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ATTORNEYS AND
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**File These 10 Tips Away
to Ensure Clutter-Free
Wage and Hour
and I-9 Practices**

Presented by: Mary P. Snyder

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LexMundi
World Ready



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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Mary P. Snyder, or another licensed attorney.

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Today's Agenda



I-9s Proper Classification Proper Payment

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Declutter Your I-9 Processes

Verifying Employment Authorization and Identity of New Employees

- To comply with the law, employers must:
 - Verify the identity and employment authorization of each person they hire;
 - Complete and retain a Form I-9 (Employment Eligibility Verification) for each employee; and
 - Refrain from discriminating against individuals on the basis of national origin or citizenship

Who must complete a Form I-9?

- Employers must complete an I-9 for each new person that is hired after Nov. 6, 1986
 - Employee must have been at least offered a job and subsequently accepted the job offer
 - Should not complete I-9 for job applicants
 - The I-9 process **cannot** be used to screen job applicants
- Need to ensure you use the most up-to-date form each time

Tip #1 – M-274

- Fantastic resource - Will answer most questions regarding how to complete I-9
- Keep a link in your “favorites” list in web browser
- Require anyone who completes I-9s to review www.uscis.gov/i-9-central/handbook-employers-m-274



Tip #2 - Review of the Documents

- The completion of the Form I-9 must be done **in person**
 - Remote employees?
 - Third party reviewers (liability)
- I-9s need to be completed and documents reviewed **within three (3) days** of the hire
 - The employer representative/third party who signs the form (completes the I-9) must be the person who examines the original docs
- Documents must be **originals**
 - The only exception is that an employee may present a certified copy of his/her birth certificate



Required Documents

- Employers **may not** request specific documents from List A or a combo from Lists B and C
 - Even if an employee has an expiring doc, you **CANNOT** ask that employee to provide that same updated document
 - Each time an employee completes an I-9, he/she can present ANY acceptable combination listed on the Form I-9
- Employers **may not** accept any expired docs as proof of employment verification
- An employee does not have to provide a social security card or a social security on Section 1



Tip #3 - Photocopying the I-9

- Unless you participate in E-Verify, you are not required to make photocopies of documents
- However, for purposes of best practices, it is advisable to establish a practice of photocopying an employee's supporting documentation. Why?
 - Internal audits;
 - Government audits/investigations; and
 - Good faith defense
- **BUT NOTE:** If you choose to make photocopies, you must do so for all employees
 - Photocopies, if made, should be stored with I-9s



Tip #4 – When to Reverify

- When an employee's Employment Authorization Document (EAD) expires, employers must reverify the employment authorization no later than the date the authorization expires
 - Employees with EADs need to file for extensions well in advance (as close to start of 6 month window as possible)
- Reverification must be completed in Section 3 of I-9
- Employees are NOT required to present a new version of the same doc that was presented to satisfy Section 2 but was subsequently expired
 - Any doc or combo of docs acceptable to demonstrate work authorization is okay
 - Employee's choice
- NEVER reverify a Permanent Residency Card (Green Card) even if it has an expiration date
- No need to reverify based on a change in employee's employment status as long as person is a continuing employee



Tip #5 – Ensure You Have Only the I-9s You Need

Arrange I-9s for terminated employees so that they can be properly purged when the end of the retention period arrives:

- When an employee is terminated, mark the I-9 with the LATER of:
 - 1) three years from the date of hire, or
 - 2) one year from the date of termination
- File the I-9s by the purge date.
- Keep a running list of purged I-9s, including the name of the former employee, the date of hire, the date of termination and the date the file was purged





Tip #6 – New Salary Basis Test

- Standard salary level went from \$455 per week to \$684 per week (equivalent to \$35,568 per year for a full-year worker)
- Total annual compensation requirement for highly compensated employees went from \$100,000 per year to \$107,432 per year
- Employers can use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of standard salary level

The final rule became effective on January 1, 2020.

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Tip #7 – The Duty Tests Did Not Change

- Different for each exemption
- Need to analyze actual job duties
- Often involves complex analysis

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Administrative Employees – Ask Yourself:

- Is it the performance of office or nonmanual work?
- Is the work directly related to the management or general business operations of the employer or the employer’s customers?
- Does it require the exercise of discretion and independent judgment with respect to **matters of significance**?
- Is it directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment?



Executive Employees – Ask Yourself:

- How does this employee spend the majority of his/her time?
- Is it managing the enterprise or managing a customarily recognized department or subdivision of the enterprise?
- Does the employee direct the work of at least two or more other full-time employees or their equivalent on a regular basis?
- Does the employee have the authority to hire or fire other employees? Or do his/her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees typically get followed?



Professional Employees – Ask Yourself:

- How does this employee spend the majority of his/her time?
- Is it work that requires advanced knowledge (knowledge that is predominately intellectual)?
- Does the work require the consistent exercise of discretion and judgment?
- Is the advanced knowledge in a field of science or learning that would usually be acquired through a degree program?



Outside Sales Employees – Ask Yourself:

- How does this employee spend the majority of his/her time?
- Is it making sales or obtaining orders or contracts for services or for the use of facilities?
- Does the employee regularly work away from the office (and not out of his/her home)?



Might the Employee Qualify for Highly Compensated Employee Exemption?

- Does the employee earn the annual equivalent of \$107,432?
- Does the employee earn a weekly salary of at least \$684/week?
- Does the employee's primary duty consist of nonmanual work?
- Does the employee regularly perform at least one of the exempt duties performed by an administrative, executive or professional employee?



Tip #8 – How to Ensure Exemptions are Defensible?

- Clean up your job descriptions, evaluations and training documents
- Make sure they reflect exempt duties for exempt employees
- Make sure that business documents support the exemptions
 - Do executive employees sign off on hire/fire paperwork?
 - Do administrative employees sign off on documents relating to their areas?





Declutter Your Timekeeping and Pay Practices for Hourly Workers

Tip #9 – Streamline Your Processes for Recording All Hours Worked

- Need to track all hours worked
- Update policies regarding working from home/checking email while off-duty
- Make sure supervisors understand and comply with policies
- Policy stating no off-the-clock
- Ensure compliance with travel time rules

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Travel Time

<p>You do have to pay for:</p> <ul style="list-style-type: none"> • Home to work on a special one-day assignment away from regular work site • Travel as part of a day's work (such as job site to job site) or to see a client • Travel away from home community for an overnight stay during ordinary work time (including corresponding hours on non-work days) 	<p>You do not have to pay for:</p> <ul style="list-style-type: none"> • Ordinary commute time • Travel as a passenger away from home community for an overnight stay that takes place outside ordinary working hours • Time spent driving a vehicle if the employee chooses that option in lieu of the second option
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Training Time

- Attendance at lectures, meetings and trainings need not be counted as working time (i.e., need not be paid) if the time spent meets **all four** of the following criteria:
 - Attendance is outside regular working hours
 - Attendance is truly voluntary
 - The training is **not directly related** to the employee's job
 - The employee does not perform any productive work during attendance



Training Time

- Training is directly related if it is designed to make the employee handle his/her job more effectively as distinguished from training the employee for another job
- Training is **not** considered directly related if it is designed to prepare the employee for advancement, even if it has the collateral effect of making the employee more efficient in the current job
- Attendance is not voluntary if employee is led to believe that non-attendance will have a negative impact on his/her working conditions



After-Hours Communications

- Includes email, instant messaging, phone calls and texting
- Employees must be paid for hours they are suffered or permitted to work
- Must pay if the employer knows that employees are working after hours
- If you have a no off-the-clock policy and/or no unauthorized overtime policy, the employer may be able to discipline but still has to pay



Tip #10 – Review Your Regular Rate Calculations

- The Fair Labor Standards Act (FLSA) requires employers to pay hourly employee overtime pay of at least one and one-half times their “regular rate of pay” for any hours worked in excess of 40 hours per workweek
- Regular rate is not always the same as the hourly rate
- The regular rate includes all remuneration for employment
- The regulations define what must be included in the regular rate
- Much litigation over regular rate calculations



All Non-Exempt Employees Must Be Paid Overtime If they Work Over 40 Hours in a Workweek

- Even if your payroll is done every two weeks, you have to calculate the number of hours worked by employees in each separate workweek
- No averaging over the course of the pay period
- For most employees, overtime is 1.5 x the regular rate of pay
- For some types of pay, only the .5 premium is due, because the straight time for the hours has already been paid. (Day rate, for example).
- You have to keep track of hours worked, even for salaried non-exempt employees, to be able to calculate the regular rate



Regular Rate

Part of the regular rate for overtime calculations:

- Commissions
- Non-discretionary bonuses
- Shift and pay differentials
- Stipends for on-call time
- Reimbursement for expenses personal to the employee
 - Free lunch where there was no work reason for it
 - Tuition reimbursement? Depends on how closely linked it is to the job.

Not part of the regular rate for overtime calculations:

- Gifts that are paid on special occasions that are not measured by or dependent on hours worked, production or efficiency
- Payments for vacation, holidays, PTO, etc. – must be absences that are infrequent or sporadic
- Reimbursement of expenses that are incurred for the employer’s convenience
- Discretionary bonuses – no promise of a bonus or an amount



New Rules on Regular Rate

Clarify that the cost of the following may be excluded from the regular rate of pay:

- Providing wellness programs, onsite specialist treatment, gym access and fitness classes
- Employee discounts on retail goods and service
- Payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay
- Tuition programs, such as reimbursement programs or repayment of educational debt



New Rules on Regular Rate

- Allow reimbursed expenses to be excluded from the regular rate even if not incurred solely for the employer's benefit
- Allow reimbursed travel expenses to be excluded from the regular rate so long as they do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System and meet other regulatory requirements
- Clarify that pay for time that is not "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate





Quintanilla Poultry LLC
\$96,782.00

The company paid its chicken catchers a piece rate based on the number of loads of chickens each crew caught. Hours were not factored into pay. The company also paid some crew leaders a combination of fixed salaries each workweek for supervisor duties performed and piece rates for catching and loading chickens. The employer did not keep track of the number of hours each employee worked.



Intermountain Concrete Polishing
\$47,676.00

The concrete floor polishing company paid employees straight-time rates for all the hours they worked. Employees sometimes traveled to worksites several hours away from their home communities during the workday and then returned home the same day. The employer did not pay for this travel time.



Energy Conservation Insulation Company
\$159,027.00

The company, an insulation contractor, paid employees piece rates based upon their production. The company did not keep track of hours worked by the employees.



U.S. Limited LLC
\$54,121.00

U.S. Limited LLC provides environmental labor and social responsibility audits to its clients. The company paid lead auditors as exempt from overtime requirements, and paid them salaries.



Apex Pipeline Service Inc.
\$242,038.00

The company, a provider of construction services to the oil and gas industry, classified field office managers and safety coordinators as exempt from overtime. It also paid employees per-diem payments based on the craft they performed, regardless of travel status or distance from home to worksite.



American Samoa Power Authority
\$110,865.00

The company capped shifts at eight hours each day. When employees worked late and punched out after their scheduled shift ending times, the employer changed the time records to remove the extra hours because the hours had not been authorized.





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