

FAQ's regarding HR Issues and Employment Laws

1. Who is an employee and who is an independent contractor?

The Internal Revenue Service (IRS) has begun a very serious effort to determine whether workers declared as independent contractors are instead employees. Employers who have paid workers as independent contractors (gross wages without withholding for taxes) in order to avoid the employer's FICA contribution and federal Unemployment Tax are being assessed the amount of the FICA and unemployment taxes that should have been paid, **plus** interest and penalties, by the IRS.

Read EXHIBIT 1, "Employee Or Independent Contractor Relationship?". Your answers to the questions in that document will help you determine whether a worker is an employee or an independent contractor. If, after answering the questions, you are still uncertain whether a worker is an employee or an independent contractor, you may want to obtain a form SS-8 from the IRS or contact an employment law attorney for further assistance.

For additional information about who the IRS considers to be an employee or an independent contractor, go to: <http://www.irs.gov/govt/fslg/article/0,,id=110344,00.html>. At that site, you should also click where it says, "See [Publication 15-A](#), *Employer's Supplemental Tax Guide*, for more information."

2. What is the difference between hourly and salary, between exempt and non-exempt employees?

The Fair Labor Standards Act (FLSA) defines employees as exempt from the overtime payment provisions of the Act or non-exempt from the provisions of the Act. Non-exempt employees can be paid either hourly or by salary. **NOT ALL EMPLOYEES PAID ON A SALARY BASIS ARE EXEMPT; JUST BECAUSE AN EMPLOYEE RECEIVES A SALARY DOES NOT MAKE HIS/HER JOB POSITION EXEMPT FROM OVERTIME.** To be exempt, jobs also must meet the fixed salary level test AND a job duties test.

Exempt employees are those who meet the FLSA job duties test for: Professionals, Outside Sales Persons, Executives, or Administrative category. Exempt employees do not have to be paid overtime for hours worked that exceed 40 hours in a workweek.

ALL EMPLOYEES IN NON-EXEMPT JOBS MUST BE PAID OVERTIME FOR THEIR HOURS WORKED THAT EXCEED 40 HOURS IN A WORKWEEK, WHETHER THEY ARE REGULARLY PAID HOURLY OR BY SALARY.

The Act requires employers to establish a consecutive 168 hour period (7 days x 24 hours/day) as a workweek. The workweek may begin on any day and at any time of the day. (Employers often start the workweek at 12:01 a.m. each Monday and end the workweek at 12 midnight the following Sunday.) Non-exempt employees must be paid overtime for all hours worked over 40 in the workweek. For hourly employees, payment must be at least 1½ their regular hour rate for overtime hours. Non-exempt salaried employees must, in addition to their regular salary, be paid at least ½ times their hourly equivalent rate for overtime hours.

Payment for overtime must be made with the paycheck for the payroll period in which the overtime was worked. **COMP TIME (COMPENSATORY TIME OFF) CANNOT BE PROVIDED TO NON-EXEMPT EMPLOYEES IN LIEU OF PAYMENT FOR OVERTIME. AN EMPLOYER CANNOT REDUCE THE NUMBER OF HOURS AN EMPLOYEE WORKS IN A SUBSEQUENT WORKWEEK TO "make-up" FOR OVERTIME WORKED IN A PREVIOUS WORKWEEK.** E.g., if Joe works 50 hours in workweek A and 30 hours in workweek B, he has to be paid overtime for the 10 hours of overtime in workweek A even though he is only paid for the 30 hours worked in workweek B; if the payroll period covered workweeks A + B, Joe would be paid the equivalent of 85 hours: 40 + (10 x 1.5 = 15) + 30. It would be a violation of the FLSA to only pay Joe a combined 80 (50 + 30) hours in a payroll period that covered weeks A + B.

The DOL implemented new regulations that became effective on August 23, 2004. The minimum salary level for an employee to be EXEMPT has increased to \$455/week, regardless of the number of hours the Exempt employee works.

EXAMPLE: an employee is hired or reassigned to a job that only works 20 hours per week and the job normally pays \$807.69/week (\$42,000 annually for a full-time, 40 hour/week employee). The now part-time employee is paid a pro-rated amount \$403.85 (50% or 20/40 times \$807.69). The job does NOT meet the \$455/week minimum salary level. Thus, the Exempt job becomes a Non-Exempt job unless the employee is paid a salary of at least \$455/week.

For further information, go to: <http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm> and read the Fact Sheets.

A number of free publications regarding the FLSA are available from the Wage and Hour Division, U.S. Dept. of Labor (602-514-7100). Questions regarding who is an exempt employee or a non-exempt employee, definitions of hours worked or not worked for calculating overtime, record keeping requirements, etc. will be answered by the Wage and Hour Division publications or by calling them.

3. How often and when do I have to pay employees?

The Arizona Wage Claims Statute (A.R.S. 23-351) states that employees must be paid at least twice monthly; so, you can pay weekly, bi-weekly, or semi-monthly. You can withhold up to 5 days' wages; meaning that the pay day can be up to a week (5 working days) following the end of the payroll period.

Employees who quit or resign can be paid on the normal pay day following their last day of employment; you have the option of paying sooner.

Employees who are discharged (involuntary termination) must be paid within 3 working days or on the normal pay day following discharge, whichever is sooner.

You must withhold (payroll deduct) for certain taxes (Social Security, Medicare, federal withholding, and AZ withholding). You may make other payroll deductions, such as for health insurance, uniforms, purchases of company products, etc., only when the employee has provided written authorization to do so. You must withhold for garnishments, tax liens, or other court ordered deductions. You cannot withhold from payroll any amounts for tools, keys, equipment, or other lost or non- returned items, unless you have a signed document from the employee authorizing such a deduction.

With regard to garnishments, you should obtain Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA); go to: <http://www.dol.gov/esa/whd/regs/compliance/whdfs30.pdf>

4. Do all my employees have to be age 18 or older?

No. However, the state of Arizona has youth employment (child labor) laws (A.R.S. 23-230 through 23-242) that restrict the hours an underage (under 18) child can work. Also, the federal and Arizona Occupational Safety and Health Acts (OSHA) restrict the kinds of jobs and work activities that an underage child can perform.

No one under 14 can be employed, with a few exceptions. No one under 16 may be employed before 6 a.m. or after 9:30 p.m., except newspaper carriers; employees under 16 cannot work more than 3 hours per day or 18 hours per week while school is in session if they are enrolled in school OR more than 8 hours per day or 40 hours per week if they are not enrolled in school. No one under 16 may be employed in solicitation sales or door-to- door deliveries after 7 p.m.

5. Do I have to insure all of my employees?

All employees must be provided worker's compensation coverage, paid in full by the employer, according to the Arizona Worker's Compensation Law. The Industrial Commission requires all employers who have employees to post two notices: "Notice to Employees RE: Arizona's Worker's Compensation Law"; AND, "Work Exposure to Bodily Fluids". Both are available from your worker's compensation insurance carrier.

Medical, life, dental, disability, or other similar types of insurance are NOT required by law at this time.

General liability, vehicle liability, and others types of insurance coverage for one or more employees may be a wise decision, but are not necessarily required.

6. What is “Unlawful Harassment”?

The EEOC’s guidelines regarding harassment state that ALL forms of harassment will be subject to its guidelines: sexual harassment or harassment based on the person’s race, gender, age, color, national origin, disability, religion.

If a tangible employment action occurs against an applicant or an employee, the employer will ALWAYS LIABLE; the employer cannot present an “affirmative defense.”

A tangible employment action against an applicant or employee is an adverse employment-related decision toward the person. Such actions could include: not hiring; unwelcome transfer; disciplinary actions; etc..

The components of an affirmative defense are: that the business has and enforces a policy against harassment; and, that the victim failed to use the complaint process provided in the policy.

7. What do I need to know about OSHA?

Effective January 1, 2002, OSHA requires that: each recordable on-the-job injury/illness must be reported via a form 301; the annual recordkeeping of recordable injuries/illnesses to be kept on a form 300; and, the annual summary information of recordable injuries/illnesses for the previous calendar year (from the form 300) be displayed on a form 300A from February 1 – April 1.

To obtain the booklet regarding recordkeeping requirements and which includes the OSHA forms for recordkeeping, go to: <http://www.osha.gov/recordkeeping/new-osh300form1-1-04.pdf>

8. When are I-9 (Employment Eligibility Verification) forms supposed to be completed?

EVERY employee must complete Section 1 of a form I-9 on his/her FIRST day of employment. The certification (Section 2 – Employer) section can be completed within 3 business days of employment.

The penalty, PER FORM, for recordkeeping violations of I-9 forms ranges from \$100 to \$1000. Most employers have forms that are incorrectly completed, incomplete, and/or lacking required data.

The penalty for knowingly hiring an illegal alien starts at \$10,000 with a minimum 6 month jail sentence.

For further information for employers, go to:

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=91919c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=91919c7755cb9010VgnVCM10000045f3d6a1RCRD>

9. What is E-Verify?

The Legal Arizona Workers Act requires all employers in Arizona to use E-Verify, in addition to the federal I-9 process, to verify that new hires have employment eligibility (i.e., have the legal right to work in the U.S.).

The consequences for non-compliance begin with a 10 day suspension of the businesses right to operate in Arizona.

To obtain information about E-Verify or to enroll in the program, go to:

http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm

10. Do I have to provide employees Break Periods and/or Meal Periods?

Neither the federal government, nor the state of Arizona, have statutes regarding employers providing meal and/or break periods. Therefore, each employer can set its own policy about meal and/or break periods.

The FLSA states that in order for a meal period to be unpaid for an employee in a non-exempt job position, it must be at least 30 minutes of uninterrupted time away from work duties/responsibilities. So, allowing a non-exempt employee to sit at his/her desk or work station during a “meal period” could result in the “meal period” being time worked, for purposes of the FLSA and calculating overtime, if the employee performed any work during that “meal period”. Any work could be just answering the employer’s phone or doing some job/work-related research on the internet or answering questions from customers or co-workers.

11. Can job offers be made verbally? Or, should they be in writing?

While offers can be made verbally, it is better to make them via an offer letter. The offer letter should state the agreed upon job title and starting wage/salary. The letter should include a statement that it is contingent upon ALL of the contingencies listed in the letter. Thus, if the applicant signs the offer letter, he/she has agreed to accept the contingencies.

Contingencies upon which an offer is based and that should/could be listed include, but are not limited to, that:

- the employee provide proof of identity and proof of employment eligibility and properly complete a form I-9 on his/her first day of employment; and, meet E-Verify requirements;
- the employee sign on his/her first day of employment a Confidential Information Agreement; if this is a contingency, a copy of the Agreement should be included with the offer letter so the applicant can read/review the Agreement before being required to sign;
- the employee provide a copy of his/her current driver's license and MVD report, if he/she will be driving on company business;
- and/or other such contingencies.

The offer letter should include language that the applicant, if he/she signs the letter, attests that he/she is not under a "covenant not to compete agreement" with a former employer and that he/she will not bring materials, files, documents, or other information from a previous employer that would be in violation of a "Confidential Information Agreement" with a former employer.

Also, the offer letter should identify the process by which a signed copy is presented to the employer and the date and deadline at which the offer, if not accepted, is void.

12. Can we drug test employees? Applicants?

Yes. Arizona has a drugs/substances statute that is favorable toward an employer, provided the employer has a written drugs/substances testing program that meets the statutes. Having a written policy that meets the Arizona statutes allows an employer to: terminate an employee who refuses to provide a specimen for testing or who tests positive and to receive a discount on worker's compensation insurance costs.

When a drugs/substances testing policy that meets the Arizona statutes is in place, employees who refuse to consent to provide a specimen or who test positive will be disqualified from receiving unemployment insurance benefits.

For additional information, see EXHIBIT 2.

13. Must employees received accrued/earned vacation pay when they quit, resign, or are fired.

Yes. In *Schade v. Dietrich*, the Arizona Supreme Court ruled that vacation pay is "wages." And, the Arizona Revised Statutes (ARS Title 23, Chapter 2, Article 7, Payment of Wages) requires the payment of "wages" on the next regular payday (if the person quits or resigns) or within 3 business days (if the person is discharged).

To not pay vacation pay could result in a penalty equal to three (3) times the amount owed to the employee.

14. Are all employees eligible for FMLA leave?

No. To be eligible for FMLA leave, an employee must work for a business that has 50+ employees. In addition, the employee must have:

- worked for the business at least 12 months, even if not consecutively;
- worked at least 1250 hours during the 12 months, rolling backward from the date that FMLA leave, if granted, would begin; and,
- work at a site/facility where within a 75 mile distance there are 50+ employees.

15. We receive mailings about ALL-IN-ONE, 5-in-1, or 6-in-1 posters. Should we purchase those?

The advantages of such posters are that they are laminated and require less wall space than the space

required of the individual posters.

One disadvantage is that you are paying for notices/posters that can be obtained for free from the appropriate state or federal agency. Another is that the workers compensation insurance notice will not include the name and address of your workers compensation insurance carrier or the policy number; all of that information is required, by law, to be on the notice/poster.

The major disadvantage of purchasing such posters is the risk of having to comply with a law with which your business would otherwise not be required to comply. For instance, the ALL-IN-ONE, 5-in-1, and 6-in-1 posters include the FMLA poster. If your business is under 50 employees, but posts the notice, it will have accepted responsibility to comply with FMLA since it notified employees of their rights to FMLA . . . Ooops!

It is recommended that you review the required notices and posters, by threshold numbers of employees (see PART 3, page 11), and post only those you are required to display.

16. What questions can or cannot be asked during an employment interview?

Questions that are considered to be discriminatory (the answers to the questions could result in discrimination against the applicant) are unlawful and should not be asked.

Questions that are job-related and that will allow you to assess how well the person could perform the job are lawful and may be asked.

See EXHIBIT 4 for further information.

17. What is “negligent hiring”?

When an employer hires someone into a position where it is foreseeable that the employee could do harm to the public and the employer does not complete an adequate background check and the employee does do harm to the public, the employer can be liable under the legal theory of “negligent hiring.”

For instance, if a company has employees who install appliances, who deliver furniture, or who otherwise are in a customer’s home and the employee commits an act of violence toward the homeowner, or steals, or rapes, and the company did not conduct a thorough background check, and the employee has a history of such acts, the employee probably will face a claim of “negligent hiring.”

The most common risk for employers is with employees who drive on company business. If an employee drives on company business and his/her driving record shows a history of speeding, moving violations, running stop signs or red lights, and the employee is involved in an accident while driving on company business, the business will probably face a claim of “negligent hiring.” See EXHIBIT 5 for further information.

18. Does a payroll service (ADP, Paychex, other) automatically report new hires to the Arizona New Hire Reporting Center?

Typically, such payroll services only provide the information on your behalf if you have enrolled for that service and are paying a fee for that service. Since the liability is on the employer, not the payroll service, you should verify with your payroll service that it is reporting new hires. If it is not, you can pay for that service or report new hires yourself.

19. How important is it that a non-exempt employee sign his/her time sheet?

VERY. When a non-exempt employee signs that the time sheet is accurate (he/she has not worked fewer hours than recorded and not worked more hours than recorded), the company is protected.

If the employee were to file a claim with the Wage & Hour Division of the Dept. of Labor that he/she had not been paid overtime, the signature would allow the company to refute the employee’s claim that he/she worked more hours than recorded.

If the company learned and had proof that the employee had worked fewer hours than recorded, the signature would be proof of the employee’s falsification of the time sheet. Then, the employee could be disciplined or discharged and the employer would have the signed time sheet, along with other document of the false record, to defend any claim.

20. If employees pay for the cost of disability insurance, instead of the company paying the premium, the benefit is not taxed to the employee. Can we require every employee to sign up for disability insurance and deduct the premium from payroll?

No. If the employee pays all or part of a premium, he/she may not be required to sign up for the benefit. Only when the employer pays the entire cost is it possible to require every employee to sign up for disability insurance.

Employers who have questions or who want assistance with complying with any of the employment laws listed above should contact an experienced human resource professional or a competent employment law attorney.