

# ANSWERS TO YOUR TOUGHEST EMPLOYMENT LAW QUESTIONS

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# Presenter

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# Agenda

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## FLSA/OVERTIME

- When do I have to pay overtime?
- At what rate do I have to pay overtime?
- How do I exempt employees from overtime?
- How will the FLSA changes affect my business?
- What is the best way to address/communicate the re-classifications to the affected employees?
- Is it true that FLSA class action cases are on the rise?
- My company uses 1099 independent contractors for many positions, is that a problem?
- How does DOL decide if a worker is an employee or an independent contractor?

## EMPLOYEE DOCUMENTATION

- What paperwork should I keep in a personnel file?

## TERMINATIONS

- What is the proper way to handle employee termination?
- What are prohibited reasons for firing employees?

# Agenda

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## FMLA

- When can I deny FMLA leave?
- Can I terminate employees when their FMLA leave expires?

# FLSA/Overtime

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## WHEN DO I HAVE TO PAY OVERTIME?

- Overtime pay is governed by the Fair Labor Standards Act (FLSA).
- Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay.
- FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such.
- Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees.

# FLSA/Overtime

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## WHEN DO I HAVE TO PAY OVERTIME?

**Several states have daily overtime rules.**

- Alaska, California and Nevada require overtime pay for any hours worked past 8 hours in a day.
- Colorado requires overtime pay for any hours worked past 12 hours in a day.

# FLSA/Overtime

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## AT WHAT RATE DO I HAVE TO PAY OVERTIME?

- Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings.
  - This is calculated by dividing the total pay for employment in any workweek by the total number of hours actually worked.

# FLSA/Overtime

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## HOW DO I EXEMPT EMPLOYEES FROM OVERTIME?

To be considered exempt and not be paid overtime, DOL requires that jobs generally must pass a:

- Salary basis test
- Salary level test
- Job duties test

# Salary Basis Test

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- 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.
- Permitted salary deductions- DOL allows employers to “dock” an employee’s salary under certain situations (ex: during the first or last week of employment, while on FMLA, when employee does not have time available under a PTO policy, etc.)
- An actual practice of making improper deductions from salary will result in the loss of the exemption.

# Salary Level Test

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- The amount of salary paid must meet a minimum specified amount.
- The standard salary level required for exemption is currently \$455 a week (\$23,660 for a full-year worker) and was last updated in 2004.
- Test level will be increasing to approximately \$50,440 under the new FLSA amendments.

# Duties Test

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- Generally must meet certain tests regarding their job duties
- The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations

# Exemptions

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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

# Exemptions

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## MOTOR CARRIER EXEMPTION

### Applies to employees who are:

- Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102
- Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce
- Not covered by the small vehicle exception

# Exemptions

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## DEHERRERA V. DECKER TRUCK LINE

- Important interstate commerce exemption case just decided on April 21, 2016.
- Drivers alleged they were owed overtime pay for deliveries within the state.
- Federal trial court and the 10th Circuit Court of Appeals held that by driving an intrastate leg of shipments in interstate commerce, drivers became subject to the authority of the Secretary of Transportation and were thus exempt from the overtime pay requirements of the FLSA.

# FLSA Changes

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## HOW WILL THE FLSA CHANGES AFFECT MY BUSINESS?

- Any salaried exempt employees earning less than \$50,400 will lose their overtime exemption once the rules take effect (unless otherwise exempted).
- Employees losing their exempt status can be reclassified as hourly, non-exempt or salaried, non-exempt.

# FLSA Changes

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## WHAT IS THE BEST WAY TO ADDRESS/COMMUNICATE THE RE-CLASSIFICATIONS TO THE AFFECTED EMPLOYEES?

- Be proactive and develop a communication strategy.
- Employers may wish to transition employees from salaried exempt to salaried, non-exempt status and reassure them that they are not being demoted, but rather that this is a government-driven technical change in how they are paid.

# FLSA Changes

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## IS IT TRUE THAT FLSA CLASS ACTION CASES ARE ON THE RISE?

- Yes. This year, workers' attorneys and government agencies are expected to file more lawsuits and continue refining successful strategies for securing certification of their class and collective actions.
- According to a new report from management-side firm Seyfarth Shaw LLP, wage-and-hour case filings in federal courts in 2015 were at 8,954, up from 8,066 the previous year. This year-to-year increase has persisted since 2000, going up by more than 450%, according to the report.

# FLSA Changes

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## IS IT TRUE THAT FLSA CLASS ACTION CASES ARE ON THE RISE? WHY?

**Various factors are fueling the continuous rise in suits, including:**

- Federal overtime legislation changes,
- minimum-wage increases in many states and municipalities,
- an intense focus on independent-contractor classification and
- more scrutiny of who is actually a worker's employer, especially in the context of whether a franchisor or franchisee is liable for wage-and-hour compliance, according to the report.
- Penalty structure of FLSA makes it profitable for lawsuits.

# FLSA and Independent Contractors

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MY COMPANY USES 1099 INDEPENDENT CONTRACTORS FOR MANY POSITIONS, IS THAT A PROBLEM?

**Not if you follow the rules.**

- US DOL is in the middle of a major misclassification initiative and failure to follow them can subject an employer to major financial penalties.
- The DOL Misclassification Initiative is underway as a joint effort between DOL, IRS and several states including AL, AK, AR, CA, CT, CO, FL, IA, ID, IL, KY, LA, MA, MD, MN, MO, MT, NH, NM, NY, OR, RI, TX, UT, WA, WI, WY.

# FLSA and Independent Contractors

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## HOW DOES DOL DECIDE IF A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

- **The extent to which the work performed is an integral part of the employer's business.** If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.
- **Whether the worker's managerial skills affect his or her opportunity for profit and loss.** Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

# FLSA and Independent Contractors

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MY COMPANY USES 1099 INDEPENDENT CONTRACTORS FOR MANY POSITIONS, IS THAT A PROBLEM?

- **The relative investments in facilities and equipment by the worker and the employer.** The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

# FLSA and Independent Contractors

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## MY COMPANY USES 1099 INDEPENDENT CONTRACTORS FOR MANY POSITIONS, IS THAT A PROBLEM?

- **The worker's skill and initiative.** Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

# FLSA and Independent Contractors

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MY COMPANY USES 1099 INDEPENDENT CONTRACTORS FOR MANY POSITIONS, IS THAT A PROBLEM?

- **The permanency of the worker's relationship with the employer.** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

# FLSA and Independent Contractors

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## MY COMPANY USES 1099 INDEPENDENT CONTRACTORS FOR MANY POSITIONS, IS THAT A PROBLEM?

- **The nature and degree of control by the employer.** Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

- The following areas need to have separate employee files: personnel, medical, payroll, I-9, and Equal Employment Opportunity.
- Have a formal policy regarding who can access which parts of the file. Most parts should be HR only.
- Most states permit employees to get copies of what is in their files.

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

### Records that should be kept in the personnel file include:

- Application and resume
- Letters of recognition
- Job description
- Hiring, promotion, demotion, transfer, layoff
- Rates of pay and other forms of compensation
- Disciplinary notices or documentation of verbal warnings
- Notices of commendations and awards
- Performance appraisals
- Any forms signed by employee expressing adherence to employer's policies
- Education and training records
- Termination paperwork; exit interview

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

### Medical Records

- The American with Disabilities Act requires employers to keep all medical records separate. All medical records including health insurance enrollment forms, beneficiary forms, physical examinations, medical leaves, worker' compensation claims, any doctor's notes or accommodation recommendations, and drug and alcohol testing need to be in a separate file for each employee.

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

### Immigration (I-9) Forms

- Best practices recommend that employers maintain these forms chronologically by year. Forms must be retained for three years after the employee is hired or one year after termination, whichever is later. Keeping this information in a separate file reduces the opportunity for an auditor to pursue and investigate unrelated information.

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

- The Immigration Reform and Control Act requires employers to request and retain the Employment Eligibility form (INS Form I-9). Within 3 days of beginning work, the employee must provide the employer with proof of identity and authorization to work in the United States. The employer cannot require the employee to provide specific documents. The employee can produce any forms that meet the requirements. The list of allowable documents is stated on the back of the form.
- Note- although the current I-9 is technically expired, the feds have not come up with an amended form.

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

- Monetary penalties for knowingly hiring and continuing to employ violations range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties, at the higher end.
- Penalties for substantive violations, which includes failing to produce a Form I-9, range from \$110 to \$1,100 per violation. Per violation = per I-9 form!
- In determining penalty amounts, ICE considers five factors:
  - The size of the business
  - Good faith effort to comply
  - Seriousness of violation
  - Whether the violation involved unauthorized workers
  - History of previous violations

# Employee Documentation

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## WHAT PAPERWORK SHOULD I KEEP IN A PERSONNEL FILE?

### Equal Employment Opportunity

- To minimize claims of discrimination, it is important to keep source documents that identify an individual's race and sex in a separate file.
- Additionally, if internal/external charges are investigated, the recommended practice is to maintain these files separately as well.

# Terminations

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## WHAT IS THE PROPER WAY TO HANDLE EMPLOYEE TERMINATION?

- While most states recognize at-will employment, best practice is to document progressive disciplinary actions before terminating.

# Terminations

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## WHAT IS THE PROPER WAY TO HANDLE EMPLOYEE TERMINATION?

### Voluntary

- Company should request employees to provide notice (2 weeks, 30 days, etc.).
- Employees should be required to submit resignation in writing.
- Risk assessment should be conducted to determine whether employees should leave prior to end of notice period.
- Exit interviews should be conducted.

# Terminations

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## WHAT IS THE PROPER WAY TO HANDLE EMPLOYEE TERMINATION?

### Involuntary

- Policies and procedures related to progressive discipline should be followed.
- Disciplinary actions should be documented.
- Company should require HR or Senior Management approval before termination.
- Situations that might lead to claims of retaliation or discrimination should be discussed before termination.
- Two members of management or HR should be present for termination meeting.

# Terminations

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## WHAT IS THE PROPER WAY TO HANDLE EMPLOYEE TERMINATION?

### General Practice (applies to both)

- Separating employee is provided with required notices and benefit election materials.
- Final paycheck is provided within required timeline (By State).
- Procedures are in place to protect confidential business information, data and physical security of the facilities.
- Ensure that all company property is returned, including laptops, keys, access cards, and cell phones.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

- There are certain reasons that you can never use to fire an employee.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### Discrimination

- Federal law makes it illegal for most employers to fire an employee because of the employee's race, gender, national origin, disability, religion, genetic information, or age (if the person is at least 40 years old).
- Federal law also prohibits most employers from firing someone because that person is pregnant or has a medical condition related to pregnancy or childbirth.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### **Retaliation**

- It is illegal for employers to fire employees for asserting their rights under state and federal antidiscrimination laws.
- An employee can bring a retaliation claim even if the underlying discrimination claim fails.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### Refusal to Take a Lie Detector Test

- The federal Employee Polygraph Protection Act prohibits most employers from firing employees for refusing to take a lie detector test.
- Many state laws also set out strong prohibitions against using lie detector tests.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### **Alien Status**

- The federal Immigration Reform and Control Act (IRCA) prohibits most employers from using an employee's alien status as a reason for terminating employment, as long as that employee is legally eligible to work in the United States.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### Complaining about OSHA Violations

- The federal Occupational Safety and Health Act (OSHA) makes it illegal for employers to fire employees for complaining that work conditions don't meet state or federal health and safety rules.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### Violations of Public Policy

- Most states prohibit employers from firing an employee in violation of public policy, meaning for reasons that most people would find morally or ethically wrong.

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### Violations of Public Policy

- Most states agree that the following reasons for termination would violate public policy and would therefore be illegal:
  - terminating an employee for refusing to commit an illegal act (such as refusing to falsify insurance claims or lie to government auditors)
  - terminating an employee for complaining about an employer's illegal conduct (such as the employer's failure to pay minimum wage), and
  - terminating an employee for exercising a legal right (such as voting or taking family leave).

# Terminations

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## WHAT ARE PROHIBITED REASONS FOR FIRING EMPLOYEES?

### WHICH STATES HAVE THE PUBLIC POLICY EXEMPTION?

The public policy exception is similar to the federal requirements, but it can be pursued at the state level as well as at the federal level. It's one of the more widely applied exceptions, and these states are the only ones that **do not** follow it:

- Alabama
- Florida
- Georgia
- Louisiana
- Nebraska
- New York
- Rhode Island

# FMLA

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## WHEN CAN I DENY FMLA LEAVE?

**Can deny if not a covered employer.**

- Must have at least 50 employees within 75 driving miles.

# FMLA

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## WHEN CAN I DENY FMLA LEAVE?

**Can deny if employee is not eligible.**

- Employed at least 12 months on the date of leave.
- Worked at least 1250 hours during prior 12 months.

# FMLA

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## WHEN CAN I DENY FMLA LEAVE?

Can deny if employee does not have a proper triggering event.

- a “serious medical condition”
  - Can be their own, spouse’s, or child’s
- birth/placement of a child
- “providing care for”
- Military Leaves (12/26wks)

# FMLA

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## WHEN CAN I DENY FMLA LEAVE?

### Can deny for lack of proper documentation.

- Make sure you have provided employee with proper forms.
  - Certification of Health Care Provider for Employee's Serious Health Condition WH-380E
  - Certification of Health Care Provider for Family Member's Serious Health Condition WH-380F
- May contact healthcare provider for clarification or authentication.
- If forms or documentation is incomplete, employee has 7 days to correct deficiencies.
- Employee must return form within 15 days (in most cases).
- Employers can request second and third opinions
  - Employer must pay for second and third opinions
  - Third opinion is binding

# FMLA

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## CAN I TERMINATE EMPLOYEES WHEN THEIR FMLA LEAVE EXPIRES?

**Make sure the employee doesn't qualify for unpaid ADA leave.**

- Offering unpaid leave may be a reasonable accommodation under the ADA, depending on the circumstances.
- Can be from 1 month up to 6 months.

# QUESTIONS?

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