COMPLYING WITH THE FAIR LABOR STANDARDS ACT (FLSA)
Agenda

- FLSA Overview & Recent Amendments
- FLSA Exemptions
- Exemption Determinations and Documentation
- Hours Worked
Overview of the FLSA & Recent Amendments
FLSA’s General Requirements

- Imposes minimum wage and overtime obligations for employees who do not qualify for an exemption
- Minimum wage
  - Federal – $7.25 per hour
  - States vary (Missouri = $7.65)
- Overtime
  - Must pay 1.5 times hourly pay rate for time worked over 40 hours
  - Specific rules to follow when paying overtime
Exempt vs. Non-Exempt

- Non-exempt means an employee is subject to the FLSA’s minimum wage and overtime mandates.
- An exempt employee is not subject to minimum wage and overtime requirements (i.e., they are “exempt” from these requirements).
Three Tests for Most Exemptions

Exemptions require three elements:

1. The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”);

2. The amount of salary paid must meet a minimum specified amount (the “salary level test”); and

3. The employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the “primary duties test”).
## Salary Level Test for Most Exemptions

**Old Test**
- Eligible for most exemptions if employee is paid $455 per week ($23,660 annually)

**New Test**
- Employees must be paid $913 per week ($47,476 annually)
  - Number will be updated every 3 years to remain in the 40\(^{th}\) percentile of weekly earnings for full-time salaried employees
  - First update will be effective on Jan. 1, 2020
- Highly Compensated Employee total annual compensation also increased to $134,004
Options?

- Options available if the position is below the regular salary threshold
  1. Classify as exempt and raise salary to $47,476
     - May make sense in some situations where salary plus anticipated overtime costs would exceed $47,476
  2. Classify as exempt and restrict workweeks
  3. Classify as non-exempt
     - Must track and record hours
     - Eligible for overtime
Restricting Workweeks

- FLSA does not require that an exempt employee be paid his or her salary for any week in which no work is performed.

Result?
- Salary threshold ($913 per week) can be annualized for employees working less than 52 weeks out of the year.

Examples
- 48-week (11-month) employee meets threshold if paid $43,824
  - $48 \times 913 = 43,824$
- 40-week (9-month) employee meets threshold if paid $36,520
  - $40 \times 913 = 36,520$
But Keep in Mind…

- Part-time exempt employees must meet the weekly salary level
- Weekly salary level for part-time exempt employees is NOT prorated

**Effect:**
- Employee works 20 hours per week, year round
- To meet salary level test, employee must be paid at least $913 per week for 52 weeks
- \( 913 \times 52 = 47,476 \)
Main Consequence of FLSA Changes

- Many employees that have been classified as exempt in the past, but are paid less than $47,476, will be transitioned to non-exempt status
  - Eligible for OT
  - Must track and record hours worked
FLSA Exemptions
Primary Duties Test

- Beyond the salary basis test and salary level test, an exempt classification necessitates an employee meeting a “primary duties test”
- There are several types of possible exemptions and the primary duties test varies by exemption
Possible Higher Education Exemptions

- Executive
- Professional
- Administrative
- Computer Exemption
- Others to consider
  - Highly Compensated Employee Exemption
  - Combination Exemption
Executive Exemption

- Primary duty is management of the business or a customarily recognized department or subdivision thereof
- Must customarily and regularly direct the work of two or more other employees (full-time or equivalent)
- Has the authority to hire or fire other employees
  - Or suggestions and recommendations as to the change in status of other employees are given particular weight
Professional Exemption

- Primary duty is the performance of work:
  - Requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - Requiring invention, imagination, originality or talent in a “recognized field of artistic or creative endeavor”

- These two types of professionals are commonly referred to as Learned Professionals and Creative Professionals
Learned Professionals

- Advanced Knowledge = predominately intellectual in character and which requires the consistent exercise of discretion and independent judgment
- Field of Science or Learning = traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, teaching, sciences, and similar occupations
- Prolonged course of specialized intellectual instruction = generally requires that the employee have the appropriate academic degree (and possibly certification, if applicable)
Common Types of Learned Professionals

- Accountants
- Lawyers
- Athletic trainers
- Teachers
- RNs (not LPNs)
- Paralegals
- Physician Assistants
Administrative Exemption

- **Primary duty**
  - Is the performance of office or non-manual work *directly related* to the management or general business operations of the employer
  - Includes the exercise of discretion and independent judgment with respect to matters of significance
Administrative Exemption (cont.)

- Some key considerations regarding an employee’s level of discretion and independent judgment as to significant matters:
  - Does employee have authority to formulate, affect, or interpret policy?
  - Does employee carry out major assignments?
  - Does work affect business operations to a significant degree?
  - Can employee commit the employer in matters that have significant financial impact?
  - Does employee have authority to waive or deviate from established policies and procedures without prior approval?
  - Can employee negotiate and bind the employer on significant matters?
  - Does employee investigate and resolve matters of significance on behalf of the employer?
  - Does employee represent the employer in handling complaints, arbitrating disputes or resolving grievances?
Administrative Exemption (cont.)

- Regulations provide that discretion and independent judgement as to significant matters:
  - Must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources
  - Does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work
Computer Exemption

Must be employed as a computer system analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field

Primary duty must consist of:
- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- 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;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties
Exemption Determinations and Documentation
Problems

- Employees classified as exempt because they are paid over the salary threshold but there is no further analysis of job duties
- Employees are classified as exempt because “they seem to have exempt duties” instead of a careful analysis of which exemption, if any, applies
- An employee challenges his/her exempt status. What support would the employer have for defending this designation?
Misclassification

Why is it a problem?

- Rise in litigation
- Collective actions
- Back pay for unpaid overtime
  - 2 years
  - 3 years if “willful” violation
- Liquidated damages equal to unpaid overtime
- Unwarranted overtime
Critical Considerations When Classifying An Employee as Exempt

- Must analyze an employee’s actual job duties to ensure they align with an exemption
- Must document which exemption is being utilized
- Must write/update job description to reflect the application of the exemption being used
Importance of Job Descriptions

- Courts have stated that a determination as to whether an exemption applies requires a “thorough, fact-intensive analysis of the employee’s employment duties and responsibilities.” *Schaefer-LaRose v. Eli Lilly & Co.*, 679 F.3d 560, 572 (7th Cir. 2012).

- As such, a position’s written job description is not dispositive if an exempt classification were to be challenged. In other words, a court would also look at other evidence (e.g., testimony) when considering what the employee’s primary duties entail.

- However, the job description is a piece of evidence that will be considered and is a key tool that an employer has to support an exempt classification.
Example: The Executive Exemption Analysis & Documentation

4 key questions

1. Does the employee customarily and regularly direct the work of two or more other employees (or their equivalent)?
   - If no, the exemption cannot apply
   - If yes, clearly explain how many employees the employee at issue supervises (e.g., 1 full-time employee and 2 half-time employees)
   - Ensure the job description reflects this

2. Does the employee have the authority to hire or fire other employees?
   - If yes, skip #3; if no, go to #3
   - If yes, specifically state this fact in the job description
Analysis and Documentation: Executive Exemption (cont.)

3. If the answer to #2 is “No,” are the employee’s suggestions and recommendations nevertheless considered (and influential) when there are hiring and firing decisions being made or when there may be some other change in the employment status of another employee?

   • If the answer to both #2 and #3 is no, the exemption cannot apply
   • If #3 is yes, clearly explain your reasoning
   • If #3 is yes, ensure the job description reflects it. Below is sample language.

“This position is actively involved in the interviewing and screening process whenever a position is being filled in the department, and this includes providing a recommendation as to which candidate should be hired. The Director of Human Resources will also consult with the person filling this position regarding employee evaluations, promotions, and salary levels.”
Analysis and Documentation: Executive Exemption (cont.)

4. Is the employee’s primary duty the “management” of the business or a specific department?
   • If no, the exemption cannot apply
   • What are “management” duties? (see the next slide)
   • To the extent the employee has “management” duties they should be documented and listed in the job description
“Management” Duties Include, But Are Not Limited To, Activities Such As:

- Interviewing, selecting, and training of employees;
- Setting and adjusting their rates of pay and hours of work;
- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- Handling employee complaints and grievances; disciplining employees; planning the work;
- Determining the techniques to be used;
- Apportioning the work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;
- Providing for the safety and security of the employees or the property; planning and controlling the budget; and
- Monitoring or implementing legal compliance measures.
Hours Worked
Key FLSA-Related Policies

- Pay Policy (including FLSA Safe Harbor for reporting and investigating improper deductions)
- Recording Hours Worked Policy
- Overtime Policy
  - OT Authorization Form
- Compensable Travel Time Policy
- Remote Work Policy for Non-Exempt Employees
- Meal and Rest Break Policy
- Guidelines for “On-Call” Time
FLSA Hours: What Counts?

- Any work that the employee is “suffered or permitted” to work
- “Suffered or Permitted” = any work the employer knows about or could have found out about
- All time spent by an employee performing activities that are job-related is potentially “work time”
FLSA Hours Include

- Break time
- Unproductive time
- Work done before a scheduled shift
- Activities done to prepare for work
- Clean up time and “after closing” work
- Work completed at home
- Work completed on the way home
- Training time (with some exceptions)
- Voluntary, unauthorized, and unapproved work = work
FLSA Hours Do NOT Include

- Meal periods (if more than 30 minutes long and no active duties)
- Leave time (even if it is included for other purposes)
- Some travel time
- Sleep time
- Commute time

ALL TIME SPENT ON ACTIVITIES THAT BENEFIT THE EMPLOYER ARE WORK HOURS
Overtime Rules: Refresher

- FLSA requires overtime payment for hours worked over 40 in a single workweek
  - No requirement of daily overtime
  - No requirement of weekend overtime
  - No requirement of overtime for hours worked outside of normal schedule

- Overtime pay = one and one-half times the regular rate of pay
  - Example: If regular rate is $10/hour, OT rate is $15/hour

- Cannot average work hours out over multiple workweeks to avoid overtime

- Employees cannot waive their right to overtime compensation
Other Overtime Considerations

- Should not let employees work overtime unless they have been authorized to do so.
- Can/should discipline employees for performing unauthorized overtime work.
  - Reminder: they still must be paid for this work time.
- Employees can also be disciplined for refusing to perform overtime work.
Duty of Management

- “It is the duty of management to exercise its control and see that work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensation for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”

29 C.F.R. 785.13
“On-call” time

- Key questions:
  - Can the employee generally use on-call time for his/her own purpose?
  - Are the restrictions so substantial that the employee cannot conduct other activities of their choosing?
Remote work

- Working away from the regular work place is still work
- Includes “off-the-clock” emails, phone calls, text messages
Travel Time

- Travel time during work hours is generally compensable
- Travel time during non-work hours is generally not compensable
- But there are special situations
Out Of Town Travel Time (One-Day)

- One-day special assignment
  - Generally considered hours worked even if outside the normal workday hours

- But normal commute time can be deducted
  - Bob had 6 hours of travel time outside of his typical schedule
  - But his 15 minutes of normal commute time each way (30 minutes total) can be deducted from this number
Out Of Town Travel Time (Overnight)

- Included as work time when the travel time cuts across normal workday hours (even on weekends)
- Travel time during non-work hours does not count as hours worked, unless the employee is driving
- If the employee is performing work while traveling, this time is compensable regardless of when it occurs
- Hotel time (including sleep time) is not compensable time unless the employee is working
Attending Lectures, Meetings, and Training Programs

- Usually considered hours worked
- Do not have to count if all of the following four criteria are met:
  1. Attendance is outside of the employee’s regular working hours;
  2. Attendance is voluntary;
  3. The course, lecture, or meeting is not directly related to the employee’s job; and
  4. The employee does not perform any productive work during such attendance
Questions?