

ComplianceHR MasterClass

Auditing for PAID

What it Means and How to Self-Audit for Compliance Success

May 31, 2018



This presentation is for educational purposes only. TriNet provides its clients with HR and best practices guidance. TriNet does not provide legal, tax, or accounting advice.



Lori Brown
CEO, ComplianceHR

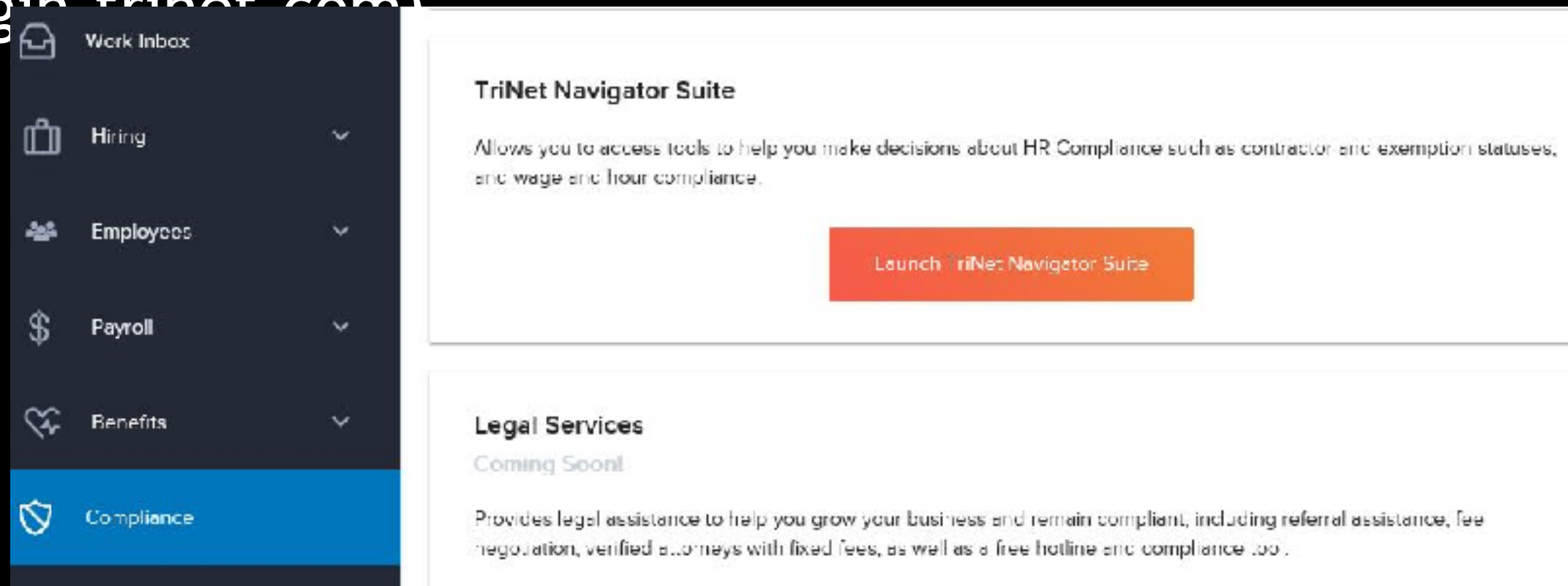
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Compliance **HR**




Accessing Your Navigator Suite

- Under the Admin View, the TriNet Navigator Suite can be found under the “Compliance” link on the TriNet platform (login trinet.com)



Accessing Your Navigator Suite

Navigator IC




Independent Contractor Assessment

Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

[+ Create New Evaluation](#) [View Evaluations](#)

[IC Agreement](#)

Navigator OT




Exempt Status Assessment

Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

[+ Create New Review](#) [View Reviews](#)

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Navigator Pay Practices



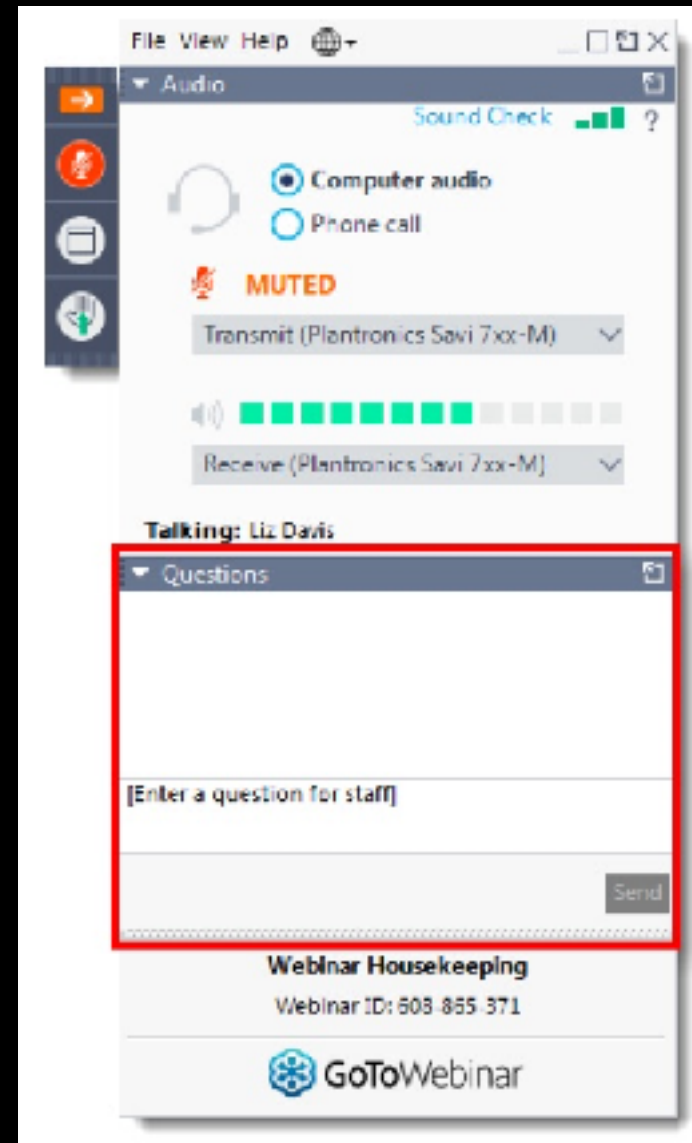
Wage and Hour Compliance

Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

[Find Minimum Wage](#) [Use Rapid Reference](#)

Answering Your Questions

Please submit your questions via the text questions pane:



AGENDA

- PAID: An Overview
- Auditing Independent Contractors
- Auditing Overtime Exemptions
- Auditing for Off-the-Clock Work



Today's Featured Speaker



Tammy McCutchen
VP Strategy, ComplianceHR
Littler Principal
Former Administrator, US-DOL,
Wage & Hour Division

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An Overview

Tammy McCutchen

The PAID Program

Wage and Hour Division (WHD)

PAID Program

The Wage and Hour Division's (WHD) new nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, facilitates resolution of potential **overtime and minimum wage** violations under the Fair Labor Standards Act (FLSA). The program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster.

Under the PAID program, employers are encouraged to conduct audits and, if they discover overtime or minimum wage violations, to self-report those violations. Employers may then work in good faith with WHD to correct their mistakes and to quickly provide 100% of the back wages due to their affected employees.



Why Should You Participate?

- No 3rd year of back wages, in most cases
- No liquidated damages
- No civil monetary damages
- Individual release of claims
- DOL approval of compensation practice
- Reduction in private suits including attorneys' fees



Employer Eligibility & Obligations

Not Available to employers:

- With prior or existing DOL or state agency investigations on same issues
- When private litigation has already been threatened or filed
- With a history of violations in DOL's [enforcement database](#)

Employer's Obligations

- Conduct a self-audit
- Correct issues going forward
- Pay back wages

How Does PAID Work?

- Conduct a self-audit to identify non-compliant practices
- Consider whether to seek DOL's help to resolve
- Create a plan to correct the compliance issues going forward
- Calculate and pay back wages
- Prepare and submit materials to DOL



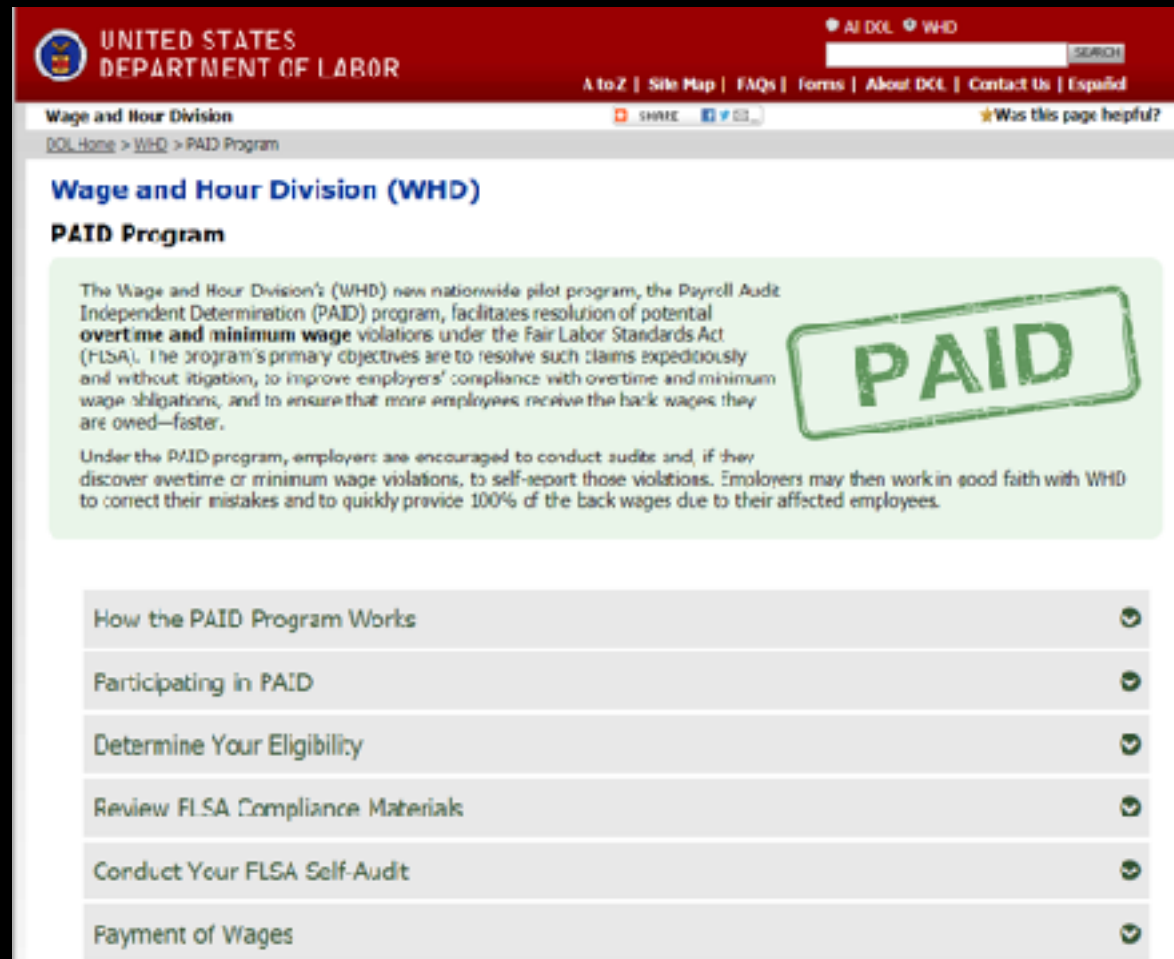
What are the Downsides?



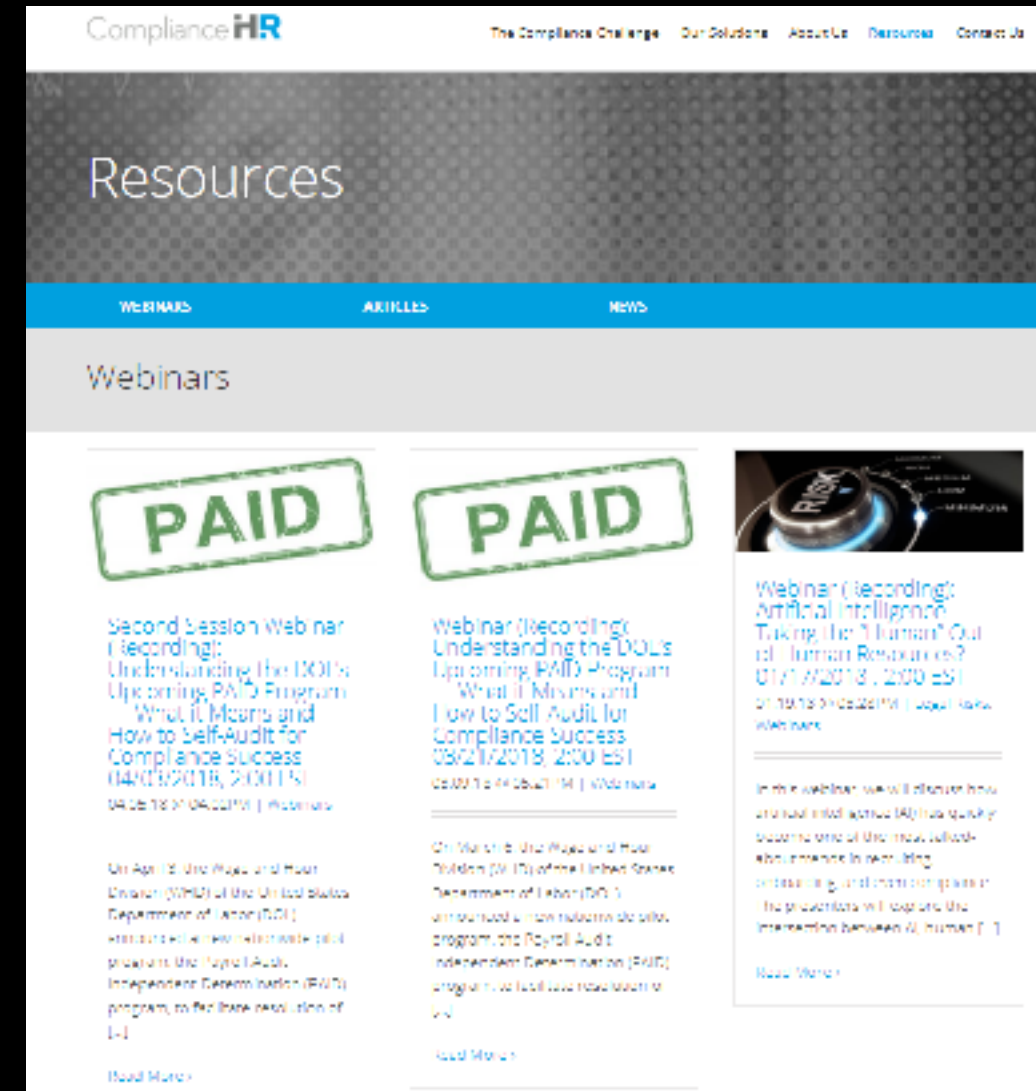
- Must pay 100% of back wages calculated as owed (and DOL may adjust) - no ability to negotiate for less than a dollar-for-dollar payment
- Cannot force an employee to accept payment of the back wages or force execution of release
- Documents submitted may be subject to FOIA
- Potential waiver of attorney-client privilege
- May not resolve state wage and hour claims

Need More Information on PAID?

dol.gov/whd/paid



The screenshot shows the official website of the Wage and Hour Division (WHD) of the United States Department of Labor. The page is titled "PAID Program" and features a large green "PAID" stamp graphic. The text describes the program as a nationwide pilot for resolving overtime and minimum wage violations. A sidebar on the right lists several steps: "How the PAID Program Works", "Participating in PAID", "Determine Your Eligibility", "Review FLSA Compliance Materials", "Conduct Your FLSA Self-Audit", and "Payment of Wages".



The screenshot shows the ComplianceHR website, which has a blue header with the company logo and navigation links. The main content area is titled "Resources" and includes a "Webinars" section. Two webinar cards are visible, both featuring a green "PAID" stamp. The first card is for a "Second Session Webinar (Recording): Understanding the DOL's Upcoming PAID Program" and the second is for a "Webinar (Recording): Understanding the DOL's Upcoming PAID Program". A third card on the right is partially visible, titled "Webinar (Recording): Artificial Intelligence: Taking the 'Human' Out of Human Resources?".

Auditing For Paid

1. Determine Audit Scope
2. Fact Finding
3. Legal Analysis
4. Back Wage Calculations
5. Identify Remedial Actions
6. Report to DOL

*TriNet does not conduct Audits nor provide audit advice.



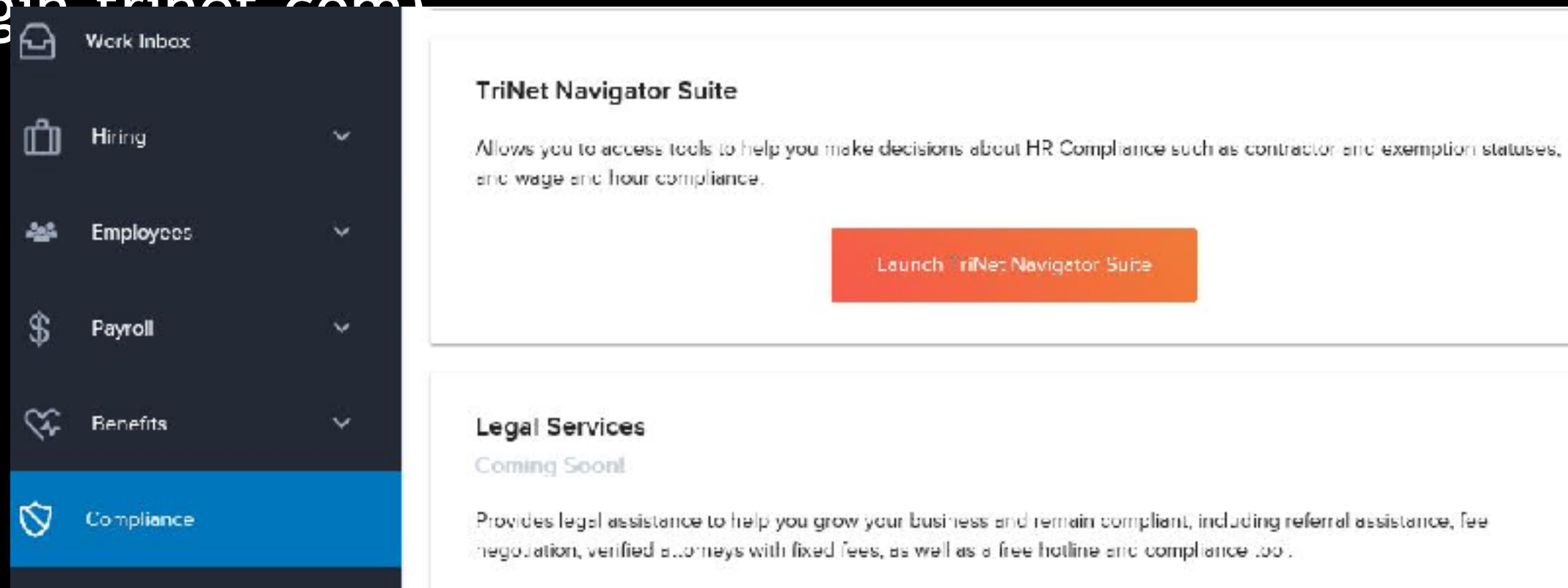


Auditing Independent Contractors

Neil Alexander


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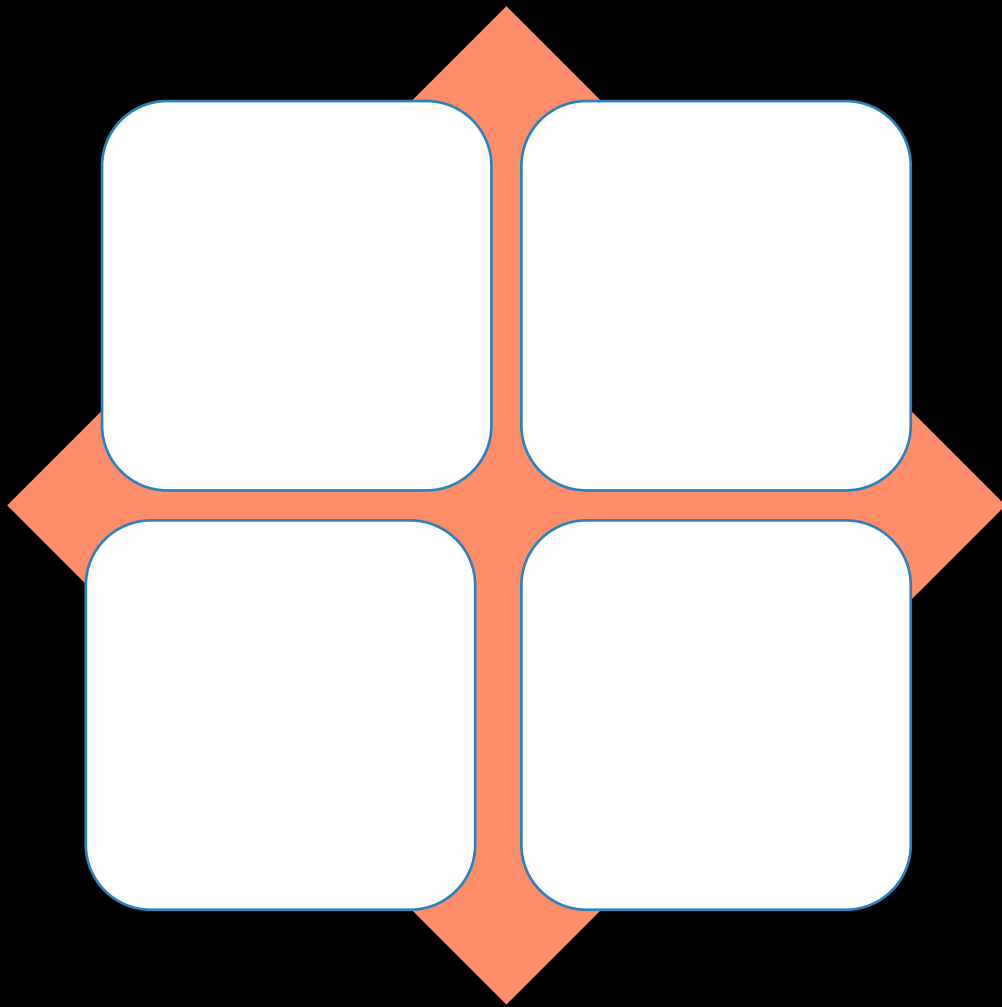
Special Guest



Neil Alexander
Littler Shareholder
NAlexander@littler.com

- Significant experience auditing and evaluating independent contractor classifications.
- Regularly appears in state and federal courts in Arizona and Nevada and before the EEOC, DOL, among others.
- Deep expertise in employment risk management, workforce design and maximizing contingent worker options, compliance with the ADA and the FMLA, and other legal issues.

The Legal Issues



Over 100 Different Legal Tests

- Federal law alone has three different tests for determining IC status
- Layered on top of these, states may have up to six different tests under different laws

IRS Test Uses 3 Groups of Factors

- **Behavioral Control**

- when and where to do the work
- what tools or equipment to use
- what workers to hire or use
- where to buy supplies or services
- what work is assigned to specific individuals
- what order or sequence to follow

- **Financial control**

- business expenses
- worker's investment

- extent to which worker's services are publicly available
- payment method
- worker's risk of profit or loss

- **Type of Relationship**

- written contracts describing the intended relationship
- whether employee-type benefits are provided
- permanency of relationship
- are services provided a key aspect of the company's business

Darden Common Law Test

1. The skill required
2. The source of the instrumentalities and tools
3. The location of the work
4. The duration of the relationship between the parties
5. Whether the hiring party has the right to assign additional projects to the hired party
6. The extent of the hired party's discretion over when/how long to work
7. The method of payment
8. The hired party's role in hiring and paying assistants
9. Whether the work is part of the regular business of the hiring party
10. Whether the hiring party is in business
11. The provision of employee benefits
12. The tax treatment of the hired party

FLSA Economic Reality Test

1. The extent to which the work performed is an integral part of the employer's business
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss
3. Investments in facilities and equipment
4. The worker's skill and initiative
5. The permanency of the worker's relationship with the employer
6. The nature and degree of control by the employer

State Tests

- May be multi-factor balancing tests or conjunctive tests with multiple required elements
- Some state laws create a presumption of IC status, but other states have a presumption of employee status

The “ABC” Conjunctive Test

- A. The contractor is free from control and direction by the company;
- B. The services to be performed by the contractor are either outside the usual course of the company’s business or will be performed outside of the company’s place of business; *and*
- C. The contractor is customarily engaged in an independently established trade, occupation, profession or business.

The Dynamex Decision

- On April 30, 2018, the California Supreme Court issued a landmark decision in *Dynamex Operations West v. S.C. (Lee et al.)*
- Rejected the Borello test in favor of adopting a modified “ABC” test, similar to that used in Massachusetts and Indiana
- Eliminates the option of qualifying as an IC if all the work is done off site or remotely
- Burden is now on the organization to prove that an individual meets the qualifications of an independent contractor
- ComplianceHR's Navigator IC is the only intelligent, on demand solution applying California's new Dynamex standard

IC Audit Topics and Red Flags



- Do not classify individual workers or former employees as ICs
- Do not prohibit ICs from working for other companies
- Do not provide training, instruction or attempt to control HOW work is performed
- Limit review of IC work to safety, quality control and compliance with contract specs
- Do not provide tools or equipment
- Pay on flat fee/per project basis if possible and do not reimburse business expenses
- Contract terms on:
 - IC status
 - Indemnification
 - All of IC's workers to be paid in compliance with the FLSA, DBA and state laws

General Rules for Compliance

Independent Contractor

- A business offering services to the public with separate employees and facilities.
- Contract is for duration of project or for less than a year. IC has time to work for others.
- IC responsible for own business expenses and makes a significant investment in his business.



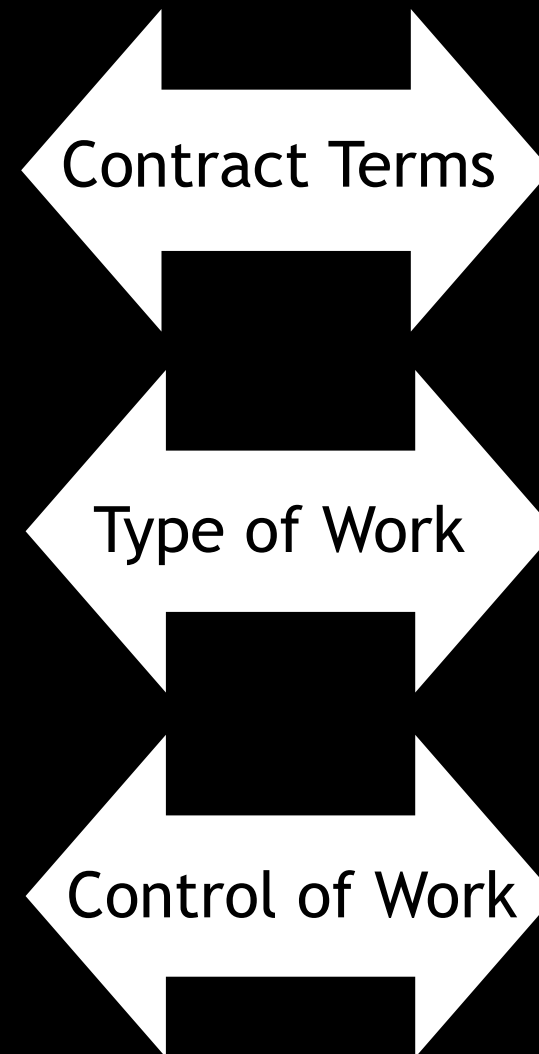
Employee

- An individual who does not have an independent business organization.
- Relationship is continuous and full-time. Individual is not allowed to work for other firms.
- Principal provides tools and equipment and reimburses the individual for business expenses.

General Rules for Compliance

Independent Contractor

- Paid by project/task; no non-compete; terminated only for contract breach; may subcontract.
- Work is not an integral part of the principal's business and can be performed by the IC's employees.
- Controls when, where and how the work is performed. Controls sequence and hours of work.



Employee

- Paid a salary or by the hour; cannot incur a loss; may be terminated at will.
- Work is essential to the principal's business and/or performed by its own employees.
- Principal provides training and instruction on how to perform work, sets work hours, and requires reports.

Uncovering the Facts

From the Company

- Key Facts
 - Is work core or integral
 - Extent of control and training
 - Duration of engagement
 - Payment method
 - Written agreement/intent
- Sources
 - Operations managers/supervisors
 - Accounts payable/vendor mgmt.

From the Contractor

- Key Facts
 - Structure and other employees
 - Public marketing/representations
 - Other clients/sources of revenue
- Sources
 - Contractor
 - Principal's managers/supervisors
 - Web/social media, gov't and industry sites

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Navigator IC Questionnaire

Navigator IC

Express Analysis

Atlas Design: Graphic Design

To what degree is the work to be performed by Atlas Design [core](#) to Abc Inc.'s business?

Somewhat, although not directly performing the core work, Atlas Design's work will be part of Abc Inc.'s primary workflow

Will Abc Inc. control where Atlas Design can perform the work under this engagement?

No, Atlas Design can perform the work at any location

Are Abc Inc. employees performing the same or similar work that Atlas Design is being engaged to perform?

☐ Yes ☒ No

Has Dagny Taggart ever been an employee of Abc Inc.?

☐ Yes ☒ No

Please indicate the level of [instruction](#) Abc Inc. will give Atlas Design:

Some general guidelines on Abc Inc.'s expectations

Under the terms of the engagement, how much control can Abc Inc. assert over the [order](#) in which Atlas Design will perform the work?

No control

Navigator IC

Engagement Details

Atlas Design: Graphic Design

Will Atlas Design have the right to turn down specific jobs or assignments from Abc Inc.?

☒ Yes ☐ No

Will Abc Inc. provide Dagny Taggart, her employees or subcontractors' employees with training or direction in any of the following areas (check all that apply):

☐ Security or safety procedures

☐ Use of basic equipment (two-way radios, telephones, copy machines)

☐ Anti-harassment, discrimination or other codes of conduct

☒ Software programs required to perform the work

☐ General work rules dictating the terms of the engagement (hours of work, lunch and rest breaks, job location, security protocols)

☐ How to perform the work (whether by a manual, seminar, classroom training, video demonstration or other similar means)

☐ Job shadowing or on-the-job training

☐ Situational interviews

☐ Use of tools or equipment required to perform the work

☐ Training for workers who do not have the experience or skills needed to complete the work

☐ Select All

☐ None of the above

Compliance is Few Clicks Away...

Navigator IC

Thank You!

You have completed the questionnaire.

Please select Submit Answers to submit your final answers to the system. If you would like to change any of your answers, use the Back button. You will not be able to go back and change your answers after submitting them to the system.

[< Back](#)[Submit Answers >](#)

Actionable Guidance, Delivered Instantly

Compliance **HR** NAVIGATOR IC

Independent Contractor Risk Report for Abc Inc.


CONTRACTOR
Mr. Darryl Taggart

ENGAGEMENT
Graphic Design

JURISDICTIONS
California
Federal

[View Risk by Jurisdiction](#)

What is the risk of classifying Atlas Design as an independent contractor?



Under the facts that you have provided, it is unlikely that Atlas Design will be found to be an employee.

FOR MORE INFORMATION ABOUT YOUR RESULTS PLEASE SEE THE RESOURCES BELOW:

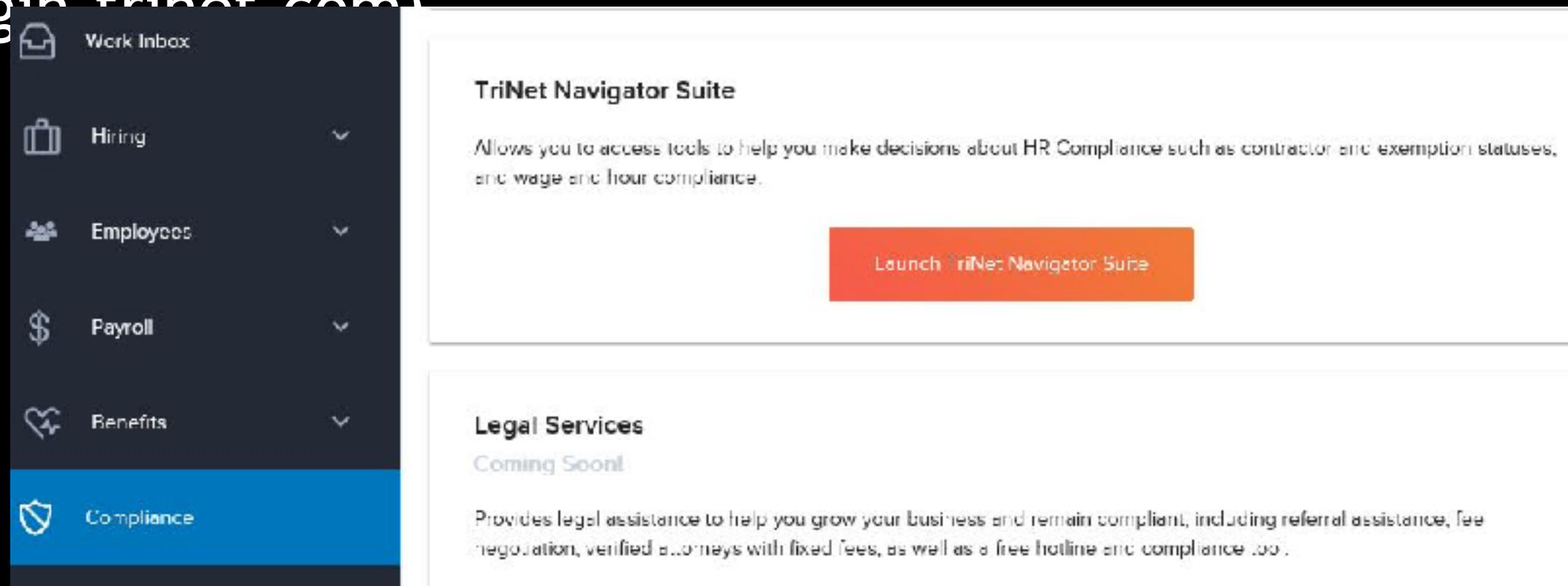
- ▶ How to Lower Your Risk Level
- ▶ Summary of Independent Contractor Laws
- ▶ Transcript of Your Questions and Answers
- ▶ Disclaimer

Compliance **HR** NAVIGATOR IC

Risk Factors	Steps to Lower Risk
The Contractor's Business Organization	A company may be able to lower misclassification risk by engaging contractors who have a separate and independent business organization. Although none are determinative, indicators of a separate business include: payment of business-related taxes; maintaining a formal business structure (other than a sole proprietorship); having a Federal Employer Identification Number (FEIN) for tax purposes (not a Social Security Number); operating under a business name different from the contractor's own name; maintaining licenses, registrations or permits required to operate a business; maintaining business insurance; maintaining records of expenses, assets, income and liabilities; having a bank account (separate from an individual or family account) for the purpose of depositing business revenues and paying business expenses; and maintaining a business office away from the contractor's home. Abc Inc. may be able to reduce its risk score by ensuring Atlas Design meets most of these indicators of having a separately established business.
Parties' Rights to Terminate the Engagement	<p>Employees may be terminated at will. An independent contractor relationship can be terminated only as set forth in the contract. Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract.</p> <p>Abc Inc. may be able to reduce its risk score through contract terms providing that: (1) the contract can be terminated only for a breach; and (2) the breaching party will be liable for damages caused by the breach.</p>

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Legal Analysis

- Evaluate whether contractor should be classified as an Independent Contractor or Employee
 - Analyze status and risks under the FLSA, IRS, Darden common law, and other federal law tests
 - Analyze status and risks under applicable state law tests
 - Analyses include reviewing applicable case law, regulations, and opinion letters to see how analogous circumstances have been treated in the past
- Structural Changes?
 - Consider changes to the relationship structure to mitigate risks



Remedial Actions



- Restructure relationship to mitigate risks to a tolerable level
 - Change payment method
 - Limit control and training
 - Ensure contractor works with other clients
 - Other changes
- Reclassify contractor to employee
 - Evaluate *Microsoft* benefits issues
 - Calculate back minimum wage and overtime due

IC Audit QUESTIONS & ANSWERS






Auditing Overtime Exemptions

Libby Henninger

Navigator OT


Navigator IC



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Special Guest



Libby Henninger
Littler Shareholder
lhenninger@littler.com

- Specializes in conducting complex wage and hour audits under the FLSA and state laws
- Provides compliance counseling to employers
- Represents employers before the U.S. Department of Labor, EEOC and state agencies

Exemption Audit Topics

- Most risky jobs
 - Lowest exempt pay bands
 - Jobs codes with the most employees
 - Entry level accounting employees
 - Computer employees
 - Inside Sales
 - Engineering techs
 - Project managers



The Legal Issues

- Salary Level: \$455 per week
- Salary Basis Test
 - Predetermined amount of compensation each pay period
 - The compensation cannot be reduced because of variations in the quality or quantity of the work performed
 - Must be paid the full salary for any week in which the employee performs any work
 - Need not be paid for any workweek when no work is performed
- The Duties Tests
 - Executive
 - Administrative
 - Professional
 - Computer
 - Sales

Executive Duties

1. Primary duty is management of the enterprise or of a customarily recognized department or subdivision of the employer or the employer's customers
2. Customarily and regularly directs the work of two or more other employees, and
3. Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight

Executive Exemption Analysis

Two or More Other Employees

- Does the employee supervise 80 compensable work hours of other employees each week?
- Have there been time periods when the 80-hour standard was not been met?
- Best Practice: Apply the exemption only to employees who supervise at least 3 full-time employees



Executive Exemption Analysis



Supervisory Authority

- Is the employee the final decision-maker on hiring and firing?
- If not, explore the employee's involvement in hiring, firing, promotion, discipline, performance reviews, compensation, etc.
- Best Practice: Apply the exemption only to employees who regularly play a significant role in key employment decisions

Administrative Duties

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.



Administrative Exemption Analysis



Primary Duty

- What goods or services does the company sell?
- Is the employee involved with producing or selling?
- Does the work performed directly increase company revenues?
- Does the employee work in a business unit normally viewed as a “support” or “administrative” function?

Administrative Exemption Analysis

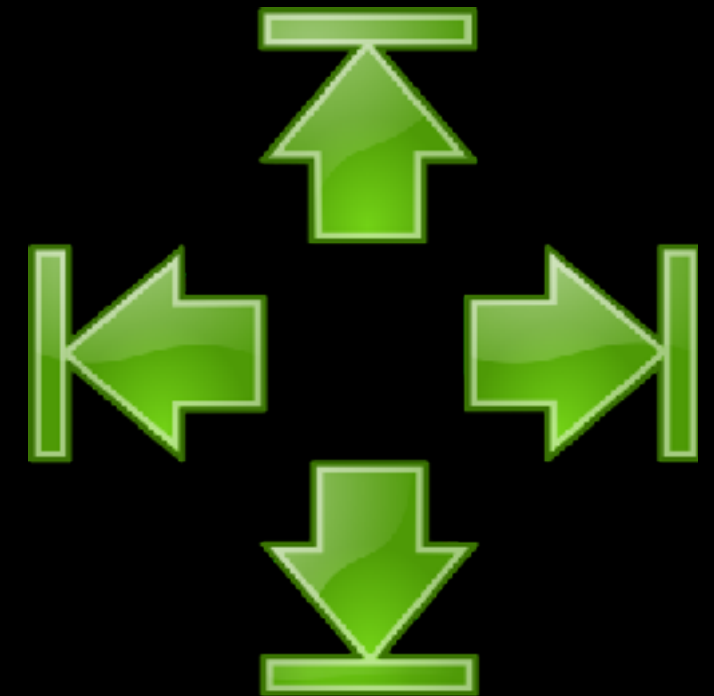
Discretion and Independent Judgment

- What decisions can the employee make without further review?
- How often are the employee's recommendations followed?
- Is the employee free to choose among a number of possible solutions?
- If two employees are presented with the same facts, would they be expected to reach the same decision?
- If an employee makes a mistake, how does that affect company operations or finances?
- What percent of the employee's time each week is spent performing mechanical, repetitive, recurrent or routine work?

Administrative Exemption Analysis

Identify Limits to Discretion

- How closely is the employee supervised?
- Are there written manuals, guidelines, policies or other documents setting forth operational practices and procedures for this job
- Does the employee use computer-based tools to perform the job?
- Is the employee required to follow established procedures?
- Are there negative consequences if the employee fails to follow established procedures?



Learned Professional Duties

Primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction



Learned Profession Exemption Analysis



- Does the employee work in a recognized profession?
- Is a specialized advanced degree required?
- Does the employee use his advanced, specialized knowledge in the job?
- Is the employee required to follow established procedures?
- How much time does the employee spend performing routine or repetitive work?

Creative Professional Duties



The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Creative Professional Exemption Analysis

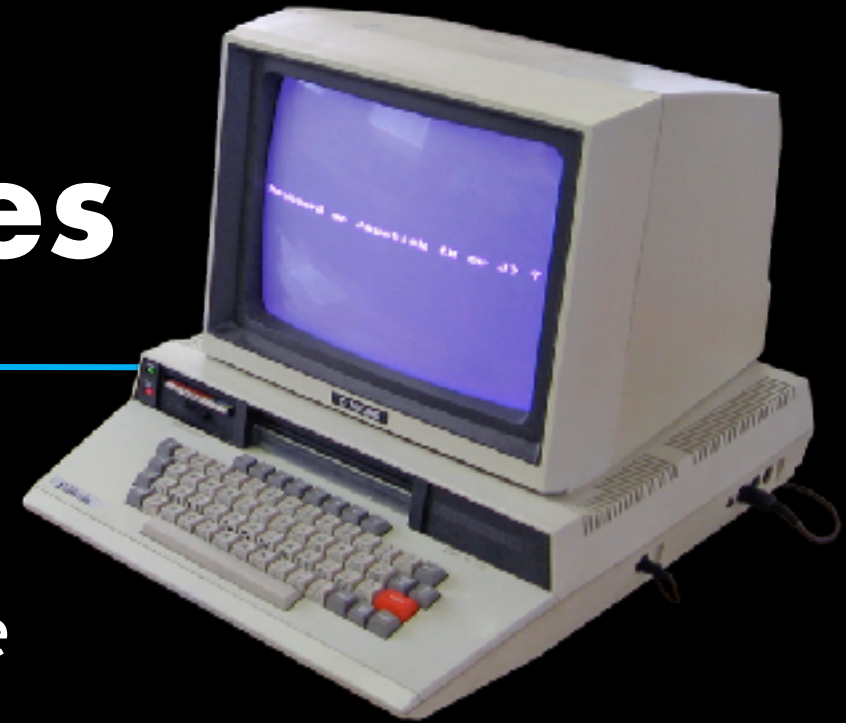
- Does the employee work in a recognized artistic field (e.g., writing, drawing, photography, graphic design)
- Does the employee create original content? Or is the content provided by others?
- Is the employee required to follow established specifications?
- Does the employee use computer assisted design?
- How often is the employee's work modified or rejected?



Computer Exemption Duties

Primary duty must consist of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs based on and related to user or system design specifications
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems
- A combination of such duties, the performance of which requires the same level of skills



Computer Exemption Analysis



- Does the employee
 - Consult with users to determine software/hardware needs?
 - Develop, modify, document, analyze or test systems or programs?
 - Write computer code?
 - Answer “help desk” calls?
 - Assist end users to troubleshoot standard computer software?
- How much time does the employee spend on routine data entry?
- How much time does the employees spend repairing or troubleshooting hardware?

Sales Exemptions

Outside Sales

- Primary duty of making sales or obtaining orders/contracts
- Customarily and regularly engaged away from the employer's place of business

Commissioned Sales

- Retail or service establishment
- More than 50% of earnings are commissions
- Regular rate (earnings divided by hours) each week must be at least 1.5 times minimum wage

Sales Exemption Analysis

- What is the sales process as trained by the company?
- How often does the employee work away from a company location or a home office?
- Is the employee compensated based on level of sales?
- How much time does the employee spend performing work related to his/her own sales such as developing prospects, creating marketing materials, preparing sales reports and negotiating contracts?
- How much time does the employee spend performing work which is not related to sales (e.g., training, attending meetings)?



Uncovering the Facts



- Employee-by-employee or job-by-job
- Review any job descriptions or other information that details expected job duties of a position
- Interview managers with knowledge of day-to-day job duties
- Employee interviews?

Uncovering the Facts

- Use the list of questions we already discussed, but key information to obtain includes:
 - Primary responsibilities
 - Direct supervision
 - Most important decisions the employee can make
 - Tools or programs that the employee uses to perform duties
 - Any specialized degree or certification requirement for the position
- Evaluate whether actual or estimated hours worked by the employee can be determined

Legal Analysis

- Salary level and basis
- What exemptions?
- Review regulations
- Review applicable case law and opinion letters to see how similar cases have been treated in the past
- Don't forget state law
- Don't rely on what you have done in the past or what your competitors are doing



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Navigator OT Questionnaire

Navigator OT

Abc Inc., Engineer

Work State

Where do employees in this position work?

Cuba City

Compensation Details

How is this position paid?
Select all that apply.

☒ On a salary

☐ On a fee basis

☐ By the hour

☐ Commissions

☐ A non-discretionary bonus

☐ None of the Above

What is this position's annual salary?

\$ 78000.00

Has the salary for this position ever been reduced for reasons other than standard employee benefit?

More information

☐ Yes ☒ No

Exemption Analysis

What is the highest level of education the average employee in this position has achieved?

Some High School

Do employees in this position perform work in any of the following artistic or creative fields?
Check all that apply.

☐ Acting

☐ Design (including web design)

☐ Drawing, Sketching or Caricaturing

☐ Film/Video

☐ Graphic Arts

☐ Journalism

☐ Music

☐ Painting

☐ Performance Art

☐ Photography

☐ Writing

☐ Other Artistic Media

☒ None of the Above

How many employees does the average employee in this position supervise?

From employees answer 11

0.00

Representing the Company

☐ Making recommendations on selection or termination of contractors/vendors hired for purposes related to business operations

☐ Negotiating and entering contracts

☐ Managing compliance with contract terms, including resolving complex issues and disputes

☐ Handling routine issues related to existing contracts such as monitoring performance dates and invoicing (but not resolving disputes or other complex issues)

☐ Directing the work or managing performance of non-employees such as temporary workers, independent contractors, subcontractors or vendors

☐ Monitoring or implementing legal compliance measures

☐ Negotiating settlements or resolving disputes with contractors/vendors

☐ Representing the company before the press, public, or government, including representing the company during government inquiries or investigations

☒ None of the Above

< Back

Next >

Do employees in this position perform work in a computer, software or information technology field?

☐ Yes ☒ No

Do employees in this position sell Abc Inc.'s products or services?

☐ Yes ☒ No

< Back

Next >

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63

Navigator OT Results

What is the risk of classifying David Anderson as an exempt employee?



David Anderson is likely to meet the requirements for the following exemption: Administrative.

David Anderson is extremely unlikely to meet the requirements for the following exemption: Outside Sales.

David Anderson does not qualify for the following exemptions: Professional and Learned Professional.

Individual Exemption Risks



Administrative Exemption



Executive Exemption



Outside Sales Exemption

Understanding Your Risk

Riskiest Factors

David Anderson's risk may be lowered as follows:

Exemptions	Risk Factor	Steps to Lower Risk
Administrative	Administrative Duties	In order to qualify for the administrative exemption in Colorado, an employee must regularly perform work that regularly and directly assists an executive and are important to the decision-making process of the executive. It appears that David Anderson may not meet these requirements, thus increasing the risk of classifying him as an exempt administrative employee. Abc Inc. may want to consider restructuring David Anderson's job duties to ensure he is more directly assisting in the decision-making process of an executive.

Failure to Qualify

David Anderson has failed to meet the most basic qualifications required in order to be classified as exempt under the Computer, Creative Professional, Executive, Learned Professional and Outside Sales exemptions.

Exemptions	Reason Not Qualified
Learned Professional	The Learned Professional exemption requires that the employee have advanced knowledge "customarily acquired by a prolonged course of specialized intellectual instruction." This requirement restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence that an employee meets this requirement is possession of the appropriate four-year advanced academic degree. However, the word "customarily" means that the exemption is also available to employees who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and

Remedial Actions



- Restructure jobs to fit more squarely into an exemption
- Reclassify as non-exempt
 - Adjust compensation plans
 - Modify policies
 - Provide training
 - Develop communication materials
- Calculate back wages

Exemption Audit QUESTIONS & ANSWERS





Auditing for Off-the-Clock Work

Whitney Ferrer

Special Guest



Whitney Ferrer
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- Specializes in conducting comprehensive pay practices audits for FLSA and state law compliance on all wage and hour pay practices issues, including off the clock, and regular rate
- Specializes in conducting FLSA and state law exemption audits
- Defends employers in wage and hour class and collective actions

The Legal Issues

- The FLSA does not include a definition of “work”
- All work “suffered or permitted” by the employer must be compensated
- “Work” includes any time an employee is required, requested or permitted to work
- Interpreted broadly to employee’s benefit
- It is the duty of management to see that work not required or requested is not performed



Most Common Off-the-Clock Audit Topics

- Meal & Rest Breaks
- Waiting and On-Call Time
- Training/Meeting Time
- Travel Time
- Pre- and Post-Shift Activities
- Time Recording and Rounding



Meal & Rest Breaks



- Meal and rest breaks are not required under the FLSA
- If provided, a meal period may be unpaid if 30 minutes or longer and the employee is completely relieved of duties
- An employer may require an employee to remain at the worksite during a meal or rest break
- A rest period of 20 minutes or less is compensable work time

Waiting and On-Call Time

Waiting Time

- Employees must be paid for time spent “engaged to be waiting”
- Employees “waiting to be engaged” are not working

On-Call Time

- On-call time is compensable if an employee is unable to use the time effectively for his/her own purposes
 - Required to stay on or close to the employer’s premises
 - Responds to calls frequently
 - Short required response time
 - Any other limitations on employee’s use of his or her time

Training/Meeting Time

Training time is compensable work hours unless all four of the following requirements are met:

1. Attendance is outside regular working hours
2. Attendance is voluntary
3. The training/meeting is not job related
4. The employee does not perform any productive work during the training/meeting



Travel Time

Compensable

- Travel between job sites during the work day
- Travel to another city for special one-day assignments (minus normal commute time)
- Overnight travel during the employee's normal work hours (on a work or non-work day)

Not Compensable

- Normal home-to-work commuting, unless employee begins work prior to commuting
- Overnight travel, if outside the employee's normal work hours (on a work or non-work day)

Pre- and Post-Shift Activities



Work:

- Booting up and turning off the computer
- Reading emails
- Shift-change conversations
- Donning/doffing

Not work:

- Commuting
- Walking from the parking lot
- Waiting to punch a time clock
- Bag/security checks (?)

Time Recording & Rounding



- Employers are required to keep records of all hours employees work each workday and the total hours worked each workweek.
- The practice of recording employees' starting and stopping times to the nearest five minutes, or the nearest one-tenth or quarter of an hour is allowed by the FLSA, provided it is used in such a manner that over a period of time, it results in employees being compensated for all the time they have worked.

Uncovering the Facts

- Conduct facility level investigation
- Interview HR Rep or Plant Manager about:
 - General timekeeping practices - electronic timekeeping, exception based time reporting, rounding or paying to punch
 - General work schedules - any pre or post shift meetings, required to change into uniforms at work, general meal and rest break policies (length of time, auto deducts, potential for employees to work through lunch), any after hours work relating to emails or phones, on-call expectations, driving to different work locations



Uncovering the Facts

Review time records to issue spot:

- Recorded time is the same as the scheduled shift
- Recorded time is round number versus minutes
- Time records show a significant number of missed punches, adjustments to time, or other anomalous entries
- Frequent time punches during on-call shift
- Gaps in time of less than 20 minutes

TIME SLIP							
WEEK		TO		TO			
5-28-12		20		6-1-12		20	
DAY and NIGHT	MORNING		AFTERNOON		EVENING		Total Hours
	Start	Stop	Start	Stop	Start	Stop	
SUNDAY							
MONDAY	h.o	l.i	d.a	y.			8
TUESDAY	7:45	1p	2p	4:30			8
WEDNESDAY							8
THURSDAY							8
FRIDAY							8
SATURDAY							
TOTAL HOURS THIS WEEK							40
Signed (Employee)		Employee Number		Approved By			
[Signature]		[Redacted]		[Redacted]			

Uncovering the Facts

- If any off the clock work is discovered, in order to estimate back wages liability, you must determine the amount of off the clock work at issue. This can be estimated by interviewing leadership or asking the employees themselves how much time was spent in the off-the clock activity
- Once you estimate the amount of time spent in off the clock activity, an analysis of time sheets and pay records will need to be conducted in order to determine the total hours worked each week, the amount of overtime worked based on off the clock activity, and the rate at which the overtime will be paid

Legal Analysis

- Do any identified issues result in off the clock work that bumps employees into overtime?
 - If yes, back wage calculations will need to be performed
- Do any identified issues result in unpaid time, but do not bump the employee into overtime?
 - If yes, is MW met for all hours worked?
 - If yes, no back wage owed for gap time
 - If no, MW wage adjustment owed



Remedial Actions



- Calculate and pay back wages
- New or revised policies, communicated annually
- Annual training for managers on “what is work”
- Require certification of hours worked every pay period
- Toll-free hotline to report off-the-clock work
- Investigation process

Navigator Pay Practices

Navigator Pay Practices



Wage and Hour Compliance

Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

► Find Minimum Wage

► Use Rapid Reference

Navigator Pay Practices

Getting Started

To begin, select the application you want to launch. You may click on the name of an application to learn more about it.

- [Navigator Final Pay ⓘ](#)
- [Navigator Frequency ⓘ](#)
- [Navigator Holidays ⓘ](#)
- [Navigator Meal & Rest ⓘ](#)
- [Navigator On-Call ⓘ](#)
- [Navigator Posters ⓘ](#)
- [Navigator Rate Change ⓘ](#)
- [Navigator Travel Time ⓘ](#)
- [Navigator Voting Time ⓘ](#)

Next >

OTC Audit QUESTIONS & ANSWERS



Wrap Up



Back Wage Calculations

- Misclassification
- OTC Work



Remember the Basic Formula



All Remuneration
÷
All Hours Worked

Misclassification

The Formula

- $RR = \text{Total \$} / \text{Total Hours}$
- $BW = RR \times 0.5 \times \text{OT Hours}$
- Weekly Calculation
- Calculate for two or three years
- If no time records, you will need to estimate hours worked each week

An Example

Ann worked in retail as an exempt assistant manager for a salary of \$35,000; she worked 50 hours a week:

- $\text{Weekly} = \$35,000 / 52 = \673.08
- $RR = \$672.06 / 50 = \13.46
- $\$13.46 \times 0.5 = \6.73
- $\$6.73 \times 10 = \67.31 per week

Off-the-Clock Work

The Formula

- $MW\ Check = Total\ \$ / Total\ Hours$
- $BW = RR \times 1.5 \times OT\ Hours$
- Weekly Calculation
- Calculate for two or three years
- If no time records, you will need to estimate number of OTC hours

An Example

Sue worked at a beef processing plant for \$400 per week (\$10 per hour, x 40 hours). Every morning she spent 12 minutes donning/doffing a uniform but was not paid for that time.

- 1 hour OTC per week, all overtime
- $MW\ Check = \$410 / 41 = \9.75
- $BW = \$10 \times 1.5 \times 1 = \$15\ per\ week$

Reporting to DOL

- Audit Report
 - Audit methodology
 - Audit finding
 - Back wage calculation methodology
 - Plans to achieve future compliance
- Back wage calculation spreadsheet



THE FLSA



SOLUTION



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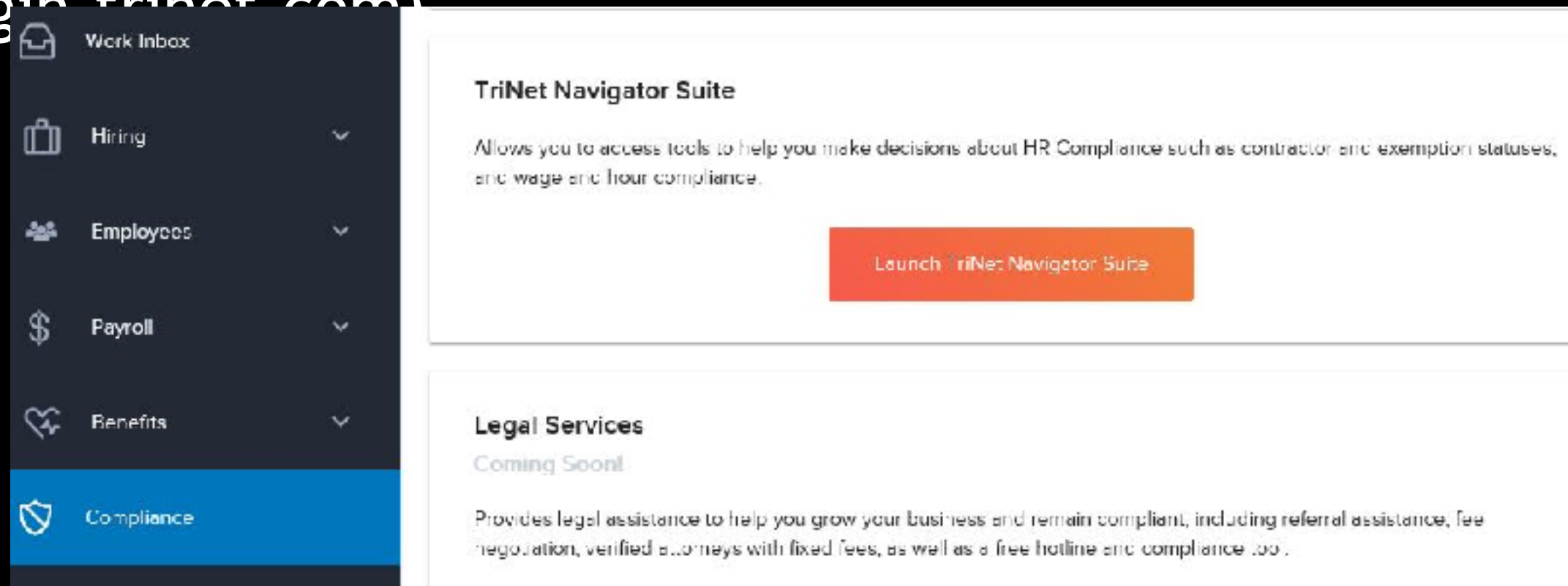
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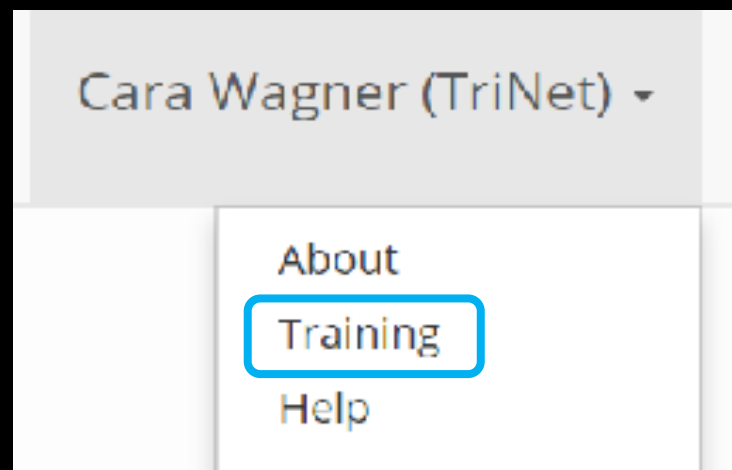
Accessing Your Navigator Suite

- Under the Admin View, the TriNet Navigator Suite can be found under the “Compliance” link on the TriNet platform (login trinet.com)



Additional Support

- For additional training materials click the drop down next to your name on the top right of the landing page and select training:



- Reach out to your TriNet Contact for additional support and questions.

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THANK YOU

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