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Exempt? Nonexempt? Stipends or not?
How to Successfully Navigate Wage and Hour Laws that Apply to Independent
Schools
(and hopefully survive a DOL audit while doing so)

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Session Outline

- Governing law and Government Audits
- Exemption Classifications
- Independent Contractor
- Methods for Changing Status

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Governing Law

- Fair Labor Standards Act (FLSA)
 - Federal law
 - State law may be similar, more restrictive, less restrictive, or non-existent
 - Enforced by the Department of Labor
 - Audits of employers based on
 - Industry
 - Complaint
 - National DOL Attention

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Audits

- Both Federal and state department of labor can conduct audit
- Generated by:
 - Complaint – usually look at more than just complainant
 - Industry focus
 - Random selection
- Can look at FMLA compliance, I-9 documents, exemption classification, calculation of pay, tracking of hours, etc.
- May notify other agencies if concerns: OSHA, IRS etc.
- Appear at door asking for records: Suggest you need time to compile and set another meeting
- Appear cooperative but do not over share
 - Attempt to determine why they are visiting
 - May or may not tell you

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Exemption Overview

- Employees covered by FLSA unless qualify under “exemption” category
 - **Non-Exempt** = *Not* exempt from overtime & other requirements
 - **Exempt** = Exempt from overtime & other requirements
- Non-Exempt (covered by the FLSA rules)
 - Compensated at minimum wage for all hours *worked*
 - Overtime for all hours *worked* over 40 in a workweek
 - Overtime calculated at regular rate of pay (not necessarily hourly rate)
- Exempt (not covered by the FLSA rules on overtime)
 - Qualifies under exemption category
 - Executive, Administrative, Administrative in Educational Establishments or Professional
 - Paid on salary basis
- Independent contractor not covered by FLSA

Non-Exempt Employees

- Employer must track hours worked by non- exempt employee
 - Risk assessment – how much risk for how much benefit
 - Clock, employee recording on paper, employee recording on computer, sign in & out at front desk, assume base work hours and notify employer when work more or less than base work hours
- Non exempt paid on hourly rate
 - # of hours worked times hourly rate
 - Can set “fixed” rate per week based on established work week and add overtime payment for hours over 40
 - Salary overtime eligible employee vs. hourly employee
- Overtime paid at 1 ½ times **regular rate** of pay
 - “work” doesn’t include paid leave
 - Regular rate = total remuneration for employment earned in the workweek (number of hours worked times hourly rate + any non discretionary payment) divided by the total number of hours worked by the employee in the workweek

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Three Part Test For Exemption

- Salary Level
 - Paid at the minimum rate of \$455/week
- Salary Basis
 - Paid the same amount each week regardless of the # of hours worked
 - Limited ability to dock in hour increments
- Job Duties
 - Meet the qualifications of an exempt category
 - Executive, Administrative, Administrative in Educational Establishments or Professional
 - Actual duties performed by the employee
 - Not just as described in the job description





Salary Level & Salary Basis

- Salary Level
 - Paid at the minimum rate of \$455/week
- Salary Basis
 - Pre-determined amount of compensation each pay period
 - Cannot be reduced based on quality/quantity of work
 - Must receive full salary if any work performed
 - regardless of the number of days or hours worked
 - FMLA exemption: Based on hours if intermittent leave
 - can use paid vacation or sick leave (whole days vs hours)
- Docking allowed in whole days if:
 - Voluntarily absent for personal reasons (trip with husband)
 - Used up sick and vacation leave
 - Disciplinary suspension
 - **Major** safety violations
- Teachers Not Subject to Salary Basis Pay
 - Allowed to dock in hour increments

Go Back To Your School and Check

DO YOU HAVE AN EXEMPT
EMPLOYEE ON
YOUR PAYROLL THAT HAD
THEIR PAY DOCKED IN HOUR
INCREMENTS?

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Job Duties Considered in Exemption Qualification

- Review of job duties when determining qualification for exemption category
- Actual job duties and responsibilities performed by employee
- Factors also considered
 - Job title
 - Can hurt but not necessarily help
 - Job description
 - Make sure the person actually performs this work
- Review regularly since responsibilities change
- Performance of employee may allow one employee but not another to qualify as exempt
 - Two employees holding the same job title may assume different amounts of responsibility

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Go Back To Your School and Check

DO YOU HAVE EMPLOYEES WITH
THE SAME TITLE PERFORMING
DIFFERENT JOBS AS A RESULT
OF INITIATIVE, SKILLS,
KNOWLEDGE OR TENURE IN THE
POSITION?

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Executive Exemption

- Paid on Salary Basis
- Primary duty
 - managing the school, or a customarily recognized department or subdivision
- Direct
 - two or more other full-time employees or the equivalent
 - four half times
- Authority to
 - hire, fire, advance, promote & change status given *particular weight*
 - “*Particular weight*”
 - part of the employee’s job duties to make such recommendations?
 - recommendations are made, requested, and relied upon?

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Administrative Exemption

- Paid on Salary Basis
- Primary duty
 - performance of office or non-manual work directly related to the management or general business operations of the School
 - work directly related to running or servicing of the School
- Must
 - exercise discretion and independent judgment on matters of significance
 - authority to compare, evaluate and make decision on matters of significance
 - more than applying well-established techniques, procedures or specific standards described in manuals or other sources

Professional Exemption

- Paid on a salary basis or fee basis of not less than \$455/week
- Primary duty
 - performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment
- Advanced knowledge
 - in field of science or learning
 - customarily acquired by a prolonged course of specialized intellectual instruction
 - lawyers, doctors, engineers

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Professional Exemption: Teachers

- Salary Basis Not Required
 - can dock in hour increments
 - can dock for leaving day before spring break begins
 - can dock if fails to appear on first day of orientation
- Primary duty
 - teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in an educational establishment
 - caution if considering teacher's aids

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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

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Computer Professionals

- Employed as computer systems analyst, computer programmer, software engineer or other similarly skilled worker in computer field and
- 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
- Does NOT include:
 - Manufacture or repair of hardware and equipment
 - Work highly dependent upon or facilitated by use of computers and programs

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Independent Contractors Factors Considered

- 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

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Consequences of Treating Employee as Independent Contractor

- Payment of wages, benefits, overtime compensation
- Tax liability
- Failure to allow participation in deferred compensation plan
- Insurance treatment (workers comp., unemployment)
- Liability Coverage
- Legal Exposure for Failure to properly classify
 - Increase in cases filed

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Positions to Consider

- Coaches – teachers? coach elsewhere?
- Substitutes – day rates? substitute for other schools?
- Counselors – have own practice?
- Psychometrists (testers) – have own practice?
- Tutors – work for other schools/parents?
- Other specialists (coordinator of play, after school programs,)

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Changing From Exempt to Non-Exempt

- Employees often “offended”
 - perceived as “unprofessional”
 - tracking time is often the issue
- Cost Benefit Analysis
 - law requires overtime payment to non-exempt employees
 - employees upset if status changed
 - financial liability for failing to compensate overtime
 - liability for cost of non-payment vs. employee morale
- Challenges
 - Retroactive or only going forward
 - Employees question why not retroactive
 - Great unhappiness
- Strategies for Change
 - Identify other changes planned (benefits, handbooks)
 - Roll out as one package
 - Sell as a positive
 - Consider using “overtime eligible” and “overtime not-eligible”

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contact information

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