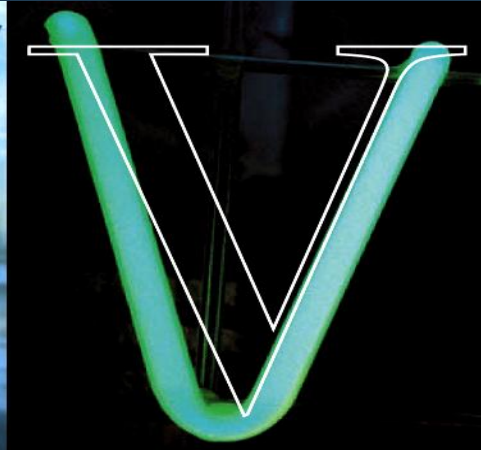


VENABLE[®]LLP

legal compliance
in the compensation of employees

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governing law

- fair labor standards act (FLSA)
 - federal law
 - enforced by federal department of labor
- state laws
 - some states parrot federal law
 - enforced by state department of labor
- rules most beneficial to employee prevails
- both state and federal can investigate
- audits of employers based on
 - industry audit, complaint by employee & lottery
- department of labor created APP for tracking of time



legal foundation

- law governs:
 - proper payment of employees
 - how compensation is made to employees
 - how compensation is calculated
- everyone is covered by the law unless they are “exempt”
 - must fit into exemption category
 - no relationship to “importance to school”
- department of labor (state and federal) consider:
 - appropriate percentages
 - 70% non-exempt
 - 30% exempt



employee classifications

- two classifications
 - overtime eligible (non-exempt)
 - paid on an hourly basis
 - overtime pay for hours **worked** over forty in a workweek
 - one and one half times the regular rate of pay
 - “salaried employees” can be overtime eligible
 - non-overtime eligible (exempt)
 - paid on a salary basis
 - the same amount regardless of number of hours worked
 - must meet certain requirements to be exempt from overtime pay



3 part test for exempt status

- salary level
 - is employee paid at least the minimum required rate?
- salary basis
 - is employee paid the same amount each week?
- job duties
 - does the work performed by the employee meet the classification guidelines?



salary level

- minimum salary for exempt employee now \$455 per week (\$23,660 per year)
- “highly compensated employees” exemption
 - total annual compensation of \$100,000 or more (must include at least \$455 per week paid on a salary or fee basis)
 - regularly perform at least one of the duties in the standard exemption tests



salary basis

- predetermined amount of compensation each week regardless of amount of time worked
- cannot be reduced because of variations in the quality or quantity of work
- must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked
- can dock from **paid leave** in hour increments can not dock from **pay**
- teachers NOT subject to salary basis pay



docking from salary

- can dock in hour increments from **paid leave**
- no docking from exempt employee pay in hour increments
- can dock in whole day increments from salary for:
 - voluntarily absent for personal reasons
 - used up sick and vacation leave
 - still only in entire days
 - FMLA leave
 - disciplinary suspension (entire week only)
 - major safety violations (VERY MAJOR)



job duties (classification)

- actual job duties and responsibilities performed by employee
- factors also considered:
 - job title
 - job description
 - make sure the person actually performs this work
- review regularly since responsibilities change
 - ie; new manager changes nature of job



executive exemption

- paid on salary basis of at least \$455/week
- **primary duty**
 - managing the school, or managing a customarily recognized department or subdivision of the school
- direct
 - two or more other full-time employees or the equivalent
- must have authority to hire or fire other employees
 - **particular weight** must be given to the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees



executive exemption

- **“particular weight”**:
 - recommendations part of the employee’s job duties
 - recommendations frequently made, requested, and relied upon
 - pertain to employees regularly under supervision
 - not necessarily ultimate decision maker
 - higher level manager can override

- **primary duty**
 - principal, main, major, most important duty of employee
 - major emphasis on character of job as a whole
 - required to spend more than ½ time on exempt work



executive exemption

■ management

- includes (but not limited to) activities such as:
 - hiring and training
 - setting rates of pay
 - planning and directing work
 - evaluating
 - handling complaints
 - disciplining
 - allocating work
 - determining how and with what tools and resources work will be performed



professional exemption

- salary basis or fee basis of not less than \$455/week
- primary duty
 - performance of work requiring **advanced knowledge**
 - predominantly intellectual in character
 - requiring the consistent exercise of discretion and judgment
 - distinguished from work involving routine mental, manual, mechanical or physical work
- advanced knowledge
 - in a field of science or learning
 - customarily acquired by a prolonged course of specialized intellectual instruction analyze, interpret, make deductions from varying facts or circumstances
 - not attained at high school level



professional exemption: teachers

- not required to pay on a salary basis
 - can dock pay in hour increments
- must pay at least \$455/week or on fee basis
- primary duty
 - teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in an educational establishment
 - examples: academic teacher, kindergarten teacher, teachers of the gifted or disabled.



computer professionals

- paid on salary basis of at least \$455/week
- primary duty consists of:
 - application of systems analysis techniques and procedures
 - design, development, testing and modification of computer systems or programs or machine operating systems
 - combination of above
- computer systems analyst, computer programmer, software engineer or other similarly skilled worker in computer field
- does not include:
 - manufacture or repair of hardware and equipment
 - work highly dependent upon or facilitated by use of computers and programs



administrative exemption

- paid on salary basis of \$455/week
- primary duty
 - must be the performance of office or non-manual work directly related to the management or general business operations of the school; and
- employee must:
 - exercise discretion and independent judgment with respect to **matters of significance**



administrative exemption

- “directly related to **management** or **general business operations**”
 - work directly and significantly impacting the running or servicing of the school

- “**exercise of discretion and independent judgment**”
 - comparison and the evaluation of possible courses of conduct
 - acting or making a decision after the various possibilities have been considered

 - more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources



administrative exemption

- authority to:
 - formulate, affect, interpret management policies or operating practices
 - establish and implement policies and operations of school
 - perform work that affects business operations to substantial degree
 - commit employer to matters that have significant financial impact
 - waive or deviate from established policies
 - provides expert advice
 - investigate and resolve matters of significance



administrative in educational establishments

- paid on a salary basis or fee basis of \$455/week or not less than entry level teacher
- primary duty
 - performing administrative functions directly related to academic instruction or training in the educational establishment
 - performing work related to the academic operations and functions of the school
 - department chair, librarian, dean of students



overtime pay

- pay of time and one half regular hourly rate of pay for all hours worked over 40 in a work week
 - definition of work week
 - Sunday morning to Saturday night?
 - definition of “worked”
 - Actually worked, not paid leave or holiday
 - regular hourly rate of pay
 - All remuneration (non discretionary) divided by 2080
- authorized by supervisor
 - compensated even if not approved
 - disciplinary issue



compensatory time

- time off that would normally be worked in a workweek to control and avoid overtime costs
- available to overtime eligible staff only
 - may be requested in advance of the workweek and must be approved by the supervisor
- compensatory time granted on an hour-for-hour basis
- must be used in the same workweek – cannot be banked or stored for future use



meals and breaks

- unpaid breaks must be “duty-free”
 - if not “duty-free” must be paid
 - duty free must be truly **duty free**
 - can not be voluntary work
 - sitting at desk during lunch?

- if less than thirty minutes in duration
 - not sufficient time to obtain “break” if less than 30 minutes



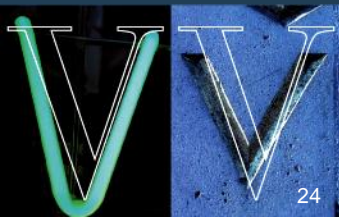
on-call time

- not paid time if employee is unrestricted
 - i.e., employee can leave the premises and carries a beeper/phone
 - overtime eligible employee is required to be in a specific location waiting for an assignment, then they are “engaged to wait” and must be paid for on-call time



recordkeeping

- school is “responsible” under the law to “track” hours worked by employees
 - schools often turn this over to employees
- tracking of time –
 - sign in and out at start and end of day and for lunch and breaks
 - establish “core” hours of work and require reporting of additional time worked
 - record vacation, sick, paid time off, other types of leave
- supervisors responsible for reviewing timesheets before submitting them to payroll



calculating overtime

- based on 40 hours in workweek
- based on hours actually worked
 - not just paid, i.e., sick leave or vacation
- calculated on regular rate of pay
 - hourly rate vs. regular rate of pay
- working more than one job at different rates
 - higher rate or weighted average
- guaranteed wage with built in overtime
 - how many hours the employee works
 - divide total number of hours plus ½ hour for each hour worked over 40 (times 52)
 - divide into annual salary
 - time and one half over that number of hours



Independent Contractor v. Employee

overview

- Increased scrutiny by IRS and DOL
 - Employee reclassification initiative for independent contractors - *\$25 million dollars* to strengthen and coordinate federal and state efforts to enforce statutory prohibitions, and to identify and deter misclassification of employees as independent contractors
 - IRS announced it will randomly audit 6000 companies over the next 3 years to find misclassified employees
- Common challenges for schools
 - Tutors, testers, tennis/music instructor, coaches
- Implications of misclassification
 - Unpaid employer taxes
 - Employee benefits (including health and retirement)



Independent Contractor v. Employee

redesigned IRS test

- IRS looks at degree of control and independence based on three categories:
 - Behavioral: Does the school control or have the right to control what the worker does and how the worker does his or her job?
 - How is IC evaluated?
 - Financial: Are business aspects of IC's job controlled by the school?
 - How is IC paid, what expenses are reimbursed, who provides tools/supplies, who provides insurance?
 - Opportunity for profit and loss
 - Type of relationship: Are there written contracts or employee type benefits?
 - Pension plan, insurance, vacation pay, etc.?
 - Will the relationship continue and is the work performed a key aspect of the business?
 - Can worker perform this work for other schools?
- Weigh all factors – no magic “number” of factors
- Documents: agreement, job description, other documentation of factors used in coming up with the determination



exposure and strategy

- when change status
 - failure to reimburse can result in loss of exemption for all employees in the same job classification
 - how far back do you go
 - two year statute of limitations
 - consider title options and disassociation with “status” or “value”
- make changes in connection with other changes such as handbook, vacation modification, health insurance
- use as benefit
 - value employee and want to pay for time



FMLA leave entitlement

- Federal FMLA provides up to 12 weeks of family and medical leave per 12 month period
- Federal FMLA provides up to 26 weeks of military family leave in a 12 month period
- is an umbrella that all other leave falls into
 - FMLA runs concurrently with other forms of leave
 - Sick, vacation, std, workers compensation or other leave
 - starts as soon as employee is eligible



federal FMLA covered employees

- Must be employed by a school with 50 or more employees in a 75 mile radius of the place the employee works
- Employee must have worked at least 1,250 hours during the previous 12 months prior to the request for leave
- 12 months need not be concurrent
 - Separate periods of employment are counted (if break in service does not exceed seven years)
 - Military leave counts as time worked
- Full time teachers are deemed to have met the requirement
 - If a full time employee completes the first school year they become eligible for leave even if the “contract” is a 10 month contract



FMLA leave provides

- job security
 - School must hold position open for employee
 - Employee entitled to return to same or equivalent job
 - May fill position temporarily until employee returns
 - Can eliminate job if would have done so even if employee not out on leave
- unpaid leave
- benefits
 - Employer must continue to receive benefits during the leave
 - Health insurance must continue as if the employee was still working
- No loss of benefit or seniority accrued prior to the start of the employee's leave



reasons for leave

- Birth of a child or to care for a newborn child;
- Placement of a child with the employee for adoption or foster care, or placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility;
- Employee is needed to care for a “family member” with a serious health condition;
- Employee’s own ‘serious health condition’ that makes the employee unable to perform the functions of the job



Questions?



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