

Proposed Changes to the
FLSA's White-Collar Exemption Criteria:
What Nonprofits Need to Know about
the Current Rules, Where Things Are
Heading, and How to Avoid Employee
Classification Traps and Pitfalls

Tuesday, November 17, 2015, 12:30 – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq., Partner and Chair of the Nonprofit
Organizations Practice, Venable LLP

Speakers

Todd J. Horn, Esq., Partner, Venable LLP
Jennifer G. Prozinski, Esq., Associate, Venable LLP



CAE Credit Information

***Please note that CAE credit is available only to registered participants in the live program.**

As a CAE Approved Provider educational program related to the CAE exam content outline, this program may be applied for **1.5 credits** toward your CAE application or renewal professional development requirements.

Venable LLP is a CAE Approved Provider. This program meets the requirements for fulfilling the professional development requirements to earn or maintain the Certified Association Executive credential. Every program we offer that qualifies for CAE credit will clearly identify the number of CAE credits granted for full, live participation, and we will maintain records of your participation in accordance with CAE policies. For more information about the CAE credential or Approved Provider program, please visit www.whatiscae.org.

Note: This program is not endorsed by, accredited by, or affiliated with ASAE or the CAE Program. Applicants may use any program that meets eligibility requirements in the specific time frame toward the exam application or renewal. There are no specific individual courses required as part of the applications—selection of eligible education is up to the applicant based on his/her needs.



Upcoming Venable Nonprofit Events

Register Now

- **December 10, 2015:** [A Breach Can Happen to You \(or Already Has, and You Just Don't Know It Yet\): How Nonprofits Can Best Manage Cybersecurity Risk](#)
- **January 14, 2016:** [Impact Investing and Nonprofits: Opportunities, Innovative Structures, and Creative New Ways to Raise Funds and Further Your Mission](#)
- **February 4, 2016:** Nonprofit Chapters and Affiliates: Finding Structures and Relationships That Address Your Challenges and Work Well for Everyone (*details and registration available soon*)
- **March 10, 2016:** Nonprofit Federal Award Recipients: Meeting New Requirements, Avoiding Dangerous Pitfalls, and Adding Value through a Strong Compliance Program (*details and registration available soon*)



Overview

Topics covered today:

- Proposed DOL regulations
- Common exemptions from the FLSA
- Independent contractors and new DOL guidance
- Computer professionals
- The importance of written job descriptions
- Managing nonexempt employees' entitlement to overtime
- Compensable and non-compensable time for nonexempt employees
- Compliance tips and strategies



Three Questions in Play

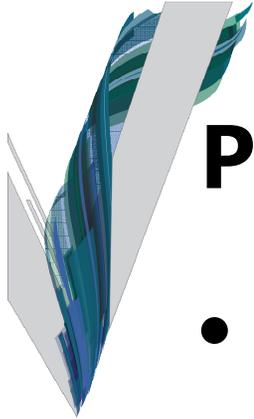
One *Why* and Two *Whats* :

- Why are wage and hour lawsuits so prevalent?
- What are the main wage and hour compliance obligations for my nonprofit?
- What can I do to minimize risk to my nonprofit?



Why So Prevalent?

- Number of W & H lawsuits nearly doubled over 10 years
- Large payouts for successful lawsuits
 - Class actions – huge leverage
 - Double or triple damages
 - Attorneys' fees
- Media coverage of large settlements
- Targeted attorney advertising
- Jury bias against employers
- W & H compliance is difficult
- New and expanded laws every year



Proposed DOL Regulations

- Increasing salary requirement
- “Automatic update” of salary requirement
- Increasing salary threshold for highly compensated employees
- No proposed changes to duties requirements



Overtime Basics

- **General Overtime Rules under the FLSA**
 - 40-hour workweek / 1½ times the regular rate of pay
- **Common Exemptions from the FLSA:**
 - Executive Exemption
 - Administrative Exemption
 - Professional Exemption
 - Computer Professional Exemption
 - Highly Compensated Employee Exemption
- **Two Tests to Determine Whether Exemption Applies:**
 1. Salary Test
 2. Duties Test

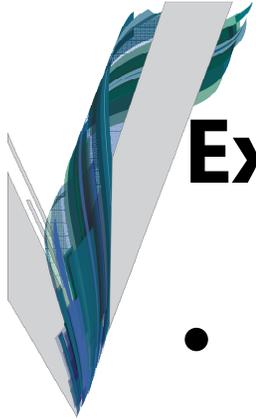


Exemption Application

- **Salary Test:**

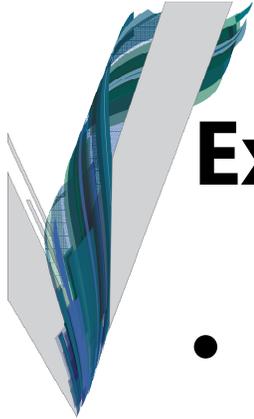
- Current Requirements

- Paid \$455 per week (\$23,660 per year)
 - Paid on a salary basis
 - Pay not subject to reductions because of quantity or quality of work
 - Ready, willing, and able to work



Exemption Application (cont.)

- **Salary Test:**
 - Proposed Change
 - Paid \$970 per week (\$50,440 per year)
 - Automatic update



Exemption Application (cont.)

- **Current Duties Test:**
 - Asks about the “primary duty”
 - Factors considered include:
 - Relative importance of exempt duties
 - Amount of time performing exempt duties (but not necessarily majority of time)
 - Relative freedom from supervision
 - Wages paid to other employees for non-exempt work



Exemption Application (cont.)

Duties Test and the Proposed Regulations

- No proposed changes, but requests comments on:
 - Whether duties tests should be changed at all
 - Minimum amount of time performing work that is primary duty
 - California's 50% threshold
 - Reconsider short and long duties test
 - Concurrent duties regulation for executive employees



Executive Exemption

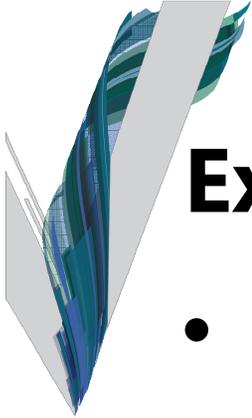
- **Duty Test**

- Primary duty is the management of the enterprise or a department within the enterprise
- Regularly directs the work of two or more other employees
- Has authority to hire or fire employees, or, alternatively, management will heed his/her recommendations to hire or fire employees



Executive Exemption (cont.)

- **Whether the Primary Duty Is Management**
 - Interviewing, selecting, and training employees
 - Adjusting rates of pay or work hours
 - Planning and directing work tasks
 - Maintaining documents used for performance evaluations
 - Conducting employee reviews
 - Addressing workplace complaints or grievances
 - Budgetary decisions and oversight
 - Monitoring or implementing legal compliance measures
 - Ensuring employee safety



Executive Exemption (cont.)

- **Supervision of Subordinate Employees**
 - Regularly directs the work of at least two employees
 - The subordinate employees are full-time, or, alternatively, the part-time employees work at least 80 combined hours per week



Executive Exemption (cont.)

- **Authority to Hire or Fire Employees**

- The employee does not need unilateral authority

- Relevant factors

- Are such decisions or recommendations part of the employee's job responsibilities?

- How often are such decisions or recommendations made by or requested of the employee?

- How often does the employer rely upon the recommendation of the employee?

- **Salary Test**

- \$455 per week?

- Salaried?



Administrative Exemption

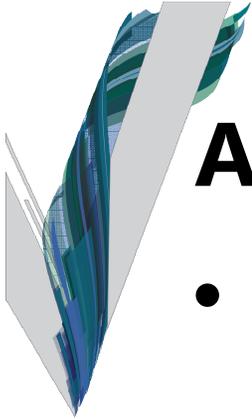
- **Duty Test**

- The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or its clients/customers
- The employee's primary duty must also require the exercise of discretion and independent judgment with respect to matters of significance



Administrative Exemption (cont.)

- **Whether Duties Directly Related to the Management or General Business Operations**
 - Duties related to running or servicing of the enterprise instead of manufacture, sales, or retail
 - E.g., finance, auditing, budgeting, purchasing, advertising, human resources, quality control, legal and regulatory compliance, employee benefits, labor relations, and health and safety
 - Duties must be of substantial importance to the management or operation of the employer's enterprise or the employer's clients/customers
 - E.g., employees consulting for the employer's clients/customers
 - Indispensability of the job is not dispositive



Administrative Exemption (cont.)

- **Exercise of Discretion and Independent Judgment**
 - The employee chooses between two or more possible courses of conduct
 - The choice is free from immediate direction or supervision on matters of significance
 - The employee's decisions may still be reviewed at times
 - The decisions may be recommendations for action rather than direct action
 - Merely following procedures is not sufficient



Administrative Exemption (cont.)

- **Matters of Significance**

- Major assignments related to employer's operations
- Must affect the operations in a substantial manner
- Authority to implement, interpret, or create management policies or operating practices
- Authority to deviate from established policies or procedures without prior approval
- Employee may commit the employer in significant financial matters
- Involvement in planning of long- or short-term business objectives
- Conducts investigations or resolves matters for management
- Represents the employer in complaints or disputes



Administrative Exemption (cont.)

- **Salary Test**
 - \$455 per week?
 - Salaried?



Professional Exemption

- **Duty Test**

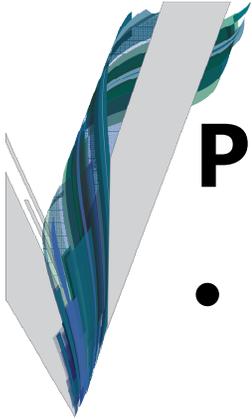
- The primary duty is the performance of work which requires either:
 1. Knowledge of an advance type or field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 2. Invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

- **Salary Test**

- \$455 per week?
- Salaried?

- **Two Types of Professional Exemptions**

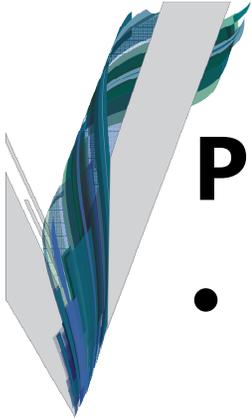
1. Learned Professional
2. Creative Professional



Professional Exemption (cont.)

- **Learned Professional**

- The work must require advanced knowledge
 - Intellectual in character
 - Requires consistent discretion and independent judgment
 - Not routine mental, manual, or mechanical work
- Usually acquired through prolonged specialized study
 - Specialized degree or period of instruction
- Common examples
 - Lawyers
 - Doctors
 - Pharmacists
 - Registered Nurses
 - Physician Assistants
 - Chefs
 - Athletic Trainers



Professional Exemption (cont.)

- **Creative Professional**

- The employee's primary duty must require invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
 - Not routine mental, manual, or mechanical work
- A recognized field of artistic creative endeavor
 - Original and creative in character
 - Not mere reproduction by an employee with ability and training
 - E.g., music, writing, acting, graphic design



Computer Professional Exemption

- **Duty Test**

- The primary duty must consist of:

- Application of systems analysis techniques and procedures, e.g., consulting with users to diagnose and fix IT problems;
- Design, development, analysis, testing, or modification of computer systems or programs, e.g., creating prototypes or design specifications;
- Design, testing, creation, or modification of computer programs related to machine operating systems; or
- A combination of any of the above, as long as the duty requires the same skill level



Computer Professional Exemption (cont.)

- **Salary Test**

- Unlike other exemptions, allows for hourly rate:
 - \$455 or more per week and on salary basis; or
 - \$27.63 or more per hour
- Proposed changes would not effect computer professionals who are paid on an hourly basis



Highly Compensated Employees Exemption

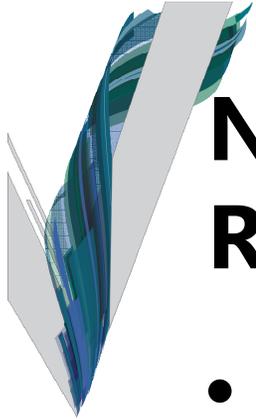
- **Current Requirements**

- Annual compensation of at least \$100,000;
- Compensation includes at least \$455 per week in salary;
- The employee's primary duty includes performing office or non-manual work; *and*
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt, administrative, or professional employee.



Highly Compensated Employees Exemption (cont.)

- **Proposed Changes**
 - Annual compensation of at least \$122,148;
 - Compensation includes at least \$970 per week in salary



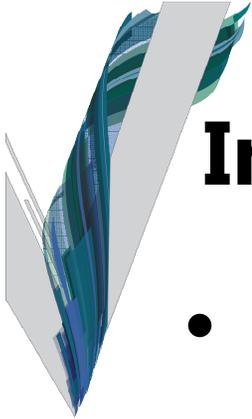
Next Steps in Light of Proposed Regulations

- Examine classifications to determine compliance with current regulations
- Identify employee classifications likely to be affected by proposed regulations
 - Options
- Silver lining?



Independent Contractors

- **July 15, 2015 DOL Administrator's Interpretation**
 - “. . . most workers are employees under the FLSA.”
 - “The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself.”
 - Proper test to determine classification is economic realities test, not common law control test



Independent Contractor (cont.)

- **Desire or intention of parties is irrelevant to the determination**
 - “an agreement between an employer and a worker designating or labeling the worker as an independent contractor ***is not indicative*** of the economic realities of the working relationship and ***is not relevant*** to the analysis of the worker’s status”



Independent Contractors (cont.)

- **Three-Prong Test**

- 1. Financial Control**

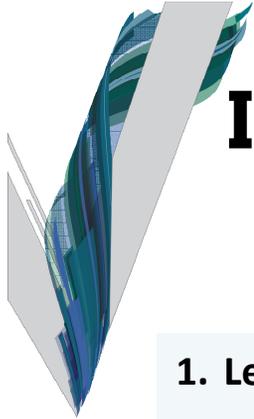
- Unreimbursed business expenses
- Worker's investment in the facilities or tools used in services
- Worker makes his or her services available to the relevant market
- How the business pays the worker
- The extent to which the worker can realize a profit or incur a loss

- 2. Behavioral Control**

- Right to direct and control what work is accomplished
- How the work is done, through instructions, training, or other means

- 3. Type of Relationship**

- Written contracts describing the relationship
- Employee benefits, e.g., insurance, pension, vacation, or sick pay
- The permanency of the relationship
- Are services performed by the worker a key aspect of the business?



Independent Contractors (cont.)

IRS 20 FACTOR TEST

1. Level of instruction	2. Amount of training	3. Degree of business integration
4. Extent of personal services	5. Control of assistants	6. Continuity of relationship
7. Flexibility of schedule	8. Demands for full - time work	9. Need for on-site services
10. Sequence of work	11. Requirements for reports	12. Method of payment
13. Payment of expenses	14. Provision of tools and materials	15. Investment in facilities
16. Realization of profit or loss	17. Work for multiple companies	18. Availability to public
19. Control over discharge	20. Right of termination	



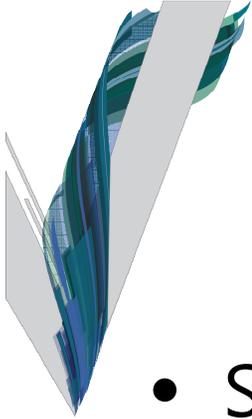
Independent Contractors (cont.)

- **Economic Realities Test (No one factor is dispositive):**
 - Integral to Business
 - Control
 - Relative Investments
 - Opportunity for Profit/Loss
 - Specialized Skill & Initiative
 - Permanency or Indefiniteness of Relationship



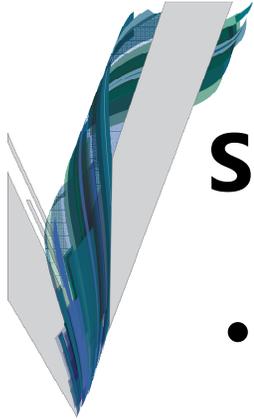
Independent Contractors (cont.)

- Consequences of Misclassification
 - income tax liability for monies that should have been withheld
 - employer's contributions of social security and federal unemployment taxes
 - potential overtime pay and/or other wage claim liability
 - state unemployment insurance payments
 - workers' compensation insurance premiums (and potential liability for workplace injuries)
 - potential entitlement to benefits under applicable employee benefit plans



Independent Contractors (cont.)

- Silver lining?
 - Opportunity to reevaluate current independent contractor agreements
 - “Just” an administrative opinion



Salary Test Deductions

- **Permissible Deductions from Salary**
 - Absences for personal reasons, i.e., not sickness or disability
 - Deductions for sickness or disability absences pursuant to a bona fide sick plan
 - Penalties for major safety rule violations*
 - Disciplinary suspensions for one or more full workdays
- ***State-by-State Payroll Deduction Rules**
 - In general, very strict civil penalties for deducting employees' pay
 - E.g., payroll deductions for damaged property are typically illegal



Salary Test Deductions (cont.)

- **Consequences of Impermissible Deductions**
 - “Actual Practice” of making improper deductions?
 - Number of improper deductions
 - Time period of improper deductions
 - Existence/absence of clearly communicated policy regarding improper deductions
 - If “actual practice”
 - Salary test is not satisfied for the time period in which the “actual practice” occurred for employees in the same job classification and working for the same managers responsible for the improper deductions
 - Affected employees will not be deemed to have earned \$455 per week



Salary Test Deductions (cont.)

- **Safe Harbor Provision**

- No consequences for improper deductions if:
 - There is a clearly communicated policy prohibiting improper deductions, including internal complaint procedure;
 - The employer reimburses employees for improper deductions; and
 - The employer makes a good faith commitment to future compliance.
- No safe harbor available if the employer willfully makes improper deductions after notice, e.g., receipt of an employee complaint



Importance of Written Job Descriptions

- **In addition to W & H benefits:**
 - Tool for employee selection, training, and evaluation
 - Pay equity/compensation analysis
 - ADA accommodation process
 - FMLA compliance
- **W & H benefits**
 - Enables efficient auditing of exempt status
 - Value in litigation
 - Proof of primary duties and responsibilities
 - “Admission” by employee
 - Evidence of “good faith”



Importance of Written Job Descriptions

- **Content of Job Descriptions**
 - Job title
 - Job objective and purpose
 - List of duties and responsibilities
 - Essential functions
 - Non-essential functions
 - Location
 - Relationships and roles
 - Compensation information
 - Exempt/non-exempt
 - Grade, band, or range
 - Physical requirements
 - Qualifications – “KSAs”



Importance of Written Job Descriptions

- **Process.**

- Samples for similar jobs
- Template for creation/refinement
 - Structured questions
 - Log of activities over measured time
- Subject matter expert
 - Supervisor input
 - Incumbent input
- I/O psychologist – job analysis

- **Periodic review**

- Slippage
- Accretion
- Annual changes to “salary basis threshold”



Managing Non-Exempt Overtime

- **Robust time and attendance system**
 - Recordkeeping responsibilities
 - Time in, time out
 - Lunch and breaks
- **Employee time certification**
- **Overtime policy**
 - No overtime unless prior approval
 - Pay unapproved overtime – but potential discipline
 - Report violations without fear of retaliation
- **Management training**
 - No “off the clock work” – ever
 - Potential personal liability



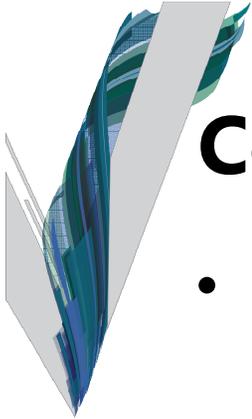
“Compensable” Time for NE Employees

- **Concept of “time worked” is complex.**
 - **Travel time**
 - **Rest and meal breaks**
 - **Sleep time**
 - **Waiting time**
 - **“On-call” time**
 - **Training/education time**
 - **“Device” time**
 - **Pre- and post-shift activities**



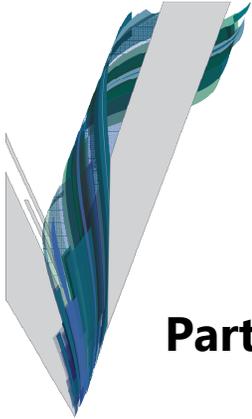
Compliance Tips and Strategies

- **Conduct a Wage and Hour Audit**
 - Attorney-client privilege
 - “Good faith” defense against enhanced damages
- **Scope of Audit**
 - **Exempt job classifications**
 - Compensation arrangement
 - Duties test
 - Deductions from pay
 - **Non-exempt pay practices**
 - Working time
 - Deductions
 - Regular rate calculation for OT
 - “Fluctuating” workweek
 - **Recordkeeping, posters, policies, notices**
 - **Independent contractor arrangements**
 - **State law “wage payment” compliance**



Compliance Tips and Strategies

- **Voluntarily corrective action**
 - **Modify policies and practices**
 - **Prospective change in employee's classification**
 - **Change in duties**
 - **Change in compensation**
 - **Retroactive pay adjustment**
 - **Timing considerations**
 - **Accuracy of records**
 - **Packaging the message**
 - **Supervisor training**



Questions?

**Jeffrey S. Tenenbaum, Esq.,
Partner and Chair of the Nonprofit Organizations Practice, Venable LLP**

JSTenenbaum@Venable.com

t 202.344.8138

Todd J. Horn, Esq., Partner, Venable LLP

THorn@Venable.com

t 410.244.7709

Jennifer G. Prozinski, Esq., Associate, Venable LLP

JGProzinski@Venable.com

t 703.760.1973

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

Follow [@NonprofitLaw](https://twitter.com/NonprofitLaw) on Twitter for timely posts with nonprofit legal articles, alerts, upcoming and recorded speaking presentations, and relevant nonprofit news and commentary.