



# Worker Classification: Navigating New Rules and Pitfalls

# Agenda

**1** Exempt vs.  
Non-Exempt

**2** Employee vs.  
Contractor

**3** Q&A

## Recent changes to exempt/non-exempt status

	Prior Threshold	July 1, 2024 threshold	Jan 1, 2025 threshold
White collar exemptions	\$684/week (\$35,568/year)	\$844/week (\$43,888/year)	\$1,128/week (\$58,656/year)
Highly compensated exemptions	\$107,432/year	\$132,964/year	\$151,164/year

# Will the new rule survive lawsuits?

- A recent U.S. Supreme Court decision will bolster challenges to the new rule, since *Chevron* deference is gone.
- A Texas federal court issued the first preliminary decision, finding that the new rule is likely an unlawful exercise of the DOL's power.
- The result is that the new rule is temporarily on hold ONLY for the state of Texas as an employer (not all employers in Texas). For all employees besides Texas government employees, the new salary level test is in place.
- A related 5th Circuit case gives the DOL some hope that the new rule could survive.






# What should employers do now?

Considerations when thinking through reclassification vs. raise:

- Affected employees
- Budgeting
- Training
- Communicating changes to employees
- Job descriptions/compensation structure



## Tool: SixFifty Exempt Non-Exempt Analyzer

### Exempt Non-Exempt Analyzer

- ✓ 1 Introduction
- 2 Organization Name
- 3 Position Title

Assign

## Let's get started with your exempt non-exempt analysis!

Before we begin, there are a few things you should know. We are not your lawyer and this tool does not offer legal advice. It only offers legal information. If you want to learn more about this exempt non-exempt tool, click *See More Information* below.

[See More Information](#)

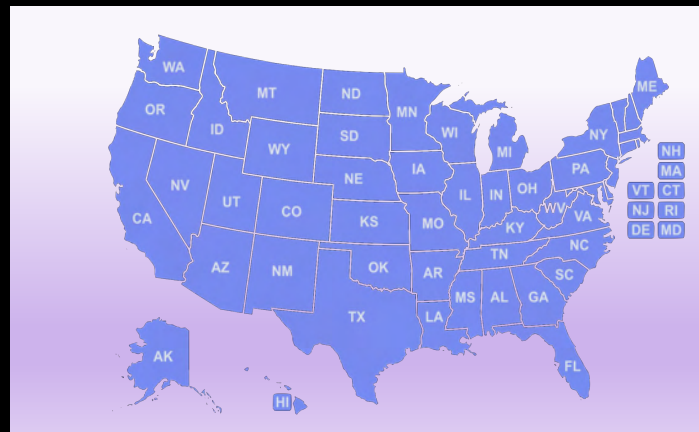
Back

Next

# Don't forget about state-level exemptions!

States that have higher thresholds than the July 1 increase:

- Alaska - \$48,796.80
- **California - \$66,560.00**
- Colorado - \$55,000.00
- **NYC and Nassau, Suffolk, and Westchester Counties - \$62,400.00**
- New York (rest of state) - \$58,458.40
- **Washington - \$67,724.80**



# Employees and Contractors - A 10,000 Foot View

An **Employee** is a worker over whom an employer exerts significant control, and who is economically dependent on the employer.

- E.g., a full-time worker who is directly supervised by their employer

A **Contractor** is a worker who is not economically dependent on an employer (often because the worker operates as an independent business) and over whom an employer exerts less control than it has over employees.

- E.g., a worker who is hired for a one-off project that is outside the employer's expertise





# Federal or State Law?

**There are a lot of EE/IC tests for employers to choose from**

- Multiple tests under federal law, plus ~one in each state

**As a rule of thumb, the federal tests are usually where you should look first**

- Federal employment law applies in most circumstances and often preempts similar state laws

**But state rules are still important in some circumstances, like:**

- When a state imposes rules that are more employee-friendly than comparable federal law; or
- When you are dealing with a requirement that only exists at the state level



# The Three “Little” Tests



## The “Economic Realities” Test

- Used for the Fair Labor Standards Act (FLSA)
- Determines whether the worker is entitled to minimum wage and overtime pay
- Considers 6 factors

## The “Right to Control” Test

- Used by the IRS for federal tax purposes
- Determines whether the employer is required to withhold taxes from the worker’s pay
- Considers 3 factors
- Based on the *Darden* Test

## The *Darden* Test

- Used under a variety of federal laws, including ERISA and Title VII
- Determines whether the worker is eligible for benefits and discrimination protections (among other things)
- Considers 12 factors

# The FLSA “Economic Realities” test

Focuses on whether the worker is economically dependent on their employer with reference to six factors:

- Opportunity for profit or loss\*
- Investments by the worker and potential employer
- Degree of permanence of the work relationship
- Nature and degree of control\*
- Extent to which work performed is an integral part of the business
- Skill and initiative

Department of Labor issued a regulation earlier this year that changed the test

- Same factors, but weighted differently

Validity of the new rule is currently being litigated

- Remains in effect until a court says otherwise

## EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT

### FEDERAL MINIMUM WAGE

**\$7.25** PER HOUR  
BEGINNING JULY 24, 2009

The law requires employers to display this poster where employees can readily see it.

#### OVERTIME PAY

#### CHILD LABOR

An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 years old may work outside school hours in certain non-manufacturing, non-mining, non-retail jobs with certain work hour restrictions. Different rules apply in agricultural employment.

#### TIP CREDIT

Employees of “tipped employees” who meet certain conditions may claim a partial wage credit based on tips received by their employees. Employees must pay tipped employees a cash wage of at least \$2.12 per hour if they claim a tip credit against their minimum wage obligation. If an employee’s tip combined with the employer’s cash wage of at least \$2.12 per hour does not equal the minimum hourly wage, the employer must make up the difference.

#### NURSING MOTHERS

The FLSA requires employers to provide reasonable break time for a nursing mother employee who is subject to the FLSA overtime requirements in order for the employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has a need to express breast milk. Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by the employee to express breast milk.

#### ENFORCEMENT

The Department has authority to recover back wages and an equal amount in liquidated damages in instances of minimum wage, overtime, and other violations. The Department may initiate and/or recommend criminal prosecution. Employers may be assessed civil money penalties for each willful or repeated violation of the minimum wage or overtime pay provisions of the law. Civil money penalties may also be assessed for violations of the FLSA child labor provisions. Heightened civil money penalties may be assessed for each child labor violation that results in the death or serious injury of any minor employee, and such assessments may be doubled until the violations are determined to be willful or repeated. The law also prohibits retaliating against or discriminating against any employee who files a complaint or participates in any proceeding under the FLSA.

#### ADDITIONAL INFORMATION

- Certain occupations and occupations are exempt from the minimum wage and/or overtime pay provisions.
- Certain provisions apply to workers in American Samoa, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico.
- Some states have provide greater employee protections; employees must comply with both.
- Some employees incorrectly classify workers as “independent contractors” when they are actually employees under the FLSA. It is important to know the difference between the two because employees cannot sue for, and are entitled to the FLSA minimum wage and overtime pay protections and correctly classified independent contractors are not.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.



SWHD

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# Legal Challenges to the New FLSA Test

## At least six lawsuits have already been filed

- Primarily by employer groups and freelance workers

## These lawsuits are new, so it's unclear how the courts will rule, and we may have to wait a while to get a decision

- But the new test is more likely to be thrown out in a post-*Chevron* world

## In the meantime, the rule remains in effect

- Employers should modify their classification practices accordingly





# The IRS “Right to Control” Test

Focuses on whether the employer has the right to control the worker and direct how their work is done with reference to three factors:

## **Behavioral Control**

- Does the company control what the worker does and how they perform their work?

## **Financial Control**

- Does the employer control the financial aspects of the worker’s job, like purchasing supplies, setting pay, and obtaining other work?

## **Type of Relationship**




- Does the relationship between the employer and the worker look more like an employee relationship or a contractor relationship?

# The Common Law “Darden” Test

Consists of 12 factors first articulated by SCOTUS in *Nationwide Mutual Ins. Co. v. Darden*

1. How much skill the worker’s job requires;
2. Who provides tools and equipment;
3. Who controls where work is performed;
4. The duration of the relationship between the employer and the worker;
5. Whether the worker is allowed to decline assignments;
6. Whether the worker has discretion over when and how long to work;
7. How the worker is paid
8. Who controls hiring and paying assistants;
9. Whether the worker’s job is integral to the employer’s business;
10. Whether the employer is “in business”;
11. Whether the worker receives employee benefits; and
12. How the employer treats the worker for tax purposes

# Tool: SixFifty Employee Contractor Analyzer

## Employee Contractor Analyzer

- ✓ 1 Introduction
- 2 Worker Name
- 3 Final Information

Assign

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Back

Next

# Key Takeaways



**Make sure you know what context you are making the employee contractor determination in so you know which test to apply.**

- FLSA is a good place to start if you aren't sure

**Classify workers on a person-by-person basis**

- Some factors consider info that can't be generalized across multiple people in the same position

**You can influence the classification (to an extent) by changing the circumstances of the job**

- More flexibility & less control = more likely to be a contractor

**When in doubt, err on the side of employee**

- Less risk (but increased costs) associated with misclassifying a contractor as an employee



# Q&A time!

Post your questions in  
Zoom's Q&A panel



Schedule a no-pressure  
1:1 tour of SixFifty's  
employment platform

# Upcoming webinar

## Key Legal Updates in Hiring Compliance

Oct. 10th at 10am PT/1pm ET



We'll be covering employment law trends specific to hiring, including:

- Pay transparency
- Employee notice requirements
- Laws around pre-employment inquiries (such as criminal, medical and salary history)
- And more!