

Staffing and Compensation Issues in the Outdoor Recreation Industry

Wilderness Risk Management Conference

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By Jim Pearson



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Worker Classification under FLSA:

Employer-Employee Relationship?

- Independent Contractor
- Non-Exempt Employee
- “Salaried” Exempt Employee

“Salaried” Exempt Employee

Exempt from FLSA Minimum Wage & Overtime Pay
(Effective Dec. 1, 2016)

3 TESTS:

1. Paid above \$913/wk or \$47,476/yr
2. Receive a salary rather than hourly wage
3. Perform a job listed by US Dept of Labor in an exempt category

History of New Regulations

- March 13, 2014 – President Obama issues presidential memorandum to Secretary of Labor directing update of overtime rules
 - In his remarks accompanying the memorandum the President stated that “millions of American’s aren’t getting the extra pay they deserve. That’s because an exception that was originally meant for high-paid, white-collar employees now covers workers earning as little as \$23,660 a year.”

Automatic Increases to Salary Thresholds

- The rules have never before included a system for automatically increasing thresholds
- The thresholds for white collar and highly compensated exemptions will now be adjusted **every three years** based on the BLS
- First update – January 1, 2020

Potential Consequences of Misclassifying an Employee as Exempt

- Liability for unpaid wages
- Liability for liquidated damages
- Liability for attorney's fees and court costs
- In the event of willful violations, fines and imprisonment
- Individual liability on the part of management

Is Your Organization Subject to FLSA?

- Annual dollar volume of sales or business done of \$500,000 or more and
- Some involvement in Interstate/Foreign commerce (two or more employees)
 - Recruiting customers from other states or
 - Purchasing goods from other states
- If test is met, all employees of the enterprise are subject to FLSA
- State Law

Is An Individual Covered By The FLSA?

- If no enterprise coverage, employees may be covered on an individual basis
- “*Individually engaged* in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production.” Examples:
 - Making phone calls out-of-state
 - Receiving/sending interstate mail or electronic communications
 - Ordering or receiving goods from an out-of-state supplier

Non-Exempt Employees

Subject to FLSA Minimum Wage & Overtime:

- Customer Service
- Skilled Trades
- Inside Sales
- Retail Staff
- Maintenance Workers
- Firefighters, Police, Paramedics, Park Rangers, Rescue Workers and Other First Responders

Compensation and Overtime Pay Issues

- Work week – 40 hours.
- Overtime – One and one half times the normal rate.
- Calculation of base rate.
- Minimum wage issues.
- Irregular hours, sleep time, meal time, travel time, wait time, etc.
- Record keeping.
- Non-compliance.

Handling Reclassifications: Communicating the Reclassification

- Whether or not the employee is going to be informed of his or her reclassification in person – provide the employee with a written document which includes:
 - A general statement about the reclassification
 - The employee's salary or hourly rate (even if the salary is unchanged)
 - A statement regarding any benefits that will be impacted and what steps (if any) the employer has taken to mitigate the impact of the change on the employee
 - A statement that, as a non-exempt employee, the employee will now be eligible for overtime
 - The employer's policy on overtime and advance approval of overtime
 - Information on timekeeping procedures for non-exempt employees

Exemption for Seasonal Recreational Establishments

Any employee is exempt if employed by a recreational establishment, amusement business, organized camp, religious or non-profit educational conference center IF EITHER:

1. Does not operate for more than 7 mths in any calendar yr, or
2. During the preceding calendar yr, its average receipts for any 6 mths were not more than 1/3 of receipts for the other 6 mths.

- Not applicable if business is in national forests, parks, or wildlife refuges under contract

What Is An Establishment?

- “**Establishment**,” as defined in the regulations to the FLSA, refers to “a distinct physical place of business, rather than to an entire business or enterprise, which may include several distinct places of business.”
- One particular part of a larger enterprise may qualify for the exemption, whereas other parts of the enterprise do not

Exemption for Administrative Functions in Educational Establishments

- Compensated by a salary/fee basis at a rate of at least \$913/wk or on a salary basis equal to at least the entrance salary for teachers working in the establishment
- Primary duty is performing administrative functions directly related to academic instruction or training in educational establishment
- Ex: department heads, academic counselors, vice-principals

Exemption for Teachers/ Instructors

- No minimum salary nor educational/academic degree requirement.
- Must be employed and engaged as a teacher/instructor in a school system, educational establishment, or institution.
- Primary duty must be in the field of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge.

Administrative Exemption

- Compensated by a salary at a rate of not less than \$913 per week (\$47,476 per year).
- Performance of office or non-manual work directly related to management or general business operations.
- Primary duty includes exercise of discretion and independent judgment in matters of significance.

Executive Exemption

- Compensated by a salary at a rate of not less than \$913 per week (exclusive of board, lodging, or other facilities).
- Primary duty must be managing the enterprise or department.
- Must direct the work of two or more full time employees or equivalent.
- Authority to hire and fire or recommendations given particular weight.

The Hiring Process

- Hiring competent workers is essential to operating a successful and safe adventure and recreation program.
- Assure a fair recruiting process and focus on a clear job description.

Application Stage

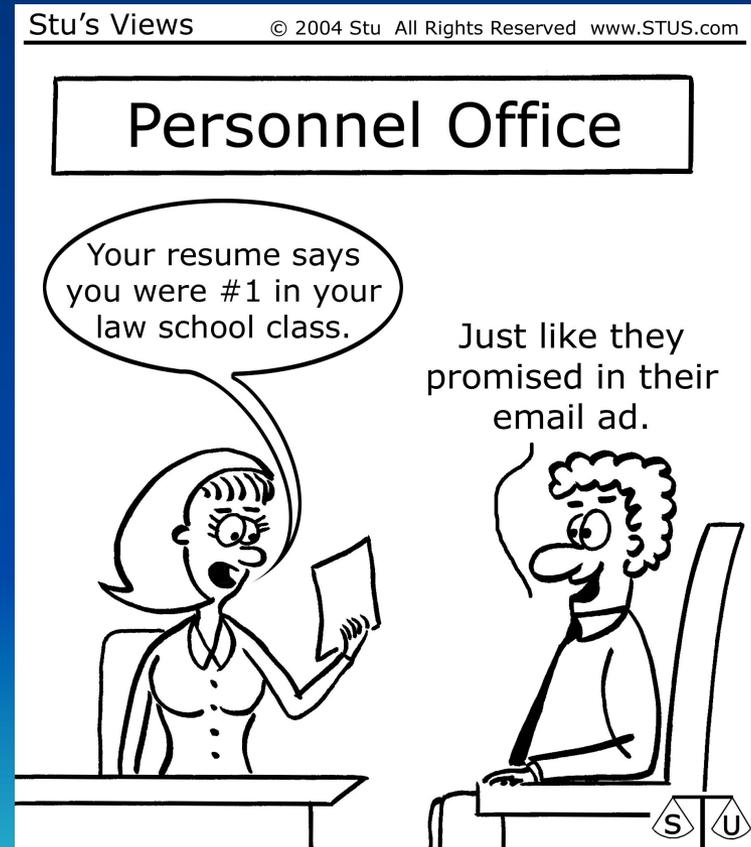
- ❖ Consent to contact
- ❖ Agreement to investigate all info
- ❖ Immediate discharge for false information
- ❖ Non-discrimination clause

Selection

Focus on the JOB being offered– NOT the person to hire

Interview Stage

- ❖ Conducted by experienced personnel.
- ❖ Use of Standard Forms
- ❖ Use Pertinent questions



Employment Relationship

After Acceptance address the following:

1. Age and date of birth
2. Forms:
 - a. IRS W-4
 - b. Immigration I-9
 - c. EEO – 1 (if required)
3. Personal Information for emergencies
4. Disabilities or Medical Conditions
5. Employee handbook and job description

Employment At-Will

Employment may terminate at any time and for any reason, with or without cause.

Exceptions to at-will doctrine

1. Anti-discrimination statutes;
2. State laws;
3. Court-imposed requirements of good faith
4. Employment contracts
5. Implied contracts – e.g., employee handbook
6. Probationary Periods

Independent Contractors vs. Employees

- Behavioral Control
- Financial Control
- Type of Relationship

Supervision & Training

- ❖ Training of Staff Members
- ❖ Employees, Independent Contractors, Interns and Volunteers
- ❖ Negligent Supervision, and Training

Behavioral Control

Facts that show whether the business has a right to direct and control. These include:

- Instructions – an employee is generally told:
 1. when, where, and how to work
 2. what tools or equipment to use
 3. what workers to hire or to assist with the work
 4. where to purchase supplies and services
 5. what work must be performed by a specified individual
 6. what order or sequence to follow

Financial Control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- The extent to which the worker has unreimbursed expenses
- The extent of the worker's investment
- The extent to which the worker makes services available to the relevant market
- How the business pays the worker
- The extent to which the worker can realize a profit or loss.

Type of Relationship

Facts that show the type of relationship include:

- Written contracts describing the relationship the parties intended to create
- Whether the worker is provided with employee-type benefits
- The permanency of the relationship
- How integral the services are to the principal activity

If considered an Employee, you are responsible for:

- Withholding Federal income tax,
- Withholding and paying the employer social security and Medicare tax,
- Paying Federal unemployment tax (FUTA),
- Issuing Form W-2, Wage and Tax Statement, annually,
- Reporting wages on Form 941, Employer's Quarterly Federal Tax Return.

OTHER CONSIDERATIONS

- Tax Issues
- Worker's Compensation Insurance
- Interns and Volunteers
- Family and Medical Leave Act ("FMLA")
- Americans with Disabilities Act ("ADA")

Vicarious Liability

- A) Liability for Employees
 - i. *Respondeat Superior*
 - ii. Acts of Employees that May Impose Liability
- B) Liability for Independent Contractors
- C) Liability for Interns and Volunteers
- D) Non-governmental Organizations



My New Year's resolution is
to win at least one of
my frivolous lawsuits.

Employer May Be Held Liable for Volunteer's Injury to Others

Respondeat Superior applies when:

1. Employer directs the duties or supervises
Volunteer
AND
2. Employer directly or indirectly benefits
from Volunteer's efforts











Conclusion



Thank You!



James V. Pearson, Esq.



"You like kayaking, travel and yoga. I hope you realize that lawyers don't have time for this stuff."