

Creative Employer Staffing During Tough Times

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BUSINESS LAW AND LITIGATION

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Presentation Outline

- **Full-Time vs. Part-Time employees**
- **Exempt vs. non-exempt employees**
- **Employees vs. Independent Contractors**
- **Virtual staffing**
- **Employee leasing pros and cons a/k/a
Human Resource Outsourcing Specialists
(HROS)**

Full-Time vs. Part-Time

Pros and cons of full-time (FT) employees.

- more control over the employee's time
- increased employee loyalty
- peace of mind - someone around to "mind the store"
- looking ahead to sale of your business - FT employees know the ropes and make excellent buyers
- Disadvantages - computing payroll taxes and staying current with all federal, state, and local employment laws
- Often, FT employees receive benefits like health insurance and paid vacation - will you provide these benefits just to be competitive?
- Who will do your FT employees' work while they are absent?
- Other options: part-time (PT) employees, temporary help, leased workers, or independent contractors

Exempt vs. non-exempt employees

Employees whose jobs are governed by the Fair Labor Standards Act (FLSA) are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay [time and half for all hours worked in a week over 40]. Exempt employees are not. Most employees covered by the FLSA are nonexempt.

Exempt vs. non-exempt employees - Cont'd

With few exceptions, to be exempt an employee must:

- a. be paid at least \$23,600 per year (\$455 per week), and
- b. be paid on a salary basis, and
- c. perform exempt job duties.

These requirements are outlined in the FLSA Regulations (promulgated by the U.S. Department of Labor).

Employees must meet all three "tests" to be exempt.

Exempt vs. non-exempt employees – Cont'd

Salary level tests.

- Employees who are paid less than \$23,600 per year (\$455 per week) are nonexempt. (Employees who earn more than \$100,000 per year are almost certainly exempt.)

Exempt vs. non-exempt employees – Cont'd

Salary basis tests.

- Generally, an employee is paid on a salary basis if s/he has a "guaranteed minimum" amount of money s/he can count on receiving for any work week in which s/he performs "any" work. This amount does not need be the entire compensation received, but there must be some amount of pay the employee can count on receiving in any work week in which s/he performs any work.
- E.g. employee's base pay is computed from an annual figure divided by the number of paydays in a year (salaried) vs. employee's actual pay is lower in work periods when s/he works fewer than the normal number of hours (not salaried).
- Whether an employee is paid on a salary basis is a "fact" and specific evaluations of particular circumstances are necessary. Whether an employee is paid on a salary basis is not affected by whether pay is expressed in hourly terms (this is a common requirement of many payroll computer programs), but whether the employee in fact has a "guaranteed minimum" amount of pay s/he can count on.

Exempt vs. non-exempt employees – Cont'd

The duties tests.

- An employee who meets the salary level tests and also the salary basis tests is exempt only if s/he also performs exempt job duties. FLSA exemptions are limited to employees who perform relatively high-level work. Whether the duties of a particular job qualify as exempt depends on what they are. Job titles or position descriptions are of limited usefulness in this determination. (A secretary is still a secretary even if s/he is called an "administrative assistant," and the chief executive officer is still the CEO even if s/he is called a janitor.) It is the actual job tasks that must be evaluated, along with how the particular job tasks "fit" into the employer's overall operations.
- There are three typical categories of exempt job duties, called "executive," "professional," and "administrative."

Exempt vs. non-exempt employees – Cont'd

Exempt executive job duties.

Job duties are exempt executive job duties if the employee:

- regularly supervises two or more other employees, and
- has management as the primary duty of the position, and
- has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

Exempt vs. non-exempt employees – Cont'd

Supervision

- interviewing, selecting, and training employees;
- setting rates of pay and hours of work;
- maintaining production or sales records (beyond the merely clerical);
- appraising productivity; handling employee grievances or complaints, or disciplining employees;
- determining work techniques;
- planning the work;

Exempt vs. non-exempt employees – Cont'd

Management

- The employee is "in charge" of a department or subdivision of the enterprise (such as a shift).
- E.g. if someone called and asked for "the boss" or for who is "in charge" at any particular time.
- An employee may qualify as performing executive job duties even if s/he performs a variety of "regular" job duties as well. E.g. the night manager at a fast food restaurant may in reality spend most of the shift preparing food and serving customers

Exempt vs. non-exempt employees – Cont'd

Exempt professional job duties.

- The job duties of the traditional "learned professions" are exempt. These include lawyers, doctors, dentists, teachers, architects, and clergy. Also included are registered nurses (but not LPNs), accountants (but not bookkeepers), engineers (who have engineering degrees or the equivalent and perform work of the sort usually performed by licensed professional engineers), actuaries, scientists (but not technicians), pharmacists, and other employees who perform work requiring "advanced knowledge" similar to that historically associated with the traditional learned professions.

Exempt vs. non-exempt employees – Cont'd

- *Exempt Administrative job duties.*

The most elusive and imprecise of the definitions of exempt job duties is for exempt "administrative" job duties.

The FLSA Regulatory definition provides that exempt administrative job duties are:

- a. office or non-manual work, which is
- b. directly related to management or general business operations of the employer or the employer's customers, and
- c. a primary component of which involves the exercise of independent judgment and discretion about
- d. matters of significance.

Employee vs. Independent Contractor

- It is critical to correctly determine whether the individuals providing services are employees or independent contractors.
- Employers must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee.
- Employers do not generally have to withhold or pay any taxes on payments to independent contractors.

Employee vs. Independent Contractor – Cont'd

To determine whether the person providing service is an employee or an independent contractor, all evidence of the degree of control and independence must be considered.

Common factors that provide evidence of the degree of control and independence fall into three categories:

- [Behavioral](#): Does the company control or have the right to control what the worker does and how the worker does his or her job?
- [Financial](#): Are the business aspects of the worker's job controlled by the payer? (look at how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- [Type of Relationship](#): Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Virtual staffing

- Skype
- Groove
- Logmein.Com and other File Transfer Programs
- <http://www.nvlaa.com/>
- <http://www.thevirtualparalegal.com/>

Human Resource Outsourcing Specialists

- **Employee leasing pros and cons a/k/a
Human Resource Outsourcing Specialists
(HROS)**
- allows management to focus on why they
went into business in the first place

For more helpful information and resources for
businesses and employers,
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