wage and hour compliance as an essential component of overall risk management
- Keep track of all hours worked with proper time records (certified by the employee and manager).
- Document policies and apply consistently, for example:

- Non-exempt employees who work more than 40 hours in any given week (some states it is more than 8 hours on any given day) must be paid 1 ½ times the regular rate of pay for each overtime hour worked.
- To work overtime, it must be pre-approved in advance (by whom) and in writing.
- Define paid or unpaid meal periods by having employee clock out/in during the meal period and being relieved from performing work.
- Have a strong policy barring off-the-clock work.
- Classify employees properly (exempt classifications have strict parameters that must be met).
- Use ‘independent contractors’ that meet the government’s parameters and definition of ‘model’ independent contractors.
- Train managers and supervisors to understand the risks associated with violations of wage and hour laws
- Educate your staff on your policies and requirements under the law to minimize any risks

**One more point to remember - *Rights of Exempt employees under FLSA overtime rules.***

Exempt employees are not eligible for overtime pay. They are paid for the job they do, not the hours they keep. Under FLSA, an exempt employee is entitled to receive the full amount of his/her base salary in any work period during which he/she performs work less any *permissible deductions*. Nothing in the FLSA prohibits an employer from requiring an exempt employee to keep a time record (‘punch a clock’) or work a particular schedule. Nor does the FLSA limit the amount of work time an employer may require or expect from any exempt employee on any schedule. But exempt employees may have rights under other laws or employment policies or contracts.