

Risk ADVISOR



Employee vs. Independent Contractor

Recent Developments from the Department of Labor's Wage and Hour Division

July has been a busy month for the United States Department of Labor's Wage and Hour Division. They have proposed a new rule to make more management and administrative workers eligible for overtime pay and issued an Administrator's Interpretation of "The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors." Both of these actions could have expensive, long term impacts on the way a community center does business.

Exempt, Non-exempt and Overtime

The proposed rule regarding exempt and non-exempt worker classification has been under consideration since 2014 and will now be published in the Federal Register. Upon publication it will be open to a 60 day public comment period. After the comment period, the Department of Labor will review the comments and issue a final rule. This process could take some time. When the "white collar" rules were last revised in 2004, it took almost a full year to respond to comments and finalize the rules. This process may not take as long this time considering the urgency the administration has attached to its initiative.

The proposed rule addresses the wage threshold that determines when employees are exempt from overtime rules. The current wage threshold is \$455 per week or \$23,660 per year. The new rule would implement a \$970 per week or \$50,440 per year level before an employee can qualify for exemption because of executive, professional or administrative duties. These weekly and annual amounts reflect the 40th percentile of all salaried full time workers. The revision also raises the highly compensated employee level to \$122,148 from its current level of \$100,000.

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Overtime Exemption Levels

	Current	Proposed	% Increase
weekly	\$455	\$970	213%
annual	\$23,660	\$50,440	213%
highly compensated	\$100,000	\$122,148	22%

The proposed rule does not change the current requirement that an employee's "exempt" work constitutes their "primary duty." It is possible that the comment period

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Coming Events

The Fund has two liability workshops scheduled during the remainder of 2015. Please mark your calendar for the following dates.

- ★ September 24, 2015 – Joint TWCARMF - TCRMF Property and Casualty Claims Workshop, The Omni Southpark, Austin
- ★ October 23, 2015 – Liability Workshop, Legislative Update and Hot Topics, The Menger Hotel, San Antonio
- ★ November 13, 2015 – TCRMF Board of Trustee Meeting, Doubletree Hotel, Austin

Information concerning workshops will be mailed to centers several weeks in advance of the events. The Fund's web site also provides workshop information and online registration. (www.tcrmf.org--“Workshops and Training” page).

Loss Control Briefs

There's an App for That

Now that hot weather is in firm control of our summer days it is time to remind workers to take hot weather precautions to prevent heat illness. The basic precautions include having plenty of water available, allowing frequent cooling breaks and scheduling the really hot and heavy work early in the morning. Workers should protect themselves from the sun with wide brim hats, long sleeves and use of sunscreen. In addition to these measures OSHA has developed an “app” called the “Heat Safety Tool” for use on iPhones and Android devices. The app will calculate the heat index and provide an estimate of the heat illness risk levels. It also provides information on how to monitor for signs and symptoms of heat illness. The app is available for download from OSHA at www.osha.gov/SLTC/heatillness/heat_index/heat_app.html. There is no cost for this tool.

(Safety+Health, July 2015)

Bed Bugs

Bed bugs continue to pose a threat to center employees who visit client homes, deliver services to the homeless or staff respite and crisis centers. If a center worker is bitten in the course of their employment, Workers' Compensation coverage for their medical attention is available but the bites usually respond to basic first aid. According to the Centers for Disease Control and Prevention, “bed bug bites usually do not pose a serious medical threat. The best way to treat a bite is to avoid scratching the area and apply antiseptic creams or lotions and take an antihistamine.” The most serious result could be a secondary skin infection from excessive scratching or an allergic reaction. The best way to get rid of an infestation is to call an exterminator experienced in bed bug eradication. Websites such as the CDC and WebMD offer information and tips about dealing with these obnoxious pests.

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Questions, comments, tips, advice, ideas, opinions, criticism, and news are welcomed and encouraged. Every effort has been made to ensure the accuracy of the information published in *Risk Advisor*. Opinions on financial, fiscal, and legal matters are those of the editors and others. Professional counsel should be consulted before taking any action or decision based on this material.

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Hurricane Season Update

As of July 30, 2015 nothing is happening in the Atlantic Ocean basin. So far this season there have been three named storms that have not exceeded tropical storm status:

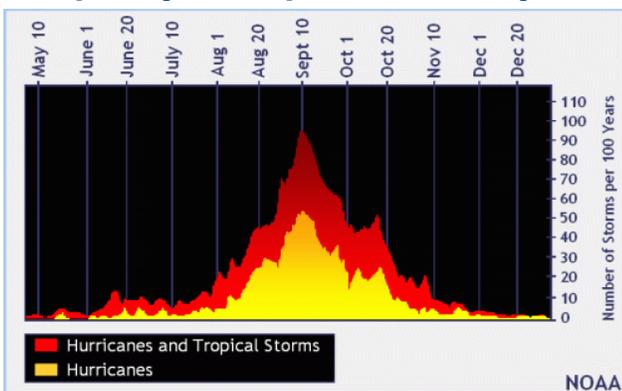
- ★ **Ana** formed on May 10 and reached maximum sustained winds of 60 mph before coming ashore in South Carolina. It brought heavy rains but did very little damage as it moved north over land.
- ★ **Bill** formed in the Gulf of Mexico off the Texas coast and came ashore on Matagorda Island with 60 mph winds. It brought heavy rains and significant flooding across East and North Texas, Oklahoma and Ohio.
- ★ **Claudette** formed off the coast of North Carolina, about 500 miles east of Cape Hatteras. It moved northeast over the Gulf Stream and achieved maximum winds of 50 mph. Claudette quickly became extra-tropical and eventually dissipated near Newfoundland.

Of the three, Tropical Storm Bill had the most significant impact with serious flooding over large areas of Texas. There were numerous high water rescues and evacuations. It developed very rapidly in the Gulf and could have easily reached hurricane status had it stayed offshore another 24 hours. Its impact illustrates the power of tropical storms regardless of the strength of their winds.

The current quiet is largely due to the strong El Nino that has developed in the Pacific Ocean. El Nino conditions cause strong wind shear in the Caribbean and Atlantic that suppresses tropical storm development. However, strong hurricanes can still form during El Nino years. During the last very strong El Nino in 1998 there were 14 named storms including ten hurricanes. Of those, Hurricane Mitch was the third deadliest storm on record killing 9,082 people in the Honduras and Nicaragua after reaching category five status with 180 mph winds. Hurricane Georges also formed that year reaching category four status with 155 mph winds. It slammed into the Louisiana and Alabama coast as a category two doing \$3.86 billion in damage. In other words, don't let your guard down and keep an eye on the Atlantic Ocean and Gulf of Mexico for tropical storm development.

Weather Underground website, National Weather Service Hurricane Archive

Frequency of Tropical Storms by Date



Source: NOAA

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will generate suggestions that a specific time requirement be implemented to provide a “quantitative” benchmark in lieu of the “qualitative” standard now in effect.

Another significant change under consideration is to make all of the salary figures subject to annual adjustment for inflation. This is something that was not done in 2004. Annually the wage levels could be adjusted by the rate of inflation or to bring them in line with the “40th percentile of salaried full time workers” as proposed in the rule. It is possible that an annual increase bringing the amounts up to the 40th percentile could exceed the rate of inflation.

Community centers that classify their staff according to current rules related to the qualitative qualification for exempt status should have few problems with any changes. However, if employees are now classified as exempt at the lower salary levels, adjustments may be required. For centers, the more troublesome aspect of possible future rule changes may be a quantitative requirement for a certain amount of administrative time before someone can be placed in the exempt category. What constitutes professional classification is also well defined in the current rule.

Misclassification of Employees as Independent Contractors

Also of significant concern to centers is who can be called an “independent contractor.” The Administrator of the Department of Labor’s Wage and Hour Division issued an Administrator’s Interpretation on July 15, 2015 entitled “The Application of the Fair Labor Standards Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.” In it the Administrator states the government’s rationale for trying to reduce and eliminate the practice of calling people independent contractors. He states,

When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as minimum wage, overtime compensation, unemployment insurance and workers’ compensation. Misclassification also results in lower tax revenues for government.

And, as we have seen recently in Texas, agencies such as the Texas Department of Labor, the United States Department of Labor and the Internal Revenue Service have been questioning the status of independent contractors for many of the reasons stated by the Administrator of the Wage and Hour Division. Until now the criteria for determining independent contractor status have been fairly well established. The IRS states in its brochure regarding who is an independent contractor that several factors determine that status. They are:

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Dangerous Furniture

Every year the Risk Management Fund has a number of Workers' Compensation claims caused by office chairs, desks and moving furniture. Since office chairs do roll, some of them roll right out from under the person starting to sit down. The person crashes to the floor resulting in a painful bruise or strain to the lower back. Chairs that have been damaged or have defective adjusting mechanisms also cause injuries when they collapse or dump people who are trying to adjust them. In the 2014 – 2015 Fund year furniture related injuries resulted in over \$26,000 in medical costs. These injuries included people being dumped out of their chairs, strain injuries while moving furniture and tripping or bumping into their desks or other kinds of furniture.

Prevention of furniture related injuries starts with awareness of your surroundings. Sometimes people who are talking to someone or looking at a computer screen start to sit down without being aware of where their chair is or that it is starting to roll away from them. Damaged or defective chairs should be repaired or replaced. People bump into their desks, file cabinets and trip over cords and computer cables. Moving furniture requires proper lifting techniques, mechanical assists and a sufficient number of people to safely move the piece. Some of the injuries occur when helping staff move offices or helping clients move to new apartments.

Cyber Breach of the United States Government's Office of Personnel Management

The largest breach of personal data in history occurred earlier this year when the Office of Personnel Management's computers were breached by a foreign government sponsored attack. Personal information including social security numbers of up to 25.7 million people was stolen in the breach. Affected people included current employees, former employees, job applicants, spouses of applicants and people who had been interviewed during security clearances and background checks. Although the breach is huge, disruptive and potentially very damaging, the thing that has astounded many informed observers is how lax the OPM was with its security measures. Audits and reports dating back to 2008 from the Inspector General's office recommended numerous measures to prevent a breach that were never implemented.

These measures included:

- ★ Files were not encrypted
- ★ Two stage authentication of users was not required on sign-in for major systems
- ★ Remote access for network administration was not restricted
- ★ Too few firewalls

- ★ Out of date anti-malware software
- ★ Only 4 employees in the security staff
- ★ Numerous false positives creating too many "incidents" for security analysts to review
- ★ Lack of VPN time-out after a certain number of minutes
- ★ OPM failed to keep up with testing and certification to ensure its systems met security standards.

Other contributing factors included a lack of adequate funding from Congress that slowed hiring and system upgrades.

New EEOC Rules Protecting Lesbian, Gay, Bisexual and Transgender Individuals

The following is taken from the EEOC's website and states their current position on discrimination against members of the LGBT community effective July 15, 2015:

*In 2012, the EEOC held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is prohibited under Title VII. See *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012). The Commission has also held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII. See *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).*

Consistent with case law from the Supreme Court and other courts, the Commission takes the position that discrimination against an individual because that person is transgender is a violation of Title VII's prohibition of sex discrimination in employment. Therefore, the EEOC's district, field, area and local offices will accept and investigate charges from individuals who believe they have been discriminated against because of transgender status (or because of gender identity or a gender transition).

The Commission also takes the position, consistent with case law from the Supreme Court and other courts referenced at the previous link, that discrimination against an individual because of that person's sexual orientation is a violation of Title VII.

The Commission accepts and investigates charges alleging sexual-orientation discrimination in employment.

Enforcement will apply to businesses with over 15 employees and still be subject to court scrutiny.

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- ★ Behavioral factors related to who has control over the work. If the individual receives extensive and detailed instructions on how work is to be performed that may show an employer-employee relationship. Employer training of the worker also contributes to employee status. If the worker receives less extensive instructions about what should be done, not how it should be done they may be an independent contractor.
- ★ Financial factors also contribute to independent contractor status. If the contractor has a significant investment in his or her business, is not reimbursed for some or all of business expenses and has an opportunity for profit or loss, independent contractor status is indicated.
- ★ Relationship between the parties also helps determine status. If the worker receives benefits such as insurance, pension or paid leave, employee status is indicated. A written contract between the parties may create strong support for independent contractor status.

The Administrator's purpose is to impose a much broader and more inclusive set of factors for determining employee status that moves away from the common law "control" factor that the IRS brochure relies on. He broadens factors to include whether or not a person is "suffered or permitted" to work and an economic realities test.

The concept of "suffer or permit" to work is stated in the Fair Labor Standards Act in its definition of "employ." The act defines "employ" as including "to suffer or permit to work." According to the Administrator, courts use "suffer or permit" as part of their consideration of economic realities. According to the Interpretation,

...courts use the multi-factorial "economic realities" test which focuses on whether the worker is economically dependent on the employer or in business for him or herself. A worker who is economically dependent on an employer is "suffered or permitted to work by the employer" and thus considered an employee under the broader definition.

According to the Administrator, the definition using "suffer or permit" was chosen to bring the largest number of people under the Fair Labor Standards Act as employees, a position that has been upheld by the courts in their rulings in FLSA cases.

Another matter the Administrator strikes at is the act of labeling an individual as an independent contractor with the use of a signed agreement or contract. In his view the economic realities are "determinative," not an agreed upon label. This leads to a broader consideration of "whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself" and therefore actually a bona fide independent contractor, not an employee. The author of the interpretation lists six criteria that determine the economic reality of the relationship between the individual and the employer. His position seems to be that the individual must pass all six tests to be considered independent.

The six "realities" are

- ★ ***Is the work an integral part of the employer's business?*** Is the individual actually doing work that the employer's employees are doing to advance the business? If the employer is a welding company and the independent contractor is also a welder, the Wage and Hour Division will assert that the individual is doing work integral to the employer's business and is therefore an employee.
- ★ ***Does the worker's managerial skill affect his opportunity for profit or loss?*** This attribute of being an independent contractor focuses on the individual's decision making ability as it affects his potential for profit or loss. The simple fact that an employer can offer more hours and the independent contractor can work them, does not relate to decision making ability. Managerial skill relates to purchasing materials and equipment, hiring, advertising and the exercise of judgment and initiative. The possibility of losing money because of mistakes or lack of managerial skill in the enterprise also affects status as an independent contractor.
- ★ ***How does the individual's relative investment compare to the employer's investment?*** The individual should invest in more than just the tools or equipment needed to do the work of the employer. Investment in advertising, communications capabilities that extend the reach of his business, rent, labor cost that is substantial and at risk should also be compared to the size and extent of the employer's investment.
- ★ ***Does the work performed require special skill and initiative?*** Skill used to perform the employer's work does not contribute to independent contractor status but initiative in running a business that offers the skills to others besides the employer would contribute. The author uses the examples of a framing carpenter and a cabinet maker. Although both types of carpentry require skill, the framing carpenter works for one builder performing the same basic function for house after house. The cabinet maker uses his skill and initiative to make custom cabinets for many different builders.
- ★ ***Is the relationship between the individual and the employer permanent or indefinite?*** An indefinite relationship implies that the individual and the employer are in an employee – employer relationship. The independent contractor performs a job for the employer of limited duration and moves on. The "employee" may perform numerous jobs over time for the same employer or work continuously or indefinitely.

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★ *What is the nature and degree of the Employer's control?* The Administrator's whole presentation of this topic minimizes control as a factor determinant of independent contractor status. He states that control over hours worked, working from home or offsite or a flexible work schedule do not make someone an independent contractor if they are economically dependent on the employer.

The conclusion of this paper is telling. The author states simply "In sum, most workers are employees under the FLSA's broad definitions." He asserts that all of the factors mentioned should be considered to determine the economic reality of the relationship between the individual and the employer.

The ramifications of this approach are significant for centers that use independent contractors for important services. The six factors listed above have all been tested in court cases usually affirming FLSA and the rulings of the Wage and Hour Division of the United States Department of Labor. So, that is nothing new. But what is new is the migration of this atti-

tude and approach into other federal and state agencies. Community centers should examine their independent contractors to make sure they are truly autonomous businesses offering and performing their services for other customers in addition to the center. They should have a significant investment in their own business infrastructure and generally perform their work and move on to other jobs. Under the criteria posed by the Wage and Hour Division the center is at risk if the independent contractor does the same work center employees do, works continuously for the center, has a very limited investment in his or her own business and does not do work for other centers or private providers. An example might be an occupational therapist who does a lot of work for the center on a year round basis, has no other clients and provides services during the same hours as the center is open. Despite the existence of a contract and her own professional liability insurance, to the Wage and Hour Division the totality of the "economic reality" makes her an employee. They see the therapist as being "suffered or permitted to work by the employer."