Texas Recreational Vehicle Association

August 14, 2016

Employment Update:

Top 2016 Compliance Issues

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Top Issues in 2016

- Fair Labor Standards Act (FLSA) expansion of overtime
- Independent contractor vs. employee classification
- Diversity in workplace; evolution of LGBT rights
- "Protected concerted activity"

The New FLSA Overtime Rules Are Here!

Riddle!

Question:

What is 508 pages long with less than 10 pages of information?

Riddle!

Answer:

- The new FLSA **overtime rules!**

DOL Final Overtime Rule

On May 18, 2016, the Wage and Hour Division of the Department of Labor issued the long-awaited Final Rule pertaining to overtime requirements under the FLSA.

The new rule is effective on December 1, 2016.

DOL Final Overtime Rule

Final Rule updates the standard salary and total annual compensation requirements for exempt employees.

Intent is to more effectively distinguish between

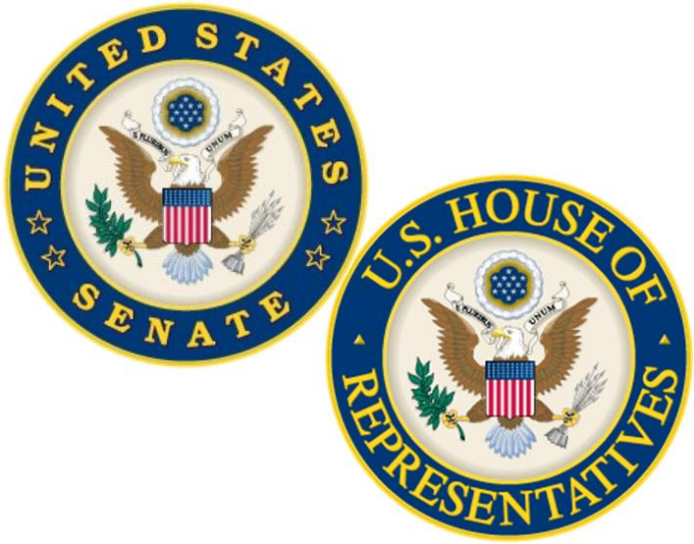
- **non-exempt**
  (or "overtime-eligible") employees and
- **exempt**
  (or "overtime-ineligible") employees.

Current status

The Final Rule is controversial due to increase in salary threshold.

- Bills have been introduced in House and Senate that would delay implementation.

- Democrats in the House have introduced a bill that provides a three-year roll-out.



Final Rule

Final rule **only** affects *salary threshold* for exempt employees and highly compensated employees.

Final rule does not affect the *duties tests* for the Executive, Administrative or Professional (EAP) exemptions.

New EAP Salary Threshold

Under the Final Rule, exempt employees must be compensated at a rate not less than:

- 40th percentile of weekly earnings of full-time non-hourly workers in the lowest wage Census Region, or
- $913 per week.

New EAP Salary Threshold

Also, beginning January 1, 2020 and every 3 years after, Secretary of Labor will update minimum weekly salary.

New EAP Salary Threshold

The required weekly compensation may be converted into equivalent amounts for periods of more than one week.

Salary threshold will be met if employee is paid:

- a biweekly salary of $1826,
- a semi-monthly salary of $1978, or
- a monthly salary of $3956

New Highly Compensated Salary Threshold

Under the Final Rule, exempt **highly compensated employees** ("HCEs") must be compensated at a rate not less than:

- Annualized earnings amount of 90th percentile of full-time non-hourly workers nationally, or
- $134,004 annually.

New Highly Compensated Salary Threshold

HCEs must be paid –

- at least a weekly amount of $913, and
- an additional amount to meet HCE threshold by the last 52-week pay period or in following month.

New Highly Compensated Salary Threshold

If employee's total annual compensation does not total $134,004 by last pay period of 52-week period, employer may make one final payment to achieve required level.

Final payment may be made:

- **during last pay period,** or
- **within one month after 52-week period.**

New
Highly Compensated Salary Threshold

E x a m p l e

Employee's annual salary is $134,004, comprised of $100,000 base pay, and expected $35,000 in commissions.

Employee actually earns $10,000 in commissions.

Employer may make payment of $24,004 within one month of end of 52-month pay period.

This final payment may only be counted for prior year's annual compensation, and not for year in which paid.

New Highly Compensated Salary Threshold

If employer does not make final payment to meet HCE salary threshold, employee may still be exempt as an executive, administrative, professional, outside sales or computer employee.

If employee does not meet all of the duties tests for an exemption, the employer must pay overtime.

“Salary Basis”

Exempt employees must:

- be paid on a salary basis, and
- satisfy “duties test” for at least one exemption.

"Salary Basis"

Employee is paid on "salary basis," if she or he:

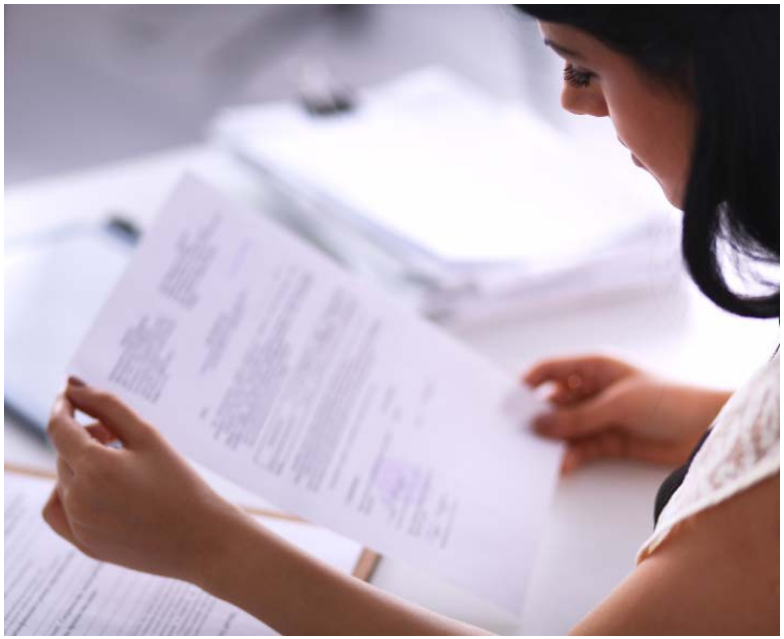
- regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation,
- with no reduction because of variations in *quality* or *quantity* of work performed.

With limited exceptions, exempt employee must receive full salary for any week in which she or he performs **any work**, without regard to number of days or hours worked.

But, exempt employee is not entitled to be paid for any workweek in which perform **no work**.

“Salary Basis”

Warning: Employee can lose exemption due to improper deductions from salary.



For example, employee is not paid on a “salary basis” if deductions are made for absences caused by employer, or lack of work due to operating requirements of business.

"Salary Basis"

To meet salary threshold, employer may use:

- nondiscretionary bonuses, incentives or commissions,
- paid on a quarterly basis or more frequently,
- to satisfy up to 10% of required salary.

“Salary Basis”

If by last pay period of a **quarter**, an employee’s total weekly salary, plus nondiscretionary bonus, incentive, and commission payments does not equal **13 times** the weekly salary required, an employer may make one final payment to reach the required salary level.

“Salary Basis”

Payment must be made no later than pay period immediately following end of quarter.

This final payment may only count for prior quarter’s salary amount and may not count toward salary amount for quarter in which paid.

Minimum Guarantee Plus Extras

Exempt employee may receive additional compensation without losing exemption or violating salary basis requirement, if employee is guaranteed at least the minimum weekly required salary (e.g. $913/week).

Examples:

Exempt employee who is paid $913/week may also be paid 1% sales commission.

Exempt employee may receive percentage of sales or profits, if also receives a guarantee of $913/week salary.

Minimum Guarantee Plus Extras

Exempt employee may be paid additional compensation based on hours worked for work beyond normal workweek, provided that the employee is guaranteed at least $913/week on a salary basis.

Additional compensation may be paid on any basis, e.g. flat sum, bonus, straight-time hourly amount, time and one-half, or other basis.

Duties Tests

The new overtime rules do not affect the duties tests applicable to the EAP and HCE exemptions.

In addition to being paid the **threshold amount** on a **salary basis**, employees must perform certain **duties** in order to qualify for overtime exemption.

Other FLSA Exemptions

The FLSA provides two exemptions that could apply to recreational dealerships.

One exemption applies to “any **salesman**, **partsman**, or **mechanic** primarily engaged in selling or servicing automobiles, trucks, or farm implements, if … employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.”

Other FLSA Exemptions

The other exemption applies to “any **salesman** primarily engaged in selling trailers, boats, or aircraft, if … employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.”

Note: This exemption is limited to **salesmen** who sell trailers, boats or airplanes. It does not apply to employees who sell services, to parts men, or mechanics.

Supreme Court Case

In *Encino Motorcars, LLC v. Navarro*, the United States Supreme Court vacated a Court of Appeals ruling that **service advisors** working at an automobile dealership were entitled to overtime pay because they were not "salesmen" under the Fair Labor Standards Act.

Supreme Court Case

Despite the language of the FLSA, the Department of Labor interpreted "**salesman**" under the first exemption to mean an employee who sells automobiles, trucks, or farm implements.

Following this guidance, the federal Court of Appeals for the 9th Circuit ruled that **service advisors** were not exempt because they do not sell automobiles, trucks or farm implements and thus, were not "**salesmen**" under the FLSA.

Supreme Court Case

The United States Supreme Court ruled, in a 6-2 decision, that unlike other agency regulations, the DOL definition of "salesman" did not warrant controlling weight and remanded the case to the Court of Appeals for further proceedings.

Independent Contractor vs. Employee

Independent Contractor vs. Employee

What do these have in common?

Independent Contractor vs. Employee

They all have faced multi-million dollar lawsuits accusing them of misclassifying employees as independent contractors.

Independent Contractor vs. Employee

An employer who misclassifies employees as independent contractors can have as much as a

30%

advantage over an employer who complies with the law.

Independent Contractor vs. Employee

Misclassification can also be costly and can include:

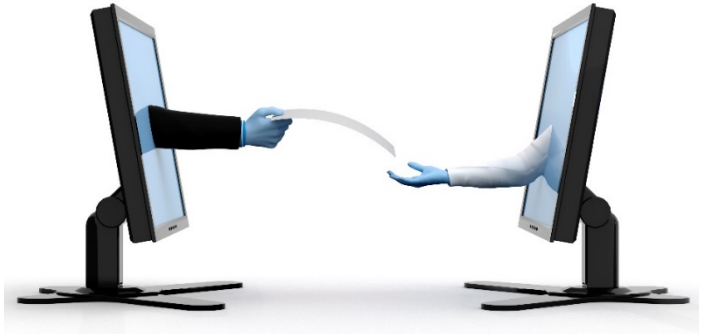
- Liability for federal and state income taxes that should have been withheld from workers' compensation;
- Employer and employee share of Social Security taxes;
- Federal and state unemployment taxes; and
- Penalties and interest on these amounts.

Independent Contractor vs. Employee

- **IRS** has developed a program for identifying employers that misclassify employees as independent contractors.
- **IRS** has estimated loss in revenue as $3-4 billion per year.
- According to the Department of Labor (DOL), up to 30% of employers are misclassifying employees.

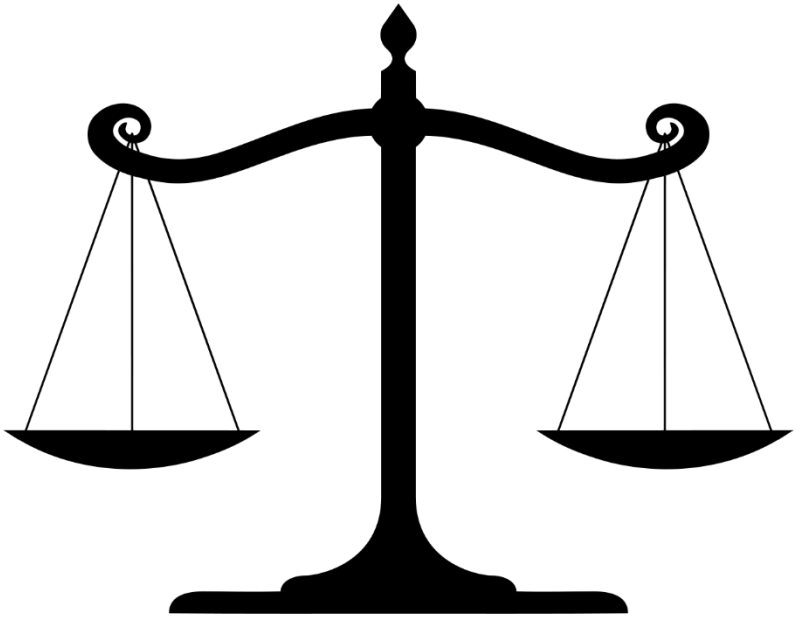
Independent Contractor vs. Employee

The IRS has entered into agreements with the DOL, state revenue agencies, and unemployment (or workforce) commissions that allow these agencies to share audit information to identify non-compliance and deter misclassification.



Independent Contractor vs. Employee

Historically, courts have applied a 20-factor test developed by common law.



The most important factor is right to direct and control the details of the work.

Independent Contractor vs. Employee

IRS has re-organized these factors into three categories:

- **Behavioral Control Factors**
- **Financial Control Factors**
- **Relationship Control Factors**

Independent Contractor vs. Employee

Behavioral Control Factors:

- Most important is right to direct and control
- Includes examination of instructions, e.g. where to work, when to work, which tools and equipment to use, other workers to assist, sequence of tasks
- Training, especially periodic or on-going training on procedures or methods
- Performance evaluations

Independent Contractor vs. Employee

Financial Control Factors:

- Most important is whether the worker has ability to realize profit (or loss) due to own efforts
- Significant investment in worker's own business is evidence of independent contractor status
- Ability to seek other opportunities
- Method of payment, e.g. guaranteed hourly, daily, weekly pay indicates employee status

Independent Contractor vs. Employee

Relationship Control Factors:

- Written agreement by itself is not determinative
- If provide employee benefits, vacation, sick leave, health insurance, retirement plan, then employee
- Ability to terminate or discharge at will indicates employee status
- Permanent or long-term relationship; if expected to continue indefinitely, then probably employee.

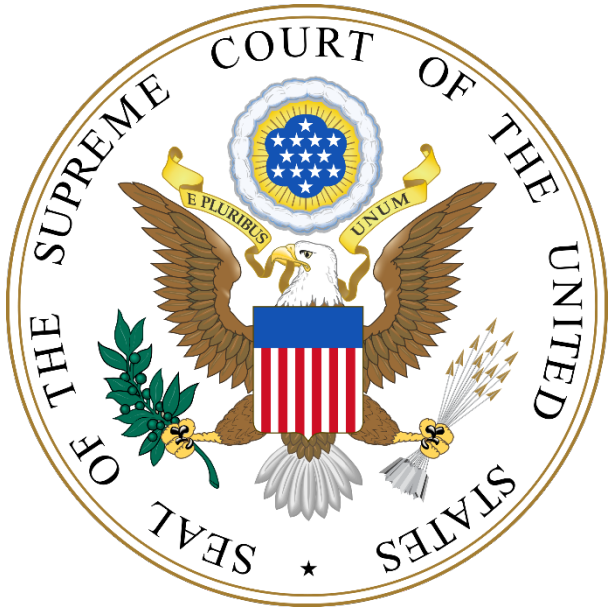
Independent Contractor vs. Employee

- Employers should carefully review worker classifications to ensure that any common law employees are properly identified.
- If unsure about the classification, employer should consult an attorney.
- A legal opinion on status of worker can provide protection from retroactive penalties if IRS reclassifies worker as an employee.

LGBT Issues

LGBT Issues

Under ***Obergefell v. Hodges***, same sex marriage is lawful in all jurisdictions. Employers need to ensure that policies, practices and employee benefit plans do not discriminate against individuals in same sex marriages.



LGBT Issues

Under ***Obergefell***, employee benefits offered to spouses and dependents must be extended to spouses in same sex marriages and their children on the same basis as offered in opposite sex marriages.

Employers may need to revise Employee Handbooks and employee benefit plans to comply with these same sex marriage and LGBT protections.

LGBT Issues

In ***EEOC v. Pallet Cos.***, settled June 23, 2016, EEOC obtained a consent decree in which employer agreed to pay $202,000 to resolve a lawsuit in which EEOC alleged company harassed a lesbian employee and fired her when she complained.

In addition to monetary damages, employer was required to retain an expert on sexual orientation, gender identity, and transgender issues to train managers, supervisors and employees on LGBT workplace issues.

Consent agreement also includes requirements on notices, policies and reporting to the EEOC.

LGBT Issues

Although Title VII does not expressly prohibit discrimination on the basis of gender identity or sexual orientation, EEOC considers Title VII's prohibition of sex discrimination to prohibit discrimination on basis of gender identity and sexual orientation.

LGBT Issues

Several States and local governments have adopted laws that contain express prohibitions.

For example, a **City of Austin** ordinance prohibits employment discrimination on the basis of "individual's race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability."

***Code of City of Austin*, section 5-3-4.**

LGBT Issues

EEOC Initiative:

- EEOC has instructed its field offices to accept complaints of discrimination based on:
  - transgender status or gender-identity-related discrimination, and
  - sexual orientation.
- And, to investigate those claims as claims of sex discrimination.

LGBT Issues

Several discrimination lawsuits have been filed against employers that took adverse employment actions after being informed of an employee's (or applicant's) intent to transition.

In many cases, the EEOC has filed suit, bringing vast governmental resources.

LGBT Issues

Other Emerging Issues:

- Use of appropriate/inclusive terminology in workplace
- Single sex facilities
- Dress codes
- Personnel records
- Customer/co-worker relations

- Health plan coverage for gender transition coverage
- Transgender transition policies

Protected Concerted Activity

What is

"**protected concerted activity**"

and why should I care?

Protected Concerted Activity

What is

"**protected concerted activity**"

and why should I care?

"Protected concerted activity" includes situations in which two or more employees are acting together **for any reason** to address their terms and conditions of employment.

Protected Concerted Activity

"**Protected concerted activity**"

also exists when one employee acts on behalf of a group to address collective terms and conditions of employment.

Protected Concerted Activity

"Protected concerted activity"

is protected behavior under section 7 of the National Labor Relations Act.

According to the NLRB, a work rule is unlawful if it would "reasonably tend to chill employees in the exercise of their Section 7 rights" or if "employees would reasonably construe the language to prohibit Section 7 activity."

***Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2204); *Lafayette Park Hotel*, 326 NLRB 824 (1998)**

Protected Concerted Activity

Class Action Waivers

NLRB takes position that employment arbitration agreements that bar class actions involving employment disputes violate Section 7 of NLRA.

***On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (August 27, 2015)**

Protected Concerted Activity

Employer Email Systems

- Employees who are permitted to access employer's email system for work-related purposes have the right to use the email system to engage in Section 7 protected activities.
- A communication does not lose its Section 7 protection merely because it happened virtually, as opposed to in person.

***Purple Communications, Inc.*, 361 NLRB No. 126 (2014)**

Protected Concerted Activity

Confidentiality Policies

- NLRB has found numerous confidentiality policies overly broad and unlawful under Section 7
- Example:

Target, Inc., 359 NLRB No. 103 (2013):

Policy overly broad where prohibited employees from releasing confidential guest, team member, or company information, sharing confidential information with other employees, prohibited employees from speaking about confidential information in break room, at home or in open areas and public places, directed them to report unauthorized access or misuse of such information. Handbook defined "confidential information" to include all Target information that is nonpublic, including employee personnel records.

Protected Concerted Activity

Costco Wholesale Corp., 358 NLRB No. 106 (2012): Handbook that prohibited employees from discussing "private matters" and "sensitive information" violated NLRA because rule could reasonably be interpreted as banning discussion of wages and terms and conditions of employment.

Flex Frac Logistics, 358 NLRB No. 127 (2012): Confidentiality rule that prohibited employees from disclosing "personnel information and documents" violated NLRA.

Quicken Loans, Inc., 359 NLRB No. 141(2013): Rule that prohibited employees from discussing "Company's business [and] personnel" violated NLRA.

Protected Concerted Activity

Employee Handbooks

NLRB has found that employees have Section 7 rights to criticize employers and working conditions.

Policies that generally prohibit employees from engaging in conduct towards management or the employer that is "disrespectful," "negative," "inappropriate," or "rude" unlawful, unless limited to a particular context. Criticism is protected even if false or defamatory, **unless** malicious.

***Casino San Pablo,* 361 NLRB No. 148 (Sept. 16, 2014); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012); *Karl Knausz Motors, Inc.*, 158 NLRB No. 164 (2012); *Echostar Technologies, LLC and Gina Leigh*, Case 27-CA-066726; *Dish Network Corporation and Communications Workers of America,* Local 6171, 16-CA-66142 and 16-CA-68261 (Nov. 14, 2012).**

Protected Concerted Activity

But, NLRB has stated that it recognizes employers' legitimate business interest in requiring employees to be professional and courteous when interacting with co-workers and customers, as long a policies do not extend to employees' treatment of management or inhibit free, open and potentially heated discussions about terms and conditions of employment.

Protected Concerted Activity

Media Communications

NLRB has invalidated several policies that limit employees' right to communicate with media. Concern is that overbroad provisions interfere with employees' rights to complain about terms of employment.

Provisions that have been struck down include:

- Do not contact media.
- Employees should not contact or comment to media about the company unless pre-authorized by Public Relations.

Employers may prohibit maliciously false statements.
Also, narrowly tailored policies that are specific to certain situations, e.g. crisis management, are more likely lawful.

***DirectTV U.S. DirectTV Holdings, LLC,* 362 NLRB No. 48 (2015);**
***Burndy, LLC,* 34-CA-65746 and 34-CA-78077 (July 13, 2013).**

Protected Concerted Activity

Social Media

NLRB has held that employee comments on social media should be treated in the same way as in person communications.

Employee conduct on social media will be protected as long as it involves protected concerted activity.

Protected Concerted Activity

Social Media – Protected Conduct

- Exchange on Facebook between non-union employees about co-worker's criticism was protected.
  - Cole-Rivera alerted co-workers via Facebook of another employee's complaint that they "don't help our clients enough," stated that she "about had it" with the complaints, and solicited co-worker's opinions.

***Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012)**

- Selecting "Like" on Facebook post is [illegible]d when related to employment relation[illegible]

***Triple Play Sports Bar and Grille*, 34-CA-12914 (2012)**

Protected Concerted Activity

Social Media - Not Protected

- Employee's post regarding dispute about product placement was not protected because it did not request concerted activity and was disparaging.
  - "You have no clue [Employee 1] … [Assistant Manager] is being a super mega [xxxx]! Its [sic] retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price … that's false advertisement if you don't sell for that price … I'm talking to [Store Manager] about this [xxxx] cuz if I don't walmart can kiss my royal white [xxxx]."

***Wal-Mart,* Case 17-CA-25030 (July 19, 2011)**

QUESTIONS????

ANSWERS????

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