



**MIKE BOURGON**

Human Resources Consulting

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# **Employee Relations Legal Update, Ideas & Trends**

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# Agenda

- Introductions
- Discussion Topics
  - Payroll Practices Update
  - Sexual Harassment
  - ADA/ADAAA Update
  - Legal Terminations
- Q&A



# **Payroll Practices Update**

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# Steps to Avoid FSLA Claims

- Examine your organization's exempt classifications, payroll practices, complaint mechanisms & training programs to make sure they meet the applicable standards.





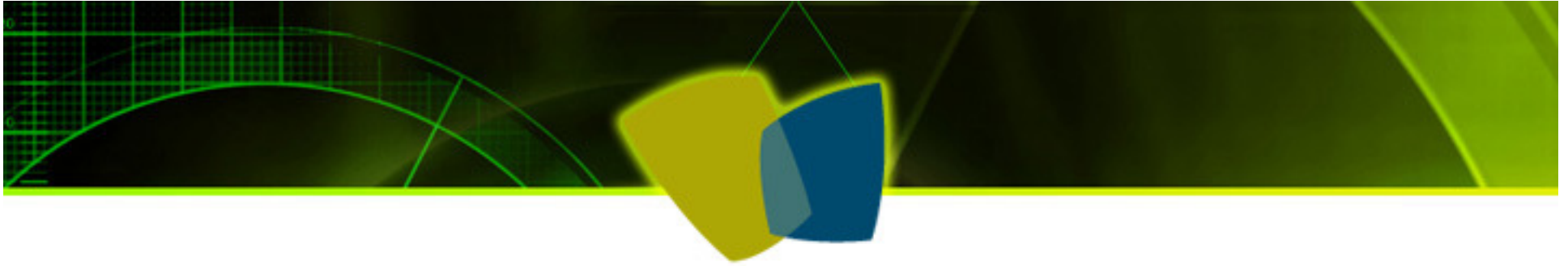
# Steps to Avoid FLSA Claims

- Conduct the salary basis test for exempt white collar employees.
- Examine the use of the regular rate of pay in overtime calculation
- Review your internal complaint & investigation procedures as well as record retention methods.



# White Collar Exemptions

- Employers must prove that overtime pay was properly denied.
- Generally applies to executive, administrative & professional employees
- A thorough review of the job duties must be performed to determine exempt status.
- An exempt position must pass both the salary basis & the duties test.



## **Violations of the White Collar Exemptions**

- If an employee is misclassified as exempt, the employer may be liable for substantial back pay for unpaid overtime.
- Liquidated damages (which the statute defines as double back pay) in addition to other damages for willful violations.







# Violations

- The statute of limitations is either 2 or 3 years depending on whether the violation was willful.
- Managers or supervisors can be held individually liable.



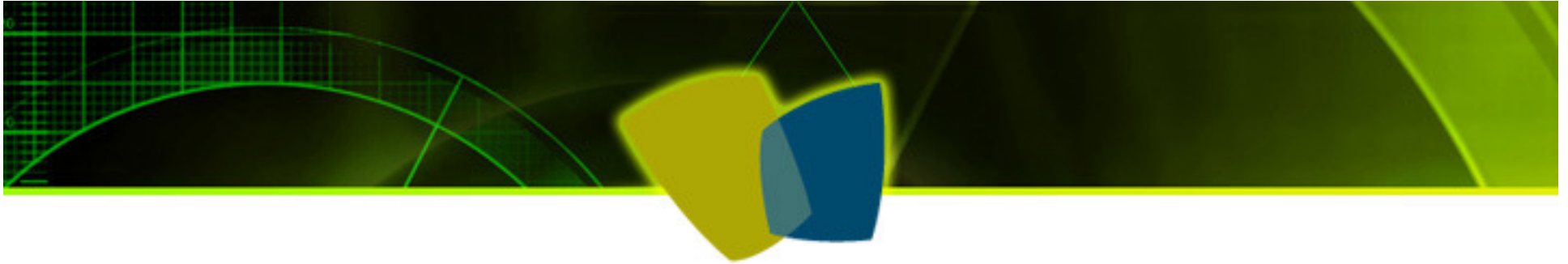
# Salary Basis Test

- In order to apply a white collar exemption, employees must receive and be paid a salary.



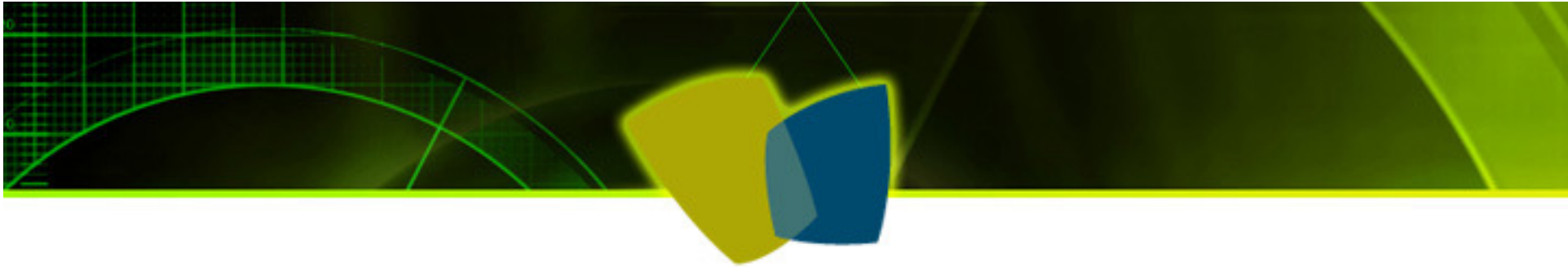
# Salary Basis Test

- If an employee receives a salary of at least \$455 per week (\$23,660 per annum) this is not subject to reduction due to variations in quality/quantity of work performed & meets the regulatory definitions for “duties”, they do not have to be paid overtime for hours worked over 40 in a week because their salary is intended to cover all of their working time.



## **Considerations for the Salary Basis Test**

1. Does the organization have a written policy prohibiting improper salary deductions?
2. Does the automated payroll system have electronic alerts to prevent salary docking?



## **Considerations for the Salary Basis Test**

3. Is there a written safe harbor policy calling for the investigation of complaints & timely reimbursing of improper deductions?
4. Is there an automated system for requesting time off, paid or unpaid? Are there review levels?





# Considerations

5. Are there rules governing time off and if so is the time off limited to full-day increments?
6. Are employee pay stubs or earning statements understandable as to how compensation is calculated?



# Considerations

7. For salaried exempt employees, do they reflect a predetermined salary that is regularly paid?
8. Failure to consider these items for salaried employees could render an exempt as an hourly employee & entitled them to unpaid overtime.



## **Regular Rate of Pay & OT Calculations**

- In many instances, employers pay attendance bonuses and other non-discretionary bonuses that induce non-exempt employees to work more steadily or more efficiently or for longer periods of time.
- These payments are not often included in the calculation of the employee's regular rate of pay before overtime pay is calculated.



# Regular Rate of Pay

- All compensation that constitutes “remuneration for employment” must be included unless it falls within a very specific statutory exemption.
- Thus these “bonuses” must be included in the calculation of the “regular rate of pay”.



# **Sexual Harassment**

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# Tangible Employment Action

When does harassment become a tangible employment action?

- If a supervisor's harassment includes the taking of a tangible employment action – the employer will have no defense to charges.



# Tangible Employment Action

- The Story of Ben. . .
  - A supervisor at your company makes sexual overtures towards Sonia, a sales woman.
  - When Sonia rejects his advances, Ben eliminates her private office and reassigns some of her work.
  - Can your company be liable for Ben's actions?



# Tangible Employment Action

A tangible adverse employment action may be found if:

- Direct economic harm
- Decreases in employee's earning potential
- Significant disruption in his/her working conditions



# Tangible Employment Action

The U.S. Supreme Court has said that a tangible employment action occurs when there is:

- A significant change in employment status such as hiring, firing, or failing to promote or reassigning with significantly different responsibilities.



# Tangible Employment Action

- A decision causing a significant change in benefits – such as a significant reduction in pay or loss of health benefits.
- A direct monetary loss is not necessary in order for conduct to constitute a tangible job action.





# Tangible Employment Action

- Rather the significant loss of benefits or characteristics such as the resources necessary for the employee to do his/her job – may constitute a tangible job action.



# **Americans with Disabilities Act**

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# ADA Accommodations Update

- As a general rule, there is a responsibility for an individual with a disability to inform the employer that an accommodation is needed.
- A Federal court has recently carved out an exception to the rule if the disability is obvious.



# ADA Example

You recently have hired a pharmacy assistant who's movements & speech are notably slow due to cerebral palsy. The individual has 2 years of experience with another local pharmacy where he received prescriptions and dispensed prescription drugs without incident.



# ADA Example

- The individual's supervisor is displeased however with his performance.
- The supervisor believes that the individual is too slow and appears to have difficulty matching customer's names with their prescriptions.





# Question

- Given that the individual has never asked for an accommodation for his disability, can the individual be transferred to another department without engaging in an interactive accommodation process?



# Answer

- The American with Disabilities Statute requires accommodation of “known” disabilities not just disabilities for which accommodation has been requested.
- The employer has a duty to reasonably accommodate an employee’s disability if the employer knows or reasonably “should have known” that the employee is disabled.



# **ADA Amendment Act of 2008 (ADAAA)**

## **Effective January 1, 2009**

Currently, under the ADA of 1990, disability is defined as:

- A physical or mental impairment that substantially limits one or more major life activities.
- A record of such an impairment.
- Being regarded as having such an impairment.



# **ADA Amendment Act of 2008 (ADAAA)**

## **Effective January 1, 2009**

While the ADAAA retains the ADA's existing definition of "disability", it amends the ADA to further clarify and define 3 critical terms within the definition which ultimately allows more employees to be covered.



# Major Changes to the Act

- Redefines the term “substantially limits”. Although the EEOC is still in the process of defining the term & finalizing the regulations, employers can be certain that the EEOC will take an expansive approach.





# Major Changes to the Act

- Expands the definition of “major life activities” to include activities such as caring for oneself, performing manual tasks, seeing, eating, breathing, learning, reading, concentrating & working , & the operation of major bodily functions such as functions of the immune system, normal cell growth, bowels, digestive, brain, bladder, circulatory, endocrine & reproductive system.



# Major Changes to the Act

- Clarifies & broadens the scope of potential liability for ‘regarding an individual as disabled’.
- Cannot consider mitigating measures, such as medications or assistive devices, when assessing whether an individual has a disability. The amendment excludes ordinary glasses or contact lenses.



# Major Changes to the Act

- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active (e.g., diabetes, epilepsy, lupus).



## **Tips for Complying with the ADAAA**

- Review your employment policies on disabilities & reasonable accommodation.
- Revisit reasonable accommodation requests, if any, that have been denied because you determined that the employee did not satisfy the ADA's definition of the term 'disability'.



## **Tips for Complying with the ADAAA**

- Train your managers who deal with accommodation requests on the changes in the law, given that more employees will be eligible for ADA protection. If there is any doubt about whether the impairment constitutes a disability under the law, it is advisable to consult with an HR professional or legal counsel.



# Tips

- Managers should also be trained on the changes to the ADA's definition of a person who is 'regarded as' disabled which now may make it possible for just about anyone with a non-temporary impairment to bring the discrimination claim under the law. Denigrating comments about employees' physical appearance or physical & mental abilities are now more likely to give rise to liability.





# Tips

- Understand the legal risks associated with the discipline & termination of an individual who is 'regarded as disabled' under the law. It is important to dot your "I"s and cross your "T"s to ensure you have appropriate documentation and support for your termination and disciplinary actions.



# Summary

Although the ADA Amendment Act has changed the ADA and the way courts will interpret the law, good common sense policies and practices such as promoting a respectful work environment and being open-minded and thoughtful when employees request reasonable accommodations will continue to help employers comply with the law and avoid liability.



# **Legal Terminations**

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# Impact of Employment At-Will

Most employees establish an at-will relationship with their employees either as a result of the law or an existing policy. However, as a practical matter, you should not completely rely on your at-will status to defend your termination decisions unless. . .

- You haven't used an illegal basis for terminating an employment relationship or . . .
- Done anything during the relationship to change the at-will status of your employees or . . .
- Unless you have established best practices on the front end in order to exercise your at-will employment rights with minimized risk.



# Best Practices Avoid Litigation

- Create a clearly articulated at-will employment policy.
- Include a disclaimer in the employee handbook that the company reserves the right to change, amend, and terminate HR policies at its discretion.
- Require employees to sign an acknowledgment of receipt of the HR policies.
- Ensure supervisors are trained on all policies and their applications.





# Best Practices Avoid Litigation

- Follow your own policies and apply them fairly.
- Always maintain thorough documentation.
- Don't fire an employee for poor performance when the employee's records show good evaluations.
- Don't criticize an employee for events that pre-date a positive review.





# Critical Firing Mistakes

- Failing to have an employment contract or offer letter for each employee
- Not having standard policies in writing
- Not having proper appraisal documentation
- Not having a legitimate job related reason
- Failure to prepare for the termination



# Critical Firing Mistakes

- Taking too long to take action
- Not having a follow-up plan
- Talking too much
- Letting the word out
- Arguing



# The Termination Meeting

- Remember: Termination is not discipline.
  - Discipline is an attempt to remediate an inappropriate behavior.
  - Termination is simply cutting lines.
- Termination is not the time to teach life lessons.
- Set the termination date & time early in the week & early in the day.



# The Termination Meeting

- Notify other key personnel who have a need to know, such as senior management & security.
- Be brief
  - No more than 15 minutes. . . Any longer & you are lecturing, not firing.
  - Employee will start to escalate.
  - Abandon normal protocol (exit interview).



# The Termination Meeting

- Keep your feelings to yourself.
- Explain exit process and final pay information.
- End the meeting and escort employee from building.



# Questions & Answers

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