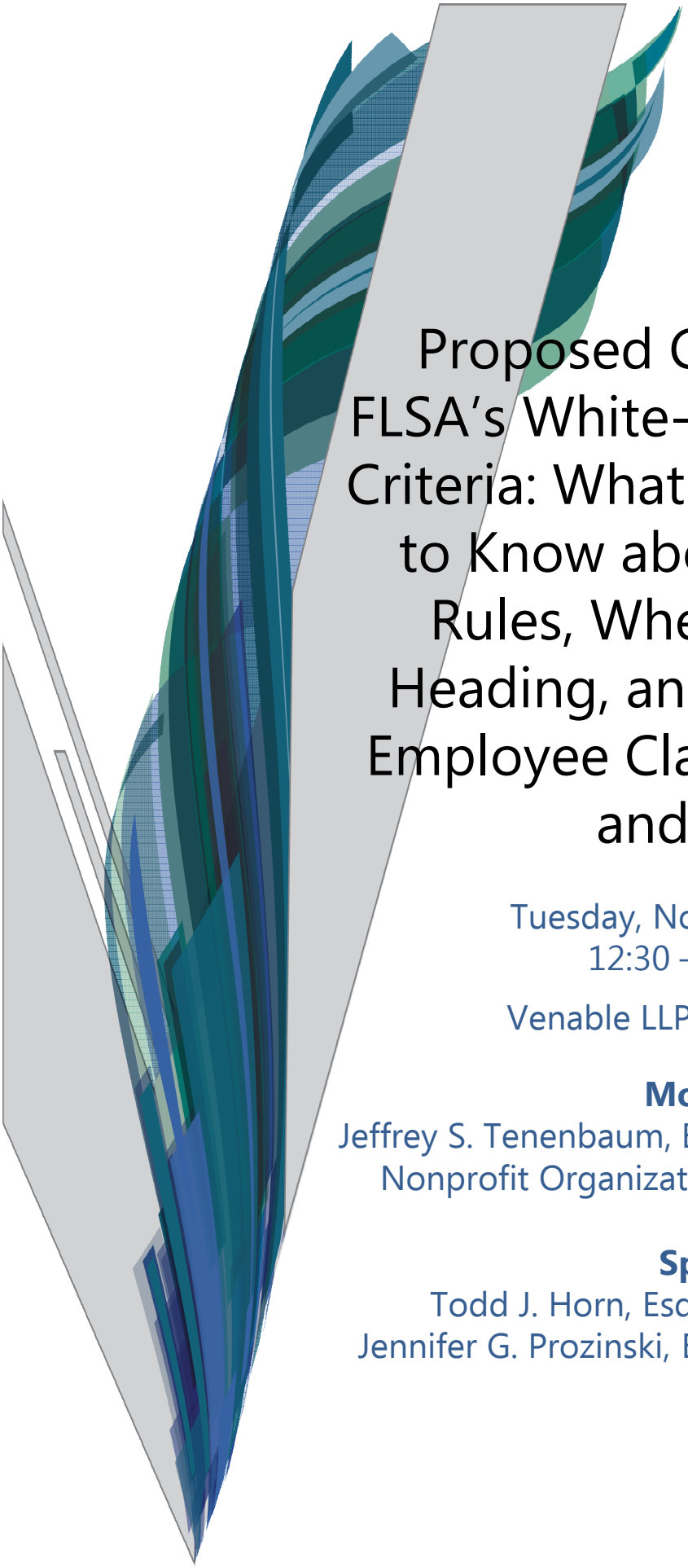

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Proposed Changes to the FLSA's White-Collar Exemption Criteria: What Nonprofits Need to Know about the Current Rules, Where Things Are Heading, and How to Avoid Employee Classification Traps and Pitfalls

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

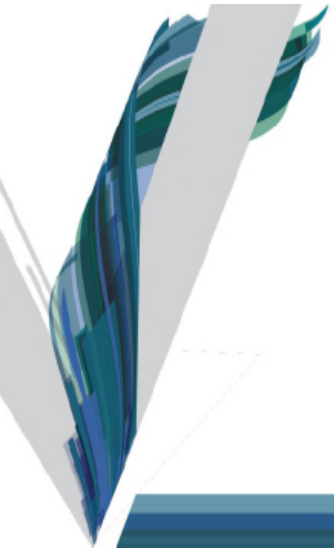
Venable LLP, Washington, DC

Moderator

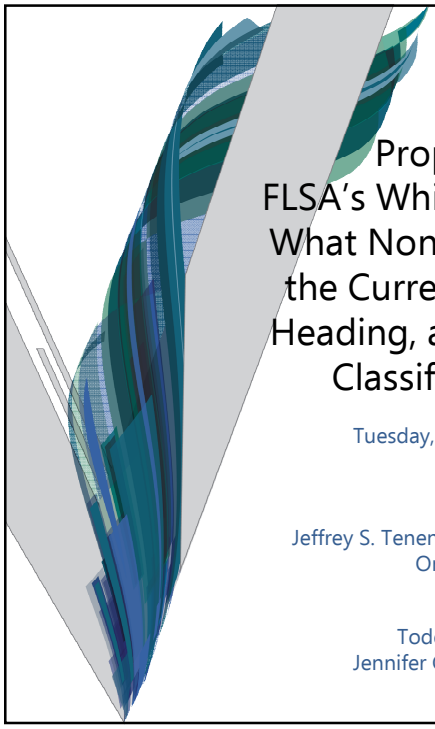
Jeffrey S. Tenenbaum, Esq., Partner and Chair of the Nonprofit Organizations Practice, Venable LLP

Speakers

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



Presentation



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Register Now

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- **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?

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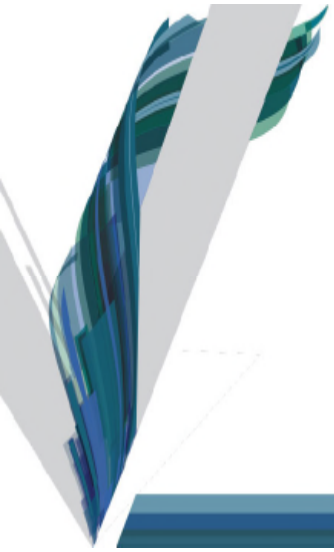

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, one of only nine in the 2014 rankings, and also one of only 10 in the 2015 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-16 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 and 2015 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

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Air Conditioning Contractors of America
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American Alliance of Museums
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American Cancer Society
American College of Cardiology

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MEMBERSHIPS

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New York Society of Association Executives

American College of Radiology
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American Friends of Yahad in Unum
American Institute of Architects
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National Association for the Education of Young Children
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National Board of Medical Examiners
National Coalition for Cancer Survivorship
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National Council of Architectural Registration Boards
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National Fallen Firefighters Foundation

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Telecommunications Industry Association
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
United States Tennis Association
University of California
Volunteers of America
Water Environment Federation
Water For People

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-16

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-15

Served as member of the selection panel for the inaugural *CEO Update* Association Leadership Awards, 2014

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

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Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association

Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.

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With over 25 years of courtroom experience in employment cases, Todd Horn was selected as Maryland's "Lawyer of the Year" for Employment Law in 2011 by the peer-review publication, *Best Lawyers in America*.

Mr. Horn also co-authors the comprehensive legal treatise, *Maryland Employment Law* (Lexis 2013), a book that Federal and State Courts have cited as a leading reference for over two decades.

Focusing on employment law, Mr. Horn ranks as a top "Band 1" lawyer by *Chambers USA*, which reported that he "is admired as a fantastic litigator – one of the best in the courtroom, with a tremendous presence," is "very professional and efficient," and is "particularly sought out for high-stakes litigation."

After a four-week jury trial in 2013, Mr. Horn and his team obtained a defense verdict in a 13-plantiff, multi-million dollar age discrimination lawsuit. Mr. Horn regularly handles cases involving "whistleblowing," discrimination, compensation, disability accommodations, retaliation, sexual harassment, ERISA, wrongful discharge, and defamation.

Mr. Horn also has significant experience successfully defending employers in "class action" wage and hour lawsuits under the Fair Labor Standards Act (FLSA) and Maryland law. He litigated one of the only cases in Maryland resulting in the complete denial of class certification under the FLSA. *Syrja v. Westat, Inc.*, 756 F. Supp. 2d 682 (D. Md. 2010).

Mr. Horn also helps his clients avoid employee lawsuits and obtain strategic advantages in sensitive investigations, workforce reductions/reorganizations, disgruntled employee issues, and ADA/FMLA compliance.

SIGNIFICANT MATTERS

Mr. Horn regularly represents Fortune 500 companies involved in employment-related litigation in the Washington, DC - Baltimore region. His experience covers a wide range of industries including healthcare, government contractors, financial, retail, hospitality, construction, biotechnology, food service and telecommunications.

Mr. Horn served as a lead defense counsel in one of the nation's largest employment-discrimination class-action lawsuits. His other cases include:

Adedje v. Westat, Inc., 214 Md. App. 1 (2013).

Rashad v. WMATA, 945 F. Supp. 2d 152 (D.D.C. 2013).

Walters v. Transwestern Carey Winston, LLC, 2012 U.S. Dist. LEXIS 60380 (D. Md. 2012).

Panagodimos v. CNS, Inc., 2012 U.S. Dist. LEXIS 31013 (D. Md. 2012).

Mwabira-Simera v. Sodexho Marriott, 786 F. Supp. 2d 395 (D.D.C. 2011).

EEOC v. WSSC, 631 F.3d 174 (4th Cir. 2011).

AREAS OF PRACTICE

Labor and Employment

Healthcare - Labor and Employment Law

Financial Services Wage Compliance

Healthcare Cost Reduction

Regulatory

Global Labor and Employment Capabilities

INDUSTRIES

Life Sciences

BAR ADMISSIONS

Maryland

District of Columbia

COURT ADMISSIONS

U.S. Court of Appeals for the D.C. Circuit

U.S. Court of Appeals for the Third Circuit

U.S. Court of Appeals for the Fourth Circuit

U.S. District Court for the District of Columbia

U.S. District Court for the District

of Maryland

U.S. Supreme Court

EDUCATION

J.D., William and Mary Marshall-Wythe School of Law, 1987

Moot Court

B.S., Economics, *with honors*, University of Mary Washington, 1984

Phi Beta Kappa

MEMBERSHIPS

American Bar Association, Sections of Labor and Employment Law and Litigation

Maryland State Bar Association

Maryland Association of Defense Trial Counsel

Syrja v. Westat, Inc., 756 F. Supp. 2d 682 (D. Md. 2010).

Smith v. Westat, Inc., 09-CV-140-CAP (N.D. Ga. 2009).

Montgomery v. General Dynamics, 2008 WL 4546262 (S.D. Ohio 2008).

King v. Marriott International, Inc., 160 Md. App. 689, 866 A.2d 895 (2005).

Covance Laboratories, Inc. v. Orantes, 338 F. Supp. 2d 613 (D. Md. 2004).

Sherman v. Marriott Hotel Services, Inc., 317 F. Supp. 2d 609 (D. Md. 2004).

Higgins v. Food Lion, Inc., 197 F. Supp. 2d 364 (D. Md. 2002).

King v. Marriott International, Inc., 337 F.3d 421 (4th Cir. 2003).

Arbabi v. Fred Meyers, Inc., 205 F. Supp. 2d 462 (D. Md. 2002).

Lane v. Wal-Mart Stores, Inc., 2000 U.S. Dist. LEXIS 13935 (D. Md. 2002).

Aheart v. Sodexho, Inc ., 2000 U.S. App. LEXIS 7779 (4th Cir. 2000).

Hogue v. Sam's Club, Inc., 114 F. Supp. 2d 389 (D. Md. 2000).

Gedeon v. Host Marriott Corp., 1998 U.S. App. LEXIS 16903 (4th Cir. 1998).

Milton v. IIT Research Institute, 138 F.3d 519 (4th Cir. 1998).

Farasat v. Paulikas, 32 F. Supp. 2d 249; (D. Md. 1998), aff'd, 166 F.3d 1208 (4th Cir. 1998).

Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1997).

Steinacker v. National Aquarium, 114 F.3d 1177 (4th Cir. 1997).

Spriggs v. Citibank (Md.), N.A., 103 F.3d 120 (4th Cir. 1996).

Gaskins v. Marshall Craft Associates, Inc., 110 Md. App. 705 (1996).

Webb v. Baxter Healthcare Corp., 57 F.3d 1067 (4th Cir. 1995).

Borza v. Hallmark Cards, Inc., 45 F.3d 425 (4th Cir. 1995).

Fusco v. GE Government Services, Inc., 897 F. Supp. 926 (D. Md. 1995).

Glocker v. W.R. Grace, Inc., 68 F.3d 460 (4th Cir. 1995).

Riggle v. CSX Transportation, Inc., 755 F. Supp. 676 (D. Md. 1991).

HONORS

Recognized in *Chambers USA* (Band 1), Labor and Employment, Maryland, 2007 - 2015

Recognized in *Chambers USA* (Band 2), Employment: Mainly Defendant, Maryland, 2006

Named "Lawyer of the Year" in *The Best Lawyers in America* for Employment Law - Management in Baltimore, 2016 (Woodward/White, Inc.)

Listed in *The Best Lawyers in America* for Employment Law - Management and Litigation - Labor and Employment, 2009 - 2016 (Woodward/White, Inc.)

Recognized in *Super Lawyers Business Edition*, Employment and Labor, Baltimore, 2013

Selected for inclusion in *Maryland Super Lawyers*, 2009 - 2015

Named Baltimore Labor and Employment "Lawyer of the Year," *Best Lawyers*, 2011

Leadership in Law Award, *The Daily Record*, 2006

AV® Peer-Review Rated by *Martindale-Hubbell*

Sodexho, Inc., one of the largest companies in the United States, recognized Mr. Horn and his litigation team as an "outstanding large firm outside counsel"

Named as one of Maryland's Legal Elite by *Baltimore SmartCEO* magazine in 2006

While in high school, Mr. Horn earned the rank of Eagle Scout

ACTIVITIES

Mr. Horn provides employment advice *pro bono* to charities and nonprofit organizations and is a board member of Advocates for Children and Youth.

In 2005, he coached the University of Maryland School of Law's trial advocacy team in the ABA's Labor and Employment Law Section's Student Trial Advocacy Competition.

PUBLICATIONS

In addition to co-writing the legal treatise *Maryland Employment Law*, Mr. Horn also has been a contributing author to *Employment Discrimination Law*, the official book of the American Bar Association on this subject. It has been cited by the courts of every circuit and the U.S. Supreme Court.

- October, 2014, Labor Pains: Ebola at Work, Labor & Employment News Alert
- September 17, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate
- July 1, 2014, Storming the Castle: Employee Whistleblowing Under ACA, *Law360*
- May 2014, Labor Pains: The $2 Million Part-Time Employee, Labor & Employment News Alert
- March 2014, A SOX in the Gut: Supreme Court Vastly Expands Workplace "Whistleblower" Law, SEC Update
- February 2014, Trojan Horse Privacy Laws: Facebook Snooping, Labor & Employment News Alert
- February 2014, Labor Pains: GINA's Turning 6, and She's Learned How to Sue!, Labor & Employment News Alert
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- June 26, 2009, Maryland Employment Law, Second Edition Updated with 2009 Supplement
- January 1, 2006, The Meteoric Rise of Wage and Hour Class Actions (and How Your Company Can Avoid Them), *Bloomberg Corporate Law Journal*
- August 2005, By-Passing the Jury Through Mediation or Arbitration, *Baltimore SmartCEO*
- September 2, 2005, Release Agreements Protect You from Laid-Off Employees with a Grudge, *Baltimore Business Journal*
- April 1, 1999, A Review of Significant Court Decisions Affecting Your Business
- April 1, 1999, Hearing Bells and Whistles: An Employer's Guide to Avoiding Retaliation Claims

SPEAKING ENGAGEMENTS

Mr. Horn conducts seminars covering the maze of state and federal employment laws. His dynamic presentations assist employers in complying with the expanding landscape of personnel laws and help minimize the risk of employee lawsuits at all phases of the employment relationship – from recruitment to exit interview.

Topics of his presentations include:

- accommodating employees' disabilities under the Americans with Disabilities Act
- affirmative action requirements under the Office of Federal Contract Compliance Programs regulations
- employee discipline and termination
- interviewing techniques and pitfalls
- leave issues under the Family and Medical Leave Act
- reductions in force under the federal WARN Act and the Older Workers Benefit Protection Act
- sexual harassment prevention and investigation

- wage and hour and other compensation matters under the Fair Labor Standards Act
- November 17, 2015, 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
- December 11, 2014, LGBT, Religion, and Diversity in the Nonprofit Workplace
- September 16, 2014, What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate
- May 14, 2014, What's Ahead for 2015: Preparing Your Group Health Plan for the Employer Mandate
- December 16, 2008, "New and Revised Rules Under the Family and Medical Leave Act: What Employers Need to Know," presentation as part of Venable's Breakfast Briefing – Big Changes Coming to Labor and Employer Law
- March 22, 2006, ACC - Baltimore Chapter Luncheon

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Jennifer Prozinski represents employers in a broad range of labor and employment matters. Her practice currently focuses on labor and employee benefits law. Ms. Prozinski has defended clients in employment discrimination, trade secrets, non-competition, non-solicitation, non-payment of wages, wrongful discharge, unemployment compensation appeals and labor relations cases. Ms. Prozinski also has assisted in conducting equal employment opportunity and sexual harassment training for clients and has advised clients in developing and implementing employment policies, negotiating employment contracts, strategizing for lay-offs, negotiating employment and service contracts, and negotiating severance and settlement agreements.

AREAS OF PRACTICE

Labor and Employment

Financial Services Wage Compliance

BAR ADMISSIONS

Virginia

Maryland (inactive)

District of Columbia (inactive)

COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit

EDUCATION

J.D., *magna cum laude*, Catholic University of America, Columbus School of Law, 1998

B.A., Virginia Polytechnic Institute and State University, 1992

SIGNIFICANT MATTERS

Ms. Prozinski participated in the defense of a client that resulted in the denial of certain pension benefits for the employer's retirees.

PUBLICATIONS

Ms. Prozinski has written articles and lectured on various labor and employment issues including, the Fair Labor Standards Act, the Family Medical Leave Act, the Workers Adjustment and Retraining Notification Act, employee benefits and employee handbooks.

- October 28, 2015, For Advertising Employers, NLRA Giveth And FTC Taketh Away, *Law360*
- June 18, 2015, What to Do When Applicants Are Untruthful During the Hiring Process: Lessons for Nonprofits from the Spokane NAACP Case

SPEAKING ENGAGEMENTS

- November 17, 2015, 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

Additional Information

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ARTICLES

August 20, 2015

SECOND CIRCUIT GIVES A THUMBS-DOWN TO PRIVATE SETTLEMENT AGREEMENTS: WHAT NONPROFITS NEED TO KNOW BEFORE SETTLING FEDERAL WAGE AND HOUR CLAIMS

AUTHORS

Nicholas M. Reiter
Brian J. Turoff
Jeffrey S. Tenenbaum

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*This article appeared in **Association TRENDS** on August 27, 2015.*

Nonprofit employers sometimes struggle with whether to seek judicial or U.S. Department of Labor approval of their settlement agreements. Quite often, nonprofits and their employees alike prefer private, out-of-court settlements to maintain the confidentiality of their settlement terms and to avoid further motion practice before the court. A recent Second Circuit opinion resolved a conflict among district courts regarding the enforceability of out-of-court settlements for claims under the federal Fair Labor Standards Act (FLSA). Now, nonprofit employers that settle wage and hour claims out of court do so at their peril.

In ***Cheeks v. Freeport Pancake House, Inc.***, Case No. 14-299-cv, decided August 7, 2015, the Second Circuit held that settlement agreements for FLSA claims are unenforceable without prior approval from either a judge or the U.S. Department of Labor. The court focused on whether the FLSA constituted an "applicable federal statute" for purposes of Federal Rule of Civil Procedure 41(a)(1)(A). That rule permits parties to voluntarily dismiss a lawsuit by stipulation, subject to several other Federal Rules of Civil Procedure (none of which applied to *Cheeks*) or "any applicable federal statute."

Cheeks concluded that the FLSA meets Rule 41's definition of an applicable federal statute "in light of the unique policy considerations" for the law. The court cited a 1945 U.S. Supreme Court opinion holding that the FLSA was intended "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." It further cited its own precedent, explaining that Congress designed the FLSA "to remedy the evil of overwork by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime." With these principles in mind, the court determined that prior judicial or U.S. Department of Labor approval of settlement agreements is mandatory for federal wage and hour claims, because the FLSA qualifies as an "applicable federal statute" under Rule 41.

The *Cheeks* opinion is notable for several reasons. First, *both* the plaintiff and the defendants in *Cheeks* sought a private out-of-court settlement agreement, yet the district judge still demanded the parties file their settlement agreement on the court's public docket. Second, the Second Circuit expressly voiced its disapproval of global releases involving "unknown claims and claims that have no relationship whatsoever to wage-and-hour issues." Third, the court offered little guidance, beyond the remedial purpose of the FLSA, on why the law met the definition of "an applicable federal statute" under Rule 41, thereby leaving open the door for applying the same approval requirement to settlement agreements involving non-FLSA claims.

Time will tell whether *Cheeks* will pave the way for mandatory judicial approval of settlements arising under other federal employment laws, and, if so, whether global release agreements will become a thing of the past. For now, when negotiating settlements of FLSA claims, nonprofit employers should take into account that their settlement agreement will likely be a matter of public record, and they may be prohibited from obtaining a global release of claims. Of course, the best course of action is to avoid the FLSA claim in the first place. Accordingly, *Cheeks* provides a strong reminder to nonprofits to routinely review their wage and hour policies and practices and to consult with employment/human resource professionals as appropriate.

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ARTICLES

July 2, 2015

U.S. DEPARTMENT OF LABOR PROPOSES SWEEPING CHANGES TO FLSA OVERTIME EXEMPTION CRITERIA: THE IMPLICATIONS FOR NONPROFIT EMPLOYERS

AUTHORS

Brian J. Turoff
David A. Katz
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On June 30, 2015, the U.S. Department of Labor (DOL) made public its much-anticipated **proposed** changes to the executive, administrative, professional, computer, and outside sales employee exemptions under the Fair Labor Standards Act (FLSA), commonly referred to as the "white collar" exemptions. These proposals stem from President Obama's March 2014 **memorandum** to the U.S. Secretary of Labor, characterizing the current white collar exemptions as "outdated" and out of step with "our modern economy." If adopted, the proposals, described below, will have a profound impact on nonprofit employers' ability to treat certain employees as exempt from receiving overtime compensation.

The Current Framework

Generally, the **FLSA** requires nonprofits to pay their nonexempt employees an hourly rate at least one-and-a-half times their regular hourly rate for time worked in excess of 40 hours in a workweek. Certain "white collar" workers, namely those employed in a "*bona fide* executive, administrative, or professional capacity," may, under certain circumstances, be considered to be exempt from this overtime requirement. This exemption also can extend to individuals employed in "outside sales" positions, and in certain computer-related occupations. The FLSA also features additional **exemptions** not discussed in this article.

At present, in order to properly treat an employee as exempt under one of the FLSA's white collar exemptions, (i) the employee must be compensated on a salary basis at a rate of at least $455 per week, and (ii) the employee's primary job duties must fall within the substantive parameters of one of the above-noted exemption categories. This latter criterion requires a fact-intensive assessment regarding the nature of the employee's work and specific job responsibilities. An employee's job title does not determine whether the employee falls within a given white collar exemption.

It is important to note that the FLSA's current $455 salary threshold merely sets a floor that states are free to—and, in some cases, do—exceed. For example, the minimum weekly salary threshold required to treat an employee as exempt is $720 in California (rising to $800 in 2016), $475 in Connecticut, and $656.25 in New York (rising to $675 in 2016).

The Proposed Regulations

The DOL's proposed revisions dramatically increase the FLSA's minimum salary threshold. Specifically, under the proposal, the current $455 per week threshold—which translates to an annual salary of $23,660—will more than *double*, rising to $970 per week, for a minimum annual salary of at least $50,440 for an exempt white collar employee. This materially exceeds the current state-level minimum salary thresholds for every state.

Importantly, under the proposed regulations, the $970 salary threshold would automatically update based on inflation and wage growth over time, though the DOL will solicit comments regarding the precise methodology to be used. The DOL estimates that, in the first year of implementation, over 4.5 million white collar workers who are currently exempt could become newly entitled to FLSA overtime rights, absent any intervening action by their employers.

At present, the DOL has not proposed any specific regulatory changes to the existing "primary duty" test, but will continue to assess this possibility.

What Does This Mean for Nonprofit Employers?

The proposed regulations obviously will have a significant impact on employers of all sizes, nonprofit and for-profit alike. While the final regulations likely will not formally become effective until 2016, nonprofits should not wait to begin taking proactive steps. For example, while employers may consider

raising salaries for positions that fall below the new $970 per week threshold, they also may consider implementing scheduling changes that would limit their overtime costs. Employers are also well advised to assess their time and recordkeeping procedures, given the likelihood that certain currently exempt employees may no longer be exempt upon implementation of the final regulations.

VENABLE® LLP

ARTICLES

July 25, 2011

A NONPROFIT'S GUIDE TO PROPERLY CHARACTERIZING WORKERS AS EMPLOYEES, INTERNS AND VOLUNTEERS

AUTHORS

Jeffrey S. Tenenbaum
Nicholas M. Reiter

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For many nonprofits, the savings that come from not paying wages, benefits and taxes provide a great incentive to classify workers as interns or volunteers. But for the nonprofits that inappropriately classify workers as interns or volunteers, those misclassifications can lead to lengthy governmental investigations or costly lawsuits, including class action litigation. The consequences are serious – oftentimes financially crippling – administrative penalties or damage awards, which typically include, among other things, payments for back wages, interest on those wages, liquidated damages (meant to punish employers for non-compliance), attorneys' fees, and unpaid taxes and unemployment insurance contributions, not to mention criminal charges for nonprofit executives and others making personnel decisions. With federal and state agencies, as well as plaintiffs' attorneys, paying close attention to these issues, now more than ever is the time for nonprofits to ensure that they have properly classified their workers as interns or volunteers.

Workers as "Interns"

Many nonprofit organizations offer unpaid internships to students seeking entry into the workforce or the nonprofit sector. Under federal wage and hour law, there is no blanket provision exempting all interns or nonprofits from the law's grasp, yet unpaid interns abound. In light of this, nonprofit organizations must ask themselves: Should unpaid interns really be paid? The answer in some instances is, yes.

When determining whether federal wage and hour law requires an intern to be paid, an organization must first determine whether the federal Fair Labor Standards Act (the "FLSA") applies. An intern will fall within the purview of the FLSA if he or she engages in interstate commerce, the production of goods for interstate commerce, or in any function closely related and directly essential to the production of goods for interstate commerce. The FLSA broadly defines interstate commerce to include trade, transportation, transmission, or communication between either different states or any state and any place outside such state. Accordingly, the FLSA often applies to interns who, at first glance, have no relation to traditional commercial activities. Typical examples include interns who regularly handle interstate mail and telephone calls, send or receive goods across state lines, or travel in between states during the course of their services. Additionally, the FLSA identifies several "covered enterprises" which necessarily fall under the scope of the statute, including the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education, among others.

Given the breadth of the FLSA and the abundance of unpaid interns, a frequent assumption is that there must be an exception for interns under the FLSA. Despite its commonality in the professional vernacular, however, the FLSA does not even use the term "intern." In order for federal wage protections to attach, the intern must be an employee, as defined by the FLSA. While the statutory language does not delineate between employees and interns or trainees, a U.S. Supreme Court opinion issued in 1947 and the U.S. Department of Labor's subsequent six-part test provide helpful guidance regarding the FLSA's application to interns.

In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the individuals at issue participated in a training program that was a prerequisite to employment. The U.S. Supreme Court held that employment "trainees" were not employees for purposes of the FLSA during their training period. The Court considered the "economic reality" of their training, as well as the circumstances surrounding the training, and concluded that the training program neither contemplated compensation for the trainees nor provided the employer an immediate or direct advantage.

Following *Walling*, the U.S. Department of Labor ("DOL") issued a six-part test to help determine whether an individual is a trainee, as opposed to an employee requiring compensation. According to the DOL, if *all* of the following criteria apply, the trainees are not employees within the meaning of the

FLSA and need not be paid:

. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
. The training is for the benefit of the trainees;
. The trainees do not displace regular employees, but they do work under regular employees' close supervision;
. The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations may actually be impeded;
. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
. The employer and the trainees understand that the trainees are not entitled to wages for the time spent training. (Note that as an exception to this criterion, tuition assistance and nominal stipends for students are not considered wages.)

While this test is consistent with judicial interpretations, most courts do not hold that all six criteria must be met. Instead, they follow *Walling* and analyze the economic reality of the training, focusing primarily on whether there was an expectation or contemplation of compensation and whether the employer received an immediate advantage from work completed. Common examples of when an intern will *not* be considered a trainee include:

- The employer uses the intern as a substitute for regular workers or as a supplement to its current workforce;
- If not for the intern, the employer would have hired additional employees or asked its existing staff to work additional hours; or
- The intern is engaged in the employer's routine operations and/or the employer is dependent upon the intern's work.

However, an intern *will* be considered a trainee when the internship is part of an academic experience (*e.g.*, when an intern receives academic credit from his educational institution for completion of the internship).

Workers as "Volunteers"

Nonprofit organizations also need not compensate their "volunteers." Although the FLSA only defines "volunteers" with respect to state or local government agencies, the U.S. Department of Labor's Wage and Hour Division ("DOL-WHD") nevertheless looks to the FLSA's definition for guidance when considering whether an individual qualifies as a volunteer at a nonprofit organization. Under the FLSA, an individual is a volunteer so long as (1) he or she receives no compensation apart from expenses and/or a nominal fee to perform services for which he or she volunteered, and (2) such services are not the same type of services for which the individual is employed. In particular, the DOL-WHD will consider whether the individual had a clear understanding prior to providing services that he or she would not be compensated for his or her services and that such services were offered without pressure or coercion from the nonprofit organization. In the event of a private lawsuit, courts will lend credence to the DOL-WHD's interpretation of whether an individual is a volunteer, especially in light of the lack of statutory authority regarding workers in the nonprofit sector. However, only nonprofit organizations may take advantage of this "volunteer" exception. For-profit employers must comply with all federal wage laws, regardless of whether their workers are willing to perform services on a volunteer basis.

DOL-WHD investigators and federal and state courts will likely determine that workers fall outside the definition of volunteer if they work a full-time schedule and perform substantially the same activities as paid employees. The limited guidance currently available suggests that the definition of volunteer contemplates individuals performing humanitarian services on a part-time basis. In this context, examples of "volunteers" include individuals who help distribute food at a homeless shelter on the weekends, participate in a big-brother/sister program, or drive a vehicle to help provide transportation for a nonprofit organization's field trip.

The more common scenario encountered by nonprofits involves employees who volunteer to perform services on behalf of their nonprofit employers. Fortunately, nonprofit organizations may allow their employees to serve as volunteers so long as the voluntary activities occur outside regular working hours and are not similar to the employees' regular duties. The same considerations regarding the expectation of compensation and whether the services were offered without pressure or coercion from the nonprofit organization apply in this context.

* * * * *

In light of several recent indications from the DOL, nonprofit organizations can expect and should stay tuned for further guidance from the DOL related to whether their unpaid interns are exempt from minimum wage laws. Nonprofit organizations should be mindful that state wage and hour laws often vary from their federal counterpart and may call for a different conclusion. To ensure jurisdictional compliance, it is recommended that nonprofits consult with legal counsel.

*For more information, please contact Jeff Tenenbaum at **jstenenbaum@Venable.com**, Kristine Sova at **kasova@Venable.com**, or Nick Reiter at **nmreiter@Venable.com**.*

VENABLE® LLP

ARTICLES

December 19, 2008

NAVIGATING THE WAGE AND HOUR LAW MAZE OF UNPAID INTERNSHIPS AT NONPROFIT ORGANIZATIONS

AUTHORS

Michael J. Volpe
Megan H. Mann

RELATED PRACTICES

Labor and Employment
Financial Services Wage Compliance

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Association TRENDS

Published in *Association Trends, Perspectives on Association Management, Far Sight - The F&A Roundtable Report,* and *Sector - Maryland Nonprofits' Member Newsletter*

An overwhelming number of nonprofit organizations offer unpaid internships to students seeking an entree into the workforce and nonprofit sector. Often overlooked, however, is the fact that interns come with legislative strings attached, including federal and state wage and hour laws. These laws require, among other things, payment of a minimum wage for work performed by an individual. Moreover, under federal wage and hour law, there is no blanket provision exempting all interns or nonprofits from the law's grasp, yet unpaid interns abound. This begs the question: *Should unpaid interns really be paid?* The answer in some instances is, yes.

When determining whether federal wage and hour law requires an intern to be paid, an organization must first determine whether the federal Fair Labor Standards Act ("FLSA") is even applicable to the organization and the intern. While nonprofit organizations are generally not exempt from the reaches of the FLSA, some of their activities may fall outside FLSA coverage. Specifically, the FLSA only covers organizations that conduct commercial activities.

Irrespective of an organization's activities, an intern still may be covered by the FLSA if he is engaged in interstate commerce by virtue of the work he performs, *i.e.*, regularly handling interstate mail and phone calls.

Given the breadth of the FLSA and the abundance of unpaid interns, a frequent assumption is that there must be an exception for interns under the FLSA. Despite its commonality in the professional vernacular, however, the FLSA does not even use the term "intern." In order for federal wage protections to attach, the intern must be an "employee," as defined by the FLSA. While the statutory language does not delineate between employees and interns or trainees, a case decided by the U.S. Supreme Court in 1947 and a six-part test subsequently developed by the U.S. Department of Labor provide helpful guidance regarding the FLSA's application to interns.

In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the individuals at issue participated in a training program that was a prerequisite to employment. The Supreme Court held that employment "trainees" were not employees for purposes of the FLSA during their training period. The Court considered the "economic reality" of their training as well as the circumstances surrounding the training, and concluded that the training program did not contemplate compensation, nor did the employer derive any immediate or direct advantage from the trainees' work.

Following *Walling*, the U.S. Department of Labor issued a six-part test to help determine whether an individual is a "trainee," as opposed to an employee requiring compensation. If *all* of the following criteria apply, the trainees are not employees within the meaning of the FLSA and need not be paid:

(1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainees;

(3) the trainees do no displace regular employees, but work under their close observation;

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations may actually be impeded;

(5) the trainees are not necessarily entitled to a job at the conclusion of the training period; and

(6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent training. (Note that as an exception to this criterion, tuition assistance and nominal stipends for students are not considered wages.)

While this test is consistent with judicial interpretations, most courts do not hold that all six criteria must be met. Instead, they follow *Walling*'s lead and analyze the economic reality of the training, focusing primarily on whether there was an expectation or contemplation of compensation and whether the employer received an immediate advantage from work completed.

Irrespective of their business purpose and practice, then, federal law permits nonprofit organizations to legally retain interns without offering monetary remuneration so long as the organizations are willing to devote time and energy benefitting the intern and his educational development. Organizations, however, should be mindful that state wage and hour laws often vary from their federal counterpart and may call for a different conclusion. To ensure jurisdictional compliance, it is recommended that nonprofit organizations consult with legal counsel.

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THE METEORIC RISE OF WAGE AND HOUR CLASS ACTIONS (AND HOW YOUR COMPANY CAN AVOID THEM)

*By Todd J. Horn**

Nothing stimulates the popularity of a type of lawsuit among plaintiffs' attorneys more than the prospect of swimming in an ocean of cash. When word spreads about the fortunes reaped in a specific variety of litigation (think asbestos, tobacco, pharmaceuticals), members of the plaintiffs' bar stumble over themselves to find and enlist new clients. The flavor of the month in the employment arena – or more accurately, the flavor of the last few years – has been wage and hour class actions under the Fair Labor Standards Act (FLSA). Enacted in 1937, the FLSA is the federal law that governs the manner in which organizations must compensate their employees.

Spend a few minutes on the web and you will soon lose track of the number of lawyers boasting about the vast sums they have collected from "oppressive" businesses under the wage and hour laws. Indeed, the amounts paid by some companies that lose or settle such class actions (more properly termed collective actions) is jaw-dropping. Earlier this year, a federal court in Oregon ordered a large insurance company to pay over $50 million for unpaid employee overtime, which was in addition to a $200 million settlement that the company paid to resolve similar claims in California. No industry enjoys immunity. Dozens of well-known retail chains, banks and manufacturing organizations have paid tens of millions of dollars to resolve FLSA class actions.

Not to be outdone by plaintiffs' lawyers, the U.S. Department of Labor (DOL) boasts on its website (www.dol.gov) that it has collected well over half a billion dollars from employers in wage and hour proceedings over the last three years, and the amounts it recovered in 2004 represent a "record-breaking" increase of almost fifty percent over 2001 levels. The recent spread of wage and hour lawsuits has outpaced all other forms of employment litigation. In 2001, plaintiffs filed less than four hundred FLSA lawsuits in federal courts nationwide. Three years later, the number tripled to nearly 1,100, and that figure excludes the wage and hour claims litigated in the state courts.

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NOT YOUR FATHER'S WAGE AND HOUR LAW ANYMORE

While the potential for a large financial recovery drives the proliferation of wage and hour litigation for plaintiffs' counsel, the scope and complexity of the obligations the law imposes on employers provides the fuel. The FLSA requires that most employees receive at least the minimum wage for all hours they work. Currently, federal law sets the minimum wage at $5.15; however, this hourly wage is higher in some states. Further, the FLSA also requires employers to pay its employees "time-and-a-half" in overtime pay for hours they work in excess of forty hours a week.

Various provisions of the FLSA exempt certain "salaried" employees from the minimum wage and overtime requirements. These exempted employees typically work in executive, administrative and professional "white collar" positions. However, workers in certain sales and computer jobs may also qualify. In order to qualify as an "exempt" white collar employee, she generally must be paid on a "salary basis" at not less than $455 per week and satisfy certain tests regarding the managerial, professional or executive duties she performs. The Wage and Hour Division of the Department of Labor (WHD) administered and enforces the FLSA, but individual or groups of employees also can sue their employers for FLSA violations.

While these seemingly innocuous provisions lie at the heart of the FLSA, intervening amendments, regulations and judicial interpretations over the last sixty years have spun a complex web of obligations and prohibitions that touch every aspect of an employer's compensation practices and can challenge even the most conscientious employer. In fact, the regulations and explanatory information the WHD published in 2004 dealing with certain exemptions spans over 90 single-space pages.

If you want to lose sleep tonight, ask your managers the following questions (along with the requisite "please explain your answer" to eliminate any guessing):

1. What happens if you dock the pay of an exempt manager for the five hours he left early one day to play in a poker tournament, and how does this manager's vacation or "paid time off" bank impact your answer?
2. An hourly (*i.e.*, non-exempt) employee who generally works 9:00 a.m. to 5:00 p.m. Monday through Friday leaves work on Friday at 3:00 p.m. for a one-hour drive to the airport, followed by a three-hour flight. He has a business meeting from 4:00 p.m. to 7:00 p.m. on Saturday, followed by a three-hour flight back home on Sunday beginning at 3:00 p.m. and a one-hour drive to his home where he arrives 7:00 p.m. What hours, if any, are compensable?

3. If you have a policy that prohibits working overtime without the written permission of the division head, do you have to pay an employee if he works overtime without this written permission?
4. Are "assistant managers" who receive a $1,000 a week salary exempt from overtime under the FLSA?
5. Are the bonuses or stock options an employee receives included in his base pay for purposes of calculating the amount of his overtime?

The circumstances surrounding of each of these examples – and countless others – have generated many expensive class actions against many companies.

Lenient Class Certification Procedures

The relative ease with which a wage and hour lawsuit can be certified as a class action is a significant reason for its popularity. Most employment disputes brought in a class action format must comply with Rule 23 of the Federal Rules of Civil Procedure. This rule requires a "rigorous analysis" of several elements concerning the nature of the putative class over which plaintiffs have the burden of proof, including numerosity, typicality, commonality, comparative efficiency, among others. Over the last few years, many courts have issued decisions elevating the procedural bar that employees must clear to maintain a discrimination class action under Rule 23. This degree of procedural hostility, however, does not exist in the wage and hour class context. Instead of satisfying the various requirements under Rule 23, a wage and hour class action can be maintained among employees of a company who are "similarly situated," a comparatively lenient standard.

After a class action is filed, the plaintiff's lawyer usually seeks from the defendant organization the names and addresses of all potential class members in order to invite them to "opt in" (*i.e.*, join the case). If the employer is large, and if the potential class covers a wide geographic area, this undertaking can be massive. As such, there is a cottage industry of organizations available to assist class counsel populate the class.

The "opt in" procedure for a wage and hour class action differs from most employment discrimination class actions, where members of the certified class are automatically bound by the judgment or approved settlement unless they affirmatively "opt out." At first blush, the FLSA's requirement that an employee affirmatively "opt in" the class action in order to participate seems to favor employers. The downside, however, is that employees who do not opt into a wage and hour class action that reaches a verdict or settlement are not bound by those results and may bring their own individual FLSA lawsuit or class action against the employer. Moreover, these employees are permitted to use the same attorneys who successfully sued the defendant company in the previous suit.

Federal wage and hour lawsuits also have a more attractive two-year statute of limitations. (The statute of limitations is three years for "willful" violations). In contrast, employees alleging employment discrimination under Title VII of the Civil Rights Act of 1964 have a maximum of three hundred days to file a charge with the federal Equal Employment Opportunity Commission, which is a required procedural step that employees must take before filing a lawsuit. A back pay award quickly hits the stratosphere if thousands of employees can prove they are owed overtime over the last three years.

It gets worse. The back wages owed by an employer who violates the FLSA automatically doubles in the form of liquidated damages, unless the employer can prove that it acted in good faith and reasonably believed that it complied with the law. Still not grim enough for you? If the employees prevail in their wage and hour lawsuit, the company gets to pay their attorneys' fees on top of the fees it pays to its own lawyer. Let's pull the shades down more. Unlike many employment laws that insulate managers from personal liability, the FLSA permits an employee, in some circumstance, to sue and recover from both her employer and the individuals who are responsible for the employer's unlawful pay practices. Feel free to use this prospect of individual liability to get the attention of your managers.

Is the employer off the hook if it accidentally, as opposed to purposefully, underpaid its employees? No. Unlike discrimination lawsuits which, with limited exceptions, require employees to prove that their employers intentionally discriminated against them, employees do not need to prove intent to recover for wage and hour violations. The employer's failure to pay the required compensation is enough.

Many companies are surprised to learn that employees cannot waive their future rights under the FLSA. As such, a document signed by an employee whereby he agrees to work without receiving overtime pay or otherwise "volunteers" his time is worthless as it is unenforceable. Moreover, in order to enforce an employee's waiver of past FLSA claims, the prevailing view is that the waiver agreement must be approved by a court or the DOL. For example, remember the employee you discharged last week who signed a general release in exchange for severance pay? He can still file a FLSA lawsuit against you.

The Golden Lever

Another reason wage and hour laws generate a great deal of class litigation is because companies usually apply the same pay practices across positions or job classifications. In other words, if a company underpays one of its technicians in a particular manner, it probably underpays its other technicians the same way. This creates a tremendous leveraging potential for a lawyer to represent all these "similarly situated" technicians.

Back pay liability escalates to staggering levels with this leveraging. Assume you have an "assistant manager" who receives $60,000 a year and typically works more than forty-five hours a week. If this "salaried" employee primarily performs manual, non-"white collar" duties, he will be deemed to be non-exempt and entitled to overtime. In this scenario, the unpaid overtime over the last three years reaches in excess of $30,000, a figure that automatically doubles to more than $60,000 unless the employer proves the "good faith" defense. Multiplying this exposure by the company's other ten, fifty or one hundred similarly-situated "assistant managers" reveals why this leveraging is so appealing to plaintiffs' attorneys who typically take a percentage of the total recovery through a contingency arrangement.

Get a Compass and Get Out of the Woods

If you are ringing your hands, pacing the floor or mopping your brow over what you have just read, take heart, you have options. Although you cannot change the circumstances if your organization is hit with a wage and hour class action today, a comprehensive audit of your compensation practices, along with the implementation of corrective measures, can: (1) reduce the risk of a wage and hour class action against you in the future; and (2) increase your chances of winning if one should land on your doorstep. Your company should consider retaining seasoned employment counsel to conduct or supervise the audit in order to maximize the chances that the evaluation of your pay practices is protected from disclosure under the attorney-client privilege if litigation ensues later.

While there are literally dozens of pay practices that generate FLSA class action lawsuits, below are some of the more prevalent topics that should receive front burner attention in your audit.

Employee Classifications. One of the most common types of FLSA class action targets employers that have misclassified non-exempt hourly employees as exempt employees. As illustrated by the "assistant manager" example above, truly non-exempt employees are entitled to overtime pay even if their employer classifies them as exempt and pays them a generous salary. The test for determining whether an employee is exempt under the FLSA is not simply whether he receives a salary; the exemption also requires satisfaction of a "duties" test. This duties test generally requires that the primary duty of the employee be managerial, administrative or professional in nature. It should be noted that the demarcation between exempt and non-exempt duties is not always a bright line, but can be a wide expanse of gray. Be aware that job titles are virtually irrelevant. Accordingly, it is essential to focus on the actual duties performed by the incumbent in the position.

Overtime Computation Methodology. Another transgression that generates class action activity is a company's failure to include all the necessary components in its calculation of overtime. An employer must base an employee's time-and-a-half overtime pay on her "regular rate of pay," which

can include forms of remuneration beyond her standard "hourly rate," such as bonuses, commissions, stock options or other monetary perquisites. For example, discretionary bonuses and payments in the nature of gifts can be excluded from this calculation, but non-discretionary bonuses must be included. This calculation can be laborious when the bonus or other remuneration included within the regular rate covers a lengthy period of time or is paid intermittently.

"Pay Docking" Practices for Exempt Employees. Review any pay docking policies – and actual practices – as they impact your organization's exempt employees. Deductions from an exempt employee's salary for partial day absences, disciplinary infractions, jury duty and in other situations may destroy the exemption not only for that employee, but also for similarly situated employees. The DOL's 2004 Regulations, supplemented by numerous recent opinion letters from the WHD, will guide the direction of your audit's inquiry on these subjects.

Calculation of Compensable Time. An active species of wage and hour litigation, especially in the class action context, involves allegations that the employer did not pay its hourly employees for all the time they spent working. The most obvious cases involve "off-the-clock" violations where employers require hourly employees to perform duties without pay either before or after they "punch the clock." Beneath the apparent simplicity of this issue is a churning sea of regulations and court opinions that analyze the circumstances under which employers must compensate hourly employees for breaks, lunches, training, "donning and doffing" uniforms or protective clothing, waiting time, on-call time and travel time.

Compensation Policies and Recordkeeping Procedures. Your audit should confirm that your organization has implemented clear and compliant wage and hour policies, and that you have provided adequate training to managerial, supervisory and human resource staffers who administer those policies. Because the wage and hour laws change and develop, make this topic part of your periodic managerial training. One point bears emphasis. Make sure your organization has adopted and disseminated to its workforce the "safe harbor" policy endorsed by the Department of Labor in its latest Regulations. A compliant policy, which is available on the DOL's website, outlines the circumstances in which pay deductions can jeopardize an employee's exempt status, provides mechanisms in which employees can report violations and explains the corrective actions an employer can take to limit the risk that any improper deductions will cause the exemption to be lost. The FLSA and its implementing regulations also mandate detailed recordkeeping requirements for non-exempt employees, and, although to a lesser extent, for exempt employees.

Independent Contractors. The audit also should review your organization's use of independent contractors to ensure that they are not, in reality, employees. Although true independent contractors (*i.e.*, the man who restocks the vending machine in your building and in other buildings

around town) are not subject to FLSA requirements with respect to your organization, merely calling someone an independent contractor will not carry the day. Although there are many factors for determining whether one is an employee or independent contractor, the chief inquiry is whether you have the right to control the means and manner in which the job is performed. If your business has a stable of "consultants" who formerly worked for you as employees performing the same duties, you may have an issue. When contractors are, in reality, employees, the prospect for unpaid overtime surfaces, as well as potential exposure for failing to pay FICA, unemployment compensation and other taxes.

The Last Word

Many organizations resist conducting wage and hour audits fearing that, if they uncover problems, taking the necessary corrective action will send up a red flag. Reclassifying exempt employees as non-exempt, for example, creates the risk that the affected employees will conclude either: (1) that you are currently violating the law; or (2) that you have previously violated the law. Unfortunately, refusing to confront potential problems with your company's compensation practices makes it easier for employees to get enhanced monetary recovery and use a longer statute of limitations if they ultimately sue.

If you had to make a decision between the following two choices, which would you pick: (1) conduct a wage and hour audit that you control, direct and potentially protect under the attorney-client privilege; or (2) have the lawyers who represent your employees in a FLSA lawsuit against you conduct the audit on their terms through pre-trial discovery, where they may uncover new ways to sue you based on what they find. In light of the growing popularity of wage and hour litigation, your organization may lose the opportunity to select the first option.