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# Dealing with Misclassified Employees Under the FLSA: What Employers Should Do

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## **Presenters from the Wage & Hour Defense Institute:**

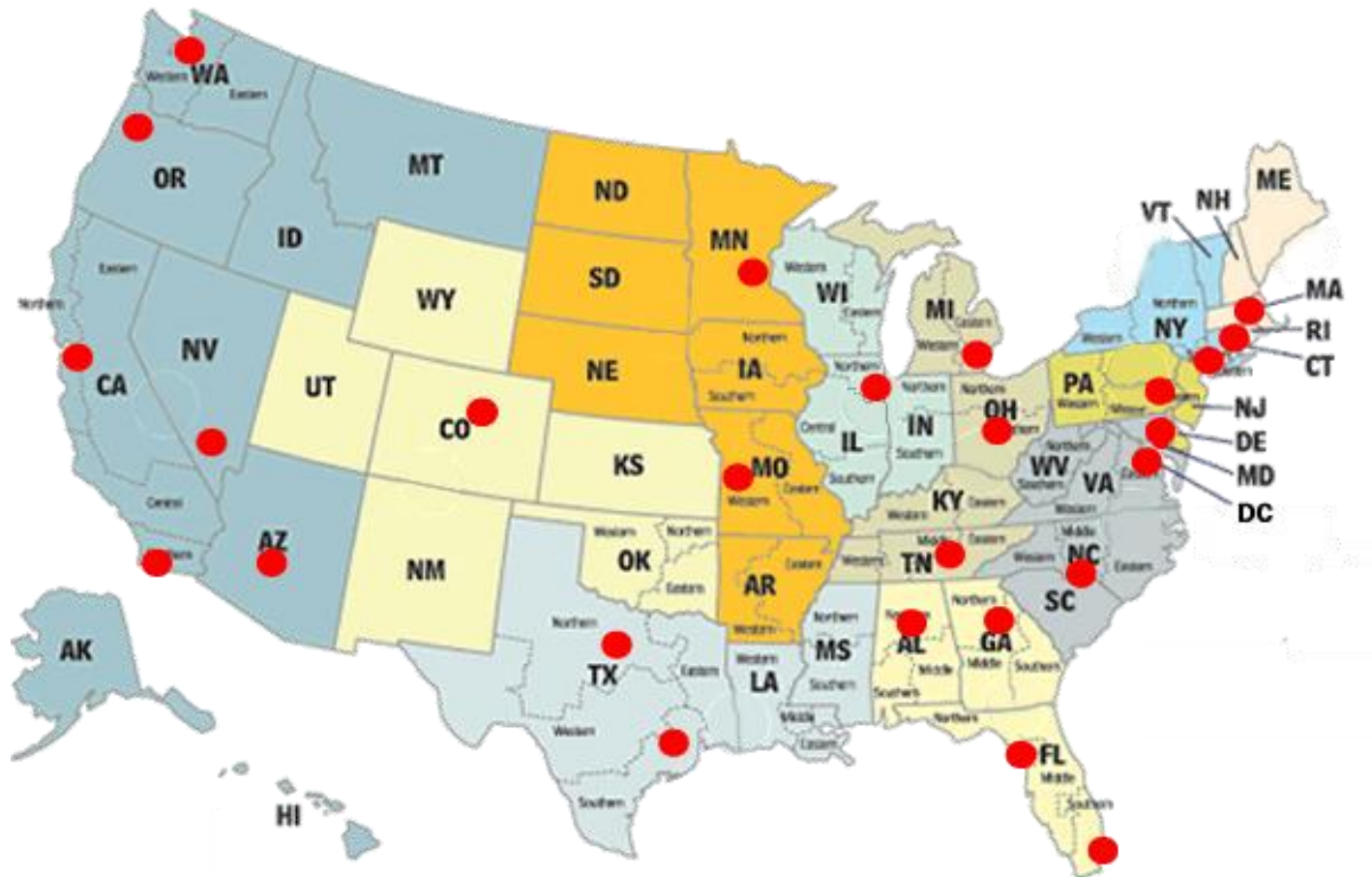
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## **Moderators:**

- Suzanne Brown of Practical Law Labor & Employment
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# WHDI Attorney Locations

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# What Is the Wage & Hour Defense Institute?

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- The WHDI is comprised of highly talented and experienced wage and hour defense attorneys from across the United States.
- The WHDI serves as a nationwide network and meeting ground for top-tier practitioners to engage in professional development and also to become an established resource for employers on wage and hour matters.

[www.whdi.litcounsel.org](http://www.whdi.litcounsel.org)

# Who Is “Misclassified?”

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Someone the employer considers “exempt” from overtime (and is usually paid a salary), but who does not fit within any exemption.

Or

Someone the employer treats as an Independent Contractor even though the person is an employee. (Independent Contractor issues will be discussed later in the webinar.)

# Exemption Options

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- “White Collar” Exemptions
  - Executive
  - Administrative
  - Professional
- Special Exemptions
  - Sales (inside or outside)
  - Computer Professional



# Common Problem Areas

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- Many IT positions
- Software Engineers
- QA
- Sales
- Accounting
- Executive Assistants
- Part-time Professionals

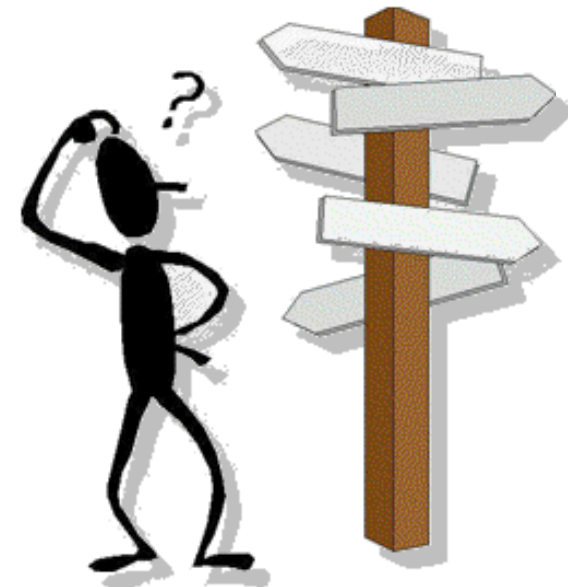
# Reality Check . . . .

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*Every employee* is presumptively nonexempt . . . . so . . .

*the employer* must prove that an employee is exempt.

This can be challenging. . .





# An Expensive Issue:

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- IBM: \$65 million to 32,000 technical and support workers
- Smith Barney: \$98 million to 20,000 stockbrokers
- Starbucks: \$18 million to 1,000 store managers and assistant managers
- Siebel Systems: \$27.5 million to 800 software engineers

# Do You Have a Misclassification Problem?

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- When was the last time your company took a look at exempt positions?



# Reviewing Exempt Positions

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- Team members – internal and external
- Importance of using the A/C privilege
- Scope of review (which positions)
- Source of information on job duties
- Form of audit report
- Exposure assessment



# Independent Contractors Under the FLSA

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- The Department of Labor uses a six-factor “economic realities” test for determining a workers’ independent contractor status:
  - The degree to which the person is independent or is controlled by the employer with respect to the way the work is done;
  - The individual’s opportunities for profit or loss;
  - The individuals’ investment in the facilities and equipment of the business;
  - The permanency and length of the relationship between the business and the individual;
  - The degree of skill needed to do the person’s work; and
  - If, and how much, the work performed by the individual is a major part of the employer’s business.
- No one factor is determinative.
- Language used by the parties to describe their relationship is not determinative.

# Other Tests for Independent Contractor Status

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- IRS: Test focuses on three categories:
  - Behavioral: Does the Company control or have the right to control what the worker does and how he/she does job?
  - Financial: Are business aspects of role controlled by company?
    - E.g., how worker is paid, whether expenses are reimbursed, who supplies tools
  - Financial: Are business aspects of role controlled by company?
    - E.g., written contracts, provision of benefits, permanency, whether services are key part of regular business activity of company
- State Laws
  - Vary widely across the U.S.

# What To Do About Misclassified Employees

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1. Do nothing
2. Limit future exposure
3. “Exempt-ify” job duties
4. Reclassify to nonexempt

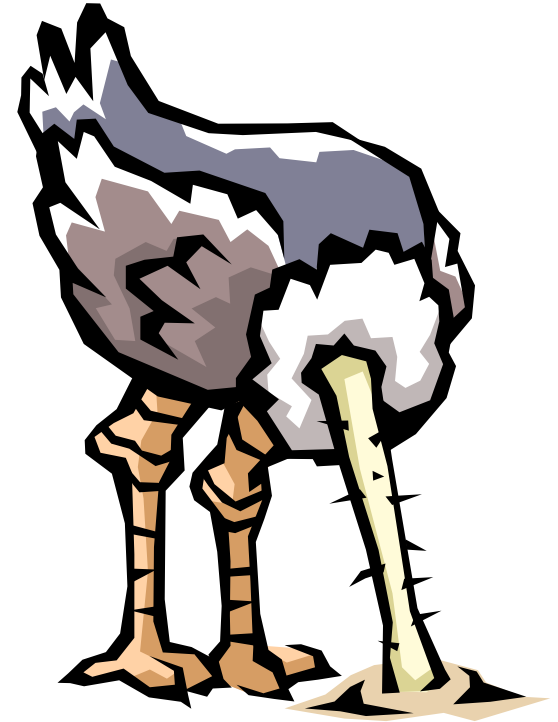


# Doing Nothing

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- Avoids potential trigger
- Prolongs risk to company
- Role of HR

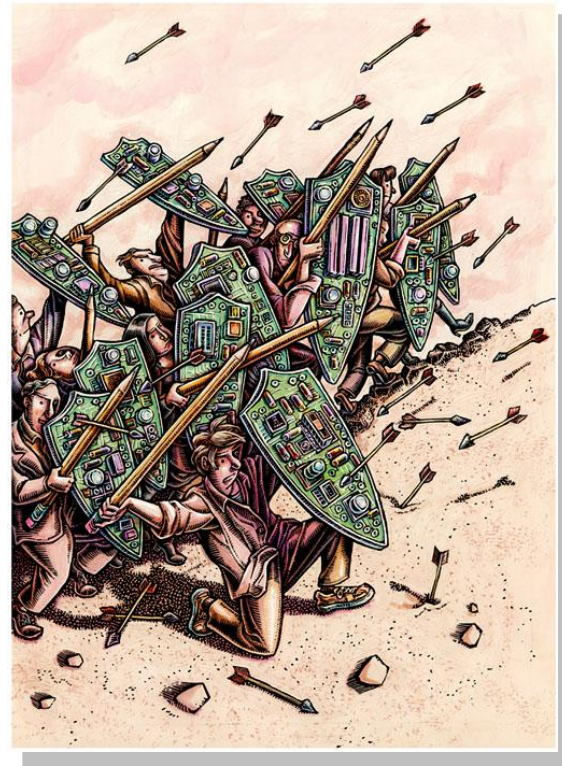
If you do nothing else, perhaps your Company needs to accrue for risk.



# Limit Future Exposure

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- Track, limit “overtime”
- Implement self-evaluation program
- Re-focus job descriptions to emphasize exempt-type duties





# “Exempt-ify” Job Duties

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- Modify job duties
- Reallocate job duties



# Reclassifying Employees

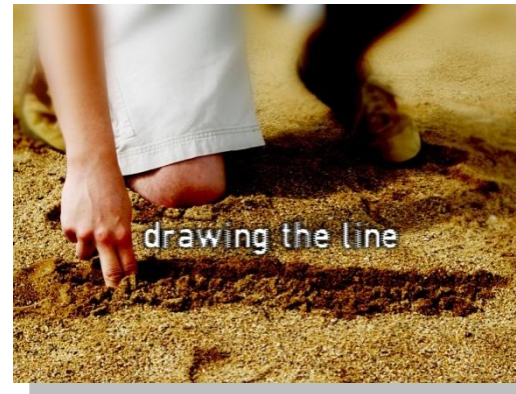
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- Where to draw the line
- Converting annual salaries to hourly pay rates
- Timing of reclassification
- Communicating the decision
- Establishing timekeeping procedures
- Training employees and supervisors
- Work-at-home issues for hourly employees
- What to do about past overtime

# Where To Draw the Line

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- More exempt employees generally means more risk
- Think about effect on recruiting
- Consider consistency across departments/locations



# Timing of Reclassification

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- Give enough notice for proper planning and coordination. Otherwise, chaos might ensue.
- Consider tying reclassification to scheduled annual bonuses and/or pay increases.



# Communicating the Reclassification Decision

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- Don't admit past liability.
- “The laws are vague, and we want to err on the side of caution.”
- “We value your hard work and want to reward extra effort (overtime).”
- Brief supervisors first, and give them FAQs to use in answering questions.

# Establishing Timekeeping Procedures

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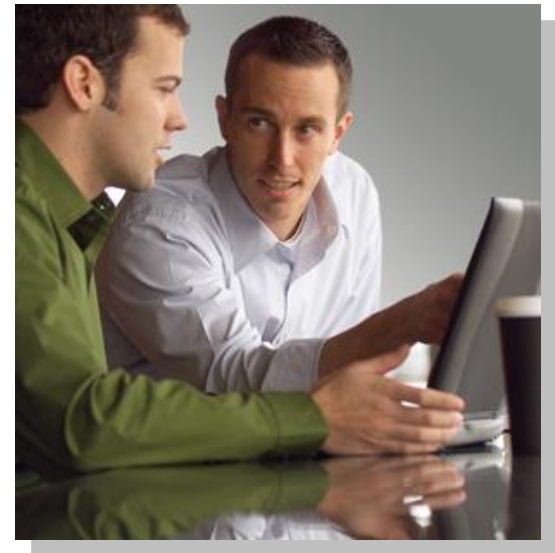
- Do you have the proper hardware and/or software?
- Train employees to record time, meal and rest breaks.
- Train managers on their responsibilities.
- Set up a timekeeping system to stay on top of meal and rest breaks.



# Training Employees and Supervisors

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- Timekeeping procedures
- “Off-the-clock” work prohibited
- How overtime works
- For managers, who can authorize overtime and how much
- Meal and rest breaks
- Travel time



# Converting Annual Salaries Into Hourly Pay Rates

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- Annual salary  $\div$  2080, or some other number?
- Will formerly exempt employees lose benefits when reclassified to nonexempt?





# Should You Pay Reclassified Employees for Past Overtime?

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- How much do you potentially owe them?
- Are any employees demanding payment?
- Will paying them open a can of worms?
- Public-sector employer accountability?



## If You Pay Reclassified Employees ...

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- Can you have them sign a release in exchange for payment?
- Unresolved issue with enforceability of wage claim releases.
- Request an acknowledgement.

## If You Pay Reclassified Employees ...

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- “I \_\_\_\_\_ acknowledge that I have been paid \_\_\_\_\_ and this amount fully compensated me for all hours worked during the last \_\_\_\_\_ years and that I am not entitled to additional wages, including overtime wages.”

# Summary

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- Proceed with care.
- Size up your problem.
- Evaluate all your options.
- If you reclassify, consider all the issues – timing, process, communication, training and potential payment for past overtime.

*This presentation is for general informational purposes only and is not specific legal advice. Please contact your attorney and discuss such matters within the attorney-client relationship for specific legal advice regarding this subject matter.*