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…

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 BigOops

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

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”

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
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

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

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)
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

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 $$$

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
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

Exempt workers

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

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
DOL PowerPoint

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

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

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
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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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
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

#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?

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?
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

Next Webinar:
June 7th
Family Leave, medical leave, ADA and workers compensation leaves

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