



YOUR 50 STATE PARTNER®

Annual Wage & Hour Update

A presentation by Gordon Rees Scully Mansukhani, LLP

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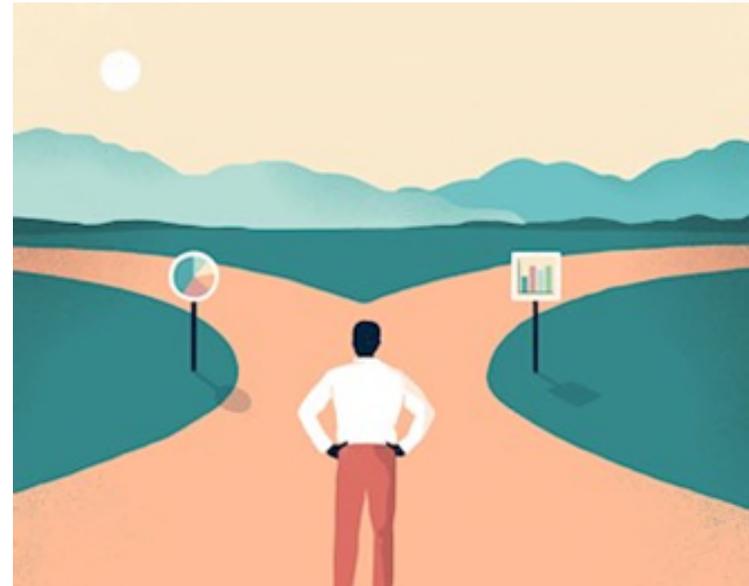
Disclaimer (we are lawyers after all...)

- This presentation is a broad overview
- It is not meant to be a comprehensive look at all wage & hour issues
- This one hour webinar is presented for illustrative purposes only and is not meant to constitute legal advice



Road Map

- FLSA: Background & Exemptions
 - Presented by Ben Bednarek
- Misclassification of Employees & Independent Contractors
 - Presented by Lori Brown
- Recordkeeping
 - Presented by Steven Crocchi
- The Remote World and Quiet Quitting
 - Presented by Kitty O'Connell





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FLSA Background & Exemptions

Presented by Ben Bednarek, Law Clerk (admission to Arizona bar pending)

First things First: What is an “Employee”?

- **Employee:** “The term ‘employee’ means any individual employed by an employer.” 29 U.S.C. § 203(e).
- **Employer:** “ ‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. § 203(d).
- **Employ:** “to suffer or permit work.” 29 U.S.C. § 203(g).

Fair Labor Standards Act

- The Fair Labor Standards Act (“FLSA”) is a set of federal laws that establishes minimum wage, overtime pay, and recordkeeping standards affecting employees in the private sector and in Federal, State, and local governments.

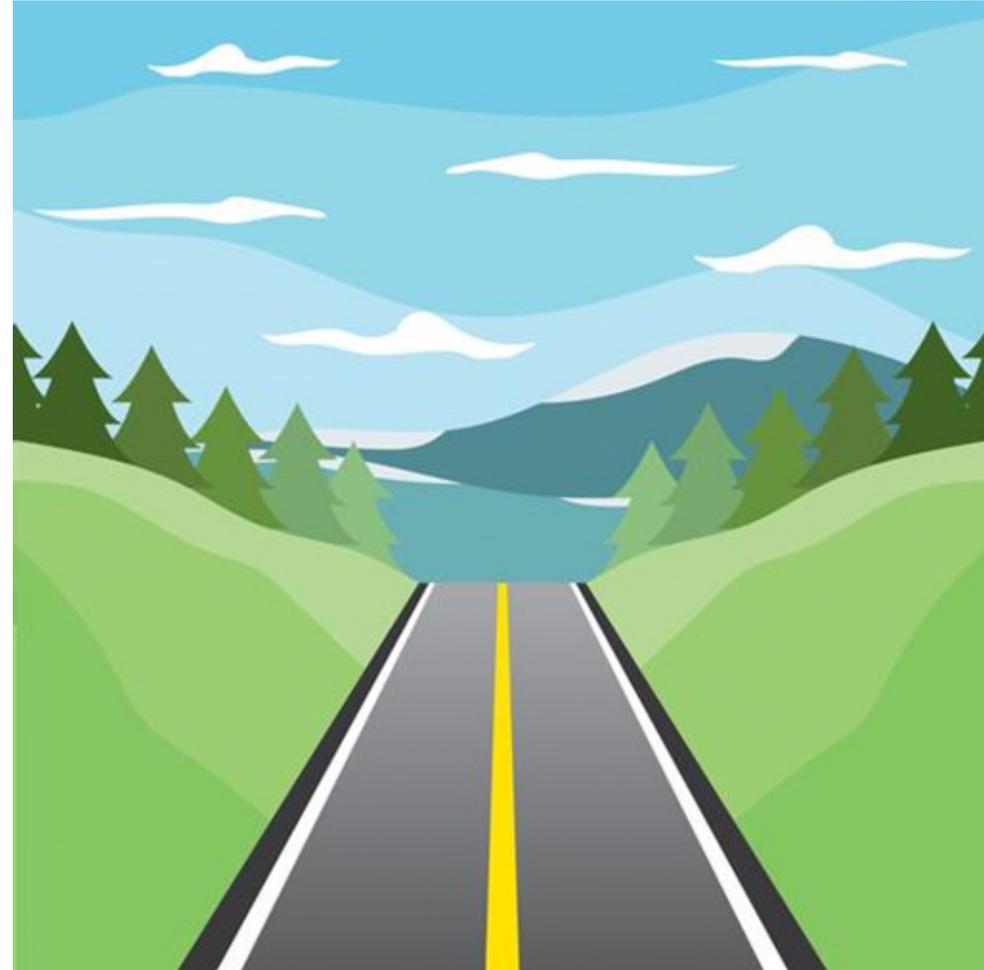


The Fair Labor Standards Act

- The federal **minimum wage** is \$7.25 per hour.
- Employers must pay the state minimum wage if it is higher.
- An “exempt employee” means the employee is not entitled to overtime
- A “nonexempt employee” means an employee is entitled to overtime
- Covered nonexempt employees must receive **overtime pay** for hours worked over 40 per workweek – 1.5 x normal pay rate.
- Hours worked ordinarily include all the time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed workplace.
- Employers must display an official poster outlining the requirements of the FLSA.
- Employers must also keep employee time and pay records.

Which Employers Need to Comply with the FLSA?

- The FLSA applies to employers whose annual sales total \$500,000 or more or who are engaged in interstate commerce.
- Most employers are covered by the FLSA because courts broadly interpret “interstate commerce.”



What Remedies are Available to Employees under the FLSA?



An employee can file a claim against an employer that violates the FLSA for:

(1) Backpay/unpaid wages

(2) Liquidated Damages – **Double their back pay.**

- Most, but not all FLSA awards include liquidated damages – there is “a strong presumption in favor” of awarding liquidated damages.

(3) Reasonable Attorney’s Fees

FLSA Exemptions

- The FLSA and accompanying regulations identify several types of employees that are exempt from receiving mandatory overtime. The most common are executive, administrative, professional, and highly compensated employees.
- **Employers bear the burden of establishing, by clear and convincing evidence, that an employee’s “primary duty” falls within an FLSA exemption.**
- **Simply naming a position administrative assistant, etc. does not make it exempt from the FLSA.**



What is an Employee's Primary Duty?

- It's not as simple as what the employee does 51% of the time. Courts consider the full scope of their employment.
- “Primary duty” for purposes of FLSA exemptions means “the principal, main, major or most important duty that the employee performs.” Factors considered in determining if an employee's exempt duties are his or her principal duties include:
 - the relative importance of the exempt duties in relation to the non-exempt duties;
 - the amount of time spent by the employee performing exempt work;
 - the relative freedom the employee has to perform his duties without direct supervision;
 - the relative difference between the employee's salary and the wages paid to other employees for the performance of non-exempt work.
- 29 CFR 541.700(a)

Exemptions: Overview

- Executive Exemption
- Administrative Exemption
- Professional Exemption
- Highly Compensated Exemption



Executive Exemption

- The employee's primary duties and responsibilities involve management of the business
- The employee must customarily and regularly direct the work of two or more other employees
- The employee has the authority to decide or make recommendations regarding hiring, firing, advancement and promotions
- The employee has discretionary powers
- The employee meets the salary test





Federal Court Arkansas (*Garrison v. ConAgra Foods Packaged Foods, LLC*)

- Team leaders at a food packaging company were classified as exempt executives
- Brought suit alleging they had no authority to hire or fire other employees
- Management asked the team leaders to report on and recommend temporary workers for permanent employment
- The court found that management's personnel decisions almost always followed the team leaders' reports
- The team leaders' opinions were given significant weight in personnel decisions and therefore were exempt

Administrative Exemption



- The employee performs office or non-manual work directly related to the management or general business operations of the business or customers
- The employee customarily and regularly exercises discretion and independent judgment of significant matters
- The employee meets the salary test
- This is one of the most frequently cited exemptions and is often used improperly

Management of General Business Operations

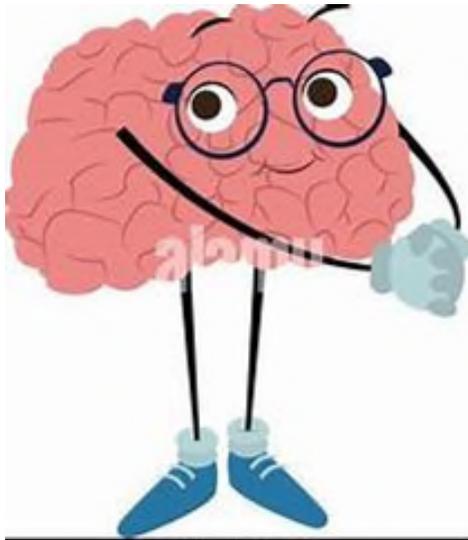
- To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. 29 C.F.R. § 541.201(a).
 - Human Resources
 - Finance
 - Payroll
 - Marketing
 - Public Relations
 - IT/Tech Support
 - Insurance Adjusters

Professional Exemption

- There are 2 potential categories:
 - Learned
 - Creative
- The employee customarily and regularly exercises discretion and independent judgment
- The employee meets the salary test



Learned Professional Exemption



- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character;
- The advanced knowledge must be in a field of science or learning;
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional Exemption

- The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



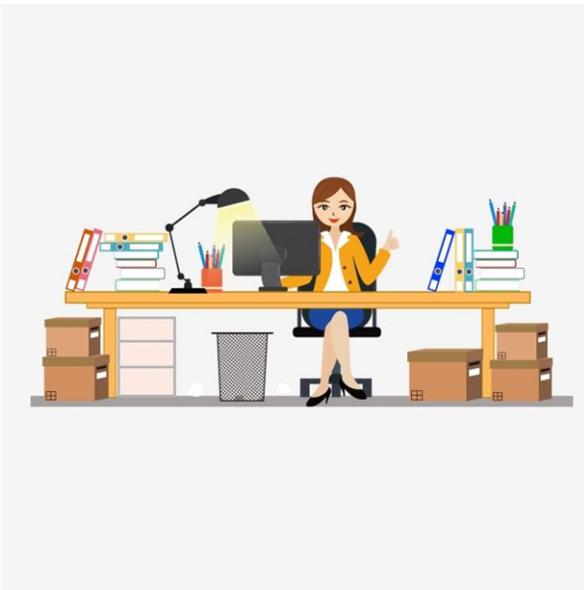
Highly Compensated

- Highly compensated employees performing office or non-manual work and paid total annual compensation of \$107,432 or more (which must include at least \$684* per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.
- **Seems simple. If they make more than this amount, they're exempt. Not exactly!**
- The Supreme Court recently heard oral arguments on a related case - October 12, 2022 in *Helix Energy Solutions v. Hewitt*.



Other Exemptions to Keep in Mind

- **Computer Employees** – main duties that deal with computer programming, design, analysis, etc. Same salary minimum but if paid hourly, they must receive at least \$27.63/hour.
- **Outside Sales Employees** – Primary duty of sales and consistently engaged away from the principal place of business.





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Misclassification of employees and independent contractors

Presented by Lori Brown, Partner (licensed to practice in Arizona, California, Nevada, Utah, Maryland, New York, District of Columbia)

What does Employee Misclassification mean?

- Exempt employee misclassification occurs when an employer treats a non-exempt worker as exempt
- The most common reason for misclassifying employees is misunderstanding the law and not knowing what makes an employee exempt
- Example: a misclassified exempt employee works one hour of overtime every day/five days a week = employee works five hours of overtime each week but is not paid for the extra hours
- Result is the employer could save money while benefiting from increased productivity

What are the Repercussions of Misclassifying?

- FLSA lawsuit to recover for unpaid overtime (individual or class action)
- State or Federal Department of Labor investigation
- Payroll violations and/or IRS audit



Examples of Recent Cases

Federal Court Illinois (*Markle v. Drummond Advisors, LLC* (2022)):

- Employee was a project manager who was paid as an exempt employee.
- Employer relied on the administrative exemption.
- The court found that employee was an exempt administrative employee under the FLSA so employee's claim failed.



Examples of Recent Cases continued

Federal Court Texas (*Gilchrist v. Schlumberger Tech. Corp.* (2022))

- Two employees who were drilling specialists filed suit alleging they were misclassified.
- Employer argued that the administrative exemption applied.
- The court concluded that the employer did not establish that the employees fell within the FLSA's administrative-employee exemption and the employees were entitled to overtime pay.



Examples of Recent Cases continued

11th Circuit Court of Appeals (*Fowler v. OSP Prevention Grp., Inc.*, (2022))

- Two employees who were property damage investigators filed suit alleging they were misclassified and entitled to overtime.
- The court held that employees' duties did not involve work directly related to the company's management or general business operations.
- The court found that the employer failed to show that the administrative exemption applied.

What does Independent Contractor Misclassification mean?

- 1099 v. W-2
- A common reason for misclassifying worker as an independent contractor is misunderstanding the law
- Entering into an independent contractor agreement with a worker is not controlling



Is there a test to determine whether a worker is an employee or independent contractor?

- There is no single determining factor for determining whether an individual is an independent contractor or an employee for purposes of the FLSA.
- Rather, courts analyze the “totality of the circumstances” and such factors such as:
 - (1) the degree of control exercised by the alleged employer;
 - (2) the extent of the relative investments of the worker and alleged employer;
 - (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer;
 - (4) the skill and initiative required in performing the job;
 - (5) the permanency of the relationship;
 - (6) whether the worker’s services are an integral part of the alleged employers’ business

Examples of Recent Cases

Federal Court Texas (*Ajquiixtos v. Rice and Noodles*, (2022)):

- Kitchen worker sued claiming he was misclassified as an independent contractor instead of an employee.
- The court found in favor of the employer on the degree of control,
- The court found in favor of the plaintiff on the extent of investment
- The court found in favor of the plaintiff on opportunity for profit or loss
- The court found that the skill and initiative required did not weigh in favor of either side (because there was not enough evidence for either),
- The court found in favor of the plaintiff on the permanency of the relationship
- The court found in favor of the plaintiff on whether the plaintiff was an integral part of the employer's business.

Examples of Recent Cases continued

Federal Court Illinois (*Walsh v. Medical Staffing of America*, (2022)):

- Department of Labor filed enforcement action against a medical staffing employer alleging the employer willfully misclassified its workers as independent contractors.
- At issue were nursing assistants, nurse practitioners and registered nurses.
- The court found that the employer exercised extensive control over the nurses' manner of work and found them to be employees, not independent contractors
- The employer asserted it had a reasonable good faith defense to defeat its liability for willfully violating the law because it was advised by legal counsel that its nurses were likely properly classified as independent contractors.
- But the court found this defense was not objectively reasonable.

Examples of Recent Cases continued

Department of Labor Investigation

- Federal wage investigators recovered \$352,347, in back overtime wages for 653 workers of a staffing agency that assigned them to manufacturing facilities and illegally classified them as independent contractors. The employees were misclassified and denied overtime and other employment benefits.

Potential Damages

- Unpaid wages
- Unpaid overtime
- Prejudgment interest (interest the judgment would have earned over the period of time from when the claimant was entitled to receive those monies)
- Liquidated damages (up to two times the amount of unpaid wages and benefits owed)

DOL New Independent Contractor Rule

- In January 2021, the Department of Labor announced a rule addressing the distinction between employees and independent contractors under the Fair Labor Standards Act.
- The rule was set to go into effect in March 2021, but was later delayed and then ultimately withdrawn by the Department of Labor in May 2021.
- In March 2022, a federal court in Texas held that the Department of Labor's delay and withdrawal was unlawful.
- The Department of Labor appealed that ruling, and the appeal is pending in the U.S. Court of Appeals for the Fifth Circuit.

Proposed Rule

- Earlier this month, the Department of Labor's Wage and Hour Division proposed a rule on this issue.
- Under the proposed rule, the six economic reality factors are:
 1. The opportunity for profit or loss depending on managerial skill;
 2. The investments by the worker and the employer;
 3. The degree of permanence of the work relationship;
 4. The nature and degree of employer control;
 5. The extent to which the work performed is an integral part of the employer's business; and
 6. The worker's use of skill and initiative.
- Comments on this rule are due on November 28, 2022.

Best Practices

- Maintain a detailed job description for all employees and company positions.
- Clearly communicate to each employee the duties and expectations of the position.
- Keep detailed records of employees classified as exempt and the relevant time period.
- Avoid assigning tasks to exempt employees outside their job description.
- Ensure that each exempt employee is paid on a salary basis.
- Most exemptions require authority to exercise discretion, so always consider when classifying employees.
- If you're unsure, don't classify them as exempt. Consult a lawyer.
- Re-classify exempt employees to non-exempt if they are misclassified
- Review services performed by independent contractors to ensure contractors are truly independent
- Address any misclassification issues right away
- Convert contractors to employees if they are misclassified



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Recordkeeping

Presented by Steven Crocchi, Associate (licensed in Arizona)

Recordkeeping Requirements

29 U.S.C. § 211: “Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him[.]”



DOL Guidance on Required Records for Employers

DOL guidance on required records for employers:

- (1) Employee's full name and social security number
- (2) Address, including zip code
- (3) Birth date, if younger than 19
- (4) Sex and occupation
- (5) Time and day of week when employee's workweek begins
- (6) Hours worked each day
- (7) Total hours worked each workweek
- (8) Basis on which employee's wages are paid (e.g., "\$15 per hour" or "\$440 per week" or "piecework")

DOL Guidance on Required Records for Employers Continued

- (9) Regular hourly pay rate
- (10) Total daily or weekly straight-time earnings
- (11) Total overtime earnings for the week
- (12) All additions to or deductions from the employee's wages
- (13) Total wages paid each pay period
- (14) Date of employment and the pay period covered by the payment



The Employee has the Initial Burden of Proving that they Worked Overtime

- **Employee's Burden:** prove that she performed work for which she was not properly compensated; employee can rely on employer records
- **Employer's Burden:** keep accurate records
- **Employer's Burden:** Employer has the burden of proving that the employee is exempt from overtime



Why is Recordkeeping Important?

- Employee has burden to prove hours worked
- But employer must maintain records
- Employee is not penalized for recordkeeping
- Without Records, Employee can meet his burden through testimony
- Employer then must either show precise hours worked or present evidence to negate the reasonableness of the employee's evidence
- It then becomes a question of credibility

Case Study: *Perez v. Rossy's Bakery & Coffee Shop, Inc.*

- Former employee claims he worked 63 hours a week for 10 months.
- Employer claims employee 40 hours and was employed for only 5 days.
- Court found employer kept inaccurate records
- Court determined hours worked based on credibility



Case Study: *Toramall v. Manhattan Constr. Group LLC*

- 8 employees sued their employer for unpaid overtime
- Employer did not keep records of hours worked
- Court awarded employees overtime for the hours they claimed

How Misclassification Impacts Recordkeeping

- Misclassification often leaves employers with no records to dispute overtime
- With no records, the issue of unpaid overtime often comes down to the credibility of the witnesses

Case Study: *Choudry v. Durrani*

- Employer misclassifies employee as exempt
- Employee sues for unpaid overtime
- Employer kept no records of hours worked or wages paid
- Employee testifies to hours worked
- Court finds employee more credible than employer and awards employee \$187,080 in unpaid overtime

Case Study: *Arasimowicz v. All Panel Sys. LLC*

- Employer misclassified employee
- Employee sought unpaid overtime
- Employer had no records of hours worked
- The issue of hours worked was an issue of fact for the jury to decide

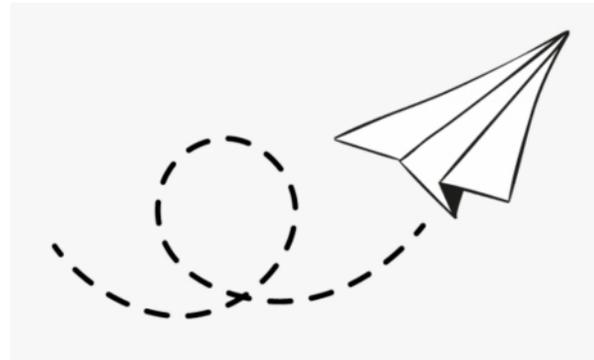
Timekeeping

Any timekeeping plan is acceptable as long as it is complete and accurate



Recordkeeping Best Practices

- Keep detailed and complete records for each employee.
- These records should include, at a minimum the employee's:
 - Rate of Pay
 - Clock-in and Clock-out Times
 - Daily Hours Worked
 - Weekly Hours Worked
 - Overtime Worked
 - Weekly Earnings
 - Wages Paid
 - Date of Paid Wages
- Err on the side of keeping more detailed records.





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The Remote World and Quiet Quitting

Presented by Kitty O'Connell, Associate (licensed in Arizona)

Remote Work

- The Continuous Workday Rule
 - The time period from the beginning of an employee's work duties to the end of those activities on the same workday is compensable work time
 - The continuous workday rule applies once the employee begins the first task that is integral and indispensable to the tasks she was hired to perform
- Ensuring flexibility
- Compensation
- Timekeeping Considerations



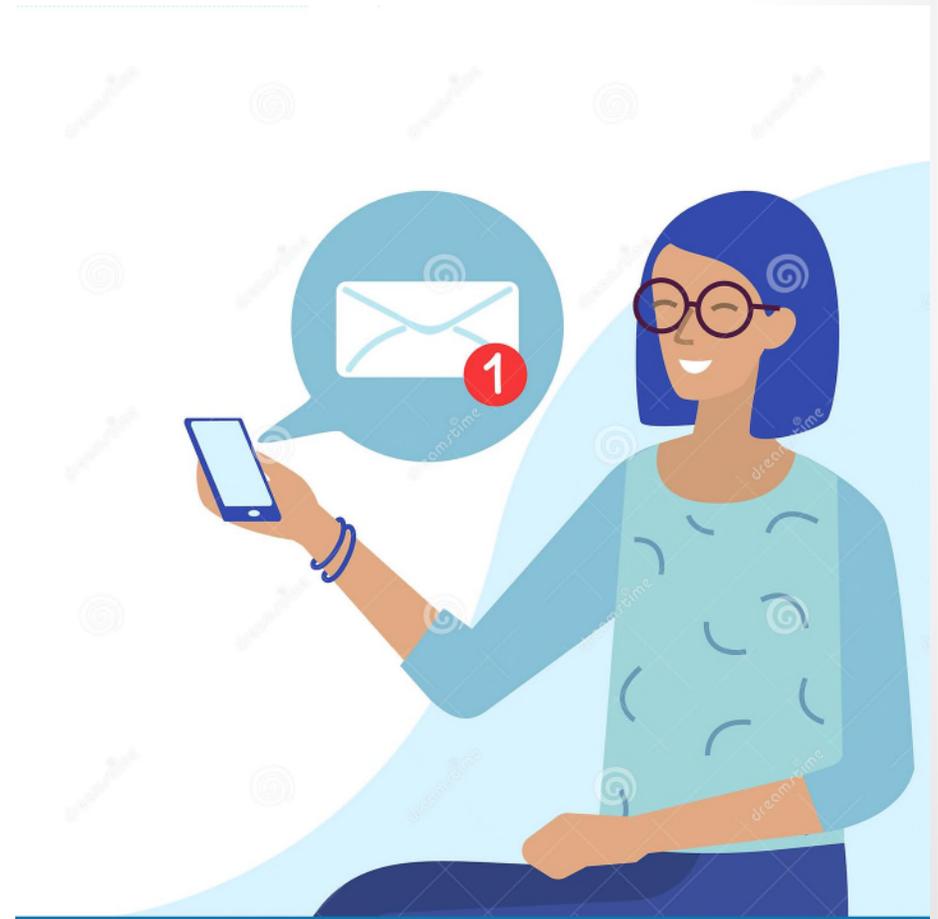
Employer Obligations Related to Telework

- The employer has the obligation to provide it employees with the equipment essential to the performance of their duties, such as a computer, keyboard and mouse
- The employer cannot require an employee to pay for expenses that are related to the operation of the business
- However, the company is not required to pay for other equipment such as a chair, desk, printer or other office equipment
- The employer is not required to reimburse telework-related expenses such as an internet, printer ink cartridges or paper



Out of Office but On the Clock?

- de minimis Doctrine
 - The amount of time spent on extra work
 - There are practical administrative difficulties of recording additional time
 - The regularity with which the additional work is performed
 - Aggregate amount of compensable time
- Effect on regular and overtime wages
- Employees must be paid for all hours work
- Employer must have actual or constructive knowledge of the work



Recommendations

- Update your written policy to prohibit off-the-clock work by non-exempt employees – including work performed outside of the workplace.
- Implement a robust system for tracking all time worked by non-exempt employees.



Quiet Quitting



Quiet Quitting



- Burned out or unsatisfied employees put forth the least amount of effort possible to keep their pay checks
- “Phoning it in” or the 80-20 rule, where 20% of employees are doing 80% of the work
- Ideas to counter quiet quitting from the Forbes Business Journal:
 - (1) No Sunday emails
 - (2) No weekend work
 - (3) Cut down on the number of meetings and their length
 - (4) Limit workplace “fun activities” (i.e., give employees their time back instead)
 - (5) Set goals based on achieving milestones and quality of work
 - (6) Give praise
 - (7) Consider pay increases
- Overall, the goal is to improve employee happiness

Best Practices

- Keep accurate and up to date personnel files
- Take performance reviews seriously and document issues
 - Positive & Negative
 - Give honest feedback
 - Don't eliminate performance reviews just because the employees are working from home!
- Give employees warnings in writing
- When giving employees verbal warnings, document the conversation in detail:
 - Who (employee involved and person giving warning)
 - What (description of incident)
 - When (date & time)
 - Why (policy or rule violated)
 - Where (where did the incident occur)
 - How (over the phone, in person, via zoom)



If you're not sure, ask!



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