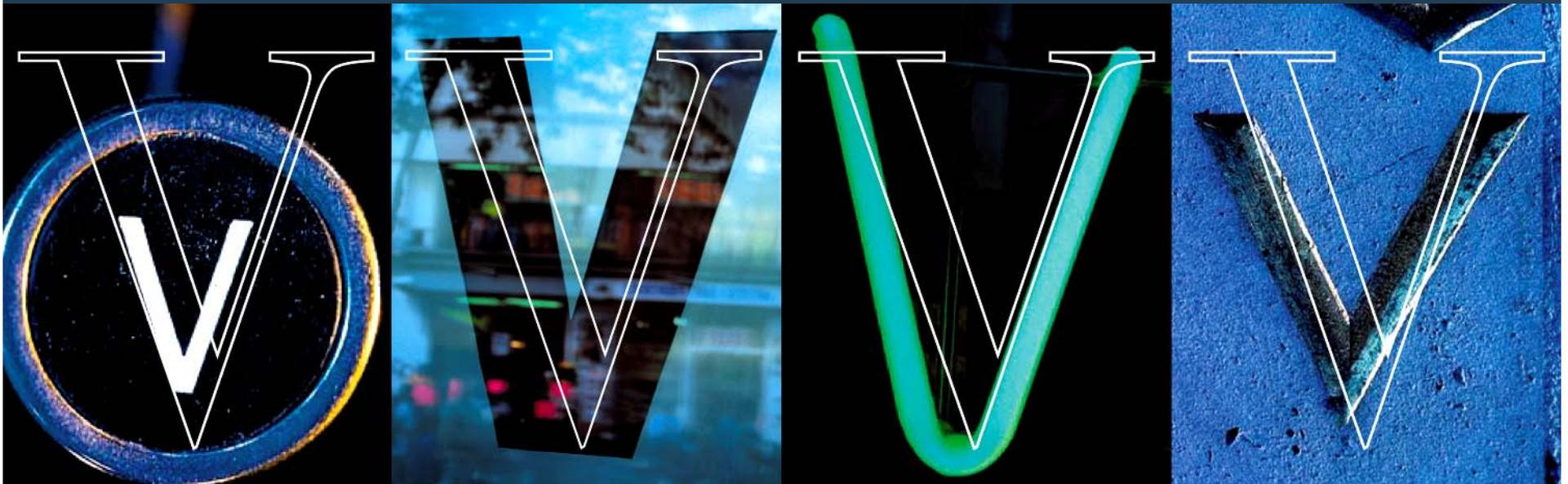


# VENABLE<sup>®</sup>LLP

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)

Caryn Pass, Esq., presenter  
VAIS 2015 BUSINESS OFFICERS INSTITUTE  
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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



## 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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