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Employment Law Issues for Supervisory Personnel

Brought to you by the
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Andrew B. Adair
Partner, Employment & Labor Practice Group

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Presented by:

ANDREW B. ADAIR

Partner, Employment and Labor



Andrew B. Adair, Esquire
267.519.6812
aadair@goldbergsegalla.com

- > Over 30 years of experience defending public entities and private employers in federal court, state court, and before administrative agencies.
- > Provides counseling and training in best practices for employment matters.
- > Performs independent investigation into claims of discrimination, harassment, and employee misconduct for public and private employers.

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Impact of Discrimination On the Workplace

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Impact of Discrimination on the Workplace

COST OF DISCRIMINATION

- > Everyone has a right to be free from discrimination and harassment
- > Happy workers are more productive
- > EEOC claims of discrimination remain at all time highs
- > Discrimination wastes resources that could be used elsewhere
- > You could be liable
- > Harassment claims are serious
- > Cost is more than just money

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Disability

Americans With Disabilities Act
Pennsylvania Human Relations Act

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Disability

The Americans with Disabilities Act (1990) & the Americans with Disabilities Act Amendments Act (2008)

- > Prohibit discrimination against a qualified individual with a disability in employment
- > Application procedures, hiring, promotion, discharge, compensation, benefits, training, etc.
- > Protects individuals from discrimination based on their association with a qualified individual with a disability
- > Pennsylvania Human Relations Act – state law which is interpreted similarly to the ADA

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Disability

WHAT DOES THE ADA REQUIRE?

An employer must provide a **reasonable accommodation** to a **qualified employee** with a known **disability** unless the accommodation would impose an **undue hardship**.

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Disability: Defining Disability

- > A **DISABILITY** is a physical or mental “impairment” that substantially limits one or more major life activities (caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working)
- > Having a record of such impairment; or
- > Being regarded as having such an impairment.

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Disability: Eligible Employees

- > A **QUALIFIED PERSON** is someone who “satisfies the requisite skill, experience, education, and other job-related requirements of the position... and can perform the essential functions of the job, with or without a reasonable accommodation and without posing a direct threat to the health or safety of the individual or others.”
- > Includes part-time and full-time employees

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Disability: Essential Job Functions

ESSENTIAL FUNCTIONS are the basic job duties.

Regulations indicate the following should be taken into consideration when determining whether a job function is essential:

- > The employer’s judgment about which functions are essential;
- > Job descriptions that were written before a job was posted;
- > The amount of time spent performing the function;
- > The consequences of not requiring the person to perform the function;
- > The terms of a collective bargaining agreement; and
- > The work experience of others who have had, or currently hold, the same or similar positions.

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Disability: Reasonable Accommodation

A **REASONABLE ACCOMMODATION** is any modification or adjustment to a job or the work environment that will enable an applicant or employee with a disability to participate in the application process or to perform essential job functions.

It also includes adjustments to assure that an individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

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Disability: Reasonable Accommodations

POSSIBLE ACCOMMODATIONS

- > Make existing facilities physically accessible to individuals with disabilities;
- > Restructure the job by assigning non-essential or marginal job functions to other employees;
- > Modify work schedules;
- > Acquire or modify equipment or services to enable the individual to perform essential job functions;
- > Adjust or modify examinations, training materials, or policies;
- > Allow use of accrued paid leave or provision of additional unpaid leave for necessary treatment;
- > Provide reserved parking places;

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Disability: Interactive Process

WHEN TO START THE INTERACTIVE PROCESS:

Initiate the interactive process when the employee's disability is known or apparent:

- > Employee requests an accommodation
- > Employee presents doctor's note with work restrictions

Employer otherwise becomes aware of need for accommodation through third party or observation

These requests and the resulting conversations between the employee and the supervisor starts the "interactive process."

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Disability: Request for an Accommodation

- > There is no specific language required when an employee is making a request for an accommodation.
 - **THE EMPLOYEE DOES NOT HAVE TO USE THE WORD "ACCOMMODATION," AND THEY DO NOT HAVE TO MAKE THE REQUEST IN WRITING.**
- > Begin the interactive process once employees provide sufficient information to let the employer know that they are having difficulty performing their job because of a physical or mental impairment which may constitute a disability within the meaning of the Act

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Disability: Request for Accommodation

EXAMPLES OF REQUEST FOR AN ACCOMMODATION

- > “I’m on a new medication and having trouble getting to work on time”.
- > “I need time off for some treatment that my doctor is recommending”.
- > “I’m making more errors because I am having trouble seeing the data on the monitor”.
- > “I just cannot stand for 8 hours anymore.”

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Disability: How to Engage in the Interactive Process

The Interactive process must be conducted on an individual basis and include:

- > Exchange information about the disability and work restrictions (employer can ask for employee’s doctor to provide clarification about restrictions);
- > Identify potential accommodations;
- > Reach a mutually satisfactory decision.

BOTH SIDES MUST COOPERATE IN GOOD FAITH

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Protected Class Discrimination

Title VII of the Civil Rights Act
Pennsylvania Human Relations Act

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Protected Classifications:

- > Race
- > Color
- > Sex (including pregnancy, sexual orientation, gender identity, sexual preference)
- > National Origin
- > Age (over 40) – Age Discrimination in Employment Act
- > Religion
- > Disability (physical or mental) – ADA

NOTE: MANY COMPANIES RESERVE THE RIGHT TO DISCIPLINE FOR INAPPROPRIATE CONDUCT EVEN IF IT DOES NOT FALL UNDER A LEGALLY PROTECTED CLASSIFICATION

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Protected Classification: Illegal Discrimination

- > Unlawful to discriminate against any employee or applicant because of his/her protected characteristics.
 - Includes: hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.
 - Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.
- > Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic based organizations or groups; or attendance or participation in schools or places of worship generally associated with certain minority groups.

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Protected Classification: Retaliation

- > Most employment statutes include anti-retaliation provisions.
- > Elements of Retaliation:
 - The employee engaged in protected activity;
 - An adverse action was taken against him or her; and
 - A causal connection between the adverse action and the protected activity.
- > **RETALIATION IS ANY CONDUCT THAT MIGHT DISSUADE A REASONABLE PERSON FROM EXERCISING HIS OR HER RIGHTS.**
 - THIS COULD INCLUDE ASSIGNMENT OF UNDESIRABLE TASKS, EVEN IF IT IS WITHIN THE EMPLOYEE'S JOB DESCRIPTION!

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Protected Classification: Retaliation

Consistency Helps Defeat Retaliation

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Protected Classification: Retaliation Examples

(Don't try these at home!!)

FOLLOWING AN EMPLOYEE'S EXERCISE OF THEIR RIGHTS, THE EMPLOYER:

- > reprimands an employee or gives a performance evaluation that is lower than it should be;
- > transfers the employee to a less desirable position against their will;
- > engages in verbal/physical abuse or harassment;
- > increases scrutiny of an employee's work;
- > treats the employee's family member negatively (for example, cancelling a contract with the person's spouse);
- > makes the employee's work more difficult (e.g. purposefully changing their work schedule to conflict with family responsibilities or moving them to an office that isolated from others they work with).

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Employment Law Issues for Supervisory Personnel

Harassment and Hostile Work Environment

Title VII of the Civil Rights Act
Pennsylvania Human Relations Act

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Harassment: Changing Awareness

- > Public opinion is polarized
- > Social media has made it easier to express opinions, but has also made us less tolerant
- > Changing sensitivities in America
- > You will work together
- > Importance of empathy: put yourself in another's shoes

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Harassment & Hostile Work Environment

> Discrimination:

- Treatment in favor or against a person based on the group, class, or category to which that person belongs rather than on individual merit.

> Workplace Harassment (type of discrimination):

(1) **QUID PRO QUO HARASSMENT:**

(2) **HOSTILE ENVIRONMENT HARASSMENT:**

Conduct of a discriminatory nature which permeates the workplace and that has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment.

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Harassment: Legal Elements

- > The employee is a member of a protected class.
- > The employee was subjected to unwelcome conduct based on one or more protected characteristics.
- > The conduct was sufficiently **severe** or **pervasive** to create a hostile or abusive work environment.
- > The conduct was both **subjectively** and **objectively** perceived as abusive by the employee.
- > The employer know or should have known about the conduct and failed to take prompt and appropriate corrective actions.

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Harassment: Conduct which can Create a Hostile Work Environment

- > Comments
- > Physical contact
- > Jokes
- > Email
- > Pictures
- > Staring
- > Gestures
- > Terms of endearment
- > Questionable compliments
- > Inappropriate gifts
- > Conditional requests for sexual favors

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Harassment:

IMPORTANT FACTS ABOUT ILLEGAL HARASSMENT

- > The harasser's intent does not matter
- > Sexual harassment may involve individuals of the same or different gender
- > The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee
- > The victim does not have to be the person harassed but could be anyone affected by the offensive conduct
- > The harasser's conduct must be unwelcome, but beware: the victim may be an unintended third party
- > Harassment may occur without economic injury to or discharge of the victim

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Harassment: Sample Provisions from Generic Harassment Policy

Harassment: any physical, verbal, or non-verbal conduct that shows hostility or disdain toward an individual based on race, color, religion, sex, sexual preference, national origin, age, disability, veteran's status, marital status, or political affiliation.

Sexual harassment: any unwelcome sexual advance, request for sexual favors, and/or other verbal, non-verbal, visual, or physical conduct of a sexual nature when:

- a. Submission to such advances, requests, or conduct is made an explicit or implicit term or condition of an individual's employment;
- b. Submission to or rejection of such advances, requests or conduct is used as a basis for making employment decisions affecting such individuals, or
- c. Such advances, requests or conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Harassment of any type will not be tolerated and can lead to discipline up to and including termination.

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Harassment: Procedure Under Generic Harassment Policy

- > Employees are often encouraged to first advise the offender that conduct is unwelcome. This is not a mandatory requirement.
- > If the employee brings the conduct to the attention of a supervisor, *the supervisor must immediately report it to the Director of Human Resources* and take immediate action to stop it.
- > All complaints must be investigated promptly.
- > Appropriate disciplinary action must be taken in a timely fashion.
- > Information must be maintained as confidential.
- > Retaliation is prohibited.

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Primary Responsibility For Supervisors And Employees:

Be Considerate

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Harassment: Supervisor Responsibility

- > Do not condone inappropriate behavior
- > Do not wait for a formal complaint
- > Treat all complaints seriously
- > If you do not have firsthand knowledge, remain neutral
- > Maintain confidentiality to the extent possible
- > All complaints of harassment should be treated equally and should be promptly investigated
- > Immediately report the incident to the Human Resources Manager
- > Document, Document, Document!

ABSOLUTELY NO RETALIATION!

- Consistency helps prevent retaliation claims

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Harassment: Everyone's Responsibilities

- > Treat all employees courteously and civilly
- > Do not place yourself in situations which could give rise to claims of harassment
- > Watch your body language
- > Help others
- > No touching, pinching, hugging, kissing, leering, staring, or other conduct which may be construed as having sexual content
- > Refrain from participating in, encouraging, or condoning harassment
- > Work time is for work

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Employment Law Issues for Supervisory Personnel

Investigation Basics

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Investigation Basics:

- > Determine who should conduct investigation – most likely it should be the Director of Human Resources; but if not, someone who is impartial and has good interview skills
- > Be thorough and act quickly – starting the investigation in 24 hours should be the goal
- > Decide how to document for accuracy and protection against "revisionist history"
- > Collect and review relevant documents
 - Complaint
 - Harassment Policy
 - Personnel Files
 - Investigation of prior incidents/complaints to see if a pattern exists

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Investigation Basics: Tips to Interview Victim

- > Ask open-ended questions to elicit facts and eyewitnesses.
- > Is victim aware of other incidents?
- > Assess demeanor.
- > Ask about victim's expectations from investigation.
- > Do not make any promises or commitments about outcome to complainant.
- > Urge victim not to discuss investigation with others.
- > Do not downplay alleged incidents or otherwise characterize them.
- > Do not reveal what you are thinking - your preliminary conclusions may change.
- > Inform complainant of your next steps in the investigation and set some rough timetables.

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Investigation Basics: Tips to Interview the Accused

- > Explain each allegation in detail so the person has the opportunity to respond;
- > Ask similar questions as posed to victim;
- > Ask whether he/she was ever accused of harassment before;
- > Make sure the accused understands there can be no reprisals made against the complainant;
- > Determine if there is a social relationship between the victim and the accused;
- > Ask about any possible motives the accuser may have to lie, exaggerate, take things out of context, etc.;
- > Outline your next steps.

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Investigation Basics: Tips to Interview Witnesses

- > Balance the need to interview additional witnesses vs. the risk of unnecessarily disseminating the fact of the complaint and/or investigation.
- > Impart only information that other witnesses need to know to tell you what they know.
- > Stress to witnesses that they are to keep what they know confidential.
- > Similar procedure used for interview as for victim and accused.
- > Explain that you will not tolerate any retaliation against a witness, and you likewise will not tolerate any retaliation against the victim or alleged harasser.

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Investigation Basics: Resolution of Investigation

- > Prepare a written report with summary of factual findings and any other evidence, attaching the various written statements, etc.
 - Report can draw conclusions as to whether harassment did or did not occur but should not make any recommendations to higher management.
- > Finding a violation of the policy is not the same as finding that unlawful sexual harassment has occurred.
- > Punishment must be appropriate and must be reasonably calculated to end the harassing behavior.
- > Be careful of implementing any temporary transfers, time off, etc. It could be construed as retaliation.
- > Director of Human Resources and/or Solicitor should be consulted before any action is taken against accused or investigation is closed with no action.
- > Follow up with the victim and perpetrator!

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Employment Law Issues for Supervisory Personnel

Wage and Hour Issues

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Wage and Hour: Fair Labor Standards Act (FLSA)

- > Fair Labor Standards Act (FLSA) affects most private and public employment. The Pennsylvania Wage Payment and Collection Law (WPCL) provides similar and supplemental protections.
- > The FLSA requires employers to pay covered non-exempt employees at least the federal minimum wage and overtime pay for all.
- > FLSA applies to employment relationship between an “employer” and an “employee.”
 - “Independent contractors” are not covered under the FLSA.
- > Federal Minimum Wage: \$7.25 per hour (effective 7/24/2009); Pennsylvania state law is currently the same minimum wage.
- > Overtime equals 1.5 times the regular rate of pay for all hours over 40 in a work week.

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Wage and Hour: Maximum Workweek

- > 40 Hour Workweek
 - Workweek = 7 Consecutive 24-Hour Periods
 - Established by Employer
 - May Differ within Organizations, Based on Business Need
 - Must be Fixed/Recurring
 - Allowable Exceptions to 40 Hour Workweek:
 - Law Enforcement and Fire Protection
 - Healthcare Workers

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Wage and Hour: Overtime Pay

- > Premium Pay for Hours Over 40 in Any Workweek
 - 1.5 Times “Regular Hourly Rate”
 - Each Workweek Stands Alone
 - Paid Time Off Hours Do Not Count
 - All Hours Worked for the Same Employer Count Together
 - Weighted Average for Multiple Rates of Pay
 - Compensatory Time Allowed in Public Employment Only

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Wage and Hour: Compensatory Time

- > Paid Time Off in Lieu of Cash Overtime (Recommended Method)
- > 1.5 Hours Awarded for Each Overtime Hour Worked
- > Maximum Allowable Accrual is 240 Hours
- > Must Be Used Before Vacation
- > Must Be Used Within 12 Months or Cashed Out
- > Cashed Out Upon Separation from Employment
- > Illegal in Private Employment

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Wage and Hour: Regular Hourly Rate

> TOTAL PAY DIVIDED BY HOURS WORKED

> REGULAR HOURLY RATE INCLUDES:

- Wages
- Commissions
- Non-Discretionary Bonus Payments
- Value of Certain Goods or Facilities (e.g., Room and Board)
- Shift Differentials

> REGULAR HOURLY RATE DOES NOT INCLUDE:

- Premium Pay for Working Weekends Holidays
- Discretionary Bonus Payments
- Gifts
- Payments for Not Working (e.g., Sick Leave, Vacation)
- Expense Reimbursements
- Value of Benefits

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Wage and Hour: FLSA Record Keeping Requirements

Employers Must Maintain, for Every Covered Employee:

- > Name, Address, SSN, Birth Date (if under 19), Gender, Occupation
- > Applicable Workweek (beginning and ending days/times)
- > Hours Worked by Day and Workweek
- > Basis of Pay (e.g., hourly or weekly rate)
- > Detailed Record of Pay, Including All Calculations and Deductions
- > Pay Dates and Pay Period Dates
- > Payroll Records Must Be Maintained for at Least Three Years

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Wage and Hour: What are Compensable Hours of Work

- > An employee must be paid for all of the time considered to be “hours worked” under the FLSA.
 - This may include time spent engaged to wait, on-call, in training, or travelling, as well as sleep time.
- > FLSA: “Employ” means to “suffer or permit to work”
 - Requiring or allowing work to be performed
- > Productive work from which the employer derives benefit
 - Employers may not benefit from labor without paying for it
- > FLSA Does not Require:
 - Breaks, Paid Time Off (e.g., vacation, sick leave), Other Benefits
 - Pennsylvania also does not require breaks during the workday
 - If offered, breaks of less than 20 minutes typically must be compensated

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Wage and Hour: Supervisor Responsibilities

- > Manage Work Hours and Overtime
- > Communicate Work Time Rules to Employees
- > Address Employee Non-Compliance
- > Ensure Accurate Reporting of Hours for Payroll
- > Manage Employee Use of Accrued Compensatory Time
- > Report FLSA Compliance Concerns to HR or Labor Counsel/Solicitor
- > When in Doubt, Seek Assistance

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Wage and Hour: Common Violations

- > **SUFFERED OR PERMITTED:** working “off the clock”
- > **WAITING TIME:** engaged to wait
- > **ON-CALL TIME:** not free from duty or employer control
- > **MEAL & REST PERIODS:** not free from duty
- > **TRAINING TIME:** unpaid training during work time
- > **TRAVEL TIME:** unpaid travel between job sites
- > **SLEEP TIME:** deduct or sleep in less than 24-hour shift

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Wage and Hour: FLSA Exemptions

- > The FLSA provides exemptions from the minimum wage, overtime and certain record-keeping requirements for employees in positions meeting specific criteria.
- > Job titles do not determine exemption status. For an exemption to apply, an employee's specific job duties and salary must meet the requirements of the Department's regulations.
- > Generally, these criteria involve a defined “duties test”, payment on a salary basis, and a minimum weekly salary amount.
- > Generally, exempt employees are paid a fixed amount without regard to hours of work. They are not entitled to overtime. Pay may not be reduced for working less than 40 hours in a workweek.

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Wage and Hour: FLSA Exemption

> FLSA Exemptions Include:

- Executive
- Administrative
- Professional
- Computer Employee
- Outside Sales
- Highly Compensated Employee

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Wage and Hour: Executive Exemption Criteria

- > Paid on salary basis at a rate of not less than \$844 per week (equivalent to \$43,888 annual salary)
- > Primary duty is managing enterprise or recognized department or subdivision of the enterprise;
- Customarily and regularly direct the work of at least two other full-time employees, or equivalent; and
 - Ability to hire and fire other employees or recommendations regarding personnel decisions are given particular weight.

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Wage and Hour: Administrative Exemption Criteria

- > Paid on salary basis at a rate of not less than \$844 per week (equivalent to \$43,888 annual salary) (effective 7/1/2024);
- > 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 regard to matters of significance.

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Wage and Hour: Professional Exemption Criteria

LEARNED PROFESSIONAL:

- > Paid on salary basis at a rate of not less than \$844 per week (equivalent to \$43,888 annual salary);
- > Primary duty is 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.

CREATIVE PROFESSIONAL:

- > Paid on salary basis at a rate of not less than \$844 per week (equivalent to \$43,888 annual salary); and
- > Primary duty is performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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Wage and Hour: Computer Employee Exemption

- > Paid on salary basis at a rate of not less than \$844 per week, or if compensated on an hourly rate not less than a rate of \$27.63; and
- > Employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field.
- > The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

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Wage and Hour: Other Exemption Criteria

OUTSIDE SALES EXEMPTION:

- > Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities; and
- > Customarily and regularly engaged away from the employer's place or places of business.

HIGHLY COMPENSATED EMPLOYEE EXEMPTION:

- > Perform office or non-manual work and paid total annual compensation of \$107,432 paid on a salary or fee basis; and
- > Perform at least one of the duties of an exempt executive, administrative or professional employee.

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Wage and Hour: Common Violations

- > **“WHITE COLLAR” EXEMPTIONS:** Misapplication of exemptions, or improper assumption that all salaried employees are exempt
- > **DEDUCTIONS:** Improper deductions in OT weeks
- > **MISCLASSIFICATION:** Improper treatment of employee as independent contractor
- > **HOURS WORKED:** Failure to record, pay for all hours worked

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Wage and Hour: Risks of Non-Compliance with FLSA

- > DOL Investigations and Audits
- > Back Pay of Unpaid Wages/Overtime (2-3 years)
- > Liquidated Damages (e.g., double damages)
- > Civil Penalties
- > Criminal Penalties

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Questions?



Andrew B. Adair

Partner

267.519.6812

aadair@goldbergsegalla.com

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Thank You

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A clear path to resolution