

Legal Connections



POWERED BY THE COLUMBUS BAR ASSOCIATION

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EXEMPT OR NOT - ENSURING EMPLOYEES ARE PROPERLY CLASSIFIED TO AVOID EXPENSIVE CONSEQUENCES

Most employers believe that paying a consistent salary every pay period is easier than tracking time and calculating hourly employee pay. Salaried employees also don't receive overtime pay, so controlling payroll costs by making employees salaried seems like an attractive alternative.

Misclassifying employees, however, can cost far more than occasional overtime pay.

It's important to use correct terminology when discussing classification. We frequently interchange salary and hourly with the correct terms 'exempt' (from overtime) and 'non-exempt'. Correct terminology is necessary because an employee can be classified as salary non-exempt, which means they receive a guaranteed salary every pay, but are still



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owed overtime wages paid at 1.5 times their calculated hourly rate for hours worked in excess of 40 in a workweek.

Each classification has pros and cons for employers and employees.

Non-exempt:

- Pros for employers: Easy to calculate (hourly rate X number of hours), wage deductions for missed time
- Pros for employees: Overtime is paid at a premium

- Cons for employers: Payroll will be variable, must be closely managed to avoid overtime

- Cons for employees: Can be psychologically de-motivating

Exempt:

- Pros for employers: Easy to calculate (set salary every paycheck), "Salary" can be psychologically motivating, No need to worry when an employee works over 40 hours in a week

- Pros for employees: Pay is consistent

- Cons for employers: No allowable wage deductions (with a few exceptions), "Work a minute, work a day" pay

- Cons for employees: No overtime for time worked over 40 hours

The Department of Labor Wage and Hour Division provides a great deal of guidance on determining if a position

"Employment regulations are changing regularly. An attorney can help you stay current to make the best decisions for your business."



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is exempt or non-exempt. The first threshold is that, "the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week," or \$11.37 per hour or less. If compensation does not surpass this weekly amount, then the employee is non-exempt. Please note that states may have separately set higher amounts.

If the employee's wages exceed this minimum amount, then the employer must evaluate the position's primary duties based on the DOL's Fact Sheets. If both the wage threshold and the duties tests are met, the position is probably exempt. While there are benefits to classifying every employee as non-exempt regardless of compensation or duties, an employer would be wise to maximize the benefits of the exempt status.

Failure to properly classify positions can result in unpaid wages, overtime, liquidated damages and attorney fees. Recently, a federal judge in Alabama approved an \$8.3 million settlement because Dollar General allegedly failed to properly pay store managers for overtime. ■

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EMPLOYMENT AUTHORIZATION: HOW CAN YOU STAY COMPLIANT?

Immigration laws and policies are changing daily; compliance has become even more challenging. In order for a non-US citizen to work in the United States, one must have either a permanent resident card (a green card), employment authorization document or employment related visa. Title 8 of the Code of Federal Regulations lists all such categories.

A permanent resident is an individual who is authorized to live and work permanently in the United States. A permanent resident card based on employment is issued for 10 years, and the permanent resident can apply for



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extensions or for naturalization after five years.

Employment authorization can be granted in various situations, including a person in refugee or asylum status;

a fiancée of a US citizen who has permission to work must file for authorization (an EAD card); and a person in temporary protected status. The expiration date on the EAD determines how long the card holder is allowed to legally work in the US. In these situations, the card may or may not be extended. Before hiring a person with an employment authorization card, potential employers should consult immigration professionals to determine whether the card can be extended. This can save the employer from hiring a person whose work permit either expires soon or does not allow extensions.

The most commonly known temporary employment-based visa category is the H-1B visa. The H-1B program allows companies in the United States to temporarily employ foreign workers in occupations that require the theoretical and practical application of a body of highly specialized knowledge (i.e., college education or higher). The H-1B visa may be approved for three years and can be extended for an additional three years. This is subject to quota and must be filed by April 1 for an Oct. 1 start, unless the employer is affiliated with a college or university. ■

7th Annual

Martin Luther King, Jr.
Memorial Civil Rights
Symposium

January 25, 2019 @ 9:00am Columbus Bar Association

A HISTORY OF HATE: Civil Rights Symposium 2019

Hate has crept into our society affecting education, the LGBTQ community and immigration. This program examines how the 1st and 14th amendments deal with hate and concludes with one man's efforts to erase hate. Register: www.cbalaw.org or (614) 221-4112

