

# 21<sup>ST</sup> ANNUAL NNAHRA CONFERENCE

*National Native American Human Resources Association*

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Cherokee, North Carolina

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# INTRODUCTION

# Classification of Employees

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- ❖ Exempt v Non-Exempt
- ❖ Independent Contractor v Employee
- ❖ Significant Wage and Hour Liability for Misclassification of Employees as Exempt and/or Independent Contractors
- ❖ Focus of Presentation Will Be Primarily from Wage and Hour Standpoint



# Fair Labor Standards Act

# Fair Labor Standards Act (FLSA)

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- Primary Federal Wage and Hour law
- The FLSA is enforced by the United States Department of Labor (DOL)

# Major Provisions

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- Coverage
- Minimum Wage
- Overtime Pay
- Youth Employment
- Recordkeeping

# Employment Relationship

- In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee.”
- Employee v Independent Contractor

# Applicability to Indian Tribes

- The U.S. Department of Labor takes the position that the FLSA applies to commercial (non-governmental) operations of an Indian Tribe.
  - ▣ *Solis v. Mathenson*, (9th Cir. 2009) 563 F. 3d 425
- Tribal Governmental Entities
  - ▣ Not Subject to the FLSA
- Voluntary Compliance?





# FLSA Exemptions

# “White Collar” Exemptions

- 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
  - ❖ Education employees

# Three Tests for Exemption

- To qualify for overtime exemption, must satisfy the “Three-Q” test
  - ▣ Quality
  - ▣ Quantity
  - ▣ Qompensation

# Proposed 2016 Rule

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- Proposed 2016 Rule which would have doubled minimum salary requirement for exempt employees enjoined by courts
- Current DOL not attempting to enact such regulations

# Standard Salary Level and Highly Compensated Employees

- Standard Salary Level – Pursuant to 29 CFR 541.600
- Current: \$455
- Highly Compensated Employee (HCE)- Pursuant to 29 CFR 541.601
  - ▣ Current: \$100,000

# Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis).
- The compensation cannot be reduced because of variations in the quality or quantity of the work preformed.
- Need not be paid for any workweek when no work is performed.

# Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business.
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

# Permitted Salary Deductions

- Seven exceptions from the “no pay-docking” rule:
  - ▣ Absence from work for one or more full days for personal reasons, other than sickness or disability.
  - ▣ Absence from work for one or more full days due to sickness or disability if deduction made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences.
  - ▣ To offset any amounts received as payment for jury fees, witness fees, or military pay.
  - ▣ (Cont.)



# Permitted Salary Deductions

- Seven exceptions from the “no pay-docking” rule, continued:
  - ▣ Penalties imposed in good faith for violating safety rules of “major significance.”
  - ▣ Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules.
  - ▣ Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment.
  - ▣ Unpaid leave taken pursuant to the Family and Medical Leave Act.

# Effect of Improper Deductions

- An actual practice of making improper deductions from salary will result in the loss of the exemption.
  - ▣ During the time period in which improper deductions were made.
  - ▣ For employees in the same job classifications.
  - ▣ Working for the same managers responsible for the actual improper deductions.
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee.

# Safe Harbor

- The exemption will not be lost if the employer:
  - ▣ Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism
  - ▣ Reimburses employees for any improper deductions; and
  - ▣ Makes a good faith commitment to comply in the future.
- Unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

# Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion, or other change of status of other employees given particular weight.

# Administrative Duties



- Primary duty is 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.
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

# Computer Related Occupations

- Primary Duty is:
  - ▣ 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.
  - ▣ A combination of the above requiring the same level of skills, AND (Cont).

# Computer Related Occupations



- The employee must also receive either
  - ▣ A guaranteed salary or fee of \$913 per week or more, or
  - ▣ An hourly rate of not less than \$27.63 per hour

# Teachers

- The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.
- Salary requirements not applicable to teaching professionals



# Common Questions

*EXEMPT*

vs

*NON  
EXEMPT*

- Examples of Difficult Classifications
- “Pigeonhole” Each Exempt Employee – Where do they fit?

# INDEPENDENT CONTRACTORS

# Contingent Workforce

- Definition:
  - ▣ Workers who are not directly engaged as full-time employees by co. for whom they perform services
- Allows co. flexibility to react to market demands and to resolve problems quickly
- Classification of workers present different issues → difficult determination, inconsistent application
  - ▣ Independent Contractor v. Employee

# Laws Re: Contingent Workforce

- ❑ Federal “Fair Labor Standards Act” (FLSA)
- ❑ OSHA – Health & Safety Policies
- ❑ Title VII of Civil Rights Act of 1964 –  
Discrimination/ Harassment
- ❑ ADA – Disability
- ❑ NLRA – Labor Rights (Unionizing)
- ❑ Employment Taxes

# Hot Cases: Employee or IC?

## Fed-Ex Litigation

- Long-running disputes with FedEx Ground drivers
- 2014 ruling (Ninth Circuit) that FedEx misclassified California drivers as “independent contractors”
  - ▣ FedEx controlled drivers
  - ▣ Drivers were responsible for costs of branded trucks, uniforms, scanners, fuel, maintenance, insurance, etc.
  - ▣ FedEx did not need to pay for overtime, missed meals or rest periods, etc.
  - ▣ Class settlement for **\$228 million** to resolve claims from '00-07

# Hot Cases: Employee or IC?

## O'Connor v. Uber Technologies

- ❑ Uber drivers filed federal class action against employer, Uber (transportation app), for misclassification as “ICs”
- ❑ Claiming they are “employees” of Uber, entitled to tips and reimbursement for expenses like gas & car maintenance

# Employee or IC?

## Tests to Determine a Worker's Status

1. **Common Law “Control” Test**
2. **Economic Reality Test**
3. **IRS 20 Factor Test**

# 1) Common Law Control Test

- ✓ If ER has right to control *means by which worker performs services as well as ends* = **EE**
  - ✓ Existence is key, exercise of control is not
- ✓ If individual is subject to control/ direction merely as to *result* to be accomplished but not as to means/ methods = **independent contractor**



# Factors IN FAVOR of “Independent Contractor”

- ❖ No instructions
- ❖ No training
- ❖ No integration
- ❖ Services do not have to be rendered personally
- ❖ Control of own assistance
- ❖ Not a continuing relationship
- ❖ Work hours set by IC
- ❖ Time to pursue other work
- ❖ Job location
- ❖ No requirements on order/sequence of work
- ❖ No required reports
- ❖ Payment for result
- ❖ Own incidental expenses
- ❖ Own tools
- ❖ Significant investment
- ❖ ICs bear risk of loss
- ❖ Work for multiple firms
- ❖ Services available to general public
- ❖ Limited right to discharge
- ❖ Liability for non-completion

# 3 Categories for Common Law Rules

## 1. ***Behavioral Control***

- ▣ Right to control manner in which work performed

## 2. ***Financial Control***

- ▣ Investment, expenses, profits/ losses, etc.

## 3. ***Relationship of the Parties***

- ▣ Intent, benefits, discharge/ termination, key aspect of regular business of company

## 2) Economic Reality Test

- ✓ Whether ER has right to control how work performed
- AND**
- ✓ Examination of underlying “economic realities” of work relationship
- ✓ DOL emphasizes following factors:
  - Services = integral part of ER’s business?
  - Investment in facilities/ equipment
  - Worker’s opportunity for profit & loss
  - Amount of judgment, initiative required for success
  - Duration of project/ services contracted for
  - Right to cancel

# DOL Definition – Independent Contractor

1. The extent to which the work performed is in an integral part of the employer's business.
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss.
3. The relative investments in facilities and equipment by the worker *and* the employer.
4. The worker's skill and initiative.
5. The permanency of the worker's relationship with the employer.
6. The nature and degree of control by the employer.

# DOL Memorandum - Independent Contractors

- “Administrator’s Interpretation No. 2015-1”
  - ▣ Issued July 2015
- DOL expresses doubt re legality of independent contractor classifications

### 3) IRS 20 Factor Rule

# Factors 1-5

1. **Instructions:** A person who is required to comply with specific instructions about the time, place and manner of work is usually considered an employee. If the employer has a right to require compliance with instructions, an employment relationship will usually be found to exist.
2. **Training:** If the employer provides a training program or the individual is under some type of apprenticeship, an employee relationship will be found to exist. An independent contractor ordinarily uses his or her own methods and receives no training from the purchaser of the services. In fact, it is usually the independent contractor's methods which bring him or her to the attention of the purchaser.
3. **Integration:** How well do the person's services fit into the overall business operation? The more they fit in (i.e., the more they are "integrated"), the greater chance that an employer-employee relationship exists.
4. **Services Rendered Personally:** If the services must be rendered personally, there is a presumption that the employer is very interested in the methods as well as the results.
5. **Hiring, Supervising, and Paying Assistants:** This generally shows control over the personnel on the job. Control seems to be synonymous with the employer-employee relationship (see also Rev. Rul. 70-440, 1970-2 CB 209).

# Factors 6-10

6. **Continuing Relationship:** The longer the continuing relation, the greater the presumption that it is one of employer-employee.
7. **Set Hours of Work:** This, again, is a control factor. The more control the employer has, the greater is the chance that an employer-employee relationship exists.
8. **Full Time Required:** If the worker must devote full time to the business of the employer, the employer has control over the amount of time the worker spends working and impliedly restricts the worker from doing other gainful work for third persons in the normal course of business.
9. **Doing Work on the Employer's Premises:** This is not necessarily a sign of control. Many independent contractors must perform their services on the premises. However, the use of a desk space, telephone or stenographic service or the use of heavy equipment, such as in the machine tool business, usually indicates an employer-employee relationship.
10. **Order or Sequence Set:** If the worker must perform the work in a sequence set by the business, then he or she is more likely an employee.



# Factors 11-15

- 11. Oral or Written Reports:** If the worker has to continuously submit oral or written reports to the employer or to the supervisors or foremen, this usually indicates a subservient relationship and one of employer-employee.
- 12. Payment by Hour, Week, or Month:** Regular periodic paychecks indicate an employer-employee relationship. Usually, independent contractors get paid in a lump sum, or a lump sum is agreed to be paid in installments.
- 13. Payment of Business and/or Travel Expenses:** If the employer pays the person for business and/or traveling expenses, the person is ordinarily an employee. On the other hand, a person who is paid by the job and who has to take care of his or her own incidental expenses is generally an independent contractor.
- 14. Furnishing of Tools, Machinery and Materials:** The fact that an employer furnishes tools, machinery, equipment, and materials tends to show the existence of an employer- employee relation; however, this is not always the case. I remember that one of the very first cases that I had as a young lawyer involved individuals working in a machine shop. I was able to prove that it was impractical for these people to bring any heavy equipment into and out of the shop.
- 15. Significant Investment:** Investment by the person in facilities used in performing services for another is a factor that tends to establish an independent contractor.

# Factors 17-20

**17. *Realization of Profits or Losses:*** One who puts assets at risk and who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor. An opportunity for profit and loss may be established by one or more of a variety of circumstances:

- The individual hires, directs, and pays assistants;

- The individual has an office, equipment, materials and work facilities;

- The individual has a business reputation at stake;

- The individual has exposure to liabilities in the ordinary course of business; and

- The individual may bid on specific jobs and therefore run the risk of overbidding or underbidding.

**18. *Making Services Available to the General Public:*** This factor usually indicates an independent contractor status. However, some independent contractors, such as certain aerospace defense specialists in electronic technology, are hired on a fairly long-term basis that occupies all of their time.

**19. *Right to Hire and Fire:*** The right to hire and fire is a very important factor in determining whether an individual is an employee or an independent contractor.

**20. *Right to Terminate:*** Generally, an employee has the right to terminate a relationship with an employer at any time without incurring a liability. This is particularly true if the employee is not under a written contract. On the other hand, independent contractors usually work under a written contract and do not have the right to terminate at will.

# Enforcement

- Enforced by DOL
- A two-year statute of limitations for wage claims; 3-year for “willful” violations
- Private Right Of Action/Sovereign Immunity Defense
- Back Wages Recovery
- Liquidated Damages

QUESTIONS