

# **Avoid Simple Employee Exemption Mistakes That Can Get You Sued**



Presented by:  
**Michelle Anderson, JD**

Inconvenience

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# About Your Expert



## Michelle Anderson, JD

### Partner with Fischer Phillips

With unique training and more than 20 years of experience in executive management, workforce development, and practicing employment law, Michelle Anderson helps businesses anticipate and solve practical and legal challenges in the workplace by defending against various claims and assisting with compliance practices and procedures.

Michelle defends employers against claimed violations involving unlawful discrimination, wage and hour, unfair labor practices, harassment, wrongful termination, retaliation, breach of contract, leave and disability, and public accommodations and workplace safety laws. To help clients comply with applicable laws and regulations, she advises on multi-state employee handbooks, employment applications, policies, and procedures; workplace investigations; Americans with Disabilities Act (ADA) matters; human resource management and systems; supervisor training; diversity and inclusion; criminal background checks; as well as Fair Labor Standards Act (FLSA) and state wage and hour audits.

An integral member of the firm's Wage and Hour Practice Group and Women's Initiative and Leadership Committee, she is also a key contributor to Fisher Phillips' COVID-19 Task Force, which has been a leader in providing advice and training to businesses around the country.



# Is Your Business At-Risk for Wage and Hour Litigation?

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## Agenda

- Compliance with the Fair Labor Standards Act
- How to spot an employee versus an independent contractor
- Proper classification of employees as exempt versus non-exempt
- Overtime compensation and calculations
- Different types of pay plans
- Correctly incorporating breaks and lunches
- Common wage/hour compliance errors and penalties
- Conducting an internal wage/hour audit

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## Federal Fair Labor Standards Act “FLSA”

- Governs the payment of minimum wage and overtime
- Enforced by DOL Wage & Hour Division
- Includes a private right of action for employees
  - Incentivized by attorney’s fees
    - Can be more expensive to litigate than settle
  - Either paid in accordance with the FLSA, or not
  - Either have the records to back this up, or you don’t
  - *BURDEN IS ON THE EMPLOYER*

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## Fair Labor Standards Act Coverage

- Enterprise Coverage:
  - Over \$500,000 in gross sales for one or more establishment
  - Hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies
- Individual Coverage:
  - Any person who works or handles goods that are moving in interstate commerce
  - As simple as running credit card transactions or bringing in supplies across state lines
- Assume that your employees are covered

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## U.S. Dept. of Labor-Wage and Hour Division

- Broad authority to investigate
- Investigations prompted by:
  - Employee complaints
  - Agency referrals
  - Proactive enforcement (industry, policy motivations)



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## FLSA-Private Litigation



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- Private right of action
- Do not have to give advance notice of allege violations before filing a lawsuit
- Often filed as a collective action
- Attorneys' fees and costs for the employee's counsel if they prevail

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## High Stakes For Wage/Hour Errors

- Individual liability
  - “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee ...”
- Liability for unpaid wages, including overtime, going back 3 years
- Risk of class and collective action lawsuits
- Liquidated damages
  - Some state laws provide for 200% liquidated damages
- Elongated statute of limitations period (e.g., 6 years in NY, NJ).
- Penalties for “knowing” violations, including criminal liability
  - Civil money penalties up to \$2,074 per person for repeated or willful violations
  - Child labor violations much higher

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## Perils of Independent Contractor Misclassification

- Now is the time to reconsider whether any independent contractors are actually employees and reclassify those individuals
- Misclassification can be costly
  - Employment law violations
  - Unpaid wages and benefits
  - Back taxes
  - Penalties and fines
  - Litigation costs and attorney’s fees

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## Department of Labor “Economic Realities” Test

### ▪ Six Factors:

- The extent to which the work performed is an **integral** part of the employer’s business.
- The worker’s opportunity for **profit or loss** depending on his or **managerial skill**.
- The extent of the relative **investments** of the employer and the worker.
- Whether the work performed requires **special skills** and initiative.
- The **permanency** of the relationship.
- The degree **of control** exercised or retained by the employer.

*See United States v. Silk, 331 U.S. 704 (1947)*

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## The “ABC Test” for Independent Contractor Classification

- A. The worker has been and will continue to be **free from control** or direction over the performance of the service;
- B. The service is either **outside the usual course of the business** for which the service is performed, or the service is performed **outside of all the places of business** of the employer for which the service is performed; **and**
- C. The worker is **customarily engaged in an independently** established trade, occupation, profession or business.

**New Jersey:** *Hargrove v. Sleepy’s, LLC*, 220 N.J. 289 (2015); N.J.S.A. §43:21-19(i)(6)(A)(B)(C)

**California:** *Dynamex Operations v. Superior Court*, 4 Cal. 5<sup>th</sup> 903 (Cal. 2018)

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## Common Wage and Hour Legal Issues

Exempt versus Non-Exempt?

- Salary does not equal exempt from overtime
- Test for exemption under federal law:
  - Must be paid on a weekly “salary basis”
    - Current salary basis: \$684 a week
  - Must meet the “job duties” requirement for a specific exemption

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## Don't Be Caught Asleep at the Wheel



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If an employee does not meet the job duties classification to be exempt, it does not matter that you are paying them a salary or the amount of that salary

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## Exemptions

- Executive
- Administrative
- Learned Professional
- Computer Employees
- Outside Sales
- Highly Compensated



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## Executive

- Primary duty is managing the enterprise or a customarily-recognized department or unit
- Customarily and regularly directs the work of two or more full-time employees (or the equivalent)
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight

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## Executive

- Interviewing, selecting, and training employees
- Setting and adjusting pay and work hours
- Appraising employee productivity and efficiency
- Handling employee complaints and grievances
- Disciplining employees
- Planning and apportioning work among employees
- Providing for the safety and security of employees or property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

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## Administrative

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- This work includes the exercise of discretion and independent judgment as to matters of significance
- Possibly one of the most often erroneously-applied FLSA exemptions

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## Administrative

Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as:

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Advertising
- Marketing
- Research
- Safety and Health
- Personnel Management
- Human Resources
- Employee Benefits
- Labor Relations
- Public Relations
- Gov’t Relations
- Computer Network
- Internet & Database Administration
- Legal & Regulatory Compliance
- Procurement

## Administrative

- Exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.
- The level of importance or consequence of the work performed.

## Administrative

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Whether the employee carries out major assignments in conducting the operations of the business;
- Whether the employee performs work that affects business operations to a substantial degree;
- Whether the employee has authority to commit the employer in matters that have significant financial impact;
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation.

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## Learned Professional

- The employee's primary duty must be the performance of work requiring advanced knowledge;
  - 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.

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## Nurses

- Licensed Registered Nurses usually meet the learned professional duties test
  - Must also be paid salary of at least \$684 week to be exempt
  - If paid hourly, entitled to overtime
- LPN's and other similar employees do not meet the job duties test
  - Entitled to overtime



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## Computer Employees

- \$684 a week or no less than \$27.63 an hour
- 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 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, the performance of which requires the same level of skills.

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## Outside Sales

- Weekly salary requirement does not apply
- 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
- Must be customarily and regularly engaged away from the employer's place or places of business.



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## Highly Compensated Employees



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- Paid total annual compensation of at least \$107,432, which includes at least \$684 weekly salary
- Primary duty includes performing office or non-manual work; and
- Employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee

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## Highly Compensated Employees-Bonuses and Incentives

- May use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy **up to 10 percent** of the standard salary level.
- If after the 52-week period, employer has not met its obligation, employer can make a final “catch-up” payment within one pay period after the end of the 52-week period.
- Catch-up payment will count only toward the prior year’s salary amount.

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## State Laws

- Some states have different overtime exemption laws
  - May require a different salary threshold
  - May have different tests for exemption
    - Alaska
    - California
    - Maine
    - New York

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## Wage and Hour Legal Issues: Non-Exempt Employees

- Must pay \$7.25/hour (or applicable state wage) for all hours worked during the week.
- Definition of workweek (7 day period)
  - Overtime based on workweek
- Work = permitted to suffer work/for the benefit of the employer
  - Tracking all time worked (actual versus rounding)
- Must keep time records for non-exempt employees for at least three years; states can be longer
- Proper calculation of regular rate in overtime weeks
  - Dual jobs, shift differentials, incentives, bonuses

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## Wage and Hour Legal Issues

- Deductions
- Whether the employer is taking any deductions or passing along expenses that will drop an employee below minimum wage or cut into overtime
- Examples include: uniforms, theft, and physicals/drug testing
- Be aware of other things that can cut into the minimum wage.
  - Special Care Uniforms (Dry clean only)
  - Mileage, cell phone usage, other items/tools that are purely for the benefit of the employer
  - “Primarily for the benefit of the employer”

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# What About Breaks?

- Breaks up to 20 minutes must be paid
- Breaks in excess of 30 minutes can be unpaid
  - Gray area between 20-30 minutes
  - Employee must be relieved of duties
  - Sufficient time to consume a meal
  - Free to leave premises?



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# What About Those Who Abuse Breaks?



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- If the employer allows employees to take short breaks under 20 minutes, **they must be paid**
- Unauthorized extensions of authorized employer breaks are not counted as hours worked for an employee when the employer has expressly and unambiguously communicated to the employee that:
  - The authorized break may only last for a specific length of time;
  - Any extension of such break is contrary to the employer's rules; and
  - Any extension of such a break will be punished.

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## Pay Plans for Non-Exempt Employees

- **The Eight and Eighty (8 and 80) Overtime System**
- Hospitals and residential care establishments
- Work period of fourteen consecutive days in lieu of the 40 hour workweek for the purpose of computing overtime
- Must be a fixed and regularly recurring 14-day period
- Pay time and one-half the regular rate for all hours worked over eight in any workday and eighty hours in the fourteen-day period
- Daily overtime may be credited towards the overtime compensation due for hours worked in excess of 80 for that period
- Memorialize in pay plan

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## Pay Plans for Non-Exempt Employees

- **Fluctuating Workweek**
- Receive weekly salary no matter how many hours worked, plus overtime if work more than 40 hours in one workweek
- Salary covers the straight time, overtime is paid at halftime
- Regular rate will fluctuate
- Memorialize in pay plan
- **Day Rate**
- Flat rate for all hours worked in a day
- Overtime paid at half time for hours worked over 40 in a workweek
- Regular rate may fluctuate
- Memorialize in pay plan

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## Incentive and Bonus Plans

- Discretionary bonuses are not wages and employees have no entitlement to a discretionary bonus
- Incentives or bonuses that are based on a specific formula (for example, hitting certain targets) will be considered wages once the criteria is met (similar to commission)



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## What businesses Can Do NOW

- Posters and notice requirements
- Review employee positions, job descriptions and compensation
- Recordkeeping, time clocks, meal breaks
- Involve legal counsel before the DOL investigates or a lawsuit is filed
- Proactive compliance audits – under privilege

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Questions?

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