HOUSTON EMPLOYMENT LAW UPDATE

May 18, 2016

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THE FAIR LABOR STANDARDS ACT: FREQUENT EMPLOYER MISTAKES AND HOW TO AVOID THEM

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Houston Employment Law Update
May 18, 2016

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FLSA BASICS

- Minimum wage ($7.25/hour)
- Overtime (1.5x regular rate) for hours over 40
- Child labor
- No retaliation

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ENFORCEMENT MECHANISMS

- **Department of Labor**
  - DOL initiatives: misclassification of employees as independent contractors; oil and gas services industry; restaurant industry; childcare industry
  - DOL audit may be followed by IRS or state audit
  - Back wages and possible civil and criminal penalties

- **Private Plaintiff**
  - Collective action (a.k.a. FLSA's version of class action lawsuit)
  - Back wages, liquidated damages, and attorneys' fees and costs
  - Damages can extend 3-years back
  - Potential for added retaliation claims
  - Potential personal liability for owners, officers, executives, directors, and supervisors

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WHY CARE?

Fair Labor Standards Act Enforcement Statistics

FY 2015	Cases with Violations	Back Wages	Percent of FLSA Back Wages	Employees Receiving Back Wages(duplicated[1])	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	10,642	$37,828,554	22%	86,229	39%
Overtime	10,496	$137,701,703	78%	173,330	78%
FY 2014	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	11,042	$36,732,407	21%	106,184	46%
Overtime	11,238	$136,239,001	79%	174,365	76%
FY 2013	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	12,403	$38,470,100	23%	103,671	46%
Overtime	12,108	$130,703,222	77%	174,197	77%
FY 2012	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	12,532	$35,270,524	19%	107,005	40%
Overtime	12,462	$148,560,700	81%	218,137	82%
FY 2011	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	12,450	$29,327,527	17%	89,305	37%
Overtime	11,990	$140,328,012	83%	204,243	86%
FY 2010	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	10,529	$21,043,700	16%	52,530	28%
Overtime	8,788	$107,545,263	84%	166,295	90%

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WHY CARE … MORE DOL NUMBERS

Low-Wage Industries Enforcement Statistics

	FY 2015			FY 2014			FY 2013		
	Cases	Back Wages	Employees	Cases	Back Wages	Employees	Cases	Back Wages	Employees
Agriculture	1,361	$4,316,681	10,025	1,430	$4,502,976	12,031	1,673	$7,642,501	11,799
Day Care	852	$1,642,924	3,992	1,144	$1,875,156	5,812	1,125	$2,183,958	5,640
Restaurants	4,787	$38,098,095	46,902	5,118	$34,451,990	44,133	6,053	$34,863,786	47,861
Garment Manufacturing	199	$1,594,928	1,275	239	$3,095,832	1,673	335	$3,597,940	2,539
Guard Services	499	$4,744,910	6,824	475	$5,659,936	6,729	643	$12,923,237	8,736
Health Care	1,551	$14,329,396	17,352	1,581	$17,703,092	21,029	1,622	$10,076,350	11,582
Hotels and Motels	981	$3,610,343	6,675	1,049	$4,040,376	7,420	1,245	$4,524,391	8,115
Janitorial Services	563	$3,520,319	4,123	523	$3,902,434	4,425	698	$4,012,577	5,466
Temporary Help	391	$2,443,421	5,278	368	$3,915,498	6,009	360	$3,226,420	6,312
Total Low-Wage Industries	**11,184**	**$74,301,017**	**102,446**	**11,927**	**$79,147,290**	**109,261**	**13,754**	**$83,051,160**	**108,050**

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WHY CARE . . . ADDITIONAL CONSIDERATIONS

- Lawsuits continue to be filed

- Class and collective action proceedings – increasingly easy to certify
  - 115 conditional certification motions granted vs. 38 denied
  - 8 decertification motions granted vs. 14 decertification motions denied

- High dollar settlements
  - $445 million in 2013; $400 million in 2014
  - Halliburton $18.3 settlement with DOL for 1,016 employees misclassified as exempt

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MISCLASSIFICATION OF EXEMPT EMPLOYEES

Exemptions

- Professional Exemption
- Executive Exemption
- Administrative
- Computer-Related Employees
- Outside Sales
- Highly Compensated Employee

Elements

- Salary Level – Must earn at least $455/week (subject to change)
- Salary Basis – Must be paid on a salary (or fee) basis
- Job Duties – Must perform the primary & other functions listed in the applicable “duties test”

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DUTIES TEST – EXECUTIVE EXEMPTION

- EE's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

- EE must customarily and regularly direct the work of at least 2+ full-time EEs or their equivalent; and

- EE must have the authority to hire or fire other EEs, or the EE's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other EEs must be given particular weight.

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DUTIES TEST – ADMINISTRATIVE EXEMPTION

- EE's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of ER or ER's customers; and

- EE's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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DUTIES TEST – PROFESSIONAL EXEMPTION

- **Learned Professional**
  - EE's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
  - The advanced knowledge must be in a field of science or learning; and
  - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

- **Creative Professional**
  - EE's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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DUTIES TEST – COMPUTER EMPLOYEE EXEMPTION

- EE must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- EE's primary duty must consist of:

  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

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DUTIES TEST – OUTSIDE SALES EXEMPTION

- EE's primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

- EE must be customarily and regularly engaged away from the employer's place or places of business.

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DUTIES TEST – HIGHLY COMPENSATED EXEMPTION

- EE's primary duty includes performing office or non-manual work.

- EE customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

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WHAT DOES "SALARY BASIS" MEAN?

Being paid on a "salary basis" means:

- Employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount of compensation (constituting all or part of the employee's compensation)
- The predetermined amount cannot be reduced because of variations in the quality or quantity of the work performed by the employee
- Employee must receive the full salary for any week in which he performs any work, regardless of the number of days or hours worked (with limited exceptions)
- Deductions from the predetermined amount may only be made in certain, limited circumstances

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PERMISSIBLE DEDUCTIONS

- One or more full day absences for personal reasons, other than sickness or disability.
- One or more full day absences because of sickness or disability (including work-related accidents) if such deductions are made under a bona fide plan, practice or policy of providing compensation for loss of salary occasioned by such sickness or disability.
- To offset any amounts received as jury fees, witness fees or military pay.
- Penalties imposed in good faith for violations of safety rules of major significance.
- Unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of written workplace conduct rules.
- Portions of the first and last weeks of employment not actually work.
- Weeks in which the employee takes unpaid FMLA leave

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IMPERMISSIBLE DEDUCTIONS

- Impermissible Deductions
  - Deduction for absence occasioned by ER or operating requirements of business (e.g., inclement weather, slowdown)
  - Deduction for absence because of jury duty, attendance as a witness, or temporary military leave
  - Deduction for partial day absence
- Exemption will be lost if ER has an "actual practice" of making improper deductions
  - Multi-factor test
  - If "actual practice" found, exemption lost during time period of deductions for EEs in same job classification working for same managers responsible for improper deductions.
- HAVE SAFE HARBOR POLICY!

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SALARY LEVEL REQUIREMENTS

- Executive, Administrative, and Professional Exemptions: paid on a salary basis at a rate of at least $455/week ($23,660/year)
  - *But,* administrative and professional employees may be paid on a fee basis
    - "Fee basis" means the employee is paid an agreed sum for a single job regardless of the time required for its completion
    - Fee payment must still meet the minimum salary requirement
- Computer Employee Exemption: paid on a salary or fee basis at a rate of at least $455/week or on an hourly basis at a rate of at least $27.63/hour
- Salary requirements do not apply to outside sales employees, teachers, lawyers, or doctors

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SALARY LEVEL REQUIREMENTS – CONT.

- Highly Compensated Exemption: total annual compensation of at least $100,000/year
  - Must include at least $455/week paid on a salary or fee basis
  - May include commissions, nondiscretionary bonuses and other nondiscretionary compensation
  - Excludes board, lodging, insurance payments, retirement contributions, and fringe benefits costs
  - Catch-up payment allowed during last pay period or within one month after end of year
  - Pro-rata amount for employees who work less than full year

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PROPOSED REGULATIONS – WHAT CHANGES?

- Revisions applicable to “white collar” exemptions
  - Executive, administrative, professional, and highly compensated exemptions

- Proposed changes to salary level requirements:
  - Currently: $455/wk or $23,660 annualized
    - Below poverty line for family of 4
  - Proposal projected at **$970/wk or $50,440/yr** (40th percentile) + automatic updates

- Highly Compensated Exemption: high salary level = easier duties test
  - Increase from $100K to **$122,148/year** (90th percentile)

- Final regulations anticipated in Spring 2016

- DOL estimates 4.6 million exempt workers who are paid under 40th percentile affected

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PROPOSED REGULATIONS – WHAT STAYS THE SAME?

- Duties tests (*at least we think …*)
- Exemptions that do not rely on salary basis test
- Rules regarding deductions
- Recordkeeping requirements
- *Pretty much everything else!*

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WHAT TO DO NOW - AUDIT

- Identify exempt employees in “at risk” salary range ($23,660-$55,000)
  - Organize by type of job, exemption classification, salary range

- Evaluate job duties “on the bubble”
  - Should be hand-in-hand with salary analysis
  - Start with largest employee classes
    - Consider reclassification of questionable positions that include employees both over and under new threshold

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WHAT TO DO NOW – WAYS TO MITIGATE

- Consider having employees start clocking hours so you can appropriately analyze compensation options

- Moving to non-exempt & controlling hours
  - Delegate responsibilities to other employees
  - Limit work from home/flexible work hours

- Restructuring positions and reassigning duties
  - Revise job descriptions

- Increasing salary & remain exempt

- Restructuring bonuses & other sources of extra comp – moving into salary

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INDEPENDENT CONTRACTOR VS. EMPLOYEE

"Economic Realities" Test = whether the worker is economically dependent on the employer or truly in business for him or herself

1. Extent to which the work performed is an integral part of the employer's business;
2. Worker's opportunity for profit or loss depending on his or her managerial skills;
3. Relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. Permanency of the relationship; and
6. Nature and degree of control by the employer.

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DOL'S 7/15/2015 ADMINISTRATOR'S INTERPRETATION

- ***Extent to which the work performed is an integral part of ER's business***
  - IC's work unlikely to be integral to ER's business.
  - Work can be integral even if it is just one component of the business or is performed by many workers.
  - Work can be integral even if it is performed away from ER's premises.

- ***Worker's opportunity for profit or loss***
  - This factor should not focus on the worker's ability to work more hours or the amount of work available from the employer.
  - IC should exercise managerial skills (*e.g.*, make decisions on staffing, advertising, and purchasing; negotiate contracts; decide which jobs to perform; etc.) in a way that affects the worker's opportunity for both profits and loss beyond the current job.

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DOL'S 7/15/2015 ADMINISTRATOR'S INTERPRETATION

- ***The relative investments of ER and worker***
  - Relevant inquiry is how worker's investment compares to ER's investment in its *overall business*.
  - Investing in tools and equipment is not necessarily a business investment that indicates worker is an IC.

- ***Whether the work performed requires special skills and initiative***
  - Focus is on the worker's *business* skills, judgment, and initiative, and not his technical skills.
  - Fact that a worker has specialized skills does not mean that he is in business for himself.

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DOL'S 7/15/2015 ADMINISTRATOR'S INTERPRETATION

- ***The permanency of the relationship.***
  - Permanency or indefiniteness in worker's relationship suggests that worker is an EE.
  - IC typically works one project and does not necessarily work continuously or repeatedly for an ER.
  - But, a lack of permanence or indefiniteness does not automatically suggest an IC relationship; rather, key is whether the lack of permanence is due to worker's own business initiative.

- ***The nature and degree of control by ER.***
  - IC must control meaningful aspects of work performed.
  - ER's lack of control over workers who work from home or offsite as well as workers' control over their hours are not indicative of IC status.
  - ER's reason for exercising control – *e.g.,* nature of business, regulatory requirements, customer demands – does not matter.
  - Control factor should not be overemphasized by ERs.

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JOINT-EMPLOYER LIABILITY

DOL's 1/20/2016 Administrator's interpretation

- **Horizontal Joint Employment (employer – employer)**
  - Whether two or more employers "are sufficiently associated or related with respect to the employee such that they jointly employ the employee."
  - Focus on relationship of employers to each other.

- **Vertical Joint Employment (employer – employee)**
  - Exists where employee has employment relationship with one employer (e.g., staffing agency, subcontractor, intermediary employer) and economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work.
  - Uses "economic realities" test to analyze working relationship between employee and potential joint employer.
  - Common law control test does not apply.

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JOINT-EMPLOYER LIABILITY

Horizontal Joint Employment (employer – employer)

- who owns the potential joint employers (i.e., does one employer own part or all of the other or do they have any common owners);
- do the potential joint employers have any overlapping officers, directors, executives, or managers;
- do the potential joint employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs);
- are the potential joint employers' operations inter-mingled (for example, is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for);
- does one potential joint employer supervise the work of the other;
- do the potential joint employers share supervisory authority for the employee;
- do the potential joint employers treat the employees as a pool of employees available to both of them;
- do the potential joint employers share clients or customers; and
- are there any agreements between the potential joint employers.

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JOINT-EMPLOYER LIABILITY

Vertical Joint Employment (employer – employee)

- **Directing, Controlling, or Supervising the Work Performed**. To the extent that the work performed by the employee is controlled or supervised by the potential joint employer beyond a reasonable degree of contract performance oversight, such control suggests that the employee is economically dependent on the potential joint employer. The potential joint employer's control can be indirect (for example, exercised through the intermediary employer) and still be sufficient. Additionally, the potential joint employer need not exercise more control than, or the same control as, the intermediary employer to exercise sufficient control.
- **Controlling Employment Conditions.** To the extent that the potential joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control indicates that the employee is economically dependent on the potential joint employer. Again, the potential joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.
- **Permanency and Duration of Relationship.** An indefinite, permanent, full-time, or long-term relationship by the employee with the potential joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue.
- **Repetitive and Rote Nature of Work.** To the extent that the employee's work for the potential joint employer is repetitive and rote, is relatively unskilled, and/or requires little or no training, those facts indicate that the employee is economically dependent on the potential joint employer.

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JOINT-EMPLOYER LIABILITY

Vertical Joint Employment (employer – employee)

- **Integral to Business.** If the employee's work is an integral part of the potential joint employer's business, that fact indicates that the employee is economically dependent on the potential joint employer.
- **Work Performed on Premises.** The employee's performance of the work on premises owned or controlled by the potential joint employer indicates that the employee is economically dependent on the potential joint employer. The potential joint employer's leasing as opposed to owning the premises where the work is performed is immaterial because the potential joint employer, as the lessee, controls the premises.
- **Performing Administrative Functions Commonly Performed by Employers.** To the extent that the potential joint employer performs administrative functions for the employee, such as handling payroll, providing workers' compensation insurance, providing necessary facilities and safety equipment, housing, or transportation, or providing tools and materials required for the work, those facts indicate economic dependence by the employee on the potential joint employer.

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OFF THE CLOCK WORK

- "Off the Clock" work includes work required by the employer but also work that the employer doesn't require the employee to do, but that the employer knows the employee is doing and it benefits the employer.

- Legal Test: Whether employer had actual knowledge of overtime or had opportunity through reasonable diligence to acquire knowledge.

You make me clock out but I then have to come back and work. Where is my money?

I cannot get my work done during my shift, so I work at home after I have clocked out. Where is my overtime?

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OFF THE CLOCK WORK – GOOD POLICIES/PRACTICES

- Require advance management approval for OT (except in emergencies)
- Require accurate time reporting
- Require employees to verify time
- Prohibit off the clock work
- Place burden on employee to notify employer of work after hours from home or outside workplace
- Open communication between employees and management

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BREAKS AND MEAL PERIODS

- FLSA does not require meal periods or breaks.
- Breaks less than 20 minutes = compensable
  - Unauthorized extensions not compensable if ER has clearly communicated to EE (i) length of authorized break time, (ii) any extension violates ER's rules, and (iii) any extension will be punished.
- Bona fide meal periods of at least 30 minutes = not compensable

WATCH OUT FOR ….

- Employees working through lunch / not completely relieved of duty
- Employees taking lunch break <30 minutes
- Employees "riding" the clock during lunch

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POST AND PRELIMINARY WORK

- "Principal activities" are compensable.
  - Is the activity "an integral and indispensable part of the principal activities" for which the employee is employed?
- "Integral and indispensable"
  - Necessary to the principal work performed
  - Done for employer's benefit
- Continuous workday rule – time between first and last principal activity is compensable.

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WAITING TIME & ON-CALL TIME

- **Waiting Time:** Whether waiting time is time worked under the FLSA depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employee have been "engaged to wait."

- **On-Call Time:** An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

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LECTURES, MEETINGS, AND TRAINING

- Time spent in attendance not work time if:
  - held outside of work hours;
  - attendance is voluntary;
  - meeting is not directly related to EE's job; and
  - EE does no productive work during the meeting time

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TRAVEL TIME

- **Home To Work Travel**: EE who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

- **Home to Work on a Special One Day Assignment in Another City**: EE who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that ER may deduct/not count that time EE would normally spend commuting to the regular work site.

- **Travel That is All in the Day's Work**: Time spent by EE in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

- **Travel Away from Home Community**: Travel that keeps EE away from home overnight is travel away from home. Travel away from home is work time when it cuts across EE's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. Time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time.

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WEATHER RELATED CONCERNS

- Hourly employees – only paid for hours worked
- Travel time during the day still compensable even if weather delays
- Exempt employees must still be paid if employer shuts down
- If open and exempt employee chooses not to come in, can exclude
- Can NOT deduct exempt employees for part-days
- If employee works from home, must pay

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REGULAR RATE CONCERNS

- Overtime paid on “regular rate” not hourly rate

- Excluded from regular rate:
  - Expense reimbursement
  - OT premium payments
  - Discretionary bonuses
  - Gifts
  - Vacation, holiday, sick pay, PTO

- Included in regular rate:
  - Commissions
  - Non-discretionary bonuses
  - Shift differentials
  - Incentive compensation

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STAY OUT OF TROUBLE…AUDIT

- Classification issues
  - Exempt vs. non-exempt
  - Independent contractor vs. employee
- Policies and procedures
- Compensation issues
  - Overtime policies
  - Regular rate calculations
  - Salary basis requirements
- Time-keeping practices

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IMMIGRATION COMPLIANCE: UPDATES AND TRENDS

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Employment Law Update
May 18, 2016

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COMPLIANCE FRAMEWORK: AGENCIES

- U.S. Citizenship and Immigration Services – adjudicates applications for immigration benefits and administers E-Verify
- Immigration and Customs Enforcement – investigative arm of the Dept. of Homeland Security
- Office of Special Counsel – enforces anti-discrimination provision of the INA
- Office of the Chief Administrative Hearing Officer – ALJ presides over issues arising under worksite compliance provisions of the INA
- Dept. of Labor – protects workers and involved in certain types of immigration related applications

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USCIS: NEW I-9

- Current version of the Form I-9 expired March 31, 2016
- USCIS is reviewing comments on the proposed changes
- Key changes include:
  - Validation on fields to ensure information is entered correctly
  - Drop down lists, including a list of “universally used abbreviations”
  - Embedded instructions on completing each field
  - Clarifies proper use of the Spanish version of the I-9
  - Dedicated area to enter additional information that now goes in margins
  - Clarifies treatment of unique immigration classes such as asylees and refugees

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USCIS: E-VERIFY

- USCIS administered program used to compare data entered on the I-9 with the SSA and DHS

- Generally voluntary, but growing and required for some employers:
  - Used by over 600,000 employers
  - 1,400 companies join per week
  - Many states have passed E-Verify legislation (including Texas)
  - Required for most federal contractors and sub-contractors
  - Required for OPT/STEM extensions

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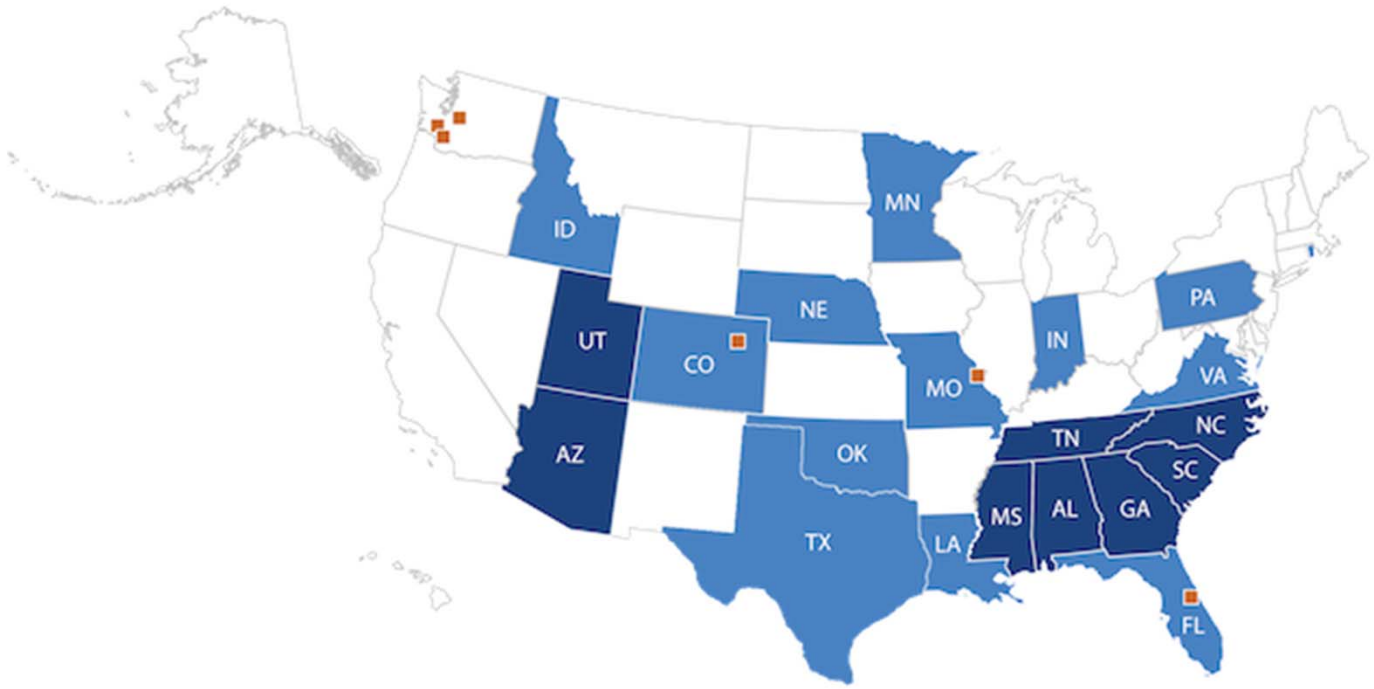
E-VERIFY: STATE MAP



All or most Employers

State Agencies AND/OR Contractors

City/County Employees and Contractors

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INTERNAL I-9 AUDITS

Six page joint guidance from ICE and OSC released Dec. 2015 to assist employers in conducting internal I-9 audits

- Either audit all I-9s or a sample selected based on neutral and non-discriminatory criteria
- Cautions against doing new I-9s for existing employees, absent acquisition or merger

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INTERNAL I-9 AUDITS

- Before conducting an audit, decide how to communicate issues with employees, preferably in writing
- Corrections should be made to the original I-9 or complete new one ASAP if no I-9 exists for employee(s), but DO NOT BACKDATE
- If unauthorized employees found, they should be given a reasonable opportunity to provide updated documents
- Employees who worked with fake documents but now have valid documents could continue to work, or could be terminated due to honesty policy

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USCIS: H-1B & L-1

- Fraud Detection and National Security Directorate (FDNS) – component of USCIS that investigates petition fraud
- Initial H-1B and L-1 petitions require a fraud prevention and detection fee
- FDNS may conduct investigations to confirm accurate representation of employer and employment
- Investigations more likely for smaller employers (less than $10MM, less than 25 employees, or certain jobs (accountants, analysts, managers)

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H-1B COMPLIANCE: PAYMENT OBLIGATION

Fischer Health & Rehab Center LLC – May 2016

- Wage & Hour case before the DOL
- H-1B valid from December 2010 to October 2013
- New Jersey-based rehabilitation center to pay **$60,000** in back wages to a former H-1B visa worker
- $25,000 to be paid upon execution of the consent agreement, followed by five monthly payments of $7,000 each from May to September

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H-1B COMPLIANCE: PAYMENT OBLIGATION

Southern Illinois University School of Medicine – April 2016

- Wage & Hour case before the DOL
- School failed to pay H-1B doctor the actual wage for her position in the general surgery division – part of her academic and clinical work
- Five colleagues earned higher wages than the doctor – with similar experience and qualifications
- School argued that the position was unique due to her bariatric specialty
- School also carried out improper deductions to the actual wage – underpayment cannot be excused by reduced productivity due to maternity leave, vacations and performance failures
- Doctor was owed **$223,884**

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H-1B COMPLIANCE: PAYMENT OBLIGATION

Care Worldwide, Inc. – Sept. 2015

- Wage & Hour case before the DOL
- Two workers with H-1B petitions approved January and March 2010, both to be paid about $50,000 annually
- When they started employment, company President told them to return later in the year, and employees sought help from the New York Attorney General
- Company ordered to pay one employee **$134,750** in back wages, interest and visa application fees, and the other **$147,958**

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H-1B COMPLIANCE: PORTABILITY DANGERS

Aqua Information Systems, Inc. – March 2016

- Employee begins working for Aqua in June 2013 based an H-1B petition to change employers
- Aqua says employment was not to begin until H-1B petition approved, which never occurred
- Judge disagreed with employer's position based on company's offer letter and company communications marketing employee to end client
- Company found liable for 10 weeks of back pay and H-1B filing fees – total of $23,000
- H-1B portability allows employment to begin upon filing of petition
- Best practices: **document the start of the employment relationship if not taking advantage of portability**

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H-1B COMPLIANCE: TRUMP TALENT MANAGEMENT

- Jamaican model, Alexia Palmer, filed suit against Trump Talent Management for fraudulent misrepresentation
- Lawsuit was dismissed for insufficient evidence; pursuing wage claim before DOL
- Palmer brought to the U.S. on a H-1B visa – paid under $5,000 over 3 years; LCA/petition wage $75K per year

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GOLDEN EMPLOYMENT GROUP, INC. (MINN) (APR. 2016)

- A staffing company committed 465 Form I-9 violations
- ICE sought a penalty of $305,525
- Company allegedly failed to prepare/present almost 400 I-9s
- 433 employees could not be verified as work-authorized
- 35% error rate
- Seriousness of the violations treated as an aggravating factor

Held:

- Ordered to pay **$209,600**
- Even if workers fail to reach Day 3 of employment, must still have Section 1 of the Form I-9 completed
- Use of E-Verify without Form I-9 does not absolve liability

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SKZ HARVESTING, INC. (MONTANA) (FEB. 2016)

- Charges from ICE included I-9 errors and knowingly employing undocumented workers
- Company responded that I-9s from 2010 to 2012 had been inadvertently destroyed

Held:

- ICE assessed a fine of **$74,587** – OCAHO lowered to **$29,600**
- Fine lowered out of discretion due to small business, and that a previously issued ICE warning notice did not equal a previous violation

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DURABLE, INC. (ILLINOIS) (SEPT. 2014)

- **March 3, 1989**: Durable entered into a settlement agreement with legacy INS (17 knowing violations and 65 failures to properly verify the eligibility of employees)

- **June 24, 2011**: Notice of Inspection served
- Alleged to have engaged in 300 Form I-9 violations
- Total penalty sought $329,895
- Durable vigorously contested its treatment as a serial offender and the "exorbitant" penalties

Held:

- Irrelevant that the company's current owners were not aware of the prior violation (they were teenagers at the time)
- Temporal gap was not enough to wipe out prior violation – no statutory look back period
- Penalty amount of **$329,895** upheld

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MCDONALD'S (NOV. 2015)

- Charges that McDonald's discriminated against foreign national employees by requiring lawful permanent residents to provide a new green card when the original one expired

- Employees were not allowed to work or fired if they did not produce a new green card

- McDonald's fined **$355,000** in civil penalties and must undergo monitoring and training for 20 months, as well as compensate impacted employees

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BARRIOS STREET REALTY LLC (LOUISIANA) (MAR. 2016)

- *Debarment: employers can lose government contracts due to immigration violations, or be forbidden from use of immigration categories including H-1B, H-2B, and Labor Certification-based green cards*

- Company agreed to three year ban on seeking non-immigrant visa workers following case with the OSC
- The DOJ obtained a voluntary concession to settle immigration related discrimination charges for the first time
- Company also paid **$30,000** in fines and **$115,000** in back pay
- Charges stemmed from rejection of 73 U.S. workers during H-2B process

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HOUSTON, TEXAS

- **Lawler Foods Inc. (April 2016):**
  - EEOC accused Houston area bakery of discriminating against job applicants due to their race or national origin since 2007
  - pattern or practice of failing to hire black and non-Hispanic entry-level applicants at production facility in Humble
  - $1 million settlement plus internal probe of hiring practices and compliance manager for settlement terms

- **Ryan's Pointe Houston LLC/Advantage Property Mgmt (Sept. 2015):**
  - EEOC accused Houston apartment management firm of targeting Hispanic employees for termination because it wanted to replace them with workers that looked more like "Ken and Barbie"
  - Management allegedly wanted to change racial demographics of complex
  - Lawsuit ongoing

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EMPLOYER SHARED RESPONSIBILITY AND THE RISKS OF A CONTINGENT WORKFORCE

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Houston Employment Law Update
May 18, 2016

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AFFORDABLE CARE ACT

Overview of Employer Shared Responsibility

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WHO IS SUBJECT TO EMPLOYER SHARED RESPONSIBILITY?

- Large employers are subject to employer shared responsibility.
- Large employer is defined as an employer with 50 or more full-time employees ("Full-Time Employees") and full-time equivalent employees in the preceding calendar year.
- Common law employees of *all entities in a controlled group* are counted for determining large employer status.
  - Full-Time Employees: average 30 hours of service per week or 130 hours of service per month
  - Full-Time Equivalent Employees: Add each part-time employee's hours of service (up to 120) for the month and divide by 120 to get the "Full-Time Equivalents" for the month
  - Count all hours for which an employee is paid or is entitled to pay for the performance of duties or paid leave
    - Hourly employees: Count actual hours
    - Salaried/non-hourly employees: May use equivalency (8 hour per day / 40 hours per week) *but not to understate hours*.

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Common Law Employees

- Treas. Reg. §54.4980H-1(a)(15)
  - Common law employees under Treas. Reg. §31.3401(c)-1(b) “the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.”
  - Exclude leased employees, sole proprietors, partners in a partnership, 2- percent S corporation shareholders, workers described in Code section 3508.

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WHAT DOES EMPLOYER SHARED RESPONSIBILITY MEAN?

- To avoid penalty, must offer "minimum essential coverage" to 95% of Full-Time Employees
- "Affordable coverage" if employee's cost of self-only coverage does not exceed 9.5% of employee's household income
  - Form W-2 safe harbor: Employee cost does not exceed 9.5% of wages reported in Box 1 of Form W-2
  - Rate of pay safe harbor: Employee cost does not exceed 9.5% of hourly rate of pay times 130 hours per month (For non-hourly employees use monthly salary)
  - Federal poverty line safe harbor: Employee cost does not exceed 9.5% of federal poverty line for a single person
- "Minimum value" if the plan's share of the total cost of benefits is 60% or greater (on average) for a standard population
  - Minimum value calculator
  - Design-based safe harbors
  - Actuary certification

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WHAT IS THE PENALTY FOR NONCOMPLIANCE?

- No Coverage Penalty
  - Do not offer "minimum essential coverage" to at least 95% of Full-Time Employees and their dependents, and
  - At least one Full-Time Employee is receiving a premium assistance tax credit for coverage purchased on an exchange.
  - Penalty Amount: $2,000 x (All Full-Time Employees minus 30)

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WHAT IS THE PENALTY FOR NONCOMPLIANCE?

- Inadequate Coverage Penalty
  - Offer "minimum essential coverage" to at least 95% of Full-Time Employees and their dependents, but
  - At least one Full-Time Employee is receiving a premium assistance tax credit
    - The Full-Time Employee is in the group not offered coverage
    - Coverage is "unaffordable" or does not provide "minimum value"
  - $3,000 x each *affected* Full-Time Employee capped at the No Coverage Penalty amount
  - Dependent includes child up to 26 (not step-child or foster child); no liability for failure to offer coverage to spouse.

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2016 PENALTY EXAMPLE

- Employer offers “minimum essential coverage” to 120 of its 125 Full-Time Employees. This coverage satisfies “minimum value” for all employees, but is not “affordable” for 40 of these employees.
- Certain employees obtain coverage on the Exchange:
  - 3 of 5 employees not offered coverage (2 receive premium assistance tax credit).
  - 25 of 40 employees offered “unaffordable” coverage (25 receive premium assistance tax credit).
  - 15 of 80 employees offered “affordable” coverage (0 receive premium assistance tax credit).

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PENALTY EXAMPLE (CONTINUED)

- No Coverage Penalty. Does not apply because "minimum essential coverage" was offered to 96% of the employees (120 of 125).
- Inadequate Coverage Penalty. Lesser of:
  - $81,000 which is 3,000 x 27 (Full-Time Employees receiving a premium assistance tax credit)

    or
  - $190,000 which is $2,000 x 95 (total number of Full-Time Employees minus first 30)

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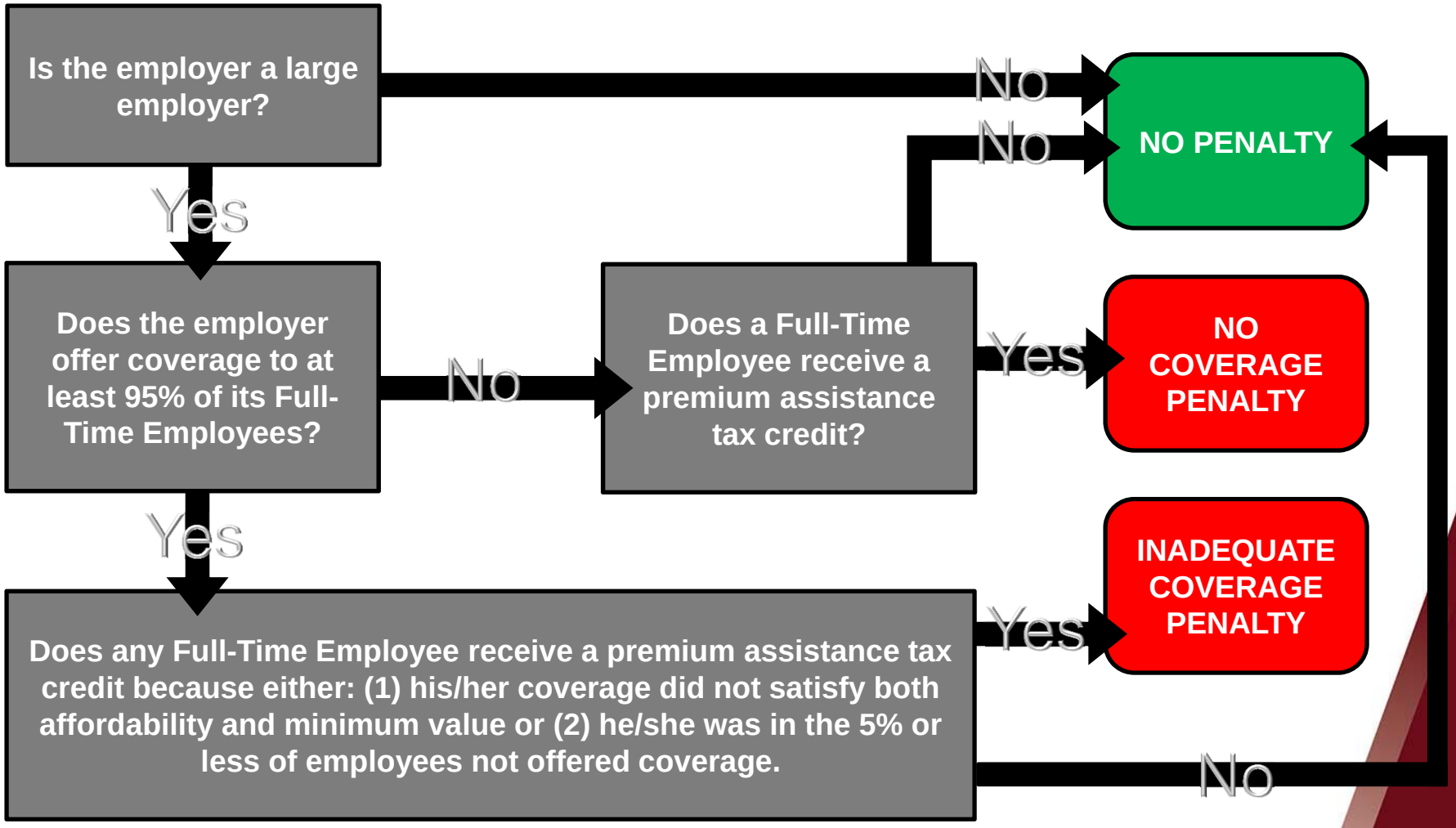
OVERVIEW OF PENALTIES



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TWO METHODS FOR DETERMINING FULL-TIME EMPLOYEES

- Monthly Measurement Method
  - Determine who is supposed to be covered during a month based on the actual hours for that month.
  - Don’t know who has to be offered coverage until the month is over.
  - Works best with stable-hour workforces with individuals who always work more than (or less than) 30 hours.

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TWO METHODS FOR DETERMINING FULL-TIME EMPLOYEES

- Look-Back Measurement Method
  - Employer may determine the status of an employee as a Full-Time Employee for a future period (referred to as the **stability period**) based on hours of service of the employee in a prior period of the same length (referred to as the **measurement period**).
  - The employer may include an optional **administrative period** between the measurement period and the stability period to perform administrative tasks such as calculating who was a Full-Time Employee during the measurement period and notifying employees of their status.

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MEASUREMENT PERIOD

- Fixed period of 3 to 12 months
- Measurement period must be uniform for all employees in a category
  (union/non-union; different unions; hourly/salaried; different states)
- Can use payroll periods instead of calendar months
- Special transition year guidance

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ADMINISTRATIVE PERIOD

- Optional period between the measurement period and the stability period
  - calculate who was a Full-Time Employee during the measurement period
  - notify employees of their status
- The administrative period may be no longer than 90 days (not three months).
- October 1-December 31 is not a permissible administrative period.
- Administrative period does not affect the length of either the measurement period or the stability period.

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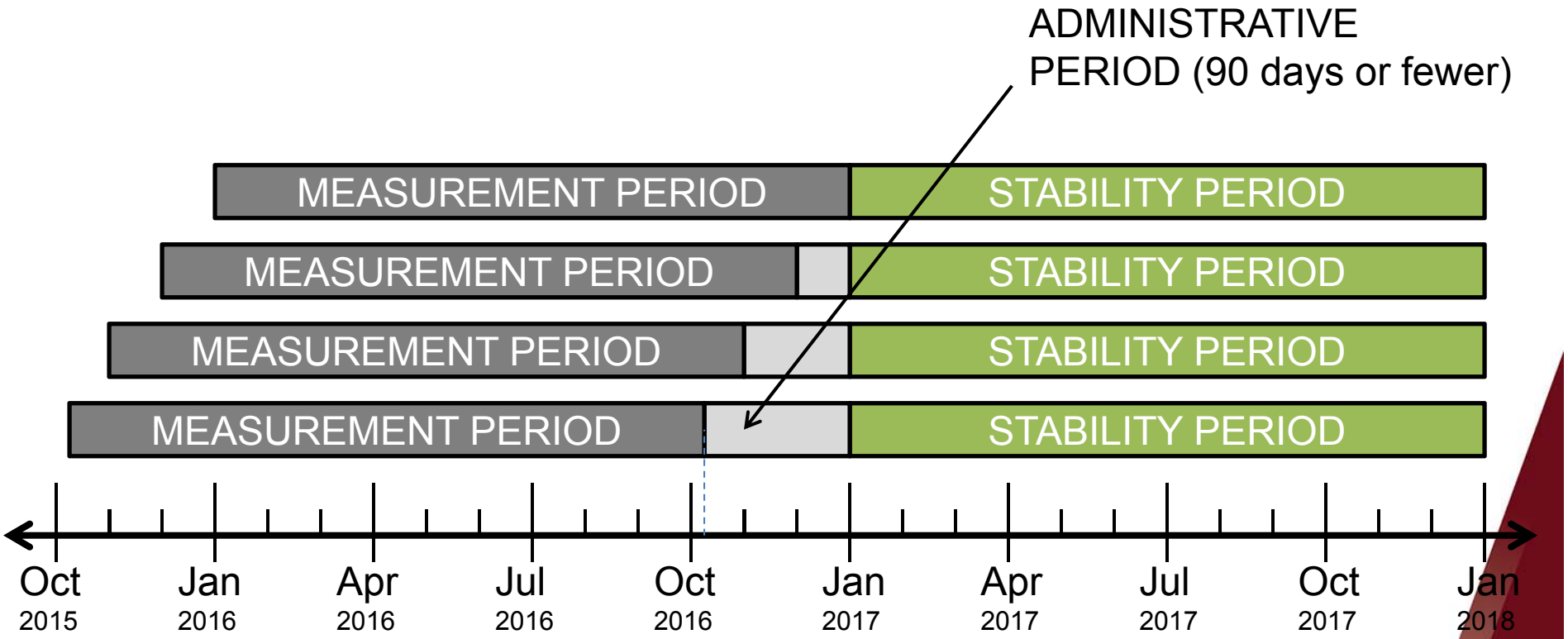
STANDARD MEASUREMENT PERIOD

- 12 month stability period that coincides with a calendar year plan.



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AFFORDABLE CARE ACT

ACA and Contingent Workers

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CONTINGENT WORKERS

- Who is a contingent worker? A worker who performs services that benefit the employer, but who is not directly hired by the employer and is not paid through the employer's payroll.

- Classify contingent workers
  - (1) independent contractor;
  - (2) common law employee of the company; or
  - (3) common law employee of an agency.

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WHY CLASSIFICATION IS IMPORTANT

- Could affect whether employer is “large employer” subject to employer shared responsibility.
- **Could affect whether qualifying coverage is being offered to 95% of Full-Time Employees.**
- Will determine whether that worker’s subsidized coverage on health insurance exchange will trigger a penalty.
- Will affect the amount of the No Coverage Penalty and cap on the Inadequate Coverage Penalty.

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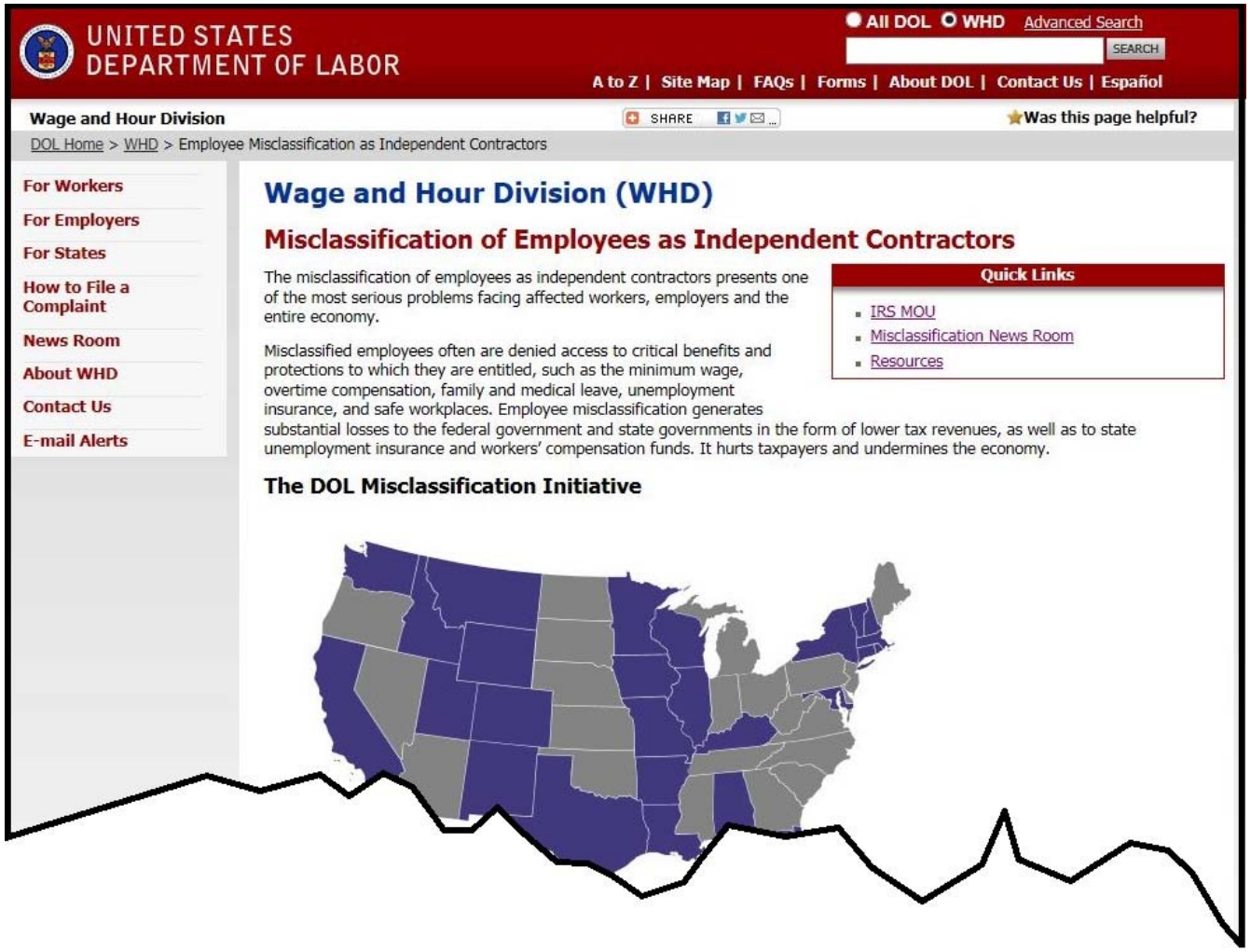
DOL MISCLASSIFICATION INITIATIVE



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DOL MISCLASSIFICATION INITIATIVE

AGREEMENT
BETWEEN
THE U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION
AND
The State of Texas - Texas Workforce Commission

This Agreement is made and entered into this 15th day of February, 2015, by and between The United States Department of Labor's Wage and Hour Division (hereinafter referred to as "WHD" or "Department") and the Texas Workforce Commission (hereinafter referred to as "TWC"), together collectively referred to herein as "the agencies" or "the parties".

WHEREAS, in connection with such enforcement, the parties' areas of jurisdiction and activities may overlap, making it desirable for the parties to share resources and enhance one another's enforcement of the law by sharing information and/or conducting coordinated investigations consistent with applicable law; and

WHEREAS, the parties also share the specific and mutual goals of providing clear, accurate, and easy-to-access information to employers, employees, and other stakeholders; and

WHEREAS, the parties desire to enter into this Agreement to set forth the terms of this partnership in furtherance of these mutual interests and goals.

THEREFORE, IT IS MUTUALLY AGREED THAT:

Purpose of Agreement

The agencies recognize the value of establishing a collaborative relationship to promote compliance

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WHO IS A COMMON LAW EMPLOYEE?

- For ACA purposes, use the test in Treas. Reg. §31.3401(c)-1(b): ". . . the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished."

- Exclude leased employees, sole proprietors, partners in a partnership, 2- percent S corporation shareholders, workers described in Code section 3508.

- "The fact that a staffing contract designates which party is the employer is not dispositive of the issue, as taxpayers may not by agreement designate one party to be an employer when that party fails to meet the federal criteria for status as an employer." IRS Chief Counsel Memorandum 200017041.

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COMMON LAW EMPLOYEES: HOW TO COMPLY

- If a contingent worker is determined to be the common law employee of the employer, how can the employer comply with employer shared responsibility.
  - (1) In limited situations, do nothing;
  - (2) Offer coverage to contingent worker through group health plan; or
  - (3) Contract for coverage through staffing agency.

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DO NOTHING

- Option is available if:
  - the common law employee contingent workers (CLECWs) would make up less than 5% of the workforce; AND
  - the employer is offering qualifying coverage to at least 95% percentage of its employees (including CLECWs)
- Risks:
  - Could fall below the 95% limit.
  - On the hook for inadequate coverage penalty if a CLECW receives subsidized coverage on the exchange.

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OFFER COVERAGE THROUGH EMPLOYER'S GROUP HEALTH PLAN

- Must review and, if necessary amend, group health plan to ensure the CLECWs would be eligible for coverage.
- Logistical issues when enrolling individuals not on employer's payroll.

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CONTRACT FOR STAFFING AGENCY COVERAGE

- To qualify, the following conditions must be satisfied:
  - staffing agency offers coverage to the CLECW through its group health plan; AND
  - the company is billed separately and pays an additional fee to the staffing agency for each CLECW who elects coverage.

- Risks
  - Staffing agency offers coverage to the CLECWs but does not charge a separate additional fee for each employee who elects coverage.
  - Staffing agency refuses to share CLECW data citing privacy requirements.
  - Staffing agency health plan covering CLECWs offers coverage that is not qualifying coverage or is inadequate or unaffordable.

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COMPLIANCE STEPS

- Review new and existing employment arrangements for compliance.
- Identify any CLECWs.
- Amend group health plan, if necessary.
- Negotiate health coverage premium to pay to agency, if necessary.

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ARE WE OUTTA THE WOODS YET? – A GUIDE TO NAVIGATING COMPLEX ISSUES UNDER THE FMLA AND ADA

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Houston Employment Law Update
May 18, 2016

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AGENDA

- Modified Work Schedules as a Reasonable Accommodation and Intermittent Leave
- Leave as a Reasonable Accommodation
- Addressing and Accommodating Mental Impairments
- Preventing FMLA/ADA Fraud and Abuse

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WHEN YOUR FULL-TIME POSITION IS CONVERTED INTO A PART-TIME/TELECOMMUTING, WORK-WHEN-I-FEEL-LIKE-IT GIG

Modified Work Schedules as a Reasonable Accommodation and Intermittent Leave

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POP QUIZ

Emily Employee works as a sales manager for Acme Supply Company. Emily typically works Monday through Friday, 8 am to 6 pm. After nine months on the job, Emily takes a medical leave of absence while she undergoes back surgery. Three months later, Emily notified her employer that she is ready to return to work on a part-time basis with the goal of working up to full-time within the next six months. Due to intermittent back pain which she cannot always anticipate, Emily requests that her employer allow her to come and go during this time period depending upon how she feels with no set hours.

Is Emily's Employer required to grant Emily's request?

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MODIFIED WORK SCHEDULES

- Under the ADA, a “reasonable accommodation” may include job restructuring and part-time or modified work schedules provided no undue hardship exists.
- Examples include:
  - Adjusting arrival or departure times.
  - Providing periodic breaks.
  - Altering when/how certain functions are performed.
  - Allowing an employee to use accrued paid leave.
  - Providing additional unpaid leave.
- However, changing a full-time position to a part-time position is not a reasonable accommodation if the change would require the elimination of an essential job function, would require the employer to create another part-time position, or would require other employees to work harder or longer.

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MODIFIED WORK SCHEDULES

- What should Emily's Employer do?
- Engage in the interactive process to determine if the requested work schedule is reasonable or whether alternate reasonable accommodations exist:
  - Analyze the essential functions of the employee's job;
  - Determine whether he/she is able to perform the essential functions pursuant to the requested modified schedule;
  - Document the findings and any basis for asserting undue hardship;
  - If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

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TIME AND ATTENDANCE REQUIREMENTS

- The ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship).
- However, employers need not:
  - Completely exempt an employee from time and attendance requirements;
  - Grant open-ended schedules (*e.g.*, the ability to arrive or leave whenever the employee's disability necessitates); or
  - Accept irregular, unreliable attendance.

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TIME AND ATTENDANCE REQUIREMENTS

- Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice.
- The chronic, frequent, and unpredictable nature of such absences may put a strain on the employer's operations for a variety of reasons, such as the following:
  - An inability to ensure a sufficient number of employees to accomplish the work required;
  - A failure to meet work goals or to serve customers/clients adequately;
  - A need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them; and
  - Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

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UNREASONABLE ACCOMMODATIONS

- Not required to **eliminate a primary job responsibility**.
- Not required to **lower production standards** that are applied to all employees, though it may have to provide reasonable accommodation to enable an employee with a disability to meet them.
- Not required to provide personal-use items.
- Not required to **excuse a violation of a uniformly applied conduct rule** that is job-related and consistent with business necessity.

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POP QUIZ

During the interactive process, Emily and her Employer came up with a mutually agreeable modified work schedule wherein she would take breaks when she experienced bouts of pain. After 3 months of this modified work schedule, Emily became eligible for FMLA leave and requests to leave work on an "as needed" basis.

Must Emily's employer comply with this request?

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MANAGING INTERMITTENT LEAVE REQUESTS

- Request certification and re-certification.
- Require employees to follow Company call-in policies.
- Track the employee's intermittent leave.
- Ask employees taking planned intermittent leave to schedule leave so that it does not unduly disrupt business operations when possible.
- If leave is foreseeable, consider transferring the employee temporarily to an alternative job with equivalent pay and benefits that better accommodates recurring periods of leave.

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ADA V. FMLA

- An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.
- Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship.
- Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12- month period.
- Leave must be provided under whichever statute provides the greater rights.

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POP QUIZ

During the interactive process, Emily suggests that telecommuting would allow her to perform the essential functions of her position while still enabling her to start late/take breaks when she experiences bouts of pain. Emily requests to telecommute up to 4 days each week on an unpredictable schedule and asserts that she can supervise the sales managers and interact with customers remotely via email, telephone, and videoconferencing. The Company has a telecommuting policy, but it requires that employees come to the office as needed, even on days set for telecommuting, and provides that jobs which require "face-to-face contact" may not be appropriate for telecommuting.

Is Emily's Employer required to allow her to telecommute?

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TELECOMMUTING AS A REASONABLE ACCOMMODATION

- Telecommuting may constitute a reasonable accommodation under the ADA, but the relevant inquiry is whether the essential functions can be performed at home.
- Factors to consider include:
  - The employer's ability to supervise the employee adequately.
  - Whether any duties require use of certain equipment or tools that cannot be replicated at home.
  - Whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.
  - Whether there is a need for face-to-face interaction and coordination of work with other employees.
  - Whether in-person interaction with outside colleagues, clients, or customers is necessary.

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TELECOMMUTING AS A REASONABLE ACCOMMODATION

- Remember in the end it is the employer's choice: An employer may select another effective accommodation which would enable an employee to perform the essential functions of his/her job even if it is not the employee's preferred choice.

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ANDERSON V. HARRISON COUNTY, MISS.,
NO. 14-60896, 2016 WL 547800 (5TH CIR. FEB. 12, 2016) (PER CURIAM)

- Plaintiff Patricia Anderson was a correctional officer for the Harrison County Adult Detention Center working an 8-hour shift Monday through Friday as a canteen officer.
- Facility wide restructuring of the correctional officer position reassigned a majority of the correction officers to 12-hour shifts with rotating, rather than fixed duties.
- Anderson submitted documentation from her psychotherapist stating that she was suffering from severe anxiety and depression and, as a result, could only work a 6-8 hour shift.
- Anderson's request was denied—there was no position available as a result of the restructuring and a schedule modification would result in an undue hardship.

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ANDERSON V. HARRISON COUNTY, MISS.,
NO. 14-60896, 2016 WL 547800 (5TH CIR. FEB. 12, 2016) (PER CURIAM)

- Win for the Employer?
- Yes!
- The warden testified that even when all of the corrections officers worked 12-hour shifts, the facility often was short staffed, requiring some of the higher ranking officers to perform the correction officer duties.
- As a result, Anderson's scheduling accommodation could not have been accomplished without requiring other corrections officers to work longer hours and extended shifts.
- Anderson failed to submit any evidence that either rebutted or undermined the warden's testimony that her requested accommodation would have caused the County an undue hardship.

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WHEN ENOUGH IS ENOUGH

Leave as a Reasonable Accommodation

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POP QUIZ

Ellen the employee took an FMLA leave of absence for her epilepsy. Ellen also received 6 months of short-term disability benefits. Ellen's employer allowed her to take leave for the entire short-term disability period, but is anxious to let Ellen go so it can find a permanent replacement for Ellen's position.

Can Ellen's employer terminate her after this 9 months' leave of absence?

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WHEN IS ENOUGH ENOUGH?

- There is no bright line/specified amount of time.
- Employers must analyze leave requests on a case-by-base basis.
- No obligation to provide indefinite leave, but an approximate return to work date is okay.
- Leave must provide employee with a reasonable prospect to return to work in the foreseeable future.
- Engage in the interactive process!

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UNDUE HARDSHIP – IMPACT ON OPERATIONS

Relevant Factors May Include:

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error.
- Lower quality and less accountability for quality.
- Lost sales.
- Less responsive customer service and increased customer dissatisfaction.
- Deferred projects.
- Increased burden on management staff required to find replacement workers, or readjust work flow or readjust priorities in light of absent employees.
- Increased stress on overburdened co-workers.

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POP QUIZ

Ethan Employee has been on a FMLA leave of absence for 10 weeks when his employer informs him that he has 2 weeks remaining of FMLA leave and requests an approximate return to work date. Ethan knows he's not able to return to work at the end of his FMLA leave, but tells his employer he should be able to return to work after an additional month of leave.

Does Ethan's Employer have to grant his additional leave request?

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LEAVE AS A REASONABLE ACCOMMODATION

- No obligation to provide additional leave if medical evidence indicates that the employee cannot currently perform the job with or without a reasonable accommodation and will likely be unable to do so by some specified or estimated date in the future—despite an employee's hope he/she will be able to return.
- But, still engage in and document the interactive process!
- An employer should allow an employee to present evidence that he may be able to return to work in the foreseeable future.

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BEST PRACTICES FOR LEAVE REQUESTS UNDER THE ADA

- Request documentation from a healthcare provider explaining the nature of the medical condition and an estimate of the leave required.
- Identify the essential functions of the employee's position.
- Conduct an individualized assessment to determine if the leave request is reasonable or whether another reasonable accommodation would allow the employee to perform the essential functions of his/her job.
- Engage in and document the interactive process as well as how the leave is impacting business and operations.
- Communicate during FMLA leave . . . after FMLA leave ends . . . and at all times before and in between!

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WHEN GENERALIZED FEAR TAKES OVER

Addressing and Accommodating Mental Impairments

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POP QUIZ

Suicidal Sammy works as a shoe salesman at the Shoe Factory. Sammy was a top salesman who got along well with all of his co-workers and supervisors. One day, Sammy mentioned to a coworker that he was going through personal issues and was planning to go home after his shift, put his affairs in order, and commit suicide.

Shoe Factory calls 911 and Sammy does not commit suicide.

In light of Sammy's mental instability, Shoe Factory wants to place him on a medical leave of absence pending a psychiatric evaluation.

Smart or Not Smart?

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ADDRESSING AND ACCOMMODATING MENTAL IMPAIRMENTS

- While a medical leave of absence is a reasonable accommodation under the ADA, an employer cannot force an employee to take a leave of absence or submit to a medical exam unless the employer has a "reasonable belief, based on objective evidence that an employee's ability to perform essential functions will be impaired by a medical condition, or an employee will pose a direct threat due to a medical condition."
- What Should Shoe Factory do here?
- What if Sammy worked as a nurse at a hospital or as a police officer?

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WALTON V. SPHERION STAFFING, NO. 13-6896, 2015 WL 171805 (E.D. PA. JAN. 13, 2015)

- Plaintiff Taj Walton experienced suicidal and homicidal ideations at work.
- In a plea for help, Walton wrote the following note to his supervisor:

  > "Lizelle, Please Help Call [*telephone number provided*] Mom [*telephone number provided*] Dad The police I'm scared and angry. I don't know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me. Make sure, please. I'm unstable. I'm sorry Taj."
- The Company called police who drove Walton to a nearby hospital without incident.
- Walton was subsequently diagnosed with depression and was advised to seek further medical treatment.
- Walton quickly sought to advise his supervisor of his diagnosis and intention to seek additional treatment; but was repeatedly unable to reach her.
- Three weeks later, Walton's supervisor terminated him.
- Did Spherion violate Walton's rights under the ADA?

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WALTON V. SPHERION STAFFING, NO. 13-6896, 2015 WL 171805 (E.D. PA. JAN. 13, 2015)

- Spherion alleged it had no choice but to terminate a potentially dangerous employee for misconduct and that proclivities towards violence are not protected under the ADA.
- Court refused to dismiss Walton's ADA claim as Walton neither committed nor threatened violent acts—he simply sought assistance:

  > "I am mindful of the fact that as a medical condition mental illness is frequently misunderstood. Predictable, and in some instances understandable, **fear of the mentally-ill can skew an objective evaluation of risk.** There is no indication here that Walton had a history of any violent conduct whatsoever, and as set forth above, his individual instinct in the moment of crisis was to seek help, and to be protective of others."

- What should Spherion have done?

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STERN V. ST. ANTHONY'S HEALTH CENTER, 788 F.3D 276 (7TH CIR. 2015)

- Plaintiff Dr. Michael Stern was the Chief Psychologist for an acute care facility who experienced poor memory and cognitive issues.
- Dr. Stern's employer placed him on a paid leave of absence pending a fitness-for-duty evaluation.
- Fitness-for-duty exam revealed short term and delayed memory functioning in the second and fifth percentiles and concluded not fit for duty.
- St. Anthony terminated Dr. Stern without first discussing the findings with him.
- Did Dr. Stern's termination violate the ADA?

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ADDRESSING AND ACCOMMODATING MENTAL IMPAIRMENTS

- Avoid making decisions based upon generalized fear of mental illness—conduct an individualized assessment.
- Require a medical exam before an employee may return to work but only where permissible.
- Don’t assume an employee with performance problems has a mental disability.
- Hold all employees to the same performance standards regardless of a disability, but provide accommodations where needed.
- Don’t withhold discipline even if misconduct might be due to the employee’s mental illness.

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FRIDAY AND MONDAY LEAVE ACT

Preventing FMLA/ADA Fraud and Abuse

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POP QUIZ

Kim calls in on the Friday before Memorial Day Weekend and says she cannot come in to work because she is having an insulin reaction. Kim is diabetic and has a current FMLA medical certification stating that she may need intermittent leave for the condition. On the Tuesday following Memorial Day, an employee reports to his supervisor that he saw pictures posted by Kim on Facebook showing her tubing on the Guadalupe River. The employee was upset because he had to fill in for Kim during her absence.

What should Kim's employer do?

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PREVENTING FMLA/ADA FRAUD AND ABUSE

- Avoid jumping to conclusions.
- Investigate patterns of absences and talk to the employee.
- Under FMLA, request recertification, which includes providing the employee's healthcare provider with a record of the employee's absence pattern and ask the healthcare provider if the serious health condition and need for leave is consistent with that pattern.

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POP QUIZ

Ben has a chronic illness and on occasion it renders him unable to work. Ben has exhausted all of his FMLA leave, but the Company has allowed him to modify his work schedule as a reasonable accommodation when Ben has a flare up. On Friday, Ben calls in sick due to a flare up related to his chronic illness.

The Company discovers that Ben is looking for a new job and has been interviewing with potential employers. In fact, Ben had an interview on the Friday he called in sick.

The Company wants to fire Ben.
How should the Company proceed?

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CURTIS V. COSTCO WHOLESALE CORP., 807 F.3D 215 (7TH CIR. 2015)

- Plaintiff Keith Curtis was an optical manager employed by Costco with a history of customer complaints and poor performance.
- In September 2011, Curtis requested and was provided a medical leave of absence under the FMLA due to stress and anxiety.
- After returning to work following the leave, Curtis's work performance did not improve and ultimately Curtis was placed on a 90 day PIP in April 2012.
- In May 2012, Curtis's subordinate informed Costco that she was concerned Curtis was going to "scam" the Company as Curtis allegedly told her he intended to take a medical leave of absence to secure his position and pay in the event of a demotion.
- Shortly thereafter, Curtis was demoted and two days later, Curtis took FMLA leave.
- Curtis filed suit for violation of the FMLA.

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CURTIS V. COSTCO WHOLESALE CORP., 807 F.3D 215 (7TH CIR. 2015)

- FMLA not triggered—Curtis's comment made in passing to a subordinate employee that he was contemplating taking a medical leave did not provide Costco management with sufficient information as required by the FMLA.
- Regardless, "activity that might normally receive FMLA protection is stripped of that protection when it is fraudulent."
- Costco demoted Curtis based upon information received from Curtis's subordinate that he intended to "scam" the Company by taking a fraudulent medical leave.

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I SPY . . .

- Can an employer spy on the employee taking FMLA leave or leave under the ADA?
- Yes, when employer has an honest suspicion that the employee is taking fraudulent leave.
- May also introduce evidence from surveillance to defend against interference claims.

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PREVENTING FRAUD AND ABUSE

- Certification and recertification are the best methods for preventing fraud and abuse.
- For reasonable accommodation requests, request documentation from a health care provider for non-obvious conditions.
- Request a second and possibly third opinion.
- Investigate allegations of fraud and abuse before taking an adverse employment action.
- Require all employees (even those on intermittent FMLA leave) to follow normal-call in procedures for reporting an absence, absent extenuating circumstances.
- Require accrued leave to run concurrently with FMLA leave.

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CASE LAW UPDATES

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INSUFFICIENT FMLA NOTICE CASES

- *Anderson v. McIntosh Construction*, *LLC*, 597 Fed. App'x 313 (6th Cir. 2015).

- *Brown v. Atrium Windows & Doors, Inc*., No. 3:13-CV-4819, 2015 WL 1736983 (N.D. Tex. Apr. 16, 2015).

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KINGSAIRE, INC. V. MELENDEZ, 477 S.W.3D 309 (TEX. 2015)

- Plaintiff Jorge Melendez lacerated his wrist while participating in demolition work for his employer which required surgery.
- Melendez filed a workers' compensation claim and took a leave of absence to recover.
- Two weeks after the incident, the Company provided Melendez with an FMLA notice advising Melendez that he would be placed on FMLA leave during his workers compensation leave.
- When Melendez's 12 weeks of FMLA leave expired, he had not been released to return to work and 4 days later, the Company terminated Melendez pursuant to Company policy.
- Melendez filed suit alleging that his termination was in retaliation for filing a workers' compensation claim.

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KINGSAIRE, INC. V. MELENDEZ, 477 S.W.3D 309 (TEX. 2015)

- Held: No retaliation because termination was pursuant to a "uniform enforcement of a reasonable absence-control policy."
- But, what about the ADA?

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