

Avoid Simple Employee Exemption Mistakes That Can Get You Sued



Presented by: Michelle Anderson, JD Inconvenience

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About Your Expert



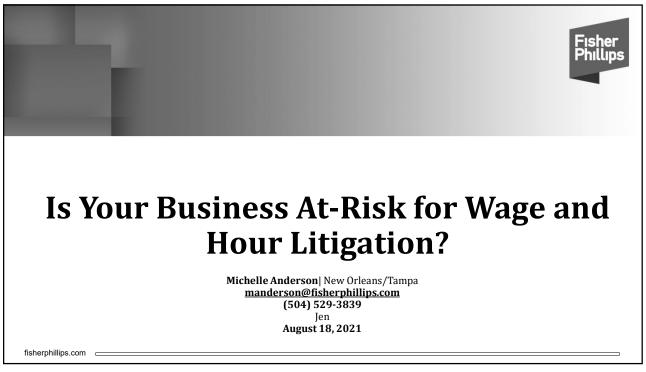
Michelle Anderson, JD

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.



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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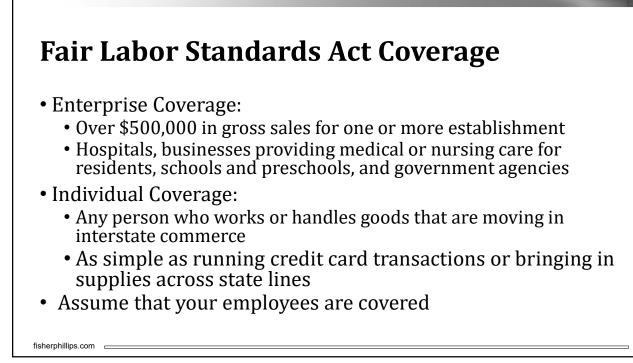
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Federal Fair Labor Standards Act "FLSA"

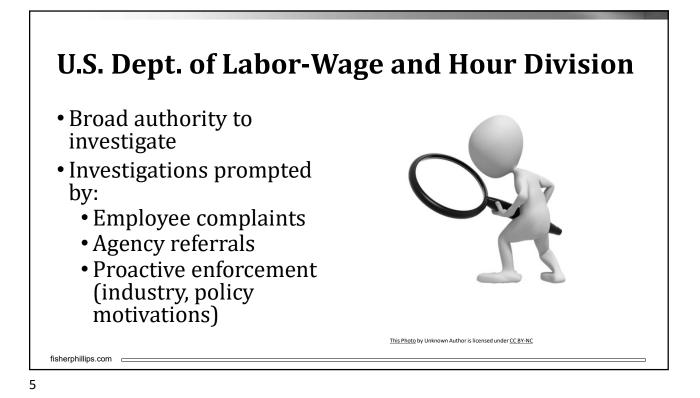
- Governs the payment of minimum wage and overtime
- Enforced by DOL Wage & Hour Division
- Includes a private right of action for employees
 - Incentivized by attorney's fees
 - Can be more expensive to litigate than settle
 - Either paid in accordance with the FLSA, or not
 - Either have the records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

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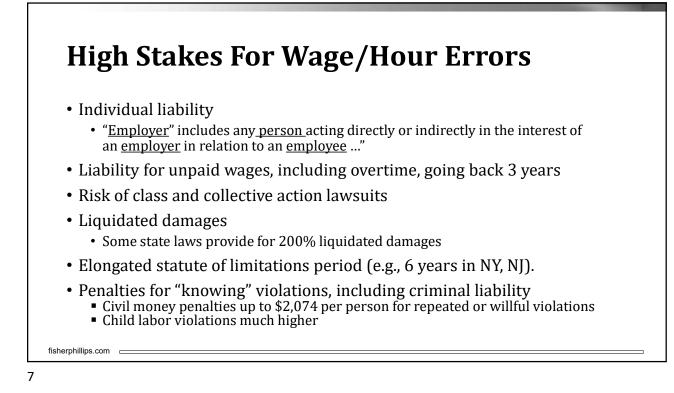
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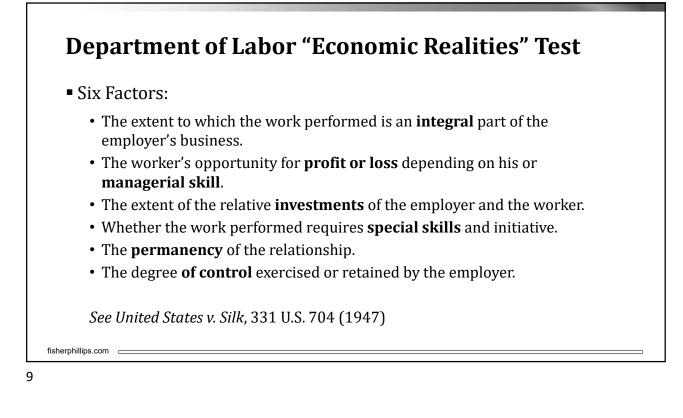
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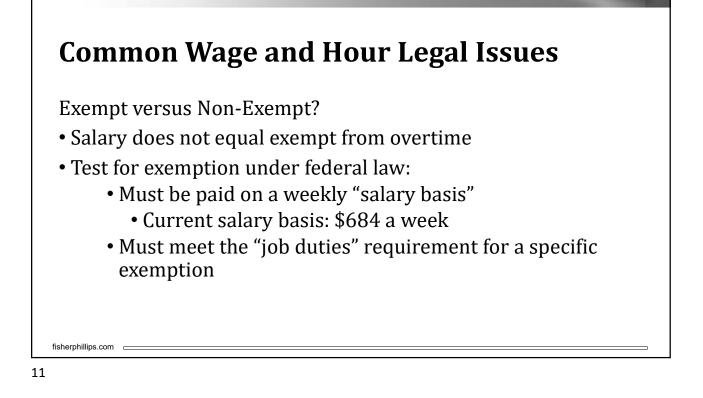
The "ABC Test" for Independent Contractor Classification

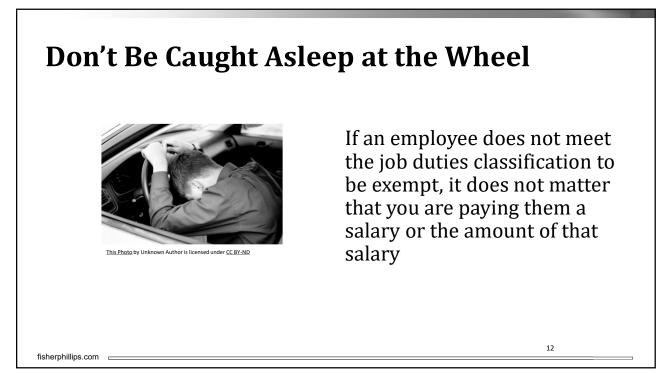
- A. The worker has been and will continue to be **free from control** or direction over the performance of the service;
- B. The service is either **outside the usual course of the business** for which the service is performed, or the service is performed **outside of all the places of business** of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

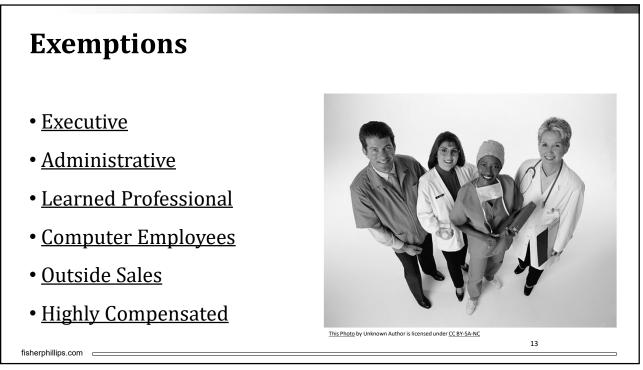
New Jersey: *Hargrove v. Sleepy's*, LLC, 220 N.J. 289 (2015); N.J.S.A. §43:21-19(i)(6)(A)(B)(C) **California:** *Dynamex Operations v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018)

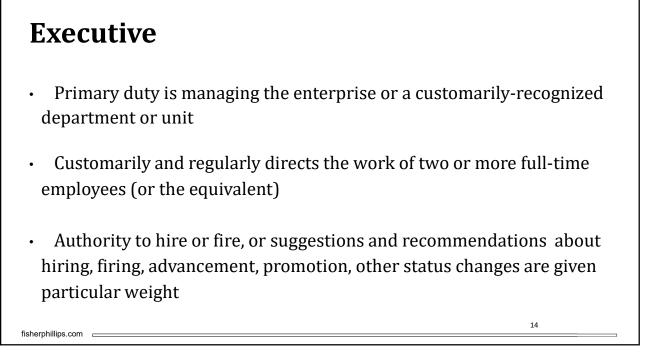
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Executive

- 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

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- Planning and controlling the budget
- Monitoring or implementing legal compliance measures

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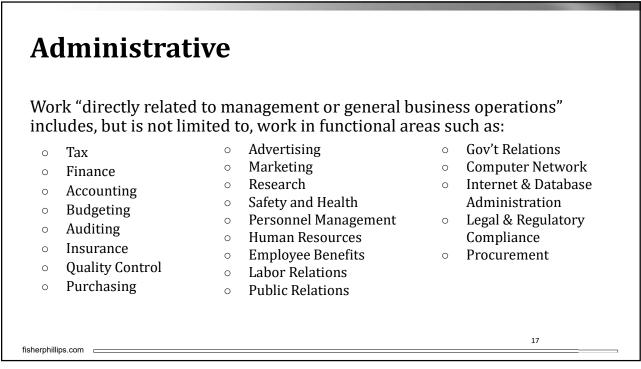
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Administrative

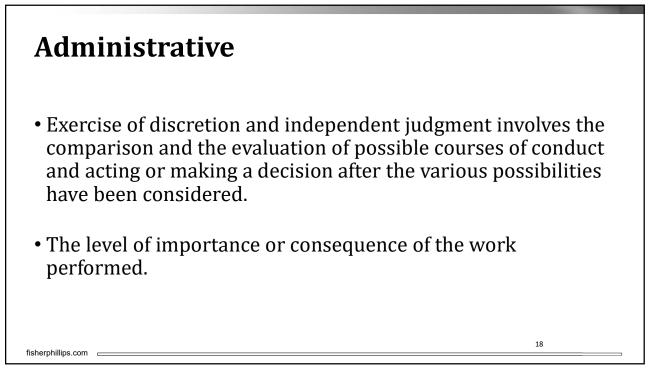
- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- This work includes the exercise of discretion and independent judgment as to matters of significance
- Possibly one of the most often erroneously-applied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

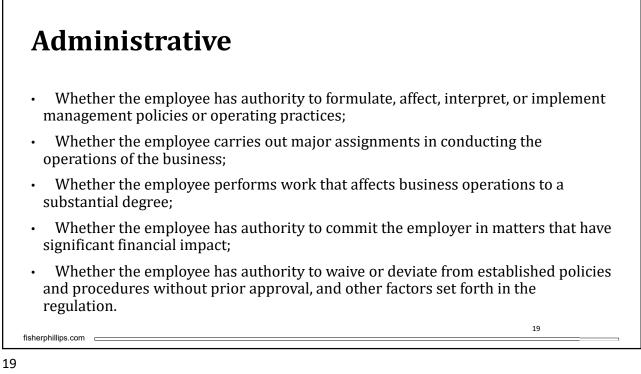
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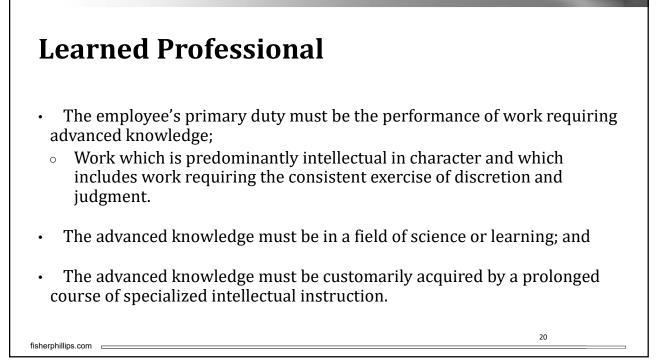












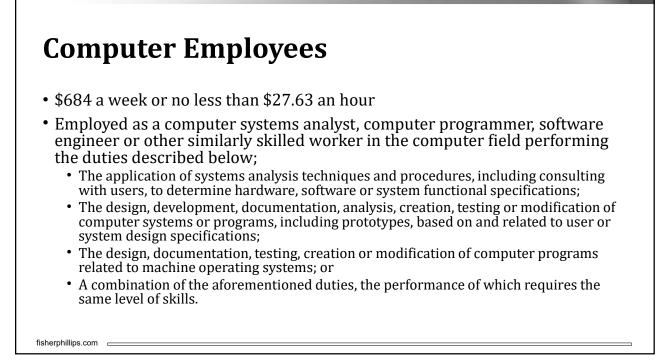
<u>Nurses</u>

- 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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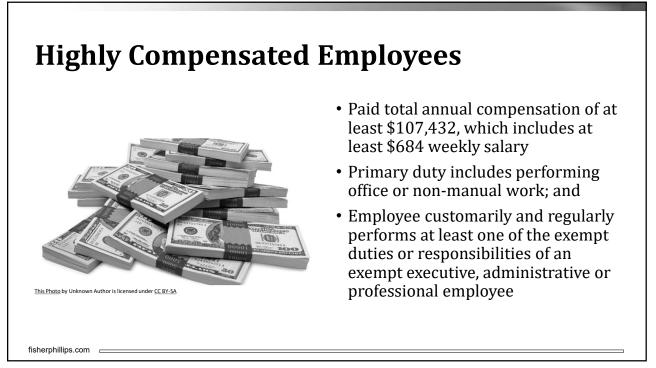
Outside Sales

- 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-Bonuses and Incentives

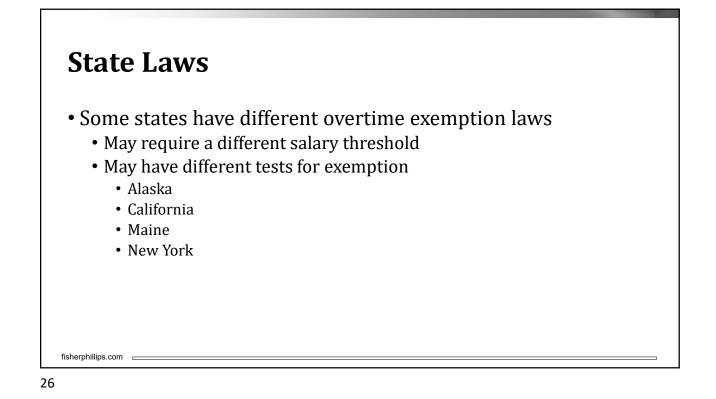
- May use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy **up to 10 percent** of the standard salary level.
- If after the 52-week period, employer has not met its obligation, employer can make a final "catch-up" payment within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

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• Catch-up payment will count only toward the prior year's salary amount.

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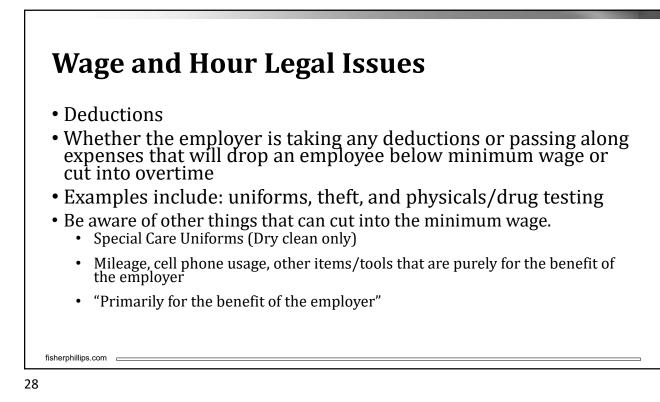


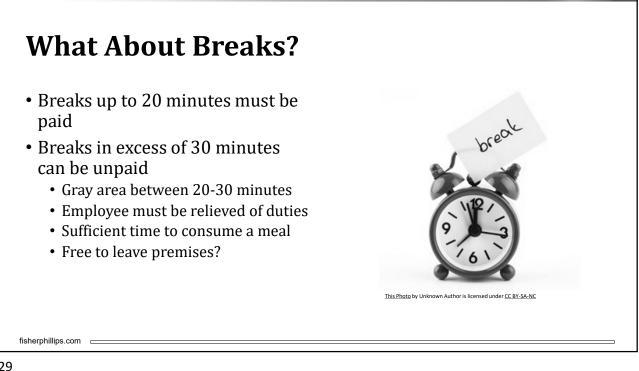
Wage and Hour Legal Issues: Non-Exempt Employees

- 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
 <u>Tracking all time worked (actual versus rounding)</u>
- 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

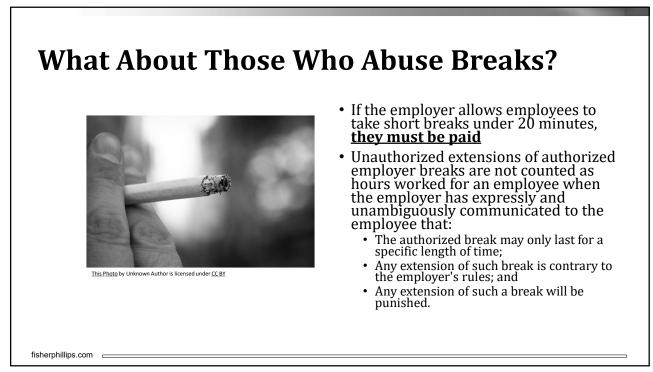
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- The Eight and Eighty (8 and 80) Overtime System
- Hospitals and residential care establishments
- Work period of fourteen consecutive days in lieu of the 40 hour workweek for the purpose of computing overtime
- Must be a fixed and regularly recurring 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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