

## Exempt or Non-exempt?

*How to answer the question  
and Why to ask*



**A Risk Management Webinar**

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## Overview

- Why does it matter that we identify whether our workers are exempt or non-exempt?
- What are the risks of mis-classifying workers?
- How can we determine how to classify our workers?
  - New FLSA regulations provide guidance
  - State wage and hour regulations must be reviewed
- Your questions, experience and concerns...

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## What Laws Govern?

- Federal: Fair Labor Standards Act
  - "FLSA" coverage is limited to workplaces engaged in interstate commerce with over \$500K in business volume
- State law: wage and hour regulations
- IRS and state definitions of employee versus independent contractor

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## A Big Oops

### RISKS

- Misclassifying workers can result in significant financial penalties, as well as back pay and back taxes owed to workers
- Most often this financial burden has not been anticipated by the nonprofit (not budgeted)
- No insurance coverage for these penalties and payments
- PLUS emotional and time drain of being audited by the DOL



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## Non-Exempt

- Default classification of all workers is non-exempt
- Must be paid:
  1. minimum wage
  2. for every hour worked
  3. premium pay for "overtime"

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## Why "Comp" time is illegal

- Non-exempt workers can't receive time off in lieu of pay
- **MUST BE PAID FOR EVERY HOUR WORKED**
- Can be paid for a regular work week, having worked *flexible* hours within the work week.
  - Jody works 2 hours extra on Tuesday evening
  - Jody can come to work 2 hours late on Wednesday
  - Jody still works her regularly scheduled 37 hours and gets paid her regular wages for the week



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## Non-exempt staff who work extra time

- Reward for non-exempt workers who work overtime = premium pay (time and a half)

OR

Flex time within the same work week

So that their weekly wages are unaffected

- Note that exempt workers who work extra hours but not “overtime” must be paid straight time for all hours worked

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## Overtime

- FLSA = over 40 hours worked per week
- State laws differ, but most follow federal definition of overtime
- Policy should be that:
  - Exempt workers receive no compensation or extra benefit for working extra time
  - Non-exempt receive premium pay
  - Non-exempt workers must request authorization PRIOR to working overtime

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## Exempt staff

- Do not receive overtime payments
- Work as long as it takes to accomplish their work
- Do not keep track of their hours\*
- May receive fringe benefits that are different from non-exempt staff (such as additional vacation)

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## How to Reward Exempt staff

- Be flexible with exempt staff – but be fair to everyone (no playing favorites)
- Instead of “comp” time, call it “flex time”
- Time “off” should be taken in close proximity to extra time worked
- Exempt staff should **not** be permitted to “bank” their “extra time” and take it as comp time hour for hour later – THIS RISKS MISCLASSIFYING the worker

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## Mis-Classification: Don't put your nonprofit at risk

- If you treat an exempt employee as if they are non-exempt, the DOL will find that they are non-exempt, and you will owe \$\$
- If you misclassify a non-exempt worker as exempt, the DOL will find that you owe \$\$
- If you think someone is an independent contractor but the DOL thinks they are an employee, then you will owe \$\$

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## Independent Contractors

- ❖ Define independent contractor status with a written agreement
  - Not employees, so no obligation to pay minimum wage or withhold taxes
  - Nonprofit may evaluate outcomes but not control methods of service provided
  - IRS 20 factor test
  - “consultants” are independent workers

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## Avoid Misclassification by Conducting a REVIEW of all positions

- Review job descriptions and compensation
- Review relationship with contractors and consultants
- Seek advice from legal counsel if necessary

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## Exempt workers

- Defined in new FLSA regulations
- Salary Basis Threshold of \$455 weekly
- Job Duties must be considered in addition to compensation



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## Exempt Workers

"Exempt" ONLY if:

- Position matches the description in regulations, and the worker receives the threshold compensation
- Works however many hours it takes to accomplish goals
- Does **not** receive premium pay for working longer hours
- Must be paid:
  - Minimum \$455 weekly
  - On a salary basis
  - Can't "dock" pay for less than a full day
  - Can only deduct from the established salary for certain reasons

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## DOL PowerPoint

- Provides more details on exempt categories:
  - Executive
  - Administrative
  - Professional
    - Creative, artistic
    - Certain IT positions

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## Violations Risks and Results

- Disgruntled employee who files a complaint post discharge
- Random audit that uncovers misclassifications of independent contractors or exempt employees
- Current employee who files a complaint

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## Principles to Reduce Risk

- Review job descriptions and agreements
- Communicate to staff whether they are exempt or non-exempt
- Treat similarly situated persons similarly!
- Internal Complaint mechanism
- If you discover a mistake – correct it to avoid continuing violations and claims of willful violations
- Policy that all overtime be authorized in advance

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## Balance Flexibility to staff with risk management for nonprofit

### ■ When in doubt

- Keep track of all hours worked
- Treat and classify the worker as non-exempt



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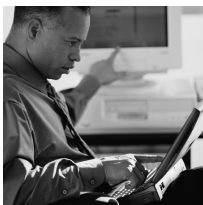
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## Hypotheticals



- #1 – Docking pay for a partial day
- Is this permitted? Yes for non-exempts
  - Is this employee non-exempt?
  - Does her salary meet the threshold test? What about her job duties?

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## Hypotheticals

- #2 – Risk created when nonprofit treats an exempt worker like a non-exempt worker by:
  - Docking hours
  - Requiring exempts to keep time records as if they were hourly
  - Not being clear on wage payment policies



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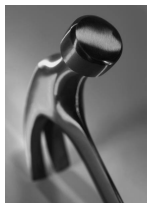
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## Hypotheticals

- #3 – Suspension of exempt workers?
  - OK only for conduct that is unsafe, or violation of a work rule
  - Instead, performance counseling session with clear communication of expectations; warning about termination or salary freeze if necessary



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## Hypotheticals

- #4 – Comp time for extra time worked
  - Clear violation of FLSA and state minimum wage and wage regulations
  - Instead, how can her job be streamlined so the extra hours are not required? What practices will help you retain employees who go the extra mile constantly?



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## Other wage and hour challenges

- One employee who works two different jobs for the nonprofit
- “On call” time
- Overnight duty for residential employees
- What are your concerns?



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## Risk Management Principles

- Define who is exempt
- Communicate to staff
- Internal complaint procedure
- Correct mistakes
- If unsure, treat as non-exempt and consult legal counsel

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## Next Webinar: June 7<sup>th</sup> Family Leave, medical leave, ADA and workers compensation leaves

Thank you!

Please complete the Webinar evaluation.  
We will send a follow-up email containing the link to the  
Survey Monkey tool.

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## About Us

- Nonprofit Risk Management Center
- Free technical assistance to nonprofit leaders, staff and advisors
- [www.nonprofitrisk.org](http://www.nonprofitrisk.org)
- Free tutorials and fact sheets on the Web site, plus affordable books, conferences, software and consulting help

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## Our Resources

### ■ FREE

- Workplace Safety Tool Kit
- Business Continuity Planning Tutorial
- Pillars of Accountability
- ADVICE

### ■ AFFORDABLE

- [www.RiskManagementClassroom.org](http://www.RiskManagementClassroom.org)
- [www.NonprofitCARES.org](http://www.NonprofitCARES.org)
- [www.MyRiskManagementPlan.org](http://www.MyRiskManagementPlan.org)

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