

# THE SEMINAR GROUP

## 4th Annual Labor & Employment Law Conference

### SMALL BUSINESS AND START-UP LABOR & EMPLOYMENT ISSUES

#### PART II: Common Traps for the Unwary

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# INTRODUCTION

Small businesses and start-up companies face a number of unique employment law issues. Many times they are not large enough to fall within the purview of certain state and federal employment laws, but as they grow, they will become subject to these laws and may not be fully aware of them. Generally, small businesses and start-ups do not have a professional HR staff or a general counsel to consult. Therefore, it is important that small business owners and attorneys representing them, have a thorough working knowledge of the various employment laws that can trip them up. This section will cover some common mistakes made by small business that can expose them to state or federal government audits, fines and penalties or to civil litigation from employees, former employees and contractors.

## I. WAGE AND HOUR LAW

Wage and hour law can be complicated and confusing. The points below are intended to address some of the most common wage and hour questions. Wage and hour laws apply to only employees.

### A. Is Your Employee “Exempt” or “Non-Exempt?”

Whether or not an employee is entitled to overtime pay depends on whether they are “exempt” or “non-exempt.”

Important: The U.S. Department of Labor implemented significant changes to the rules for what employees are considered exempt. These changes have to do mostly with the “white collar” exemptions discussed below.

There are three narrow categories of white-collar exemptions: Executives (supervisors), administrative employees, and professional employees. In addition, outside sales professionals and certain highly paid computer professionals may be exempt. Each job description has to be carefully analyzed against the legal test. The exempt employee must be paid on a bona fide salary basis regardless of hours worked. **All** other employees are non-exempt and must be paid hourly and paid overtime. There are some slight, but important differences between state and federal law on many of these exceptions.

### B. Exemptions: Executive, Administrative, and Professional

The FLSA and Oregon law both exempt certain types of employees from additional overtime pay for working more than 40 hours in a week. Once an employee qualifies as “exempt,” the employer must be careful to maintain this exempt status or else risk overtime claims and related penalties under federal or state statutes. The common term for the most frequently used exemptions is “white collar.” The white collar exemptions, available to both private and public employers, require that the employees meet two tests: (1) the salary basis test *and* (2) the duties test.

### Salary Basis Requirements

White collar exempt employees must be paid on a salary basis. Physicians, lawyers and computer professionals are the only exception to this rule under federal law. Under Oregon law, only computer professionals are exempt from this requirement. Paying an employee on a salary basis requires that the employee receive a predetermined amount of pay each week, regardless of the quality or quantity of hours worked. Thus, employees must receive the same salary whether they work more or fewer than 40 hours a week. An improper salary deduction may destroy the employee’s exempt status.

The overtime exemptions are not at risk simply because the employer pays employees more than the agreed upon salary. Employers are always permitted, under state and federal law, to give employees additional compensation beyond salaries.

## Minimum Salary

Current federal regulations, adopted August 23, 2004, require exempt employees be paid a salary of at least \$455 per week (\$23,660 per year). This replaces the former standards of \$155/week and \$250/week, which differentiated between use of the “long” and “short” tests.

Since the federal standard is higher than the Oregon standard, it effectively sets the minimum salary for all white collar exempt jobs in Oregon because employers need to comply with the law more favorable to employees.

### Permissible Deductions From Salary

Federal law permits deductions from an exempt employee’s salary only in the following circumstances:

- Absences of one day or more for personal reasons other than sickness or accident;
- Absence of a day or more due to sickness or disability if made in accordance with established policy;
- Disciplinary suspensions for violations of safety rules of major significance;
- Disciplinary suspensions for infractions of workplace rules (harassment, drug and alcohol violations);
- For partial work weeks in the initial or terminal weeks of employment; and
- For any absence covered by the Family and Medical Leave Act (FMLA), but not Oregon’s Family Leave Act (OFLA), unless the employer is a government agency.

The federal regulations also establish a safe harbor minimizing the impact of an improper deduction from an exempt employee’s salary. To take advantage of this safe harbor, the employer must clearly communicate its policy prohibiting improper pay deductions, provide a complaint mechanism, reimburse employees for such deductions and make a good faith commitment to future compliance.

#### Strategy Tip

To minimize liability for improper deduction, an employer should:

- Clearly communicate its policy prohibiting improper pay deductions;
- Provide a complaint mechanism; and
- Promptly reimburse employees for improper deductions if such deductions occur.

The Oregon law on exemptions is similar but distinct from the FLSA in some significant ways. The biggest differences are: restrictions on leave bank deductions and disciplinary deductions; and, lack of a safe harbor provision for corrective action, a/k/a “window of corrections.”

- Deductions of an entire week from salary may be allowed if the employee performs no work in that week. Except for the specific deductions otherwise allowed, no deduction may be made if the employee performs any work in that week.
- Deductions in full-day increments from salary may be allowed when the employee takes at least a whole day off for reasons other than sickness or accident.
- Deductions in full-day increments from salary are allowed for absences due to illness or disability, if in accordance with a bona fide plan, policy, or practice of providing paid sick and disability leave, when such leave is exhausted or when the employee has not qualified

for the plan. An employer without a bona fide plan, policy or practice in place for disability and sick leave may not deduct from salary for absences due to sickness or disability.

- Deductions from salary may be made for partial-day absences due to leave taken under the FMLA but not under OFLA. Otherwise, deductions are not permitted for partial days of work.
- Deductions are allowed for disciplinary absences in response to employee violations of safety rules of major significance, relating to prevention of serious danger to the plant, the public, or other employees. Note that this is more restrictive than the federal standard allowing deductions.
- Deductions are *not* allowed for jury duty, attendance as a witness, or temporary military leave if the employee performs any work during that week. However the employer may offset any amounts received by the employee as a fee or payment for such service.

The following deductions can be made from an employee's leave bank:

- Deductions may be made from bona fide paid leave banks in partial- or full-day increments. Employers are not required to honor an employee's request for partial-day vacations. The employer can deny such requests or, if the employee takes time off without the employer's approval, the employer may impose discipline for insubordination and / or poor performance. Such discipline is permissible if it does not involve docking from salary.

#### **Note**

Partial-day deductions from a leave bank may be made only on the express or implied request of the employee for time off from work; there must be a written policy or notice distributed to employees explaining the leave bank; and leave bank deductions may not be made for less than one hour.

When leave banks are exhausted, deductions from salary may not be made for partial-day absences, except:

- In particular circumstances set forth elsewhere in the regulations (generally allowing salary reductions in FMLA qualifying circumstances and prohibiting other salary deductions, except in full-day or whole-week increments);
- For public employees only, deductions from salary for partial-day absences may be made if there is an established policy of public accountability; and
- Public employer may make deductions for partial day absences when the employee who takes an unpaid leave for personal reasons or illness does not use accrued leave, and provides for deductions for furlough absences authorized by law.

## **Duties Requirements**

In addition to the salary basis requirements, exempt employees must also meet duties requirements. Because federal and state laws differ slightly regarding duties tests, the employer must comply with both when evaluating an employee's status as exempt or nonexempt. Oregon did not revise its white-collar exemption regulations to conform to the August 23, 2004 revisions to the FLSA regulations. Consequently, BOLI relies on the interpretations of the pre-August 23, 2004 FLSA regulations where they are identical to the Oregon regulations.

The chart at Appendix 7-B shows what employers need to do in order to be compliant under both state and federal law.

## **Executive Exemption**

### **Federal Law**

In addition to being paid a salary of at least \$455 per week, an executive must:

- Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision;
- Customarily and regularly direct the work of two or more full-time employees or their equivalent; and
- Have the authority to hire, fire, promote or demote other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, promotion or demotion or any other change of status of other employees.

The regulations also recognize as exempt any employee who owns at least a 20% equity interest in the enterprise in which the employee is employed.

One difficult issue for retailers has been that supervisors in retail establishments frequently have both exempt supervisory duties and non-exempt duties. Under the federal rules, a retail supervisor can maintain exempt status even though the supervisor also performs tasks such as serving customers, cooking food, stocking shelves, and cleaning the establishment, if the manager's (or assistant manager's) primary duties include activities like scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, authorizing payment of bills or performing other management functions. This is particularly true where the individual has the discretion to decide when to perform exempt work versus non-exempt work.

### **Oregon Law**

- Executive employees in Oregon must be paid on a salary basis;
- Have as primary duty the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof or is in sole charge of an independent or physically separated branch establishment;
- Customarily and regularly direct the work of two or more other employees;
- Spend most of the workweek (generally more than 50%) performing managerial, intellectual or creative tasks or own at least 20% interest in the enterprise in which the employee is employed;
- Have authority to hire and fire employees or his/her recommendation is given particular weight;
- Customarily and regularly exercise independent judgment to make decisions of significance.

### **Compliance Analysis**

The state requirement regarding percentage of time spent in exempt tasks and the exercise of independent judgment is a stricter standard than federal law.

## **Administrative Exemption**

### **Federal Law**

In addition to being paid a salary of at least \$455/week, an administrative employee's primary duty:

- Must involve office or non-manual work directly related to the management or general business operations of the employer or its customers. Examples in the regulations include

work in areas such as finance, accounting, budgeting, auditing, quality control, purchasing, marketing, personnel management, public relations, or database administration as well as those who act as advisors or consultants to the customers.

- Must include the exercise of discretion and independent judgment with respect to significant matters. Factors to be considered include, for example:
  - Whether the employee can formulate, interpret or implement management policies.
  - Whether the employee has the authority to commit the employer to matters of significant financial impact.
  - Whether the employee can deviate from established policies without approval.
  - Whether the employee is involved in planning long or short-term business objectives.
  - Whether the employee investigates and resolves matters of significance on behalf of management.
  - Whether the employee represents the company in handling complaints, etc.
- The regulations clarify that “exercise of discretion and independent judgment” does not necessarily mean that the employee has final authority. Rather, “discretion” may consist of recommendations for action, rather than the final decision to take that action. Furthermore, discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or standards in manuals.
- Additionally, the new federal regulations provide useful examples applying the standards. These examples include insurance claims adjusters, certain employees in the financial services industry, team leads for major projects, certain executive assistants, human resource managers, and purchasing agents.

## **Oregon Law**

Under Oregon law, an administrative employee must:

- Have as a primary duty work that consists of performance of office or non-manual work directly related to management policies or general business operations of employer or its customers;
- Customarily and regularly exercise independent judgment to make decisions of significance;
- Spend most of the workweek (generally more than 50%) performing management, intellectual, or creative tasks;
- Perform work as an administrative assistant, a staff employee or a special assignment employee.

## **Compliance Analysis**

The two standards are nearly identical although Oregon law focuses on the majority of time that can be spent on the non-exempt duties.

## **Professional Exemption**

### **Federal Law**

In addition to being paid a salary of at least \$455 per week, a professional must either:

- Have a primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, and whose duties require consistent exercise of

discretion and judgment. The regulations discuss a number of examples and include the following positions within the exemption if they involve completion of a degree program: certified medical technologist, registered nurses, dental hygienists, physician's assistants, accountants, chefs, athletic trainers, and licensed funeral directors.

- Or have a primary duty requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. This includes musicians, composers, cartoonists, painters and some journalists.

## **Oregon Law**

Oregon requires a professional employee to:

- Have a primary duty of performing work requiring knowledge of an advanced type in a field or science of learning, generally requiring a four-year degree or work that is original and creative in character in a recognized field of artistic endeavor or teaching.
- Spend most of the workweek (generally more than 50%) performing professional duties.
- Perform work that is predominantly intellectual and varied rather than routine.
- Customarily and regularly exercise independent judgment to make decisions of significance.

## **Compliance Analysis**

The federal and state standards are virtually identical. The federal regulations expressly divide the professional exemption into learned and creative subdivisions.

## **Computer Professional Exemption**

In addition to the other white collar exemptions, computer professionals may *also* be exempt under a separate category in both state and federal law.

### **Federal Law**

- **Compensation.** To qualify for the special computer professional exemption under the FLSA, employees must be paid at least \$27.63/hour if paid on an hourly basis, or must meet the minimum salary of \$455/week required for the professional exemption if paid a salary. In other words, they may be paid on an hourly or a salary basis.
- **Primary Duties.** If the compensation prong is met, the employee's primary duties must include some or all of the following work:
  - Application of systems analysis techniques and procedures, including and consulting with users, to determine hardware and software functional specifications;
  - Design, development, documentation, analysis, creation, testing or modification of computer systems or programs based on and related to user specifications;
  - Design, documentation, testing, creation or modification of computer programs related to machine operating systems; and / or
  - A combination of the above duties, the performance of which requires the same level of skills.

### **Oregon Law**

- **Compensation.** To qualify for the computer professional exemption under Oregon law, the regulations provide that their rate of pay must be at least \$455/week, if by salary, or \$27.63/hour, if on an hourly basis.
- **Duties.** The employee's primary duty must be one of, or a combination of, the following:

- Applying systems analysis techniques and procedures to determine hardware, software, or system functional specifications for any use of such services;
- Following user or system design specifications to design, develop, document, analyze, create, test, or modify any computer system, application or program, including prototypes;
- Designing, documenting, testing, creating or modifying computer systems, applications or programs for machine operation systems; and / or
- Any combination of the above.

#### **Note**

Although it is not required under Oregon law that the computer professional hold a bachelor's or advanced degree, he or she must qualify as a highly skilled employee who:

- Possesses a high degree of theoretical knowledge and understanding of computer system analysis, programming and software engineering;
- Can apply theoretical knowledge;
- Has attained knowledge through education and experience;
- Consistently exercises discretion and judgment; and
- Engages in work predominantly intellectual and varied in character.

This excludes trainees, entry level employees, ordinary computer operators, hardware manufacturers, as well as employees covered by a collective bargaining agreement.

### **Compliance Analysis**

The state and federal standards are virtually identical.

### **Outside Sales Exemption**

#### **Federal Law**

A sales employee is exempt if he or she:

- Is customarily and regularly engaged away from the employer's place of business making sales or obtaining orders or contracts for services or facility use. The regulations emphasize that the *outside sales employee* is "an employee who makes sales at the customer's place of business or...at the customer's home." It does not include sales by mail, telephone or Internet unless that contact is incidental to the personal sales call.
- Has the primary duty of making sales or obtaining orders or contracts for services.

#### **Oregon Law**

A sales employee is exempt if he or she:

- Is engaged in making outside sales, or obtaining orders for services or use of facilities, away from employer's place of business.
- Devotes no more than 30% of the workweek to tasks other than sales and activities incidental to and in conjunction with outside sales.

## **Compliance Analysis**

The state law has a 30% limit on non-sales related activity. Because this is more stringent than the federal requirement, it is the standard in Oregon employers must meet.

### **Retail or Service Establishment Employees Paid by Commission**

Under the FLSA and Oregon law, commission employees of retail or service establishments (RSEs) are exempt from the FLSA and Oregon overtime requirements if at least 50 percent of their earnings are from commissions and they are guaranteed pay in excess of time and one-half the minimum wage for all hours worked.

### **Highly Compensated Employees**

#### **Federal Law**

The federal regulations include a special, streamlined rule for employees paid \$100,000 or more annually. These highly-paid employees are automatically exempt if they perform non-manual work and if they have any identifiable executive, administrative or professional function as described in the standard duties tests discussed above. In other words, they do not have to meet all the elements of the standard duties test to qualify for exempt status.

#### **Oregon Law**

No such highly compensated exemption exists in Oregon.

#### **Compliance Analysis**

The federal exemption does not help Oregon employers, because no similar exemption exists in state law.

### **C. How to Calculate Overtime**

In Oregon and Washington, nonexempt employees must be paid 1½ times their regular rate of pay for any hours worked over 40 hours in one workweek (seven consecutive days). This is hours actually worked and excludes holidays, vacation days or sick days.

Some employers in these states must pay overtime on a daily basis. These include manufacturing establishments. In other states, daily overtime rules apply.

There are many exceptions to these rules and the rules vary by industry and state; check with legal counsel to see what rules apply to your workers.

### **D. Comp Time**

For private employees there is no such thing as “comp time.” If an employee works extra hours one day, they may take off an equivalent amount of time later in the same workweek (not pay period) to offset the overtime hours. Then the employee has not worked over 40 hours, so is due no overtime or “comp” time. Comp time cannot substitute for overtime which must be paid off. Comp time cannot be used in another pay period or week.

### **E. Calculating Hours Worked**

#### **• Unauthorized Overtime**

- must pay for any time the employee performs work whether the work was authorized or not.
- includes work performed away from the job site or even at home. It is your duty to make sure that the work is not performed if you do not want it to be performed.
- special record keeping may be needed for telecommuting employees.

- you may discipline or terminate for working unauthorized overtime.

- **Preparatory and Concluding Activities**

An employer must pay for time an employee spends preparing equipment for work or cleaning up after work if those activities are an “integral and indispensable” part of a principal activity for which the individual is employed.

**Example:** A programmer sets up and turns on equipment in preparation for his work. This activity is an integral and indispensable part of the principal activity for which the programmer is employed and is included as hours worked.

**Example:** In connection with the operation of some heavy equipment, the operator sometimes oils, greases, or cleans the machine or installs a new part. These activities are an integral and indispensable part of the principal activity for which the equipment operator is employed and are included as hours worked.

- **Driving Time**

Home to work and work to home travel is unpaid. Travel time to another work site is paid. If the employee is required to come to the office and then travel to a work site, time is paid. On overnight trips, travel within regular work hours is paid.

- **Training/Meeting Time**

Time spent in meetings or in mandatory training must be paid. If the law requires the employee to be certified and training is outside regular work hours it can be unpaid.

Live-in employees should have an arrangement with their employer which truly reflects the actual hours worked versus time the employee is engaging in private activities such as eating, sleeping, entertaining, rest, complete freedom from duties.

- **Work During Break Time or Lunch.**

Work actually done during break time or during lunch must be paid.

- **Donning & Doffing Uniforms**

If the employer requires a particular uniform or extensive safety gear, the time spent putting on and taking off such uniforms and equipment is paid work time.

## **II. HIRING INDEPENDENT CONTRACTORS**

Most people who perform work for a company have to be classified as employees. Only those who meet stringent legal tests can be hired and paid as Independent Contractors. Generally, the person must have an independently established business, also perform services for others or hold themselves out to others, be paid on other than a salary or hourly basis, be free from direction and control of the employer, provide their own tools and workspace, etc. If these tests are not met, the contractor will be considered legally to be an employee and be eligible for benefits, overtime, worker's comp and unemployment. This can be a very costly error for a company to make. Government entities routinely audit for compliance and can assess back wages, benefits, premiums and penalties.

After you have selected an independent contractor you must still follow certain steps to assure their contractor status.

- Contractor has independently established business;
- Free from direction and control of employer;
- Contractor obtained required business license;
- Contractor furnishes necessary tools and equipment;

- Contractor usually works off company premises;
- Contractor hires and fires its own employees;
- Contractor paid on completion of parts of the job or on retainer basis or at end of project;
- Construction contractor must be registered;
- Contractor must file business tax returns; and
- Must hold self out to the public as an independent business (business cards, phone listing, etc.).
- Make sure an Independent Contractor Agreement is signed before the independent contractor begins providing service.
- Delineate the scope of work, but do not retain control over how it is done.
- Specify the manner and timing of payment
- Consider restrictive covenants and confidentiality agreements

Work descriptions for independent contractors are used to define contract expectations. Work descriptions for independent contractors only need to identify the ultimate performance expectations and due dates. Work descriptions for independent contractors should only be generally defined, so as to leave the means of performance up to the contractor.

### **Consequences of Non-Compliance**

The most common consequence of non-compliance is that the “independent contractor” claims that he or she was actually an employee and then pursues a wage claim against the employer. The wage claims commonly pursue unpaid minimum wage or overtime, or both. Additionally, the “contractor” may pursue wage penalties for failure to pay all wages owed upon termination. The prevailing employee may also recover attorney’s fees under state or federal laws.

If a worker believes that he or she has been misclassified as an independent contractor, he or she may request that the IRS or a state revenue department make a determination of the correct classification. \*In the worst case, the Internal Revenue Code makes the willful attempt to evade the payment of taxes and the willful failure to collect or pay over taxes a felony.

Contractors injured while working may try to claim they are employees and should have been provided with worker’s compensation coverage. Also, claims have been made for unemployment insurance, 401(k) and health benefits, etc.

Contractors who find themselves out of work may file unemployment claims asserting they were actually employees. This can result in assessment of back premiums and interest.

### **III. CONFIDENTIALITY/NON-DISCLOSURE AGREEMENTS**

Many businesses succeed because of a unique or novel idea, device, method, formula, technique, process or business model. Protecting this confidential information is critical for most businesses. However, many start-up and emerging companies overlook the significant risks associated with disclosing confidential/ proprietary information to employees without first obtaining a confidentiality/non-disclosure agreement. A confidentiality/non-disclosure agreement helps establish protection for certain types of information under Oregon’s Trade Secrets Act, and can protect other information under contract principles.

#### **State Trade Secrets Acts**

When a company’s confidential/proprietary information (such as customer lists, cost data, formulas, compilations, methods, technique or processes) derives independent economic value, actual or potential, from not being generally known; and is subject to reasonable efforts to maintain its secrecy,

it may be protected from disclosure or use under the Uniform Trade Secrets Acts as codified by many states. Not all information a company considers confidential or proprietary will rise to the status of a trade secret. And, even when the information falls within one of the categories listed above, many trade secrets laws will not protect it if the company failed to take reasonable steps to protect the secrecy of the information. While not all trade secrets cases stand or fall on the existence of a confidentiality/non-disclosure agreement, having such an agreement with employees and independent contractors and specialized vendors, among others, is one reasonable step companies can take to protect their proprietary information.

### **Contract Law**

In addition to the benefit confidentiality/non-disclosure agreements provide in the trade secrets context, a company can protect a broader category of information from disclosure with a well-written confidentiality/non-disclosure agreement. As many companies have learned the hard way, not all proprietary information “derives independent economic value” from not being known, and thus is not protectable as a trade secret. Nonetheless, a company can protect other confidential/proprietary information by obtaining confidentiality/non-disclosure agreements with its employees and independent contractors.

The confidentiality/non-disclosure agreement should state with some specificity the types of information the company considers is confidential and proprietary information, i.e. cost data, customer lists, general financial data, research, pricing, etc. The agreement should also specify the circumstances under which the confidential and proprietary information can be used (i.e. in furtherance of the company’s business) and should prohibit any other use or disclosure of such confidential or proprietary information during or at any time after employment ends or services are concluded.

## **IV. NON-COMPETE OR NON-SOLICITATION AGREEMENTS**

In most states there are some limitations on an employer’s ability to require new or existing employees to sign restrictive covenants.

In Oregon, the statutory requirements for a valid and enforceable non-competition agreement between an employer and its employees have changed significantly. Under the statutory framework in place since January 1, 2008, non-competition agreements between an employer and employee are voidable unless the employer informs the employee in a "written employment offer" that a non-competition agreement is required as a condition of employment, which is received by the employee at least two weeks before the first day of employment; or is entered into upon a subsequent bona fide advancement of the employee by the employer.

Additionally, whether the non-competition agreement is entered at initial employment as described above or subsequent bona fide advancement, it is voidable unless three additional requirements are satisfied:

1. The employee performs creative, administrative, or managerial work (**not** sales); and
2. The employee has access to trade secrets; competitively sensitive confidential business information; or, is employed as an on-air talent in the broadcasting industry; and
3. The employee's annual salary exceeds the median family income for a four-person family, as determined by the United States Census Bureau.

The maximum term of a non-competition agreement is limited to two years. Employee attrition is always costly to a company. But, the cost can be devastating when key employees leave and compete with the company. Thus, while it is always tempting to move as quickly as possible to get a start-up company up and running, slow and steady wins the race when it comes to taking all the necessary steps to ensure that the company has valid and enforceable non-compete/non-solicit agreements with its key employees.

Customer and employee non-solicitations are **not** considered non-competes in Oregon, and may be entered into with any employee or contractor.

In California, restrictive covenants, except in very limited circumstances, are void. In Washington, they are more readily implemented and even continued employment of existing employees can provide sufficient consideration.

## **V. CREATIVE COMPENSATION FOR OWNERS AND FOUNDERS**

Many owners of a small business or founders of a start-up know there are insufficient funds to pay them a salary or hourly wages. However, depending upon how a business entity is structured, there may be alternatives for payment of business owners, founders and early-stage employees that still keep a company in compliance with federal and state wage and hour laws. An owner of a company does not necessarily need to be an employee, nor does a founder. Here are some options:

### **A. Employee**

Frequently owners prefer to be employees so they can qualify for employee benefit plans such as health insurance, life insurance and pension plans. Usually a founder or owner of the business will qualify as an executive employee who can be salaried if they supervise two or more employees. However, the salary must be a minimum of \$455.00 per week to qualify. Furthermore, business owners who are also employees are not exempt from wage and hour laws, but may be exempt from other legal requirements such as the requirement to provide unemployment insurance. Business owners who own at least 20% of the company are not required to be covered under the company's unemployment insurance policy with the state, in Oregon.

### **B. Advisor**

Founders and owners of the businesses can set themselves up as non-employees, but simply serve as advisors to the company or as officers or board members. Those positions, so long as they are not an employee and not receiving employee benefits, are not technically "employment" and thus wage and hour laws do not apply. Persons in such positions, can be paid stipends, a share of the profits or other amounts that may vary widely depending upon their contributions and the profit status of the business.

### **C. Profit Sharing**

Many small businesses and start-ups face cash flow problems which make it difficult to pay talented employees significant amounts to attract and retain them. Thus, many companies implement profit sharing or bonus plans that provide additional compensation to key employees based on performance of the employee and the company. This allows companies with wide fluctuations in cash flow to make additional payments to incent employees to stay with the company when profits are realized and cash flow allows such payments to be made. This allows employees to be paid on a routine basis at a minimum salary or at minimum wage or slightly above with the promise of additional compensation upon the attainment of certain profitability or other goals. These creative incentive compensation methods often make it possible for small businesses to recruit and retain strong talent. These employees recognize the risk of working for an upside that may never occur. But, if they are committed to the company and its product or services, and the upside potential is significant, they are willing to take that risk.

### **D. Stock Options**

Many startups generously grant outright or offer employees the option of stock purchase at very low prices. While the shares may not possess any real value early on in the life of a company, later they may be very valuable, especially upon sale of the business. For this reasons (and securities laws!) businesses and their counsel must carefully draft Shareholder Buy-Sell Agreements to cover all potential circumstances under which a company might want to force a buy back or prevent a sale to others.

Key provisions to consider including are call rights, employment termination buy-back, voting, agreements, method to establish price, dividends, preferred returns, purchase compel rights (“put”), tag along rights, rights of first refusal, sale and transfer restrictions, purchase payment terms and estate planning transfers.

## **VI. CONCLUSION**

In conclusion, small businesses, and those who provide legal counsel to them, must be aware of basic employment laws and HR best practices. Failure to do so can result in class action lawsuits, civil fines and penalties, and/or costly and time-consuming government investigations. Also, during acquisition or investor due diligence, questions will be asked about the company’s compliance with employment laws and a non-compliant entity may lose an acquisition opportunity or the interest of investors needed to take the company to the next level. Therefore, it is critical that small businesses and start-ups make every effort to comply with all employment laws and HR best practices.

**SMALL BUSINESS AND START-UP  
LABOR & EMPLOYMENT ISSUES**

**PART II**

**Common Traps for the Unwary**

*THE SEMINAR GROUP – LABOR & EMPLOYMENT LAW CONFERENCE  
November 1, 2012*

**CHRYS A. MARTIN**



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**WAGE & HOUR LAW**



- Exemptions
- Overtime
- Comp Time
- Calculating Hours

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**HIRING INDEPENDENT CONTRACTORS**



- Control, control, control
- Different tests for different laws
- Risks for non-compliance
- Increased Scrutiny

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CONFIDENTIALITY/NON-DISCLOSURE AGREEMENTS



- Prohibit employees from disclosing the company's confidential information to others
- The employer can decide what is confidential
- Employer must take steps to restrict access to the confidential information



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NON-COMPETE AGREEMENTS



- Only for employees who:
- Perform creative, administrative or managerial work;
- Salary exceeds median family income;
- Two weeks before hire; and
- Use non-solicitation instead



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CREATIVE COMPENSATION FOR OWNERS & FOUNDERS



- Employee
- Advisor
- Profit Sharing
- Stock Options

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**Chrys A. Martin**  
Partner, Portland  
[chrismartin@dwt.com](mailto:chrismartin@dwt.com)  
503.778.5357

Thank You!



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## Chrys A. Martin // PARTNER // PORTLAND

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### Portland

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Chrys Martin focuses her practice on employment law and employee benefits issues. She offers her clients 31 years of experience in complex employment and ERISA litigation, including class actions. Chrys applies her depth of knowledge in litigation to counseling employers and training management in pragmatic risk avoidance. Her practical approach to difficult employment issues is also grounded in prior hands-on management and human resources experience.

Chrys' employment and labor experience spans the full range of employer concerns, from discrimination and harassment to wage and hour issues to union negotiations and arbitrations. She regularly assists clients with employee handbooks and employment contracts, and has managed numerous personnel investigations and employment practices audits. Her benefits work includes an array of ERISA and fiduciary issues, including self-funded plans and designing early retirement programs.

### Practice Highlights

- Obtained defense jury verdicts in sexual harassment and age discrimination cases
- Obtained multiple jury and court trial verdicts, directed verdicts, and summary judgments in ERISA and non-ERISA benefits cases
- Prevented wage and hour class-action pre-litigation, no payments
- Co-lead litigation team in then-largest investment manager fraud case in U.S. history – ERISA and fiduciary liability

### Professional and Community Activities

- Member, 2003-present; General Counsel, 2005 – Portland Human Resources Management Association
- Fellow, American College of Employee Benefits Counsel, 2001-present
- International Foundation of Employee Benefits, 2000-present
- Chair, Law Institute Committee 2006-2008; Chair, Employment Law Committee, Board of Directors, 1997-2000 – Defense Research Institute

### Education

- J.D., Lewis & Clark Law School, 1981, cum laude  
Cornelius Honor Society
- B.A., Oregon State University, 1975, with honors  
Phi Kappa Phi Honor Society

### Related Practices

- Employment, Labor & Benefits
- Employment Litigation
- Employment Counseling
- ERISA Litigation
- Emerging Companies
- Employee Benefits
- Health Care
- Hospitality
- Food & Beverage
- Tax-Exempt Organizations

### Admitted to Practice

- Oregon, 1981
- U.S. District Court District of Oregon, 1981

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Former Chair, Civil Rights Section; Former Chair, Affirmative Action Committee – Oregon State Bar Association

Board of Directors, 1994-1999; President, 1999 – Oregon Association of Defense Counsel

Board of Directors, 2008-present; Secretary, 2010-2012 – Portland Center Stage

Board of Directors, Cascade AIDS Project, Inc., 2005-2008

### Professional Recognition

Named as one of "America's Leading Lawyers for Business" in Employment by Chambers USA, 2005-2012

Recipient of Louis B. Potter Lifetime Professional Achievement Award, DRI, 2012

Awarded AV rating by the Martindale-Hubbell Law Directory since 1994

Named as one of the "Best Lawyers in America" in Labor and Employment Law by Woodward/White, 2007-present

Selected to "Oregon Super Lawyers" in Employment Law, Thomson Reuters, 2006-2012

Selected to "Oregon's Top 25 Women Super Lawyers," Thomson Reuters, 2008-2012

### Advisories

Major Changes in Routine Handbook Policies Required, 05.22.12

New Employment Laws for 2012: Oregon, Washington, and California, 12.14.11

Guidance on New Disclosure Requirement for Group Health Plans and Insurers: Introducing the "SBC", 08.26.11

Good News For Employers: New Law Makes Securing Employment Arbitration Agreements Easier, 07.05.11

### Presentations

"Beyond the Basics: How HR and Supervisors Can Manage the Absent Employee," Second Annual Seminar for HR Staff and Line Supervisors, Davis Wright Tremaine, Portland, 06.05.12

"Top Ten Ways to Avoid Employee Claims," Davis Wright Tremaine CLE, Seattle, 05.09.12

"Nonprofit Director and Officer Responsibilities in a Changing Environment," Pacific Continental, Chubb Group of Insurance Companies, Beecher Carlson Insurance Agency, LLC, Portland, Ore., 04.24.12

"Tips and Strategies for Performing HR Investigations," PHRMA October Luncheon, Portland, Ore., 10.19.11

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"Beyond the Basics: How HR and Managers Can Prevent Employee Lawsuits,"  
Davis Wright Tremaine workshop, Portland, Ore., 05.25.11

"Attracting & Retaining Diverse Talent at Defense Firms," Oregon Association of  
Defense Counsel, Portland, Ore., 04.20.11

"How to Manage an Embezzlement Problem," Financial Executives Networking  
Group, Portland, Ore., March 2011

"Avoiding Traps for the Unwary Employer," CEO Forum, Portland, Ore., February  
2011

Supervisor's Boot Camp, Oregon Medical Association, Portland, Ore., September  
2010

"Employee Fraud in the Nonprofit World," Willamette Valley Development  
Officers, June 2010

Moderator, Creative Resolution of Employment Claims, DRI Corporate Counsel  
Roundtable, New York, N.Y., January 2010

"Avoiding Employment Landmines: Advice for the Growing Employer," Nevada  
State Bank Seminar, Las Vegas, April 2010

"How to Hire and Fire Without Getting Sued," Metropolitan Business Association,  
Portland, Ore., April 2010

### **Publications**

"Effective Arbitration of ERISA Claims Disputes," Benefits Magazine, March 2012  
Beware: Payroll Companies May Mishandle Garnishments of Tipped Employees,  
May 2011

"Effective Arbitration of ERISA Claims Disputes," In-House Defense Quarterly,  
Summer 2012