



Tuesday, October 20
11:00 am–12:30 pm

706 The Sins of Wages: The Top Ten Employer FLSA Mistakes

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Faculty Biographies

Debora A. Buljat

Debora A. Buljat is the associate general counsel for General Dynamics National Steel and Shipbuilding Company (NASSCO) in San Diego. She is responsible for managing all litigation and providing counseling on a wide-range of legal issues.

Prior to becoming in-house counsel for NASSCO, Ms. Buljat litigated a wide range of civil cases, with an emphasis in employment law. Ms. Buljat previously worked in private law practice where she represented public and private employers in all aspects of employment disputes pending before state and federal courts and administrative entities. Ms. Buljat has successfully litigated cases involving wrongful termination, discrimination, harassment, retaliation, disability accommodations, breach of contract and defamation.

She is currently on the San Diego County Bar Foundation Board, serves on ACC'S Employment and Labor Law Committee as the co-chair of the policy sub-committee, and taught a class on in-house law practice at Thomas Jefferson Law School through ACC's San Diego chapter.

Ms. Buljat received a BS from Cornell University and is a graduate of the University of Denver College of Law.

Jeremy Kashian

Jeremy Kashian is the associate general counsel for NEC Corporation of America in Santa Clara, California. She joined NEC in 2000 and has had a wide variety of responsibilities in both transactional and litigation management practice areas. Her current responsibilities include handling all aspects of employee and benefit related matters and litigation management in North America.

Prior to joining NEC, Ms. Kashian practiced employment and general litigation with a few Sacramento based law firms.

She is past president of ACC's San Francisco Bay Area Chapter. She currently serves as a member of the board of directors of a couple non-profit organizations dedicated to serving the legal and other needs of foster and underprivileged children.

Barbara Ann Sellinger

Barbara Ann Sellinger recently became vice president and general counsel of Kamine Development Corp and GettingHired in Bedminster, NJ. Ms. Sellinger has extensive experience in all areas of global labor and employment law, representing and counseling major corporations.

Most recently, Ms. Sellinger was the group vice president, enterprise labor and employment law at Wyndham Worldwide in Parsippany, New Jersey. Early in her career, she worked for the National Labor Relations Board Division of Judges and the US Department of Labor. She previously worked as an associate at the labor and employment law firm of Grotta, Glassman and Hoffman and in the employment law group of the law firm Cohen Shapiro. She was a partner at the labor and employment law firm of Epstein Becker and Green. She worked as a chief litigation and labor and employment lawyer at American Standard Inc. and RJR Nabisco Inc.

Ms. Sellinger served on the ACC Board of Directors, was the president of ACC's New Jersey Chapter (NJCCA) and remains on the NJCCA board of directors.

Ms. Sellinger received her bachelors, magna cum laude/Phi Beta Kappa from Syracuse University, her masters, from the Maxwell School at Syracuse University and her law degree from the Washington College of Law at American University, where she was awarded a dean's fellowship.

What we will cover during the presentation

- **What are the trends in wage and hour litigation**
 - Growth
 - Can Employers support claims that the recent bad economy justifies walking on the line
 - Off the clock, misclassification, no record keeping, do work at home, changing vacation policies, furloughs
- **What are the top ten FLSA Employer mistakes**
- **What have we learned—Take aways and how can we avoid these mistakes in the future?**

New Federal FLSA Collective Actions filed since 1996

Year	Number of Actions
1996	150
1997	180
1998	200
1999	250
2000	300
2001	350
2002	450
2003	550
2004	850
2005	1050
2006	1150
2007	1150

New Federal FLSA Class and Collective Actions

- **Federal FLSA Class and Collective Action Litigation has grown at an exponential pace**
 - 1,094 in 2004
 - 2,167 in 2007
 - 2,411 in 2008
 - Over a 120 percent rise from 2004 to 2008

Just a few examples of Federal and State FLSA verdicts and settlements

- **Verdicts and Settlements are HUGE and growiNG**
 - Failure to Pay Overtime Due to Misclassification
 - \$90 Million verdict against Farmers Insurance
 - \$3.3 Million settlement for Office Depot
 - \$22.4 Million settlement for Safeway
 - Meal and Rest Breaks
 - \$172 Million verdict against Wal-Mart
 - \$8 Million settlement for FedEx
 - Working Off the Clock
 - \$5.1 Million settlement for Cingular Wireless
 - Failure to Reimburse for Expenses and Mileage
 - \$3 Million settlement for Starbucks
 - Independent Contractors
 - \$22.4 Million settlement for Albertson's contract janitors
 - Multiple Violations
 - \$640 Million settlement for Wal-Mart for 63 separate wage and hour actions

Why the increase in FLSA litigation

- Benign neglect by employers
- This is an industry practice—others do it—therefore so can I
- Inability of some employers to interpret and apply the regs
- Misconception of some employers that compliance with federal law means compliance with State laws
- The technical nature of the statutes and the fact that many employers don't understand many technical aspects of it
- Management cost containment—anything goes
- Highly lucrative for plaintiff's bar
 - Possibility for unpaid wages for up to 3 years, liquidated damages, punitive damages and huge attorneys fees
- High payouts with media coverage
- Focus of organized labor
- Employee morale and discontent
- Lenient class requirements
- Lenient evidentiary requirements
- Conditional certification of a collective action is fairly easy

TOP TEN FLSA MISTAKES

1. We can do anything we want to save costs—can't we?? Doesn't the bad economy justify it?? You want me to stay in business—don't you??
2. Employees can eat and rest when they are not working.
3. Please review these training materials in your spare time.
4. White collar employees are almost always exempt.
5. Our labor budget is tapped, can you do me a favor and work off the clock today? I will make it up to you.
6. No need to pay an employee for a commission received after they've quit or are terminated.
7. I am not paying for his commute time to and from a job site – No one compensates me for my commute to work.
8. You failed to return the company laptop, so we are going to withhold your last paycheck. Vacation pay—you didn't use it, you loose it!!
9. The company has a hiring freeze so I'll use a temporary agency to circumvent it.
10. No headcount, no budget – Let's just hire an intern or get a volunteer to do some of this work on our desk.

We can do anything we want to save costs—can't we??
Doesn't the bad economy justify it??

■ **What options have companies considered? Exempt v. Non-Exempt—are there differences?**

- **Furloughs--Closing part or all of a business during slow times**
 - **Mandatory**
 - Implementation for exempt v. non-exempt
 - » Exempt—be careful, if exempt employee performs any work during a workweek, they must receive their entire salary for that week. If not, exempt status is jeopardized. See WH Opinion Letters FLSA 2009-14 (1/15/09) and FLSA 2009-18 (1/16/09)
 - » Non-exempt-can just pay for hours work unless contrary to Union Collective Bargaining Agreement

We can do anything we want to save costs—can't we??
Doesn't the bad economy justify it??

- **Issues with Furloughs**
 - Give adequate notice—Will WARN Act be in play?
 - » 100 or more employees
 - » 60 days notice of plant closing affecting 50 or more or a mass layoff of 500 or more (or 50 or more if it is 33 percent of the workforce) at a single site
 - » Temporary layoff that exceeds 6 months and a 50 percent hours reduction that lasts six months
 - Send employees home without pay in full-week increments
 - Send employees home without pay in any increments and require them to use available paid leave to make up that lost salary as long as they receive a full pay check for that time period.
 - Allow employees to volunteer for unpaid time off for personal reasons, in any increments, as long as the decision is truly voluntary and not occasioned by the employer or the operating requirements of the business.
 - Make a permanent change in their salary, so long as it is genuine and not merely an attempt to pay them like hourly employees.

We can do anything we want to save costs—can't we??
Doesn't the bad economy justify it??

- Advise employees that NO work can be performed—at all, during furloughs
 - » Non-exempt working are entitled to be paid, even for OT and Exempt may jeopardize their status
- Do not require work to be done even if not in the office. i.e. project must still be completed.
- Take away laptops and blackberries—attractive nuisance gone
- Risk--Breach of contract issue? Avoid a spike in discrimination claims—apply neutral criteria for the selection process—train decision makers—conduct statistical analysis—document.
- If mandating the use of vacation leave during furlough
 - » Legal under FLSA
 - » May not be legal under state laws

We can do anything we want to save costs—can't we??
Doesn't the bad economy justify it??

- **Reduction of salaries/wage rates, schedules and bonuses—voluntary v. job loss??**
 - Consider employee surveys to determine best process-obtain their buy in
 - Review employee contracts, collective bargaining agreements, handbooks and offer letters before implementation
 - Give adequate notice
 - Do not reduce exempt beyond the required their threshold amount—i.e. \$455/week
 - Maybe consider reducing pay and not dictating number of hours to be worked
 - Do not frequently change the hours and schedules of exempt employees— See *Archuleta v. Wal-Mart Stores*, 534 F.3d 1226 (10th Cir. 2008) (“If... the salary changes are so frequent as to make the salary the functional equivalent of an hourly wage, we will treat the salary as a sham and deny the employer the FLSA exemption...”) NOTE: California is especially strict when it appears that pay cuts and schedule reductions are an attempt to treat exempt employees like hourly employees, destroying the exemption.

We can do anything we want to save costs—can't we??
Doesn't the bad economy justify it??

- What other cost savings measures have companies considered?
- Limit overtime??
 - Equalize OT distribution
 - Require written permission by supervisor
 - What if you don't get it and you perform OT—then what?
- What about withholding pay??

Employees can eat and rest when they are not working.

- U.S. Dept of Labor website <http://wd.dol> has a table that provides state by state guidance on meal and rest period requirements
- California
 - Meal period requirement
 - Employers are required to provide employees with a thirty (30) minute unpaid meal period within the first five (5) hours of work if the employee works more than six (6) hours in a day.
 - Employee must receive a second thirty (30) minute unpaid meal period if the employee works more than ten (10) hours in one day. Meal period must commence on, or before, the 10th hour.
 - Meal periods need not be counted as hours worked if:
 - The employee is completely relieved of all duties, active or inactive; and
 - The employee is free to leave his work station; and
 - The meal period is at least thirty (30) minutes long
 - Some very limited exceptions from the duty to provide meal periods
 - Rest period requirement
 - 10 minute rest period for each 4 hours worked

Employees can eat and rest when they are not working.


- **If there is no state law requirement to provide meal and rest periods does that mean employees cannot bring claims?**
 - No. If an employer voluntarily provides meal or rest break periods in an employee handbook, employee agreement or employee contract and a violation occurs the employee may file an action under FLSA and other appropriate law
 - Texas: *Wal-Mart Stores, Inc. v. Lopez* 93 S.W.3d 548 (2002). Employees filed a class action suit for breach of contract because employee handbook provided for meal and rest periods
 - New Jersey: *Wal-Mart Stores, Inc.* 191 N.J. 88 (2007). Employees filed a class action suit for breach of contract and wage and hour actions because employee handbook and signed employee agreements provided for meal and rest periods
- **Take away**
 - Ensure employee handbooks and employee contracts do not provide legal obligations to provide meal and rest periods that are not being implemented at the company

Please review these training materials in your spare time.


- Key to these issues is whether the review of the training materials is voluntary or mandatory.
 - **29 C.F.R. 785.27** Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:
 - attendance is outside of the employee's regular working hours;
 - attendance is in fact voluntary;
 - Attendance is not voluntary if the employee is led to believe that continuation of employment would be adversely affected by non attendance
 - the course, lecture, or meeting is not directly related to the employee's job, and
 - It is directly related if it allows the employee to handle his job more effectively
 - the employee does not perform any productive work during such attendance
 - **29 C.F.R. 785.31** goes so far as to state that if the employer offers for the benefit of the employees a training course "which corresponds to courses offered by independent bona fide institutions of learning", an employee voluntarily attending such courses would not be entitled to pay for time spent in such training even if the courses are directly related to the job or provided free of charge by the employer.

Please review these training materials in your spare time.


- **Liability?**
 - Most likely an overtime issue or failure to reimburse for expenses (if applicable)
- **Take Away**
 - Confirm HR understands the law
 - Train Managers
 - To avoid OT issues, require employees to take the training during the workday and report to a manager or HR if schedule does not permit

 **White collar employees are almost always exempt.**

- **Employee will qualify for outside sales exemption under FLSA if meet both of these conditions:**
 - Primary duty must be (A) making sales within the meaning of Section 3(k) of FLSA, or (B) obtaining orders or contacts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
 - Employee must be customarily and regularly engaged away from the employer's place of business in performing such primary duty
- **California:**
 - Customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities
- **New Jersey:**
 - Whose hours of work of a nature other than that described . . . Do not exceed 20 percent of hours worked in the workweek; provided, that work performed incidental to and in conjunction with the outside sales person's own personal sales or solicitations, including incidental deliveries and collection, and shall be regarded as exempt work. Employees who basically drive vehicles and who incidentally or occasionally make sales shall not qualify for this exemption

 **White collar employees are almost always exempt.**

- **Employee will qualify for computer professional exemption under FLSA if:**
 - The employee is compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
 - The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field; and,
 - The employee's primary duty must consist of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 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;
 - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - A combination of the aforementioned duties, the performance of which requires the same level of skills

 **White collar employees are almost always exempt.**

- **California:**
 - **The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that consist of one or more of the following:**
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
 - 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
 - The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems
 - **The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.**
 - **The employee's hourly rate of pay is not less than \$36.00/hour or \$75,000/year**

Our labor budget is tapped, can you do me a favor and work off the clock today? I will make it up to you.

- Any manager who expects or allows his or her staff to put in unrecorded work time, otherwise known as working "off the clock", is a wage claim or lawsuit waiting to happen.

Just google

Work **Off The Clock** | California Employment Class Action Attorney ...
 Does your boss expect you to work **off the clock**? For a free consultation with an employment law attorney at Marlin & Saltzman, LLP, in Agoura Hills, ...
www.marlinandsaltzman.com/.../Off-the-Clock-Work.asp - [Cached](#) - [Similar](#)

Our labor budget is tapped, can you do me a favor and work off the clock today? I will make it up to you.

- FLSA does not allow an employee to waive the right to receive at least minimum wage and applicable overtime pay for all hours worked.
- An agreement to the contrary (other than a wage claim settlement supervised and approved by the DOL) is null, void, and completely unenforceable.
- California – The Brinker court held that employers may only be held liable for off-the-clock claims if they knew or should have known that their employees were working off the clock.

Our labor budget is tapped, can you do me a favor and work off the clock today? I will make it up to you.

- How about Compensatory Time?**
 - 29 U.S.C. 207 (o) Statute on compensatory time applies ONLY to public employers
 - California Labor Code §204.3 is patterned on the federal provision – utilizing these provisions for private sector employees is in direct conflict with federal law
- Take away:**
 - Managers are responsible for ensuring all time is recorded.
 - Have a written policy prohibiting "off the clock" work

No need to pay an employee for a commission received after they've quit or are terminated.

- **No FLSA rule on timing of payment of bonuses or commissions**
- **FLSA does have requirements regarding impact of bonuses on overtime calculations**
 - FLSA distinguishes between discretionary and non-discretionary bonuses
 - Non-discretionary bonus payments must be included in the overtime calculation for all non-exempt employees working more than 40 hours in any workweek covered by the bonus
 - Discretionary bonuses do not impact the overtime compensation due to non-exempt employees
 - To qualify as a discretionary bonus must:
 - The employer must retain discretion as to the fact that the bonus will be paid
 - The employer must retain discretion as to the amount of the bonus payment
 - Discretion must be retained until a time quite close to the end of the period for which the bonus is paid
 - The bonus payment must not be made pursuant to any prior contract, agreement or promise, causing the employees to expect such payments regularly

No need to pay an employee for a commission received after they've quit or are terminated.

- **Texas**
 - Requirements for timing regarding payment of bonuses or commissions
 - Once a month for exempt employees and twice a month for non-exempt employees
 - On designated paydays, if not designated then 1st and 15th of the month, must post notice indicating paydays, conspicuously
 - Payment on a regular business day if employee was not paid on payday
 - Payment after termination of employment must be made
 - In full if employee is discharged no later than the sixth day after the employee is discharged and
 - Employees who leave for other reasons than discharge must be paid no later than the next regularly scheduled payday
- **New Jersey**
 - Different requirements depending on whether employee is at-will (bonuses/commissions not considered wages) or under an employment contract (bonuses/commissions considered wages)

No need to pay an employee for a commission received after they've quit or are terminated.

- **California:**
 - Bonuses are considered wages and employee's eligibility for bonus is determined by general contract principals
 - Employees who quit or discharged before bonus calculation date generally not entitled to bonus
 - Commissions are considered wages and generally depends on terms of contract
 - If plan establishes a condition precedent that must be satisfied before commissions are earned and payable those conditions will ordinarily be enforced unless it would violate public policy, an employee is prevented by the employer from satisfying the condition, or the condition is impossible to complete due to conditions beyond the parties expectations
- **Take away:**
 - Uniform bonus and commission plans are especially important in multi-state operations
 - Review plans to ensure contractual obligations are met before final wage payment to employees who quit or are discharged

I am not paying for his commute time to and from a job site – No one compensates me for my commute to work.

- 29 CFR §785.35
 - Ordinary commuting is not compensable
 - An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel. Normal travel from home to work is not work time.
- Kavangh v. Grand Union, 192 F.3d 269 (1999)
 - Mechanic lived in Long Island. He did not have fixed work location. Received his work assignments over the telephone. He serviced more than 50 stores in Connecticut and NY. Had to be on the first assigned job site by 8:00 am and his work day ended at 4:30 pm. Grand Union compensated him for time spent traveling between job sites during the day but not for his travel time between his home and the first job nor between the last job of the day and his home. Had to return home every night because his job assignment could change the next day. He alleges he traveled an average of 7-8 hours per day.
 - Court held that he was not entitled to be paid for his time until he reached the first work assignment and his working time ended when he finished work at the last location of the day.
 - Court noted that it was inequitable and allowed the employer to benefit at the misfortune of the employee by having one employee cover such a large geographic area.

I am not paying for his commute time to and from a job site – No one compensates me for my commute to work.

- California
 - Morillon v. Royal Packing Co.*, 22 Cal.4th 575 (2000).
 - If an employee is required to report to the employer's business premises before proceeding to an off-premises work site, all of the time from the moment of reporting until the employee is released to proceed directly to his or her home is time subject to the control of the employer, and constitutes hours worked.
 - Morillon court held that it was important to distinguish between travel that the employer specifically compels and controls and an ordinary commute that employees take on their own.
 - DLSE Interpretation
 - Travel involving a substantial distance from the assigned workplace to a distant worksite to report to work on a short-term basis is compensable travel time.
 - Travel time is measured by the difference between the time it normally takes the employee to travel from his or her home to the assigned workplace and the time it takes the employee to travel from home to the distant worksite.
 - DLSE recognizes that some employees in certain occupations, by the nature of the industry and the occupation, are not assigned to a specific workplace and have a reasonable expectation that they will be routinely required to travel reasonable distances to job sites on a daily basis. If routinely required, employee could not expect to be paid for the time commuting to the job site if the job site is within a reasonable distance.
 - Calculation expressed in "time" and not distance due to traffic patterns varying from location to location
- Grey Area for Employers: If routinely required, what is a reasonable distance?

I am not paying for his commute time to and from a job site – No one compensates me for my commute to work.

- California
 - Most likely is an overtime issue
 - Statute of limitations for a claim for wages – 3 years
 - Overtime, Interest, Penalties
- Take Away
 - If you have nonexempt employees who do not have an assigned workplace and travel to worksites on an assigned basis, figure out what the custom or practice in effect.
 - For multi state employers with employees in California, focus on California first. Determine whether you are going to have separate policies/practices for California v. other states.

You failed to return the company laptop, so we are going to withhold your last paycheck: Improper Deductions?

- **When can a company make deductions from salary? What is an allowable deduction from exempt salary or minimum wage? Can employers withhold anything? What if the final pay check isn't given on time?**
 - Uniforms and uniform cleaning costs
 - Damage or loss to company property—legal for Exempt v. Non-exempt?
 - Cost of meals, lodging and other facilities furnished
 - Voluntary wage assignments
 - Loans and wage advances
 - Insurance premiums
 - Vacation pay advances
 - Union dues
 - Garnishments
 - Cash shortages due to misappropriations
 - Safe Harbor provision relating to improper salary deductions

Improper Deduction -- Risks

- Evidence that employer has a practice of making improper deductions shows the employer did not intend to pay employees on a salary basis and therefore, disqualifies employees from the OT exemption.
- A signed employee agreement authorizing such deduction doesn't validate it.
- The taking of a deduction v. a separate out of pocket reimbursement doesn't validate it.
- Either method prevents the employee from receiving a salary that is free and clear and paid on a guaranteed basis.
- Impact on all salaried, exempt employees in a given job classification
 - Loss of exempt status
 - Entitlement to Overtime
 - Civil Penalties for repeat and willful violations
 - Back pay
 - In California -- waiting time penalties

Improper Deductions: How to protect the company

- **Take Away:**
 - Keep up to date with the law
 - Ensure that the policies are clearly communicated, updated and consistently applied
 - Educate management
 - Take the following steps after receiving a complaint
 - Reimburse the employee for the improper deductions
 - Make a good faith commitment to comply in the future
 - And refrain from willfully violating the policy by continuing to make the improper deductions.
 - Implement the Safe Harbor Protections
 - Prove that the company has a written policy that articulates the prohibited deductions
 - That the policy is clearly communicated to employees and
 - A complaint process that notifies the employer of improper deductions

You didn't use it—so you loose it--Can we have a use it or lose it vacation policy?

- **Depends upon the state--No state requires that employers provide vacation benefits--BUT-once there is a policy for vacation pay--liability attaches**
- **California:**
 - NO "use it or lose it" policy is permitted.
 - If the employee has accrued vacation--it is vested--it constitutes wages and must be paid out upon termination, at the final pay rate--it does not go away.
 - No employment contract or agreement may allow for the forfeiture of accrued or vested vacation time.
 - **Take away**
 - Create a policy with a reasonable cap, limiting vacation accrual.
 - Require employees take time off, as part of the policy
 - Schedule vacations with employees, where possible
 - Instruct employees not to work while on vacation
 - Consider a pay out policy for unused vacation benefits on an annual basis
 - Pay out all accrued unused vacation at the time of termination
- **New Jersey**
 - Use it or lose it policies are legal.
 - **Take away**
 - If the company does not currently have a use it or lose it policy, be careful when revising the vacation policy.
 - Prior to implementing a new one, ensure that employees have adequate notice to use that which they have already accrued.

The company has a hiring freeze so I'll use a temporary agency to circumvent it.

- **The U.S. Supreme Court has held there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:**
- **The extent to which the services rendered are an integral part of the principal's business**
- **The permanency of the relationship**
- **The amount of the alleged contractor's investment in facilities and equipment**
- **The nature and degree of control by the principal**
- **The alleged contractor's opportunities for profit and loss**
- **The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor**
- **The degree of independent business organization and operation**

The company has a hiring freeze so I'll use a temporary agency to circumvent it.

- **FLSA:**
- **the degree of the alleged employer's right to control the manner in which the work is performed**
- **the alleged employee's opportunity for profit or loss depending upon managerial skill**
- **the alleged employee's investment in equipment or materials required for the work**
- **whether the service rendered requires special skills**
- **the degree of permanence of the working relationship**
- **whether the service rendered by the worker is an integral part of the alleged employer's business**

The company has a hiring freeze so I'll use a temporary agency to circumvent it.

■ **IRS test (Yes, means the worker is an employee):**

- Does the principal provide instructions to the worker about when, where, and how he or she is to perform the work?
- Does the principal provide training to the worker?
- Are the services provided by the worker integrated into the principal's business operations?
- Must the services be rendered personally by the worker?
- Does the principal hire, supervise and pay assistants to the worker?
- Is there a continuing relationship between the principal and the worker?
- Does the principal set the work hours and schedule?
- Does the worker devote substantially full time to the business of the principal?
- Is the work performed on the principal's premises?
- Is the worker required to perform the services in an order or sequence set by the principal?
- Is the worker required to submit oral or written reports to the principal?
- Is the worker paid by the hour, week, or month?
- Does the principal have the right to discharge the worker at will?
- Can the worker terminate his or her relationship with the principal any time he or she wishes without incurring liability to the principal?
- Does the principal pay the business or traveling expenses of the worker?

No headcount, no budget – Let's just hire an intern or get a volunteer to do some of this work on our desk.

■ **1998 DLSE Opinion Letter re Unpaid Interns for a newspaper**

■ **What if Your Intern/Volunteer Does Not Meet Test?**

- An intern can become an employee later on
- FLSA compliance
 - Exempt or nonexempt?
 - Paid at least minimum wage & receive OT if applicable

Take Away:

- Easy approach is to implement a rule that all interns must be paid.
- Harder approach: Include rules in your contingent workforce policy, educate your management that anything "free" requires strict review.

The company has a hiring freeze so I'll use a temporary agency to circumvent it.

■ **IRS test continued (Yes, means the worker is an independent contractor):**

- Does the worker furnish significant tools, materials and equipment?
- Does the worker have a significant investment in facilities?
- Can the worker realize a profit or loss as a result of his or her services?
- Does the worker provide services for more than one firm at a time?
- Does the worker make his or her services available to the general public?

■ **Take away:**

- Consequences for misclassifying someone as an independent contractor can be expensive
- *Vizcaino v. Microsoft Corp.* 120 F.3d 1006 (9th Cir. 1997)
 - Stock options
 - Vacation
 - Sick leave
 - Health Insurance
 - Retirement plans

No headcount, no budget – Let's just hire an intern or get a volunteer to do some of this work on our desk.

- **FLSA**
 - No definition of intern
 - Does not provide an exemption from minimum wage or overtime for interns
 - FLSA acknowledges that not all persons who perform some duties for an employer are "employees" and entitled to compensation
- **DOL Definition of Volunteer Under FLSA**
 - Performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered;
 - Offers services freely and without pressure or coercion; and
 - Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer
- **Policy Behind Rule**
 - Ensure that true volunteer activities were not discouraged while minimizing the risk that FLSA's minimum wage and overtime requirements were being abused by employers.

No headcount, no budget – Let's just hire an intern or get a volunteer to do some of this work on our desk.

- **Department of Labor Six Factor Test for Interns**
 - DOL position – all six criteria must be met
 - Courts differ – focus on criteria #4

Factor 1: The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

- *The closer it is to a classroom or educational setting, the easier it will be to consider the individuals to be trainees.*
- *Consider developing an individualized training plan that would be tailored to help the trainee qualify for a specific job or range of jobs with a variety of companies*

Factor 2: The training is for the benefit of the trainee;

- *In a true training environment, the trainees are not going to be trusted to do much actual work for the company; the actual production would presumably be done by regular employees.*

Factor 3: The trainees do not displace regular employees, but work under close observation;

No headcount, no budget – Let's just hire an intern or get a volunteer to do some of this work on our desk.

Factor 4: The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may be actually be impeded;


- *The actual productive work will be done by regular employees; any productive work done by trainees would have to be insubstantial in nature and amount and secondary to the training process.*

Factor 5: The trainees are not necessarily entitled to a job at the completion of the training period; and

Factor 6: The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

- *Recommended to have a written agreement to the effect that payment for the services is neither intended nor expected.*

- **2004 DOL Opinion Letter re Unpaid Interns in a Marketing Department**

 **No headcount, no budget – Let's just hire an intern or get a volunteer to do some of this work on our desk.**

■ **State of California, DLSE Eleven Prong Test for Interns**

1. The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees.
3. The trainees don't displace regular employees, but work under close observation.
4. Employer derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded.
5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. Understanding between employer and trainee that trainee is not entitled to wages
7. Any clinical training is part of an educational curriculum
8. Trainee do not receive employee benefits.
9. Training must be general, rather than designed specifically for a job with the employer.
10. Screening process is separate for trainees and employees
11. Advertisements for the program are couched in terms of education or training rather than employment.

ACC Extras

Supplemental resources available on www.acc.com

Exempt Or Nonexempt: A Practical Guide For Avoiding Common Pitfalls
Under The FLSA.

ACC Docket. March 2003

<http://www.acc.com/legalresources/resource.cfm?show=151324>

FLSA Requirements - Exempt and Non-Exempt Employees.

Sample Form & Policy. July 2008

<http://www.acc.com/legalresources/resource.cfm?show=12291>

Please note, these additional resources are provided by the Association of Corporate
Counsel and not by the faculty of this session.