

Labor and Employment 2018 Symposium

2018 Wage and Hour Update: Trending Topics and Challenges

Dorsey Speakers

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1. PowerPoint Presentation prepared by Dorsey & Whitney LLP

ahead of the curve

Workplace law trends for today and beyond.
Come up to speed to stay ahead.

2018 Wage & Hour Update: Trending Topics & Challenges

Jeff Brockmann, Vice President & Assistant General Counsel, U.S. Bank

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May 7, 2018



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Topics

- DOL Update
- Employee Classifications
- Independent Contractors
- Off-the-clock work
- Joint Employers
- Regular Rate
- Pay Equity
- Multi-state compliance
- Horizon Issues



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DOL Update

- **Salary basis rule**
 - New notice and comment period focused on revised threshold (\$33,000 - \$40,000)?
- **“PAID” program**
 - New WHD initiative
 - Encourages employers to conduct audits and self-report OT or minimum wage violations.
 - Qualifying employers will pay 100% of unpaid wages, but will not be required to pay liquidated damages.
 - Employees are not required to accept settlements.
- **Opinion letters**



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DOL Update

- **Opinion letters**
 - **Medical breaks:** Extra short rest breaks for FMLA-covered reasons are not compensable.
 - **Travel time**
 - 3 options to determine “normal working hours” for purposes of calculating compensable out-of-town travel:
 - If time records from “most recent month” demonstrate typical hours, use those hours until there is a material change in the employee’s circumstances.
 - If the records don’t show a pattern, choose an average start and end time.
 - If all else fails, negotiate the employee’s “normal working hours.”
 - Rarely able to show that employee does not have “normal working hours.”



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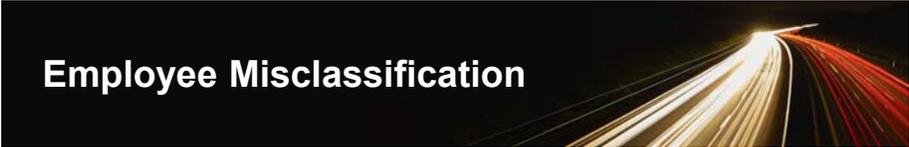
DOL Update

- **Opinion letters**

- **Garnishments:** Most lump sum payments (commissions, bonuses, profit sharing, monetary awards) are “earnings” subject to garnishment under the Consumer Credit Protection Act. Payments are earnings when “the employer paid the amount in question for the employee’s services.”



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Employee Misclassification

- ***Encino Motorcars, LLC v. Navarro* (S.Ct. April 2018)**

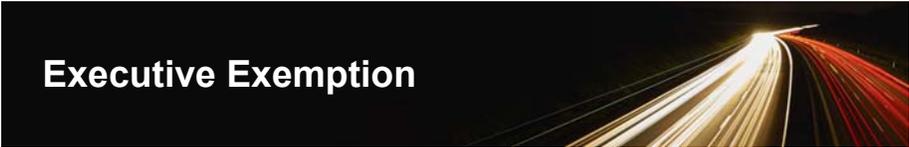
- Rejected principle that FLSA exemptions should be “narrowly construed.”

- **Consistent common cases**

- Mid-level/assistant managers
- Employees engaged in “production” functions
- Inside sales reps



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Executive Exemption

- **Exemption applies if:**
 - 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.
- **Key issues:**
 - Customarily recognized subdivision
 - Customarily and regularly direct the work for 2+ FTEs
 - Responsibility over hiring, firing, advancement and promotion



Administrative Exemption

- **Exemption applies if:**
 - 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
 - Employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- **Key issues:**
 - Directly related to the management or general business operations of the employer
 - Discretion and independent judgment with respect to matters of significance

Inside Sales Representatives

- **Outside sales representatives may be exempt if:**
 - Employee's primary duty must be making sales, 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 or places of business.
- **Inside sales representatives generally are not exempt**
- **Key issues:**
 - Making sales vs. marketing
 - Customarily and regularly engaged away from the employer's place of business + Minnesota 20% rule
 - Retail sales exemption



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Independent Contractor Misclassification

- **DOL backs away from “economic realities” test**
- **Challenges of the gig economy**
- **Beware the revolving door**
- **Major cases: *GrubHub, Uber, Dynamex Operators v. Superior Court***
- **Is independent contractor misclassification a violation of the NLRB? - *Velox Express, Inc.***



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Independent Contractor Misclassification

- **Key “red flags”**

1. Workers who are compensated at fixed intervals, rather than for designated results, are more likely employees.
2. Workers who receive benefits are more likely employees.
3. Workers who have open-ended or “at will” relationships with the company are more likely employees.
4. Workers who contribute to the company’s core business functions are more likely employees.
5. Workers who must devote all or most of their professional time to performance of duties for the company are more likely employees.
6. Workers who have set schedules and who must work on the company’s premises are more likely employees.
7. Workers subject to frequent oversight and instruction from managers, are more likely employees.



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Independent Contractor Misclassification

- **Factors that may favor independent contractor status**

1. Workers who are retained for special skills and initiative of unique value are more likely contractors.
2. Workers who have made a substantial investment in their business are more likely contractors.
3. Workers who can earn a profit or realize a loss based on management of their business are more likely contractors.
4. Workers who can delegate their responsibilities are more likely contractors.



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Off-The-Clock Work

- **Challenges of the increasingly flexible workforce**
 - Telecommuting/remote access
 - Evidentiary issues
 - New technological options
- **Other workers not subject to immediate supervision and control - field technicians, home health care, drivers**
- **Plaintiffs' counsel pursuing less egregious cases**



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Off-The-Clock Work

- **Generally**
 - Remember the “suffer or permit” standard – actual knowledge not required.
 - Remember the continuous workday rule.
 - Have clear timekeeping and overtime policies – set expectations; get acknowledgements.
 - Make clear that all overtime worked will be paid, but unauthorized work may be disciplined.
 - Make clear retaliation will not be tolerated.
 - Monitor compliance and audit – schedules, GPS, expense reports, electronic data, e-mails, text messages.
 - Enforce your policies.
 - Be proactive.



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Off-The-Clock Work

- **Addressing mobile workforce risks**
 - Limit use of remote devices/remote access to exempt employees.
 - Consider issuing company phones for company business.
 - If necessary for non-exempt employees to have remote access for company business:
 - Have clear timekeeping and overtime policies – set expectations
 - Regularly reiterate and obtain acknowledgement of off-the-clock policies
 - Establish policies regarding use – limit to necessary use only
 - Obtain related acknowledgments from employees
 - Counsel managers – limit after-hours communications
 - Monitor compliance and audit – system access data, e-mail time stamps, etc.



Joint Employment

- DOL backtracks – withdrew AI re: joint employment (June 2017)
- NLRB vacillation – *Hy-Brand v. Industrial Contractors, Ltd.*
- *Save Local Businesses Act* - would reaffirm that two or more employers must have “actual, direct, and immediate” control over employees to be considered joint employers

Joint Employment

Get the Facts on Joint Employment

Joint employment exists when an employee is employed by two (or more) employers and the employers are responsible, both individually and jointly, for that employee under the law. For example, a worker placed by a staffing company to do housekeeping work at a hotel may be jointly employed by the staffing company and the hotel.



Formerly at https://www.dol.gov/whd/flsa/Vertical_Joint_Employment.pdf



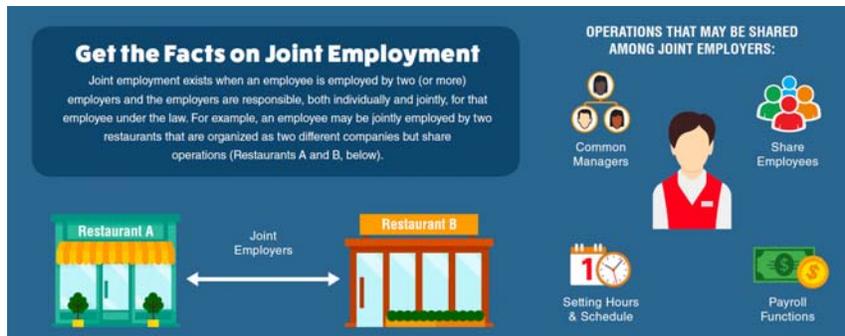
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Joint Employment

Get the Facts on Joint Employment

Joint employment exists when an employee is employed by two (or more) employers and the employers are responsible, both individually and jointly, for that employee under the law. For example, an employee may be jointly employed by two restaurants that are organized as two different companies but share operations (Restaurants A and B, below).

OPERATIONS THAT MAY BE SHARED AMONG JOINT EMPLOYERS:



Formerly at https://www.dol.gov/whd/flsa/horizontal_Joint_Employment.pdf



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Joint Employment

- **Simple (preliminary) analysis: Greater company control = greater risk**
- **Key precautions – agency relationship example**
 - Use reputable, financially sound staffing agencies.
 - Research agency history – litigation and organizing history.
 - Audit agency’s labor practices and employment conditions.
 - Minimize company “control.”
 - Have workers report to the agency where possible.
 - Work out procedures for handling HR issues ahead of time (claims of discrimination, harassment, disability, etc.).
 - Put in place anti-harassment, anti-discrimination, and ADA policies that include procedures for reporting issues to the agency.
 - Have the agency take the lead in problem solving issues involving workers and the customer.



Joint Employment

- Have clear contract language identifying the employer.
- Have clear contract language requiring legal compliance by the agency.
- Have clear indemnification language.
- Inform workers in writing that the agency is the employer.
- Confirm agency insurance coverage.
- Avoid the revolving door.
- Be proactive.



The Regular Rate

- Regular rate is an hourly rate – applies even if a non-exempt employee is paid on a piece-rate, commission or salary basis
- Regular rate = employee's total remuneration the workweek / total actually worked in workweek
- Regular rate must be at least minimum wage
- *Include:* regular wages, commissions, productivity-related bonuses, in-kind payments, premium payments other than overtime (e.g., shift premiums)
- *Exclude:* OT/extra day premiums paid, discretionary bonuses, vacation/holiday/sick pay, employer-paid benefits premiums
- Beware traps – e.g., commissions or bonuses covering multiple workweeks



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The Fluctuating Workweek

- Allows OT calculation at .5x rate rather than 1.5x rate.
- Limited to salaried non-exempt employees.
- *Thomas v. Bed Bath & Beyond* (S.D.N.Y. Feb. 21, 2018) - signed acknowledgment by an employee stating “I understand that my base weekly salary is compensation for all hours I work in a week” was sufficient to limit unpaid overtime damages to .5x the regular rate.



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Pay Equity

- **“Equal pay for equal work”**: An important principle, but difficult standard to apply.
 - **Equal Pay Act**
 - Prohibits unequal pay between men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.
 - Differences permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex.
- **Current trend towards statutes designed to “attack the gap”**
 - Prohibitions against setting new hire pay based on current / past compensation
 - Prohibitions on requiring disclosure of salary history - e.g., Minnesota H.F. 2913 / SF 2716 (2018)



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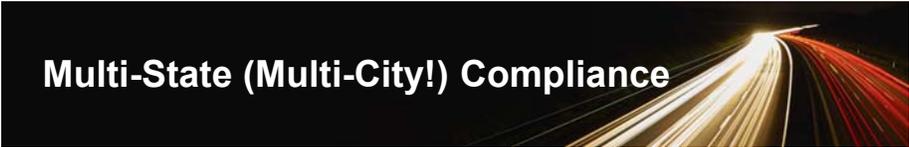


Interns

- **DOL revises “primary beneficiary” test**
 - Do both parties understand that the intern is not entitled to compensation?
 - Does the internship provide training that would be given in an educational environment?
 - Will the intern’s completion of the program entitle him/her to academic credit?
 - Does the internship correspond with the academic calendar?
 - Is the internship’s duration limited to the period when the internship educates the intern?
 - Does the intern’s work complement rather than displace the work of paid employees while providing significant educational benefits.
 - Do both parties understand that the intern is not entitled to a paid job at the internship’s end.



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Multi-State (Multi-City!) Compliance

- **Minimum wage**
- **Overtime requirements**
- **Overtime exemptions**
- **Sick/safe leave**
- **Vacation carryover & payout**
- **Break requirements**
- **Salary history prohibitions**
- **Pay statement requirements**



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Horizon Issues

- **Scheduling - again!**
 - Minneapolis city council members considering new scheduling proposals.
- **State preemption?**
 - Minnesota stalled . . .
- **Class waivers & arbitration agreements.**
 - Supreme Court decision pending!
- **NYC “right to disconnect” bill(!)**
 - Would prohibit employers from requiring employees to check and respond to email and other electronic communications during non-work hours.



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Thank You!



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