

ComplianceHR Webinar Series: Spring Into Compliance

Session 1: FLSA Boot Camp Basics



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.



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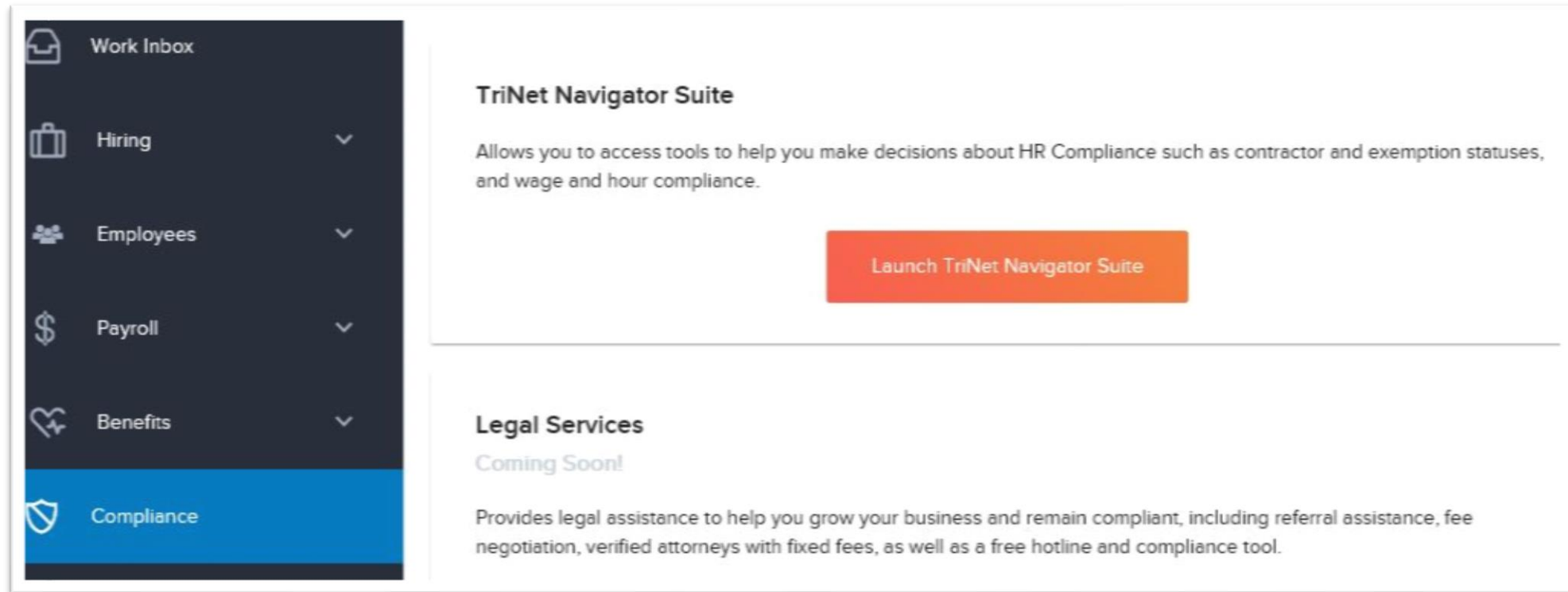
 [@labrown1419](https://twitter.com/labrown1419)

- Former Littler Shareholder
- Former General Counsel / HR Chief of Global Security Organization

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Accessing Navigator Suite

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



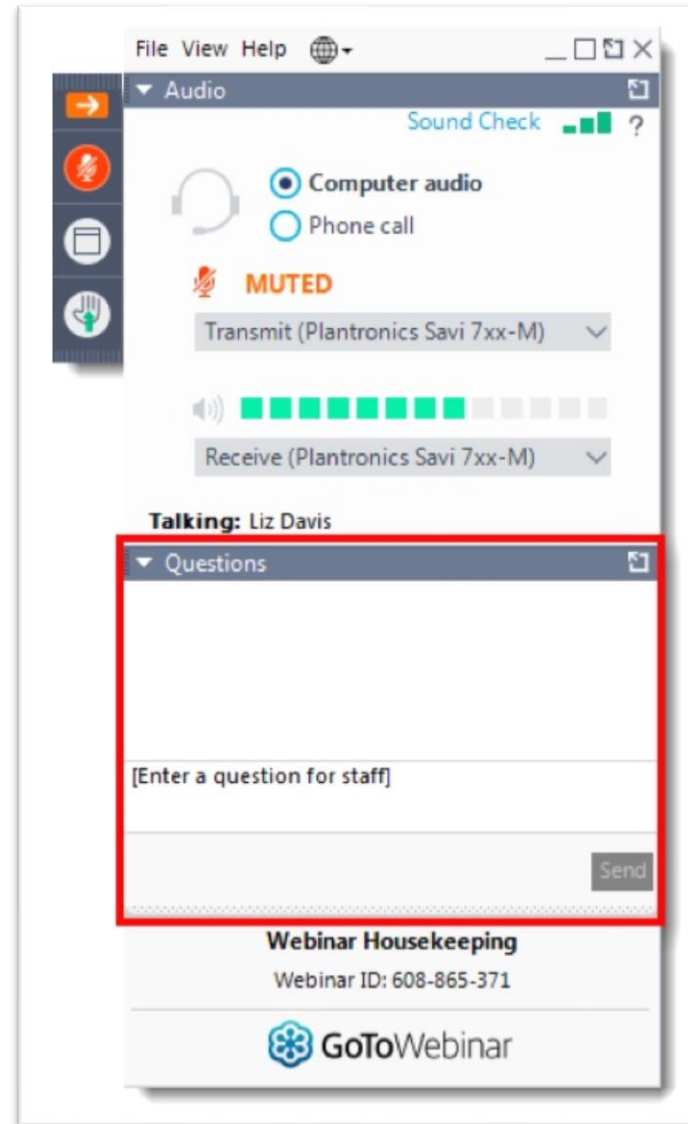
Accessing Navigator Suite

The screenshot displays the Navigator Suite interface with four modules arranged in a 2x2 grid. Each module has a blue header, a circular icon, a title, a description, and a list of actions at the bottom. The Navigator OT and Navigator Pay Practices modules are circled in red.

Module	Icon	Title	Description	Actions
Navigator IC	Teal circle with a white pen nib	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	Red circle with a white clock and checkmark	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 , Use Leadership Navigator , View Evaluations
Navigator Pay Practices	Orange circle with a white hourglass	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 Onboarding	Green circle with a white document icon	Onboarding Document Production	Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents	+ Create New Document

Answering Your Questions

Please submit your questions via the text questions pane:



What You'll Receive:

1. Full slide presentation (pdf format)
2. Link to recorded audio presentation



OBJECTIVES FOR TODAY'S SESSION:

- I. What is the Fair Labor Standards Act (FLSA)?
- II. What does the FLSA require?
- III. What does compliance with the FLSA look like, generally?



Cory Glen Walker

Littler Shareholder

Phoenix, AZ

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- Represents employers in collective, class, and hybrid actions brought under the federal Fair Labor Standards Act and state wage and hour laws
- Focuses on consulting with a wide range of employers on wage and hour compliance
- Extensive experience with internal wage and hour and independent contractor audits aimed at ensuring best practices, and avoiding class litigation

**BREAKING
NEWS**

U.S. Department of Labor Releases Overtime Update Proposal

Minimum Salary Level

Weekly

Current

\$455

2016 Final Rule

\$913

2019 Proposal

\$679

Annual

Current

\$23,660

2016 Final Rule

\$47,476

2019 Proposal

\$35,309

Bonuses, Incentive Payments, Commissions

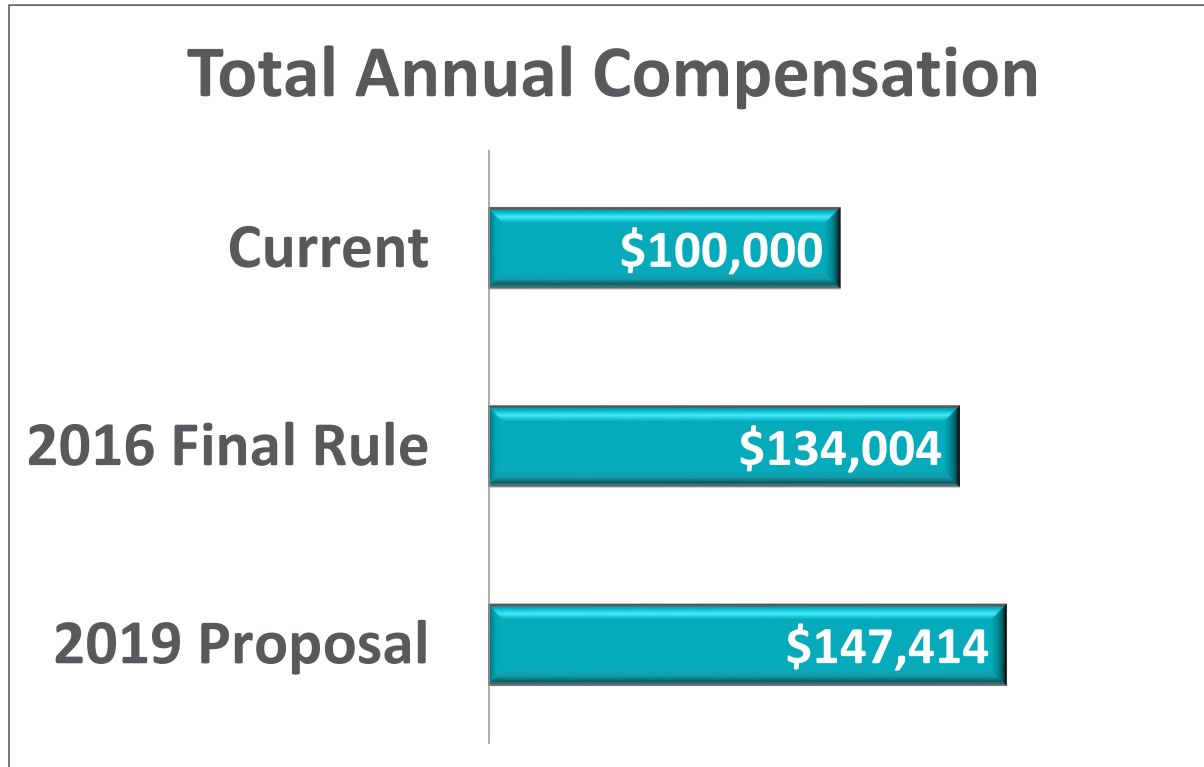
Up to 10% of the minimum salary level may be satisfied with non-discretionary bonuses, commissions and other incentive pay that are paid annually or more frequently

Let's do the math to find the real minimum salary level using the 10% rule:

$\$679 - 10\% = \611.10
weekly salary

$\$35,308 \times 10\% = \$3,530.90$
annual bonus

Highly Compensated Test



- **\$147,414 annual total**
 - \$679 weekly guaranteed salary
 - \$112,106 may be in bonuses, incentive pay and commissions (\$147,414 - \$35,308)

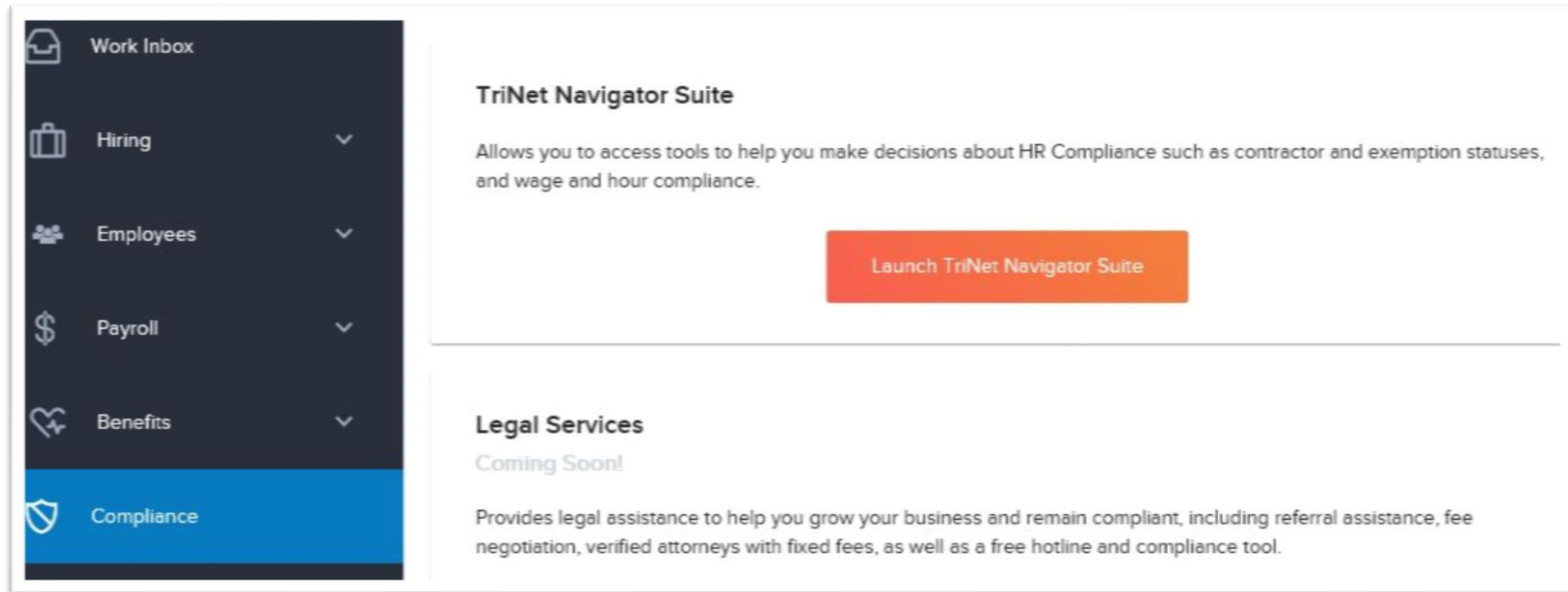
Future Increases

- Updates every four years
- Through notice-and-comment rulemaking
- No automatic increases



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Navigator OT

Navigator OT



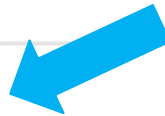
Exempt Status Assessment

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](#)

[🔍 View Evaluations](#)



Navigator OT Questionnaire

Navigator OT

Abc Inc.: Engineer

Work State

Where do employees in this position work ?

Colorado

Compensation Details

How is this position paid?
Select all that apply

☒ On a salary

☐ On a fee basis

☐ By the hour

☐ Commissions

☐ A nondiscretionary bonus

☐ None of the Above

What is this position's annual salary?

\$ 70000.00

Has the salary for this position ever been reduced for reasons other than state employee benefits?

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 Cartooning

☐ 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?
If no employees, enter 0

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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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 exemption:
Professional and Learned Professional.

Individual Exemption Risks



Understanding Your Risk

Riskiest Factors

David Anderson's risk may be lowered as follows:

Exemptions	Risk Factor	Steps to Lower Risk
Administrative	Administrative Duties	<p>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.</p> <p>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.</p>

Failure to Qualify

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

Exemptions	Reason Not Qualified
Learned Professional	<p>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</p>

The Fair Labor Standards Act

- The FLSA was enacted during the Depression and is one of the oldest federal employment laws.
- The FLSA's key provisions require employers to to:
 - Pay non-exempt employees a minimum hourly wage for all time worked.
 - Pay non-exempt employees overtime when they work more than 40 hours per week.
 - Pay for any overtime at a rate which is at least 1 1/2 times the employee's compensation rate.
 - Maintain accurate and complete time records.
- Highly Technical: The law and accompanying regulations are not intuitive
- The Department of Labor estimates that 70% of employers are not in full compliance.



Wage and Hour Primer

- Fair Labor Standards Act

Covered employers must pay non-exempt employees at least the federal minimum wage for all hours worked and overtime of 1 ½ times the employee's correct hourly rate of pay for hours worked over 40 in a workweek.

- Exemptions
- Hours Worked
- Correct Hourly Rate
- Workweek



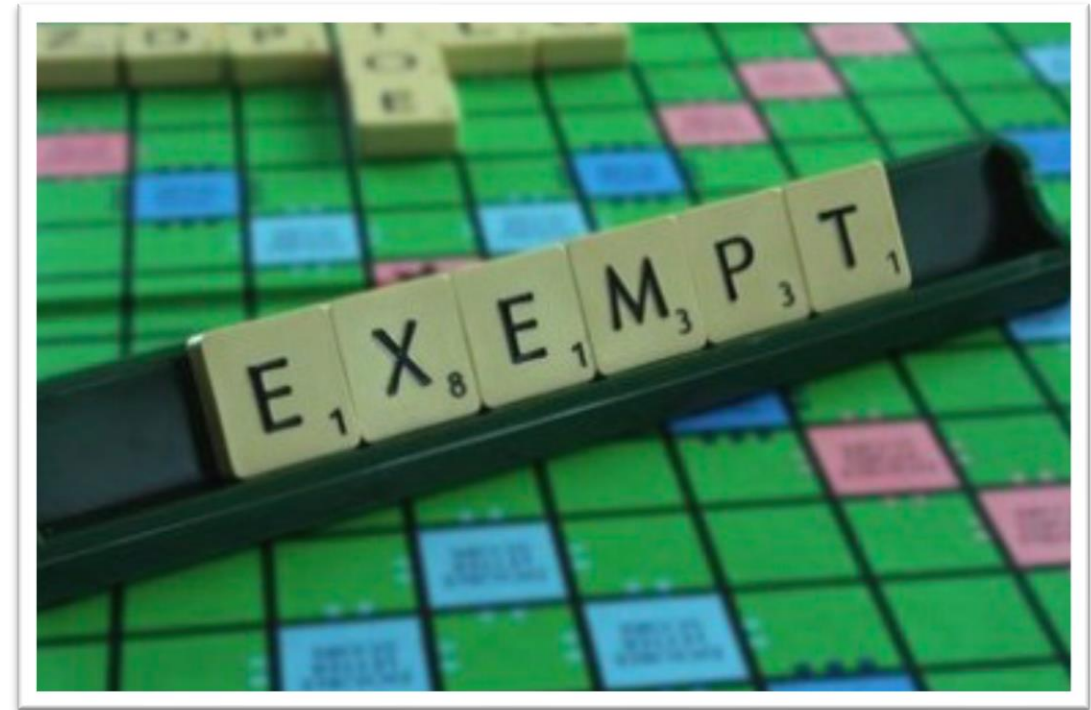
Types of Wage/Hour Liability

- Not paying overtime
 - Misclassified as exempt
 - Direction to not pay overtime
 - Miscalculation of overtime
- Not paying minimum wage
- Not paying all hours worked

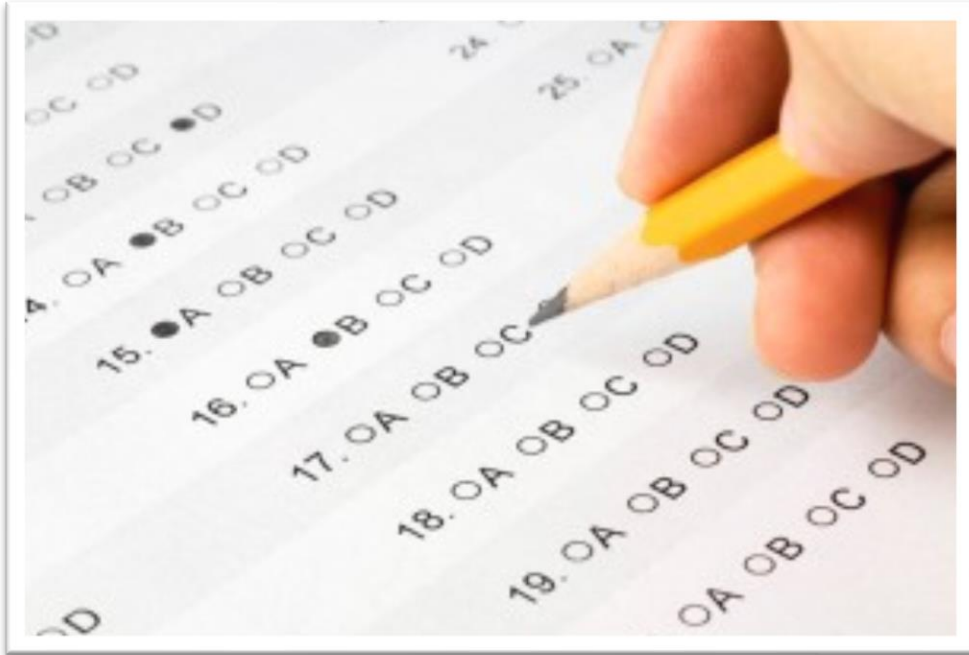


Exemptions

- Executive (from OT)
- Administrative (from OT)
- Professional (from OT)
- Computer (from OT)
- Outside Sales (from MW and OT)
- Motor Carrier Act (from OT)



Tests for Exemptions



- **Compensation Test**
 - Minimum level of compensation
 - Type of compensation
- **Duties Test**
 - Job duties, responsibilities and authority of the employee

Executive Exemption

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- 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.



Administrative Exemption

- Whose 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; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.



Learned Professional Exemption



- The employee's 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

Key Concepts

- To calculate wages correctly, you must understand three key concepts:
 - What is the “workweek”?
 - What activities are “work”?
 - What is the correct hourly rate?



What is “Work”?



The FLSA does not include a definition of “work”

Work “Suffered or Permitted”

- All work “suffered or permitted” by the employer must be compensated:
 - Work requested or required by the employer
 - Work not requested, but permitted
 - Work the employer knows or has reason to believe is being performed – even if not expressly requested



Continuous Work Day

- Employees must be paid for all hours within a workday, from the first principal activity to the last principal activity.
- A “principal activity” includes any activity that is an integral and indispensable part of an employee's work.
- In general, “work” includes all the time an employee must be on duty, on the employer’s premises, or at any other prescribed place of work.



Analysis of Working Time: Book-Ending the Day

- What time did the employee perform the first principal work activity?
- Is the employee performing work remotely?
 - Is remote work being captured in timekeeping system?
 - Is travel time being captured?
- What time did the employee perform the last principal work activity?
- Is the employee working from home at night?



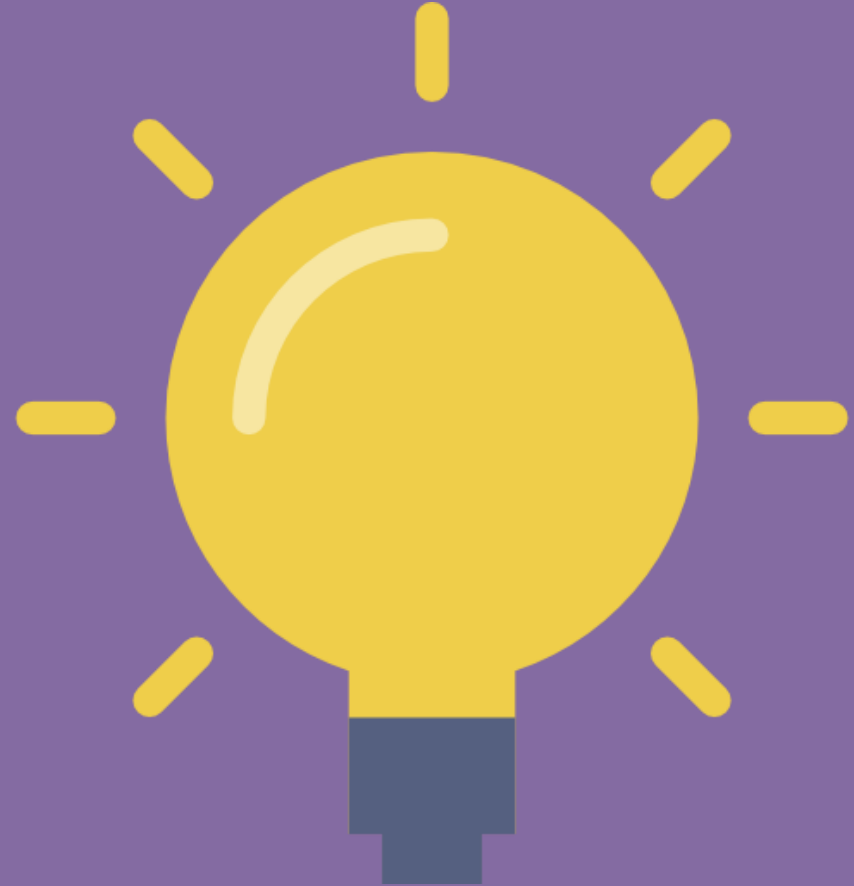
Is the Activity Work Time?

- Meal & Rest Breaks
- Waiting Time
- On-Call Time
- Training/Meeting Time
- Travel Time
- Pre- and Post-Shift Activities
- Sleep Time
- Grievances, Suggestion Systems and Charitable Activities



Key Concepts

- Work is broadly interpreted to the employee's benefit
- Employees must be paid from “whistle to whistle”
- Work includes any time the employee is required, requested, suffered or permitted to work
- It is the duty of management to see that work not required or requested is not performed



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

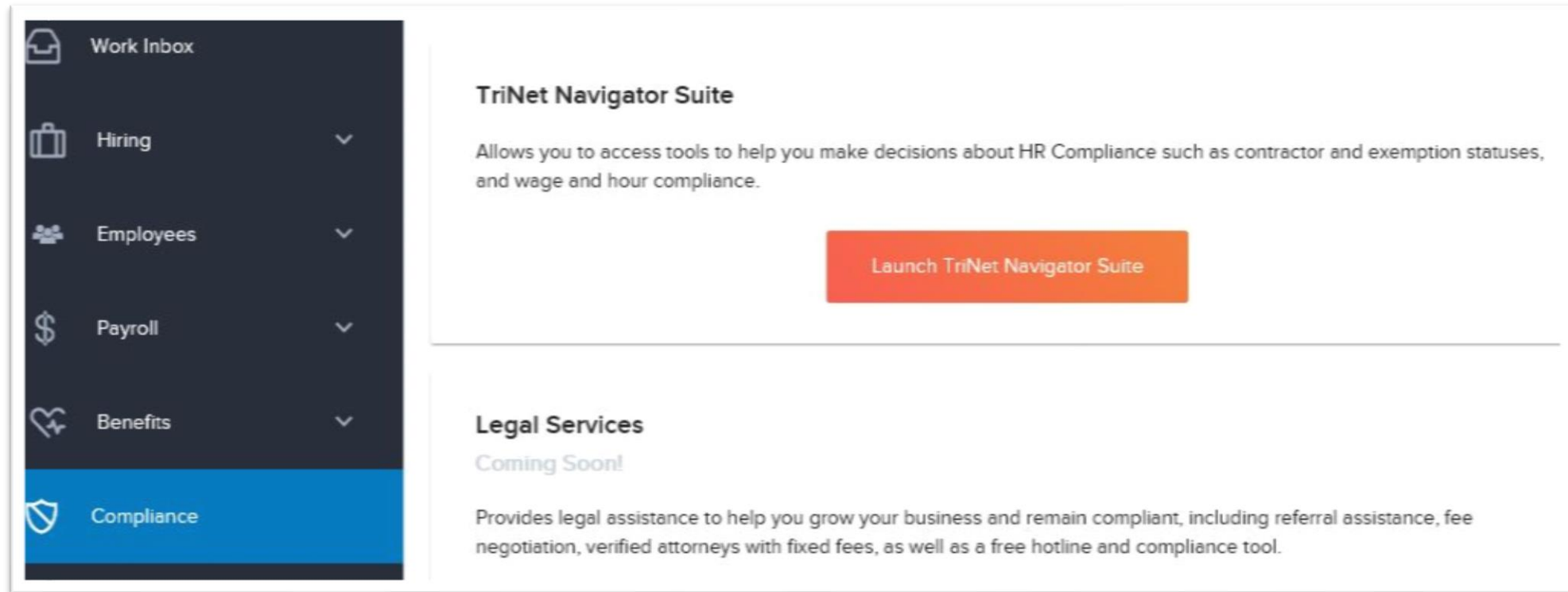
Meal & Rest Breaks – State Liability

- Many states have their own, often differing, requirements for meal and rest breaks.
- Slight variations in language can sometimes be the difference between compliance and non-compliance, e.g. “30 minutes for employees who work 6 or more hours” versus “30 minutes for 6 consecutive hours worked.”
- Requirements to look for include whether or not meal and rest periods are required, how often, whether the requirement can be waived, exemptions to the requirements, restrictions, recordkeeping requirements, and whether there are particular requirements related to minors or the industry.



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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 MW - Efficiently determine the minimum wage requirement for a non-exempt employee working in the U.S.

Navigator M&R - Quickly assess meal and rest break obligations.

Navigator Travel - Easily determine whether an employee needs to be compensated for time spent traveling.

Navigator Holidays - Know the regulations for paid holidays and days of rest.

Navigator On-Call - Quickly determine whether an employee needs to be paid for on-call time.

Navigator Final Pay - Accurately assess what you owe and when to an employee who leaves the company.

Navigator Voting - Confirm whether you're required to provide time off for voting.

Navigator Posters - Ensure that your office is displaying all required posters.

Navigator Rate Change - Know how you need to communicate changes to your employees' pay.

Navigator Frequency - Understand how often your employees need to be paid.

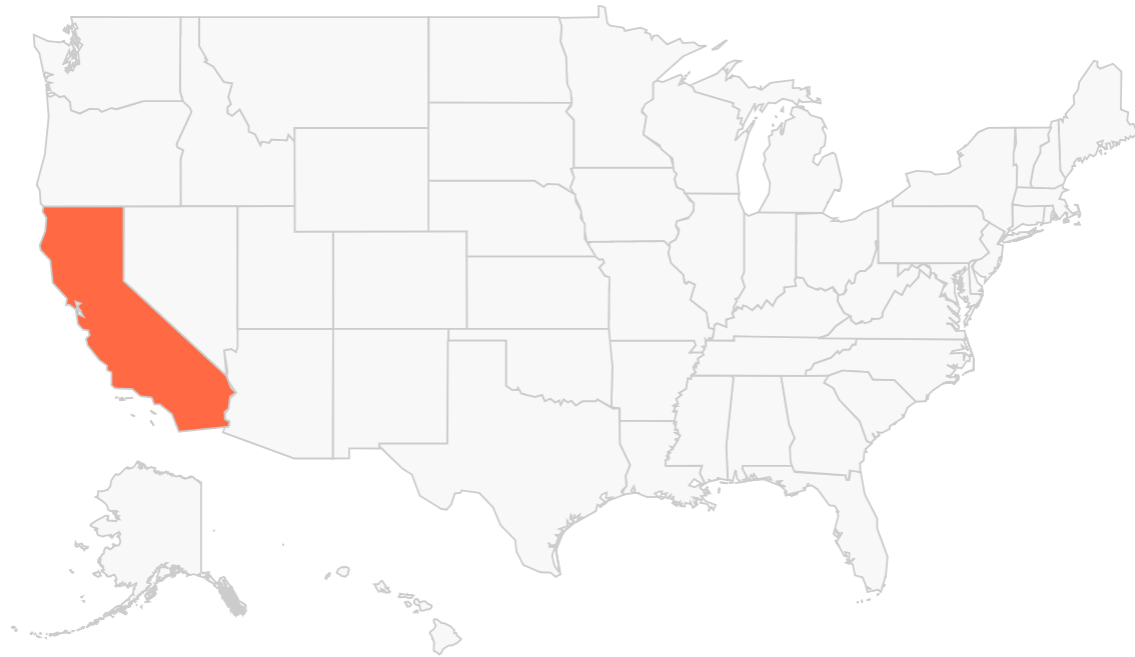
Just a few clicks away...

Select the application you want to launch.

- ☐ Navigator Final Pay ⓘ
- ☐ Navigator Frequency ⓘ
- ☐ Navigator Holidays ⓘ
- ☒ Navigator Meal & Rest ⓘ
- ☐ Navigator On Call ⓘ
- ☐ Navigator Posters ⓘ
- ☐ Navigator Rate Change ⓘ
- ☐ Navigator Travel Time ⓘ
- ☐ Navigator Voting Time ⓘ

Select a state.

California ▼



Pay Practices Results

General Requirements

Requirements to provide employees with meal and rest breaks come from state laws, as the federal Fair Labor Standards Act determines only when meal breaks must be paid or may be unpaid.

Requirements for California

Rest Breaks

Employers must permit employees in California to take a 10-minute rest break for each 4 hours worked or major fraction thereof (anything more than 2 hours) as set forth below. As far as practicable, breaks should be scheduled in the middle of each 4-hour period. Rest breaks must be paid, but employers cannot require the employee to work during the break. On duty rest periods are prohibited in California. The law is unsettled as to whether employers can require employees to stay on the work site during their rest break.

- Less than 3.5 hours worked - no break
- 3.5 to 6 hours worked - 1 break
- 6 to 10 hours worked - 2 breaks
- 10 to 14 hours - 3 breaks

Piece rate employees must be paid for rest break at the average hourly rate for the week (compensation/

Meal Periods

Employers must provide employees in California who work more than 5 hours with a meal period of at least 30 minutes. A second 30-minute meal period is required for employees who work more than 10 hours in a day. The first meal period must be provided no later than the 5th hour of work; the second meal period must be provided no later than the end of the 10th hour of work. The meal periods can be unpaid, but even if paid, the employer cannot require employees to work during the meal period. Employers may not require that employees remain at the work site during the meal period. If an unpaid meal period is interrupted with work, the employee must be paid for the meal period and provided a replacement meal period.

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
- On-call time is not work merely because the employee is required to carry a pager, cell phone or leave a telephone number where s/he can be reached



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 - FLSA

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)

Non-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)
- Commuting in state vehicle, if meets certain requirements

- Must pay travel time to actual start and stop times.
 - Should not snap time down or up, or estimate.

Travel in Company Vehicle



- Home-to-work travel in a company vehicle, and any activities “incidental” to such travel is not work time where:
 - Use of vehicle is voluntary
 - No expense is incurred by employee in use of vehicle
 - Vehicle is of a type ordinarily used for commuting
 - Work sites are within normal commute distance of employer's office

Pre- and Post-Shift Activities

Work:

- Reading emails
- Shift-change conversations
- Donning/doffing



Not work:

- Waiting to punch a time clock
- Going through security
- Walking from the parking lot to the work station

“Donning and Doffing”

- **Compensable:**
 - If putting on and taking off clothing or protective gear on the employer’s premises is required by law, the employer, or the nature of the work
 - Waiting in line for uniform
 - Walking after obtaining the uniform to the place where employees don/doff and to the work station



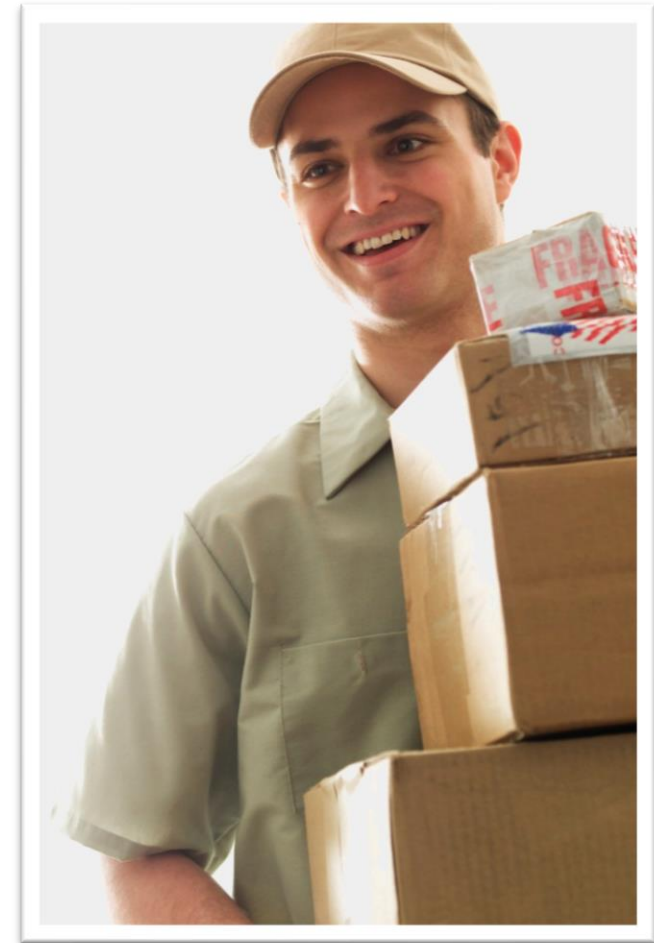
“Donning and Doffing”



- Not Compensable:
 - If employees are allowed to don/doff clothing at home, but choose to change at work
 - If the aggregate time spent donning, walking, waiting and doffing is de minimis

Cleaning & Maintaining Uniforms

- What is a uniform?
 - Usually includes any distinctive clothing that an employee would not wear on a non-work day
 - Uniform: a shirt with a company logo
 - Not a uniform: khaki pants with a blue shirt
- Employees may be working if required to clean or repair a uniform beyond normal washing and drying



Suggestion Systems, Resolving Grievances, Charitable Activities

- Time spent by an employee preparing suggestions, resolving grievances and participating in charitable activities need not be compensated if:
 - Participating in the activity is voluntary, and
 - Occurs outside normal working hours



Sleep Time



- Sleep time can be excluded from work time only if for employees on duty 24 hours, and the employee:
 - Agrees that up to 8 hours of sleep time will not be paid
 - Has adequate sleeping facilities
 - Is generally able to enjoy an uninterrupted night of sleep
 - Is paid for any interruption of sleep time
 - Is paid for the entire night if the employee gets less than five hours of sleep
 - Up to three, one-hour off-duty meal periods also may be unpaid

“Off-the-Clock” Red Flags

- Recorded time is almost always a nice round number (e.g., 9:00 a.m., 5:30 pm)
- Recorded time is almost always the same as the scheduled shift
- Time records show a significant number of missed punches, adjustments to time, or other anomalous entries
- Time punches/entries do not match hours worked shown on payroll records
- Employees observed in the workplace before clocking in, during lunch, or after clocking out



Calculating the Correct Hourly Rate

All “remuneration for employment” paid to an employee in a workweek divided by all hours worked in the workweek



Remember the Formula



All Remuneration

÷

All Hours Worked

Compensation

Included:

- Hourly wages or salary
- Commissions
- Non-discretionary team awards
- Prizes and awards related to work
- Shift or job differentials
- On-Call pay



Excluded:

- Employee benefits
- Payments for time not worked
- Business expense reimbursements
- Certain premium pay
- Gifts for Christmas or special occasions
- Discretionary team awards

Payments for Non-Work Time

Vacation, sick or holiday hours also do not count toward determining whether an employee worked more than 40 hours in the week



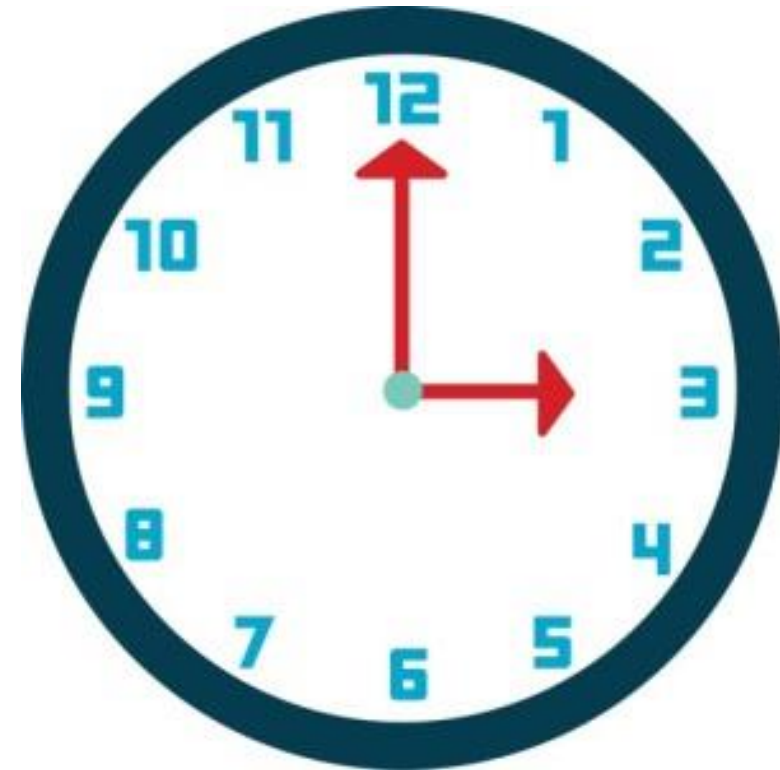
Business Expenses

Reasonable payments for traveling expenses, or other expenses, incurred by an employee in furtherance of his employer's interests and properly reimbursable by the employer.



Timekeeping Rules

- Key Points
 - Managers accountable for approving time, and ensuring procedures are followed
 - No automatic deductions
 - Interrupted breaks are paid breaks (calls, questions, email)
 - Overtime in 7 day period must be paid.
 - Non-approved overtime must be paid



Timekeeping Rules



- Employers are required to keep accurate time records, including daily clock in and clock out times for three years
- Management must be vigilant about accurately completing adjustment forms
- Courts/Agencies will always believe employee if Employer's records are inaccurate

Timekeeping

- Employees responsible for fully and accurately recording all time, including paid and unpaid leave.
- Managers MUST be very responsive to employee requests to correcting time for mistakes, leave, etc.
- Failure to comply with timekeeping policies and standards subject employees and managers to discipline.
- Employees should always be paid for all hours worked, even if they make mistakes on the timekeeping.
- Must manage time through timekeeping system
- Managers must always obtain employee approval for all time adjustments
- Employee validation of time card is an attestation to its accuracy.
- Time must be recorded for the date it was worked; and corrections must be made to the correct time period.

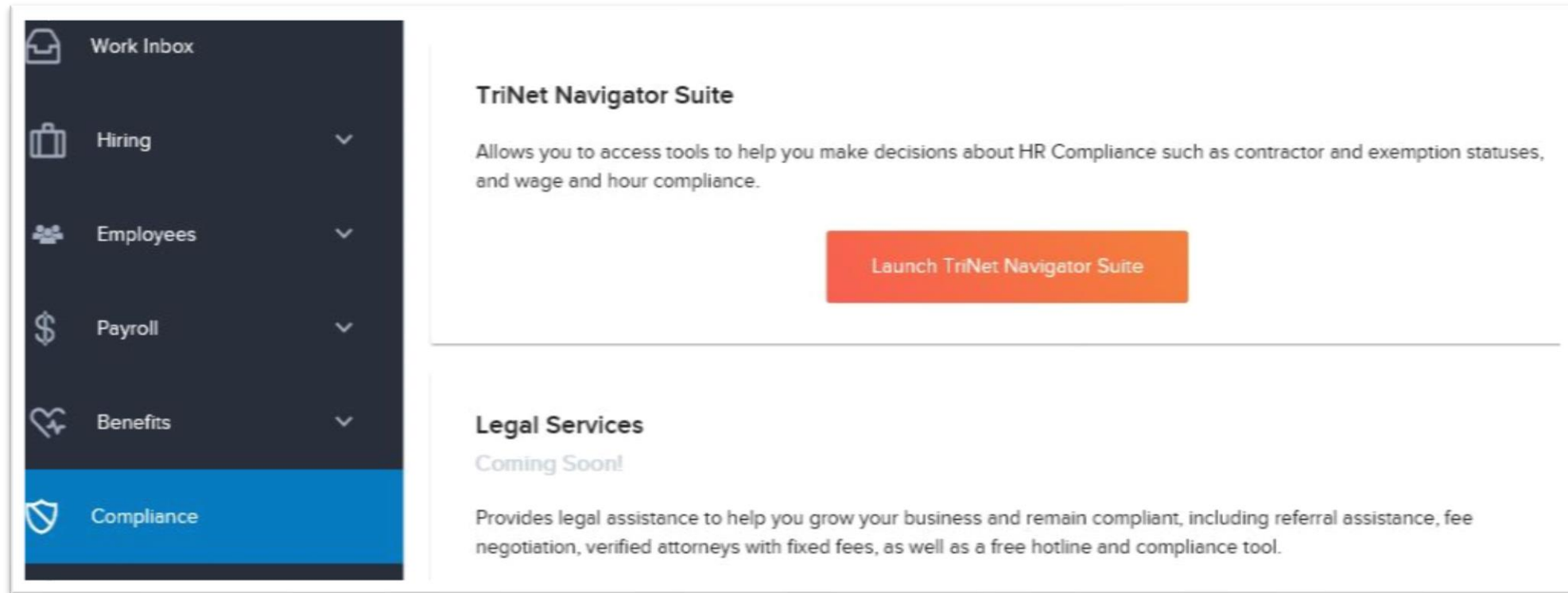
Complaints / Retaliation

- Management must quickly report employee complaints regarding unpaid hours
- Retaliation against employees who is protecting his/her rights under the law is absolutely prohibited by the law



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Questions?



Thank you!

Save the dates for sessions 2 & 3:

- Thursday, April 25 – Understanding FLSA Overtime: Who Gets it?
- Thursday, May 16 – Wage and Hour Mistakes: How to Recognize and Avoid Common Landmines

