

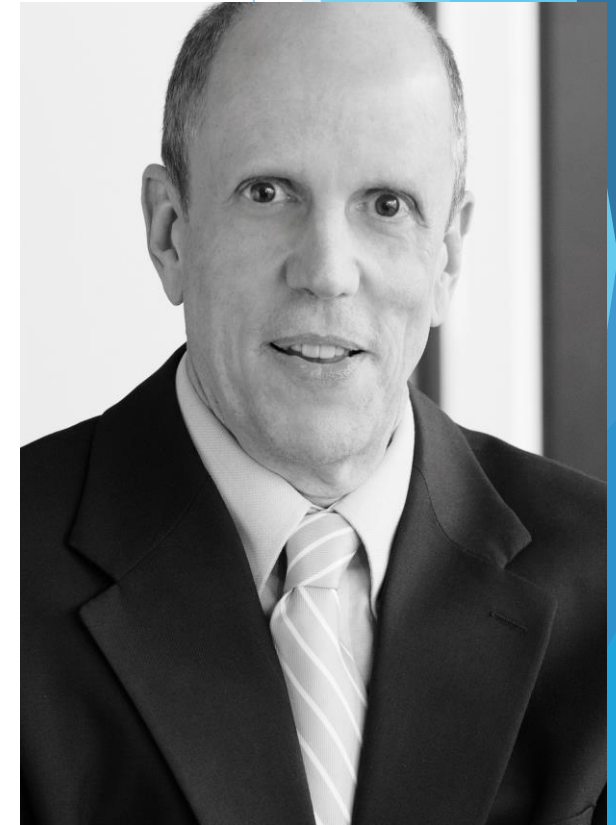


# 7th Annual Provider Conference

## **Paying Right, Sleeping Tight: Navigating Labor Law's Latest Twists**

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# Barry Dorans



Virginia Business  
*Legal*  
**ELITE**



Experience shares on what not to do provided by ...



Chip Dodd  
Support Services of Virginia, Inc.

# Exciting workforce management topics to discuss today

The following are common ways employers can face significant liability regarding management of their workforce

- ▶ Overtime - the easiest way to get into trouble with the DOL
- ▶ Payroll Deductions
- ▶ Classifying employees as Salary (Exempt) vs. Hourly (Non-Exempt)
- ▶ Classifying workers as an Employee vs. Contractor
- ▶ “Work from home” / “Remote Work” considerations
- ▶ Human Rights and Social Justice Issues
- ▶ Artificial Intelligence (AI) in the workplace
- ▶ Religious Accommodations

# So I made a mistake and didn't pay OT, how much can that cost me

## ▶ Federal -

- ▶ 100% of the unpaid overtime
- ▶ Plus 100% penalty
- ▶ Plus employee's attorney's fees in federal court
- ▶ Plus employer's attorney's fees

## ▶ Virginia

- ▶ If improperly paid by salary, owe 1.5 times straight time ( not just the half )
- ▶ Plus 100% penalty ( so 6 times what the federal judgment would be
- ▶ Plus employee's attorney's fees
- ▶ Plus employer's attorney's fees

# How much profit is there in selling Mexican food?

- ▶ Plaza Azteca has a number of restaurants in Tidewater Virginia, and 40 all together in 7 states
- ▶ Had been paying its back of the house employees a fixed amount and no overtime.
- ▶ On November 6, 2023 it agreed to settle with Department of Labor
- ▶ Agreed to pay \$11.4 million.
- ▶ Plaza Azteca released a statement saying it did not violate the law, and settled to bring closure.

# How do Overtime issues arise

- ▶ “Rightful” Termination
- ▶ Any claim by Company against employee
  - ▶ Suit for \$70,000 alleged overpayment to employee
  - ▶ Counter suit - \$400,000 plus attorneys fees
- ▶ Internet sleuth - Employee

# Non Exempt - must be paid at least minimum wage plus time and a half for overtime

- ▶ Minimum wage for all hours worked ( higher of Federal, State, or local )
- ▶ Time and a half for all hours in excess of 40 in workweek
  - ▶ If possible, schedule for 38 hours week.
- ▶ The straight pay rate must be calculated to include non-discretionary bonuses
- ▶ Employees with two or more pay rates in a work week must have the average straight pay rate properly calculated before determining the proper overtime rate.
- ▶ Overtime must be 1.5 times the straight pay rate for the work week



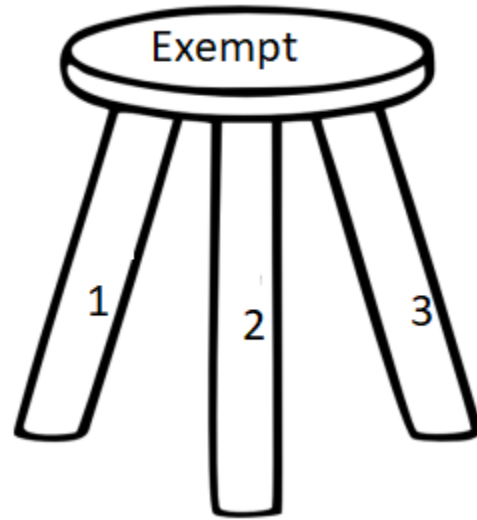


# Issues in Calculating Overtime

- ▶ One and a half times base rate earned that week
- ▶ What if I pay a bonus during a week, or month?
- ▶ Discretionary bonuses does not need to be included, but if you pay it regularly, no longer considered discretionary.

I don't have to pay overtime,  
that employee is salaried.

I don't have to pay overtime,  
that employee is the manager.



1. Paid by Salary - not hourly or daily rate
2. Must receive at least \$684 per week, \$35,568 year
3. Must fit within an exempt classification

# Salary Basis

- ▶ For each week in which the employee provides services the amount of pay should be the same.
  - ▶ Payment made on a weekly or less frequent basis
  - ▶ not a daily rate
  - ▶ DOL Audit
  - ▶ Can pay more than the fixed salary on one or more workweeks - such as commission, flat rate, or bonuses so long as salary is the primary basis.

# Deductions from Weekly or Biweekly Pay

## ▶ Permitted deduction

- ▶ a days pay if no work is performed on a work day due to employee choice
- ▶ Sickness or disability with a bonafide leave plan in place - full day deduction not a partial day.
- ▶ Can deduct from sick hours or vacation hours that are in the bank
- ▶ FMLA leave may deduct full or part day.

## ▶ Prohibited Deduction

- ▶ Hours missed due to early departure
- ▶ Day missed because Company closed due to bad weather

## ▶ Consequence of Improper Deduction- Not salaried - thus not exempt

- ▶ Handbook get out of jail card , if stated policy clearly prohibits deductions, provides opportunity to notify company, and company reimburses.

# Salary must be a minimum

- ▶ Current \$684.00 per week or \$35,568.00 per year.
- ▶ Up to 10% may be paid by non-discretionary bonus.
- ▶ Proposed increase to \$1,059.00 per week or \$55,068.00 per year.
- ▶ Proposed regulation would update that amount every three years.
- ▶ Expect challenges but you will sleep better at night if you comply.
  - ▶ How unified are the United States?
  - ▶ What is a temporary injunction?
  - ▶ What happens at the end of the case?



# Primary Duty fits within Exemption

- ▶ What are the actual duties of the employee?
- ▶ What is the primary duty?
- ▶ How much time is devoted to each duty?
- ▶ Job title is not determinative.
- ▶ Most common exemption is manager -
  - ▶ primary duty is to manage two or more people.
    - ▶ If managing only 2, set an alarm bell if one of the staff leaves.
  - ▶ significant input in hiring or firing.

# What is the Learned Professional Exemption?

- ▶ Primary duty is requires advanced knowledge and consistent exercise of discretion and judgment;
- ▶ Knowledge must be acquired by prolonged courses of specialized intellectual instruction;
- ▶ Field of science or learning ( skilled trades don't count )
- ▶ Must be paid a salary of not less than the current limit - which is \$684.00 per week.
- ▶ Registered nurses can generally be considered exempt if paid by salary.
- ▶ Licensed Practical Nurses generally not exempt, even if paid by salary.

# Independent Contractor - Employee Tests - Federal and State.

## ▶ General Factors to consider:

- ▶ 1. What is the degree of the employer's control
  - ▶ per the written agreement and
  - ▶ in practice.
- ▶ 2. Is the individual economically independent? - Do they perform work for competitors
- ▶ 3. Is the work a primary part of your business? (hint: if you have employees doing the same work, it's going to be hard to prove that an individual is an independent contractor.)
- ▶ 4. Does the worker's skill impact their ability to make a profit? - Can they make decisions on how to perform the work to impact the profitability such as hiring others, purchasing materials and equipment, etc., or is their compensation dependent on how hard they work.
- ▶ 5. What investment does the individual make in the business?

# I don't have to pay overtime, Diane is an independent contractor.

- ▶ How do you know her name?
- ▶ In Virginia law (not federal) - if an individual performs services for money, the individual is presumed to be an employee unless the company can prove the person is an independent contractor.
- ▶ Presumed guilty v. presumed innocent
- ▶ Misclassification, under the state statute, allows an individual to recover
  - ▶ lost wages ( which could include minimum wage and overtime)
  - ▶ Benefits that are paid to other employees
  - ▶ and any expenses that would have been covered by insurance
  - ▶ Payroll taxes
  - ▶ plus attorney's fees.

# Uber agreed to pay \$100,000,000.000

- ▶ Class action drivers in California and Massachusetts claiming misclassification.
- ▶ Factors that suggested employment
  - ▶ Primary work of Uber is moving clients
  - ▶ No real opportunity for profit - choosing which route is not a managerial skill
  - ▶ No special skills
- ▶ Factors in favor of independent contractor
  - ▶ Free to work for competitors
  - ▶ Driver sets own schedule / work hours
  - ▶ Driver supplies car

# Work From Home (WFH) considerations

- ▶ Addressing Remote Work and WFH in the handbook
- ▶ Workers Comp
  - ▶ When are they working and not working while at home?
  - ▶ Ex. What if they get hurt while mowing their lawn while on call?
- ▶ Accommodations for disabilities
  - ▶ Employer responsible for accommodations in the employee home?
  - ▶ Employee entitled to WFH if the office cannot make the modification?
- ▶ Company equipment, technology and furniture at home. Personal use?
- ▶ Cell phone / internet reimbursement

# Work From Home (WFH) considerations

- ▶ Confidentiality of data and sound within the home
- ▶ Can the employer have a say who else lives in the home?
- ▶ Can the employer mandate a proximity to the office?
- ▶ Can the employer dictate where remote work may or may not occur?
- ▶ Training WFH employees
  - ▶ Can employer mandate in person training?
- ▶ Dealing with performance issues
  - ▶ Can employer mandate office hours if supervision / guidance is needed
  - ▶ Terminating a WFH employee

# Work From Home (WFH) considerations

- ▶ Complex situations
  - ▶ Employee wants to return to office one or more days a week but no space is available / limited
  - ▶ Employer wants employees to return to office one or more days per week but employee is unwilling or strongly pushes back
  - ▶ Can an employer charge employees for use of office space?
  - ▶ Is the employer responsible to reimburse the employee for the use of the home space and utilities if WFH is required?
  - ▶ What situations could an employee sue their employer for discrimination if WFH arrangements are different for each employee?
  - ▶ Can the employer limit the employee from remote working for another employer?



# Monetary issues regarding remote work

- ▶ How do you track hours?
- ▶ How do you assure OT is being paid properly?
- ▶ Can you be a manager and still work remotely?
- ▶ Compensable Travel time to work at customer locations.
- ▶ Compensable mileage to work at customer locations.
- ▶ When is travel food required to be reimbursed?
- ▶ Taxation issues
- ▶ Compliance with state and local laws on benefits, minimum wage.

# Companies taking a stand on human rights or social justice issues

- ▶ How should a company respond to calls from employees to take a stand on a social justice or other controversial issue?
- ▶ If a company chooses to take a stand, how can this be done properly?
- ▶ Are there any pitfalls if a company makes donations to these causes?
- ▶ Can an employer limit an employees written or verbal speech about these issues while on the clock or while representing the employer?
- ▶ Pros and cons of adding Juneteenth to a company's official holidays.
- ▶ Employer or employees supporting a side in the Israel / Palestinian (Hamas) conflict

# Trends in Artificial Intelligence

- ▶ How should a company define AI?
- ▶ Can HR departments use it to help with hiring, analyze resumes, or grade employees?
- ▶ Discrimination by AI screening - age?
- ▶ Are employees using it to submit their resume?
- ▶ Can an employer limit an employee from using AI to perform their job?
- ▶ Does an employer need to address AI in its handbook?
- ▶ How will AI impact google searches by employees and employers on what the law requires?

# Religious Accommodations

- ▶ Employee religious belief is that he should not work on Sundays.
  - ▶ He worked a Post Office that made deliveries on Sunday.
  - ▶ There were only 7 employees at that branch.
  - ▶ His assignments were redistributed to other carriers including the postmaster general who does not normally do deliveries.
  - ▶ The postal service eventually fired him because his refusal to perform Sunday work caused increased burden on his co-workers and diminished employee morale.
  - ▶ Trial Court and Appeals Court said OK. While employee had religious belief, accommodating that belief caused harm to the business, so business could refuse to accommodate.
  - ▶ Supreme Court reversed. Must accommodate religious belief unless the burden in substantial increased costs in relation to its business.

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## Questions?

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