




Hixson Nagatani LLP

Getting Ready For
DOL Compliance Initiatives:
Wage & Hour Law

Silicon Valley Women in Human Resources
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New DOL Initiatives

- **“Plan/Prevent/Protect” (Attachment A)**
 - Intended to reverse “catch me if you can” approach
 - Priority on assuring “workers are paid their wages and overtime.”
 - Will require employers to:
 - Plan: “create a plan for identifying and remediating” legal violations.”
 - Prevent: implementation of the plan
 - Protect: ensure “that the plan’s objectives are met on a regular basis.”

2



New DOL Initiatives

- **September 19 Information-Sharing Agreement With IRS & States (Attachment B)**
 - Part of DOL’s “Misclassification Initiative”
 - Contractor & Other “Non-Employee” Classification Focus
 - States Signed Up So Far: Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington

3

Hot Wage & Hour Compliance Issues

- Misapplication of Overtime Exemptions
 - Administrative
 - Executive
 - Professional
 - Computer Professional
 - Outside Sales
 - Commissioned Employees
- Recommendations:
 - Begin internal audit with high level review to determine the at-issue exemption.
 - Conduct internal audits under attorney-client privilege

4

Detail Review of a Job

- See Attachment C
- Recommendations:
 - Closely analyze “gray-area” positions.
 - In particular, look for the classic common mistakes.

5

Common Mistake

- Professional Exemption
 - Assuming that any four-year degree is relevant
 - Having jobs classified as exempt professionals where few if any holding the jobs have specialized four-year degrees.
 - Examples:
 - Technical Writers: Santa Clara County Superior Court certified class action lawsuit on behalf of technical writers against Sun Microsystems and SeeBeyond Technology; settled for \$5 million. (July 2010).
 - Social Workers: Ninth Circuit held they are not exempt professionals, because the position does not require a specific type of degree. Solis v. Washington (9/9/11 Ninth Circuit).
 - Law Clerk: California Court of Appeal held that unlicensed law graduate was exempt. Zelasko-Barrett v. Brayton-Purcell (8/17/11 Cal. Ct. App.)

6

Common Mistakes

- **Computer Professionals**
 - **Overlooking special minimum salary requirement , or its annual increases.**
 - Currently: \$79,050 annual salary
 - Alternative: \$37.94 Hourly Rate
 - **Misclassifying entry-level programmers as exempt**

7

Common Mistakes: All Exemptions

- **Failing to apply California's strict time test.**
- **Failing to distinguish between "skill" and "discretion."**
- **Examples:**
 - Technicians
 - Many jobs focused on testing
 - Low level IT
 - Coding/debugging versus designing code

8

Recent Development

- **Oracle Wage & Hour Cases (Alameda County Superior Court, Oct 15, 2010)**
- **Court certified class action lawsuit challenging exempt classification of positions in these categories:**
 - Technical Analyst
 - Project Manager
 - Quality Assurance

9

Common Mistake

- **Administrative Exemption**
 - Failing to consider the level of importance of the discretionary decisions.
 - Example: Executive Assistants
 - Applying the exemption to employees who work directly on the company's product or service.
 - Example: Paralegal in a law firm

10

Common Mistake

- **Executive Exemption**
 - Overlooking that "management" responsibility is required, not just "supervisory" responsibility.
 - Example: "lead" positions

11

Recent Development

- **Sullivan v. Oracle** (6/30/11 Cal. Supreme Court)
 - Non-California employees of California-based employer traveled to perform work in California, training employer's customers.
 - Ruling: employer required to comply with California law overtime requirements for non-resident employees who work a full day or full week in California.
- **Recommendations:**
 - Identify non-exempt, non-California employees who may travel to work in California
 - Confirm whether such work would in fact require compliance with California overtime law, and establish compliance plan.

12



- ### “Contractors”
- **“Right to Control” Test:**
 - The worker is a contractor only if he/she retains the “right to control the manner and means by which the product is accomplished” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
 - **Recommendations:**
 - Audit current classifications under attorney-client privilege: See Attachment D
 - Establish contractor classification review process for new contractors.
 - One fall-back option for workers who do not qualify is employment through a staffing agency.
 - Should result in strong documentary evidence supporting contractor status, including a solid independent contractor agreement.
- 14

- ### Key Factors
- Amount of Supervision
 - Discretion Over When/How Long to Work
 - Location of Work
 - Right to Discharge/Quit
 - See *Narayan v. EGL, Inc.* (9th Cir. 2010)
 - Duration of Relationship
 - Is the Contractor a Former Employee?
 - How Similar is the Work?
 - Right to Assign Additional Project
 - Method of Payment
- 15

Key Factors

- Skill Required:
 - How Different than Skills Possessed by Employees?
- Intent of the Parties
 - Is There a Signed Contractor Agreement?
- Is Work Part of Company's Regular Business?
 - Do Employees Perform Same Type of Work?
- Does the Worker Own/Come From a Separate Business?
 - Does Worker Perform Work for More than One Company?

16

Vacation & PTO

- Background
 - Not required by state or federal law
 - "The law only addresses the requirements which a vacation plan, *if offered*, must meet." DLSE Manual

17

Vacation/PTO Accrual Caps

- Common Mistake: Aggressively low accrual ceiling/cap
- Recommendation: "Reasonable" time period for employees to use vacation
 - 1.75x ceiling considered safe
- Beware: "Use it or lose it" policies prohibited in California

18

Benefits Resembling Vacation

- Employers generally must accrue (and pay out upon termination) other benefits provided that resemble vacation time.
- Examples:
 - Floating Holidays
 - Compensatory Time Off
 - Some “Sabbaticals”
 - See *Paton v. Advanced Micro Devices, Inc.* (8/5/11 Cal. Ct. App.)

19

“Unaccrued” Vacation Policies

- Not per se unlawful, but present special legal challenges
- May 11, 1987 California Labor Commissioner Opinion Letter:
 - “To approve your policy, as written, would make Suastez a dead letter since every employer would tell employees they have unlimited vacation (though none is accruing or vesting), but can only take more than one or two or three weeks with approval.”
- Also consider:
 - Interaction with protected leaves
 - Practical feasibility
 - Employee morale/market competitiveness issues

20

Exempt Employees: Partial Day Personal Absences

- May Employer Charge Vacation/PTO?
 - Federal: Employer allowed to charge vacation/PTO for partial day personal absences
 - California Labor Commissioner Opinions:
 - Old: Originally only permitted deduction for full day absences; later opinion required absence of 4 hours or more in a day to deduct from exempt employee’s vacation/PTO
 - Current: no 4 hour requirement (November 23, 2009 Labor Commission Opinion Letter)

21

What If An Employee Works On Vacation?

Exempt Employees

- No “*de minimis*” exception that would apply to checking voice mail for 10-15 minutes during a week of vacation. See DLSE Opinion Letter (April 8, 2002)
- But, pro rata docking of salary for full-day absence allowed if employer did not require (directly or indirectly) the employee to do any work that day.

Non-exempt Employees

- Required to pay non-exempt employees if they “engaged, suffered or permitted” to work

Recommendation:

- Train managers not to directly or indirectly require employees to work on vacation
- But when unavoidable, track and pay for such work

22

Company Shutdowns

3 Rules:

- Exempt employees: mandatory time off should be in increments of full workweeks.
- Maximum duration: ambiguous opinion letters as to whether return date must be within 10 days or same pay period.
- Mandatory vacation/PTO use: employer must provide “reasonable notice” before requiring employees to use accrued vacation/PTO during company shutdown
 - California Labor Commissioner memorandum states notice generally must be *greater* of either 90 days or one full fiscal quarter

23


Bonuses: Hot Issue

- Non-exempt overtime regular rate: must factor in bonuses unless they are discretionary as to both:

- whether they are paid; AND
- the amount of payment

- Recommendation: analyze all forms of pay received by non-exempt employees, and whether they must be included in the regular rate.

24



Conclusion

- Thank You!
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25
