



# Review of Important Wage Payment & Employment Issues for Connecticut Nonprofits

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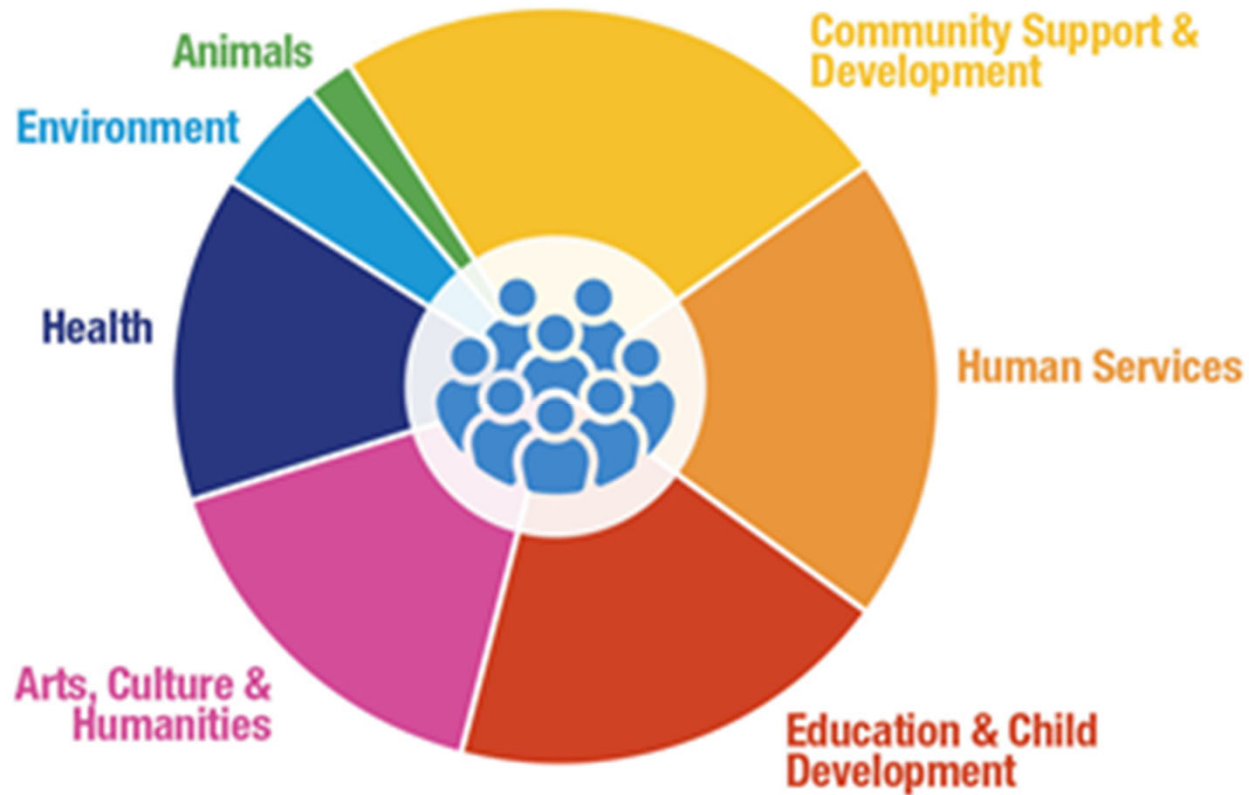
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# Brief Overview of Pro Bono Partnership

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- Our mission at Pro Bono Partnership is to strengthen nonprofits and communities by providing **free** transactional legal services to existing nonprofit organizations
- Our clients serve the disadvantaged or enhance the quality of life in neighborhoods in New York (outside of NYC), New Jersey, and Connecticut
- Our clients are nonprofit organizations that are unable to pay for legal services without significantly impacting resources for programs.
- We make it easy for attorneys to volunteer their expertise and to connect with nonprofits in their communities

# Types of Pro Bono Partnership Clients



# Types of Matters

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- Compliance
- Contracts
- Corporate structure/governance
- Dissolution and bankruptcy
- Employment/volunteer issues
- Fundraising/charitable solicitation laws
- Incorporation/tax exemption
- Intellectual property
- Lending/finance
- Merger/collaboration
- Real estate
- Tax
- Trusts and estates

# Of Note

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We note that in this presentation we are only providing general information; the information contained in this presentation does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, please contact us directly.

# Today's Agenda



- Overview of Key Wage Payment Laws
- Exempt vs. Nonexempt Classification
- Independent Contractor vs. Employee Classification
- Other Workers
- Takeaways
- Questions



# Wage Payment Law: “Employees”



- Generally, if an individual is considered an “employee” under state and federal laws, employers have legal obligations related to:
  - Wage payment
  - Taxes (income tax, unemployment, paid family leave, workers comp, etc.)
  - Training
  - Record keeping
  - Safety
  - Harassment and discrimination
  - Safety
  - Among others
- All employees are classified as “exempt” or “non-exempt” which impacts the legal requirements related to wage payment, recordkeeping, hours worked, etc.
- Nonprofits have more limited legal duties and requirements with regard to non-employees such as volunteers, independent contractors, consultants, and vendors.

# Wage Payment Law: A Note About Nonprofits



- Federal and state law contain certain specific exemptions for various non-profits.
- For example, under state law, the following are not “employees” and are not entitled to minimum wage or overtime:
  - Employees at a camp or resort open no more than six months per year.
  - Babysitters.
  - Employees at a nonprofit theater that operates no more than seven months per year.
  - Volunteers at an educational, charitable, religious, scientific, historical, literary, or non-profit organization, or persons working at those organizations where no employer-employee relationship exists.



# Wage Payment Laws: Minimum Wage



- If an employee is classified as “non-exempt,” they are paid hourly, and they must be paid the minimum wage for hours worked as well as overtime.
- The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local government.
  - Federal minimum wage: \$7.25 per hour
  - Exception for tipped employees
- Connecticut: State minimum wage increased to \$15.00 per hour on June 1, 2023.

# Wage Payment Laws: Minimum Wage



- Generally, minimum wage must be paid for all “hours worked” by non-exempt employees.
- Non-exempt employees are therefore required to record all time worked, meaning the beginning and ending of their work day, and uninterrupted breaks lasting more than 20 minutes.
  - Employees should sign off on their timecards weekly attesting to their accuracy.
  - Time punches/records should not be altered by managers unless the employee approves those changes.
  - **Should exempt employees record their hours?**
- “Hours worked” includes time when an employee is required to be on-site, working on behalf of the employer but includes a number of other circumstances such as required training, waiting time, etc.

# Wage Payment Laws: Overtime



- Non-exempt employees are also entitled to overtime pay which is 1 ½ times the regular rate of pay for each hour in excess of 40 hours in a workweek
- “Workweek” should be defined by the employer (e.g., Friday to Saturday each week)
- There is no limitation on the number of hours an employee may work in a workweek, except for minors
- Overtime pay must be calculated based on compensable time (e.g., excludes PTO, vacation, sick, and other time paid but not worked)
- The calculation of the overtime rate includes all compensation such as regular rate, commission, bonuses, incentive pay, etc.

# Wage Payment Laws

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- An employee works at an organization providing services but occasionally works in the gift shop, where he can earn commission on items sold. Does that impact his “regular rate” when calculating overtime?
- An employee goes to the post office every day after work to check the organization’s mail. In a week, this extra time is approximately two hours total. The post office is on the employee’s way home. Is the two hours considered “working time”?



# Wage Payment Laws

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- An employee tells you she knows the organization is a non-profit and she is happy to work overtime at her regular rate of pay. Are you able to pay her at her regular rate of pay rather than overtime?
- What if she offers to sign a document waiving her right to overtime?
- What if she agrees to “volunteer” a part of her time? For example, she works in development for 40 hours and also volunteers 10 additional hours each week during the month of the annual campaign?
- What if she offers to just not record the extra time?



# Wage Payment Laws

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- When the organization holds events, employees tend to work substantially more hours. The organization uses a “flex time” model and permits the employee to work less the following week. If an employee works 50 hours one week and 30 hours the next week (in the same pay period), can they be paid at their regular rate of pay for the 80 hours worked over the two-week period?



# Wage Payment Laws: Deductions



- Can only be made in very limited circumstances, as follows:
  - Connecticut or federal law requires or authorizes the employer to do so
  - Employer has written authorization from the employee on a form approved by the Commissioner of the CTDOL
  - Employee authorized the deduction, in writing, for medical, surgical, or hospital care or service, if:
    - There is no financial benefit to the employer; and
    - The deduction is recorded in the employer's wage record book.
- The deductions are for contributions attributable to automatic enrollment in a retirement plan or in the Connecticut Retirement Security Program.
- The law of another state requires the employer to withhold income tax of the other state for employees:
  - performing services of the employer in the other state; or
  - residing in the other state.

# Wage Payment Laws: Frequency of Pay



- Employees in CT must be paid weekly or bi-weekly unless the CT DOL approves a different arrangement.
- Employees must be paid within 8 days after the end of the pay period.



# Wage Payment Laws: Rest Periods



- **Lunch Break**
  - 30-Minute lunch break required when employee will work at least 6 hours (absent statutory exceptions). Lunch break must be given between the first two and last two hours of the shift and can be unpaid.
  - Worker must be completely relieved of duty for meal period not to be compensable time.
  - Non-exempt employees should clock in/out during lunch break.
  - Employees may voluntarily waive their break but should sign waiver for each day they choose to do so.
- Employees may be entitled to other breaks such as lactation or for reasonable accommodation.

# Wage Payment Laws

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- An employee tells you that she would rather leave work 30 minutes early each day and not take a break. You think that would be fine and would like to grant that request. Can you do so and how?



# Wage Payment Laws: Minors



- Special laws govern employment of employees under the age of 18. Connecticut law contains time and hour restrictions for minors (16 and 17 years old)
- Oppressive child labor prohibited by FLSA
  - 14- & 15-year-olds may work in certain non-hazardous, service or retail jobs, for limited hours
  - While school is in session, minors may work no more than 3 hours/day, between 7 am and 7 pm
  - When school is not in session, they may work up to 8 hours/day, until 9 pm

# Wage Payment: Common Pitfalls



- Classifying employees as “exempt” who do not satisfy the test
  - Employers may want to save on costs, reduce administrative burden, and create positive employee relations by classifying individuals as exempt
- Accepting an employee’s offer or request to work for free, volunteer, not record time, especially where the employee’s reason is to support the organization’s mission
- Offering other forms of payment rather than wages such as free items, gift cards, etc.
- Avoiding a formal timekeeping system to preserve employee autonomy

# Exempt v. Non-Exempt Status: An Overview



- **Exempt Employees:** Employees who use discretion and judgment on a regular basis who fit under an exemption, such as executive, administrative, and professional (among others).
  - Must meet job duties test and salary threshold amount (\$35,568 with some exceptions).
  - Not entitled to overtime or minimum wage.
- **Non-Exempt Employees:** Must be paid at least minimum wage for all hours worked and overtime at 1.5 times their regularly hourly rate for all hours worked over 40 in a workweek.

Note: The default is “non-exempt status” and employers bear the burden of proof as it relates to satisfying an exemption.

# Exempt v. Non-Exempt Status: Duties Test



- **Duties Test**
  - To determine whether employee's duties are genuinely executive, administrative, or professional
  - Not controlled by job title
- **Salary Basis Test**
  - Must be paid a pre-specified sum of at least \$684/week (\$35,568 with some exceptions)
  - Must be paid if any work is performed during the week and pay is not impacted by quality or quantity of work

# Exempt v. Non-Exempt Status: Primary Exemptions



- Typically, exempt employees are those that use discretion and judgment on a regular basis.
- The primary exemptions are called the “white collar exemptions” and include:
  - Executive employees
  - Administrative employees
  - Professional employees
- There are other exemptions as well, such as outside salespeople, highly compensated individuals, etc.

# Exempt v. Non-Exempt Status: Executive Exemption - Duties



- Primary duty is managing the enterprise or managing customarily recognized department or subdivision of enterprise
- Customarily and regularly direct the work of at least 2 or more full-time employees or their equivalent
- Has authority to hire or fire other employees, or employee's suggestions and recommendation as to hiring, firing, advancement, promotion or any other change of status of other employee are given particular weight



# Exempt v. Non-Exempt Status: Administrative Exemption - Duties



- Primary duty is *performance of office or non-manual work directly related to the management or general business operations* of the employer or the employer’s customers and primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- Directly related to “management or general business operation” means the employee performs work directly related to assisting with the running or servicing of the business which includes, but is not limited to, work in functional areas such as:
  - Tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

# Exempt v. Non-Exempt Status: Administrative Exemption - Duties



- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
  - What does this mean?
  - “Matters of significance” refers to the level of importance or consequence of the work performed. This means more than just the fact that an employer would experience financial losses if the employee fails to perform the job properly.

# Exempt v. Non-Exempt Status: Learned Professional - Duties



- **Learned Professional:**
  - 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;
  - Advanced knowledge must be in a field of science or learning; and advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

# Exempt v. Non-Exempt Status: Creative Professional - Duties



- Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- Note – There are exceptions to the professional exemption. For example, lawyers and physicians who are engaged in such practice are not subject to the salary threshold.

# Exempt v. Non-Exempt Status

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- The organization is struggling financially and an employee (receptionist) offers to be paid a salary which would save money. Can you do that?
- What if you decide to engage a staffing agency to provide you with a receptionist? Is it okay to pay the staffing agency a flat rate per week?



# Exempt v. Non-Exempt Status

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- Can you pay non-exempt employees a salary or flat rate?
- Can you reduce the salary of an exempt employee who is under-performing?
- Can you reduce the salary of an exempt employee during weeks when he/she is not working a lot of hours?



# Exempt v. Non-Exempt Status: Tips for Classifying Employees



- **Be Cautious of the Job Description** - The job description is only one piece of the analysis (and may prove misleading)!
- **Be Cautious of Titles** – The actual job that is being performed is what matters – not the title!
- **Be Cautious of Educational/Experience Requirements** – While this may provide context for the analysis, it is not an actual factor in the determination!
- **Time Matters** – The amount of time employees are performing primary duties versus other duties matters.
- **Reporting Structure Matters** – The reporting structure between the position and the supervisor is important, including the importance of the supervisor in the organization and the level of reporting that is occurring (e.g., high-level, monthly reporting versus daily reporting and oversight). The reporting structure between the position and any subordinates is also relevant.
- **Context Matters** – How the position fits within the department and the organization is relevant to the analysis.

# Exempt v. Non-Exempt Status

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What are some of the differences between managing an exempt employee versus a non-exempt employee?





# Exempt v. Non-Exempt Status: Managing Exempt v. Non-Exempt Employees



- **Exempt Employees**
  - May not record their time.
  - May be required to work more than 40 hours per week which should be clear in the offer letter.
  - Note: Absenteeism and tardiness may still be monitored and addressed if it becomes a problem.
- **Non-Exempt Employees**
  - Must record their time worked including meal breaks.
  - Must not work “off-the-clock.”
  - Should sign off on their hours worked each week and acknowledge that the time worked is accurate.
  - Should sign off on any changes made by a supervisor/manager to their time worked.
  - Employers should require approval prior to working overtime.

## Exempt v. Non-Exempt Status: Risks Associated with Misclassification



- Misclassification of employees as exempt is an emerging area of litigation because it can be lucrative for employee-side attorneys.
- This issue has also been a focus of enforcement for the relevant state agencies and the federal DOL.
- The legal costs of misclassifying workers include:
  - Back pay for all hours worked over 40 hours going several years back (can be 3 years)
  - Treble damages (under state law, as liquidated damages)
  - Attorneys' fees
  - Court costs
  - Fines and penalties
  - Prejudgment interest
  - Defense costs

# Break

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# Independent Contractor v. Employee



- There are numerous tests to determine whether an employee is an “independent contractor” under federal and state laws.
  - Tests are different depending on the agency and the law (e.g., taxes (IRS), workers’ compensation, unemployment, wage payment)
- The term “independent contractor” generally means a worker engaged to perform services free from the direction and control of the employer except for the result of their work.
- An employee is a worker who performs services for the employer, and the employer controls how and what the employee will do.

# Independent Contractor v. Employee: Scrutiny



- Independent contractors fall outside a number of employment and other laws. In addition, employers are not required to withhold taxes (income, unemployment, paid family leave), provide leave, provide benefits (workers comp), provide sexual harassment training, etc. to independent contractors or meet other legal obligations that are owed to employees.
- Because of this, government agencies scrutinize independent contractor relationships.
- For example:
  - A plumber, attorney, accountant, or construction worker who is engaged by a nonprofit providing childcare services, may be properly classified.
  - On the other hand, teachers who are engaged by the same nonprofit, may be improperly classified.

# Independent Contractor v. Employee: CT Independent Contractor Law



- Under Connecticut unemployment law, a worker is an independent contractor if they:
  - Are free from control or direction in performing their services.
  - Perform their services either outside:
    - the usual course of the employer's business; or
    - the employer's places of business.
  - Are customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service provided.

# Independent Contractor v. Employee: IRS Independent Contractor Rule



- Under IRS rules, the facts to determine whether a worker is an independent contractor fall into three categories: behavioral control, financial control, and relationship of the parties.
  - Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
  - Financial: Are the business aspects of the worker's job controlled by the payer?
  - Type of Relationship: Are there written contracts or employee type benefits? Will the relationship continue and is the work performed a key aspect of the business?

# Independent Contractor Status

Which of the following could create a risk of misclassification:

- Organization is organizing a trip to China and engages an individual to teach language and culture classes before the trip.
- Organization's mission is to provide translation services to other nonprofit service providers to ensure that they can communicate with the clients and consumers they serve. Some of the translators are employees and some are independent contractors.
- Organization engages an individual who has a facility maintenance company to power wash the outside of its summer camp cabins. The Organization has maintenance personnel, but this job is on the larger side and requires additional equipment and materials
- Organization's Development Director is retiring and has offered to train his replacement. He has requested to be an independent contractor and will only be working 20 hours per week. What should you do?





# Independent Contractor v. Employee: Risks and Penalties of Misclassification



- IRS, DOL, CT DOL, and Connecticut Joint Enforcement Commission on Employee Misclassification
- Penalties and fines
- Payment of monies due depending on agency (e.g., unemployment insurance contributions)
- Tax Liabilities
  - Missed FICA and FUTA taxes, plus penalties and interest
  - State taxes, plus penalties and interest
  - Unemployment compensation taxes
- Among other risks and penalties

# Note About Volunteers



- A volunteer is someone who donates their time and energy, without any coercion or undue pressure, and without receiving financial or material gain.
- Volunteers are not “employees”
- Employees cannot volunteer for their employer
  - Time spent voluntarily engaged in civic, charitable or humanitarian activities that are completely different from the employee's normal work duties and outside of the employee's normal working hours would not be considered work time.

# Independent Contractor v. Employee: Common Pitfalls



- Classifying individuals as independent contractors who:
  - Provide the same core services as the organization
  - Have no other clients and essentially work full-time for the organization
  - Work on-site at the organization, long-term, under the direction and control of the organization
  - Are fully integrated in the organization meaning they are supervising others and are supervised under the organization structure
- Relying on the job description not the actual work performed
- Permitting the independent contractor to dictate that the relationship should be classified as an “independent contractor” relationship

*Note: Potential consequences of misclassification are significant.*

# Note About Interns



- Under FLSA and DOL guidance, specific criteria must be met for someone to be considered an unpaid "intern" or a "trainee."
- Seven factors are evaluated in determining whether an employment relationship with an intern or student exists:
  1. Both parties understand that the intern is not entitled to compensation.
    - Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
  2. Internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
  3. Internship is tied to intern's formal education program by integrated coursework or the receipt of academic credit.
  4. Internship corresponds with academic calendar.
  5. Internship's duration is limited to period when internship educates the intern.
  6. Intern's work complements rather than displaces work of paid employees while providing significant educational benefits to the intern.
  7. Intern and employer understand that internship is conducted without entitlement to a paid job at the internship's end.
- Employers must develop and outline their trainee, internship and apprenticeship programs to ensure compliance with FLSA regulations.

# Takeaways



- Employee classification is important!
- Treat all recordkeeping and timekeeping as legal documents.
- The employer bears the burden of proving that an employee is exempt. The default position is that the employee is non-exempt.
- Overtime exemptions are narrowly construed against the employer that is trying to apply them.
- If an employer plans to have interns, they must develop and outline their internship programs to ensure compliance with FLSA regulations

# Questions?

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# Thank You

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