

# Avoiding Wage and Hour Pitfalls in the Age of COVID-19

July 23, 2020

**Littler**<sup>®</sup>

**TriNet** <sup>®</sup>

Compliance **HR**

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## Lori Brown

CEO, ComplianceHR

[brown@compliancehr.com](mailto:brown@compliancehr.com)

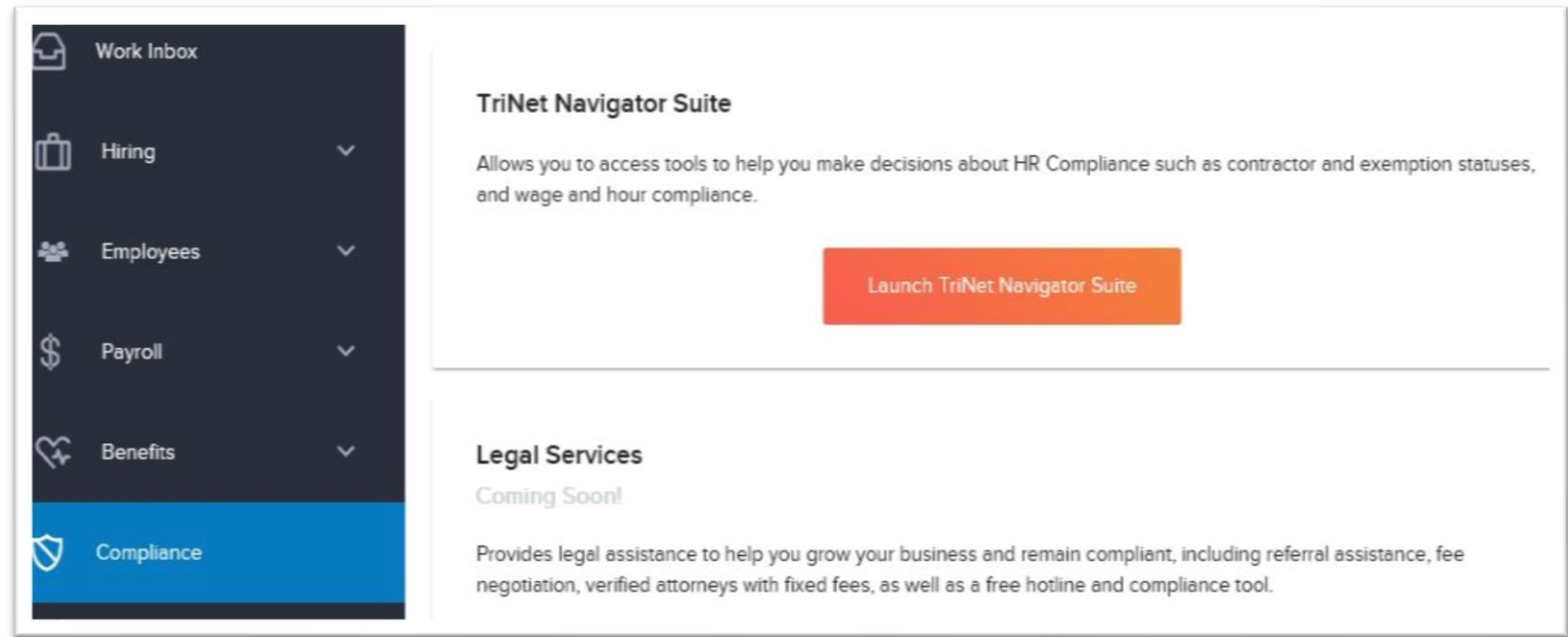
 [@labrown1419](https://twitter.com/labrown1419)

- Former Littler Shareholder
- Former General Counsel / HR Chief of Global Security Organization
- Career Compliance Geek
- Need more?  
<https://compliancehr.com/resources/>

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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)
- Must have the HR Authorizer role in the TriNet platform to use Navigator Suite



# Accessing 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](#)

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[▶ 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](#)

## Navigator Onboarding



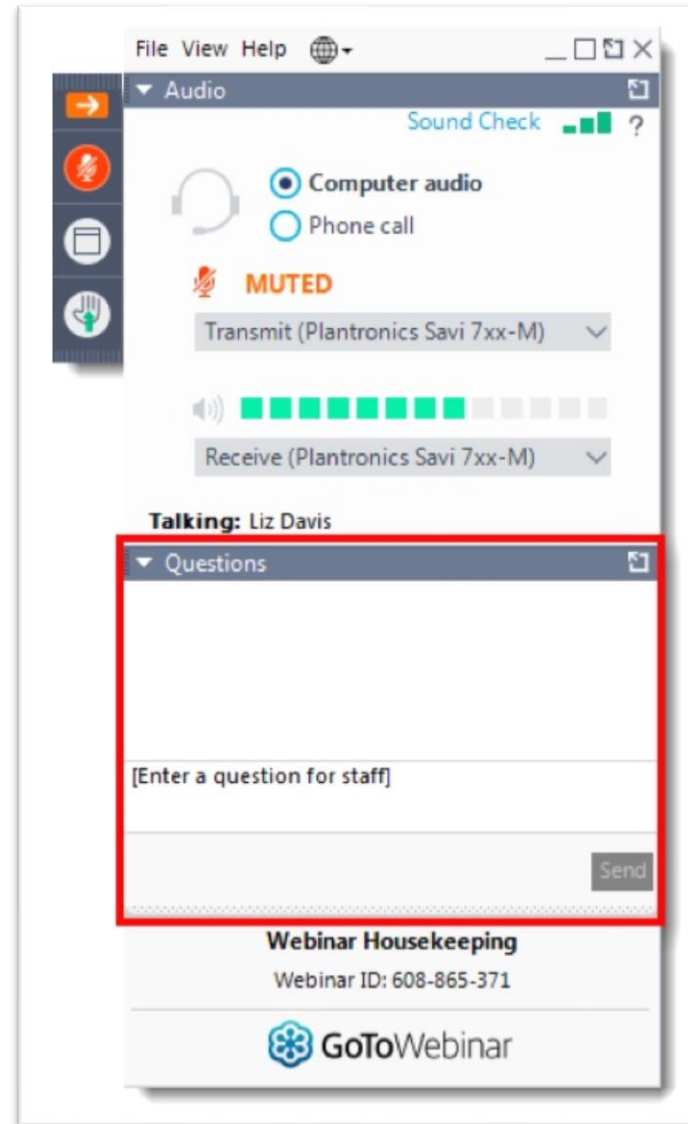
### Onboarding Document Production

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





# Agenda

- COVID-19 Wage and Hour Pitfalls
- Correction Through the PAID Program
- Using Navigator OT to Self- Audit
- Surviving a DOL Investigation





# Tammy McCutchen

VP Strategy, ComplianceHR

[tammy@compliancehr.com](mailto:tammy@compliancehr.com)

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

- Littler Principal
- Former Administrator, US-DOL Wage & Hour Division and author of 2004 revisions to the overtime regulations
- Leading authority on federal and state wage and hour laws



## Dane Steffenson

Special Counsel  
Littler, Atlanta

[dsteffnson@littler.com](mailto:dsteffnson@littler.com)  
(404) 443-3501

- Former Senior Trial Attorney, Office of the Solicitor, U.S. Department of Labor
- Nationally recognized employment litigator with unique insight into DOL enforcement strategies, policies and procedures

# COVID-19 Wage and Hour Pitfalls

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# Polling Question

**During the COVID-19 pandemic, has your company** *(select all that apply):*

- a. Furloughed exempt employees
- b. Cut salaries of exempt employees
- c. Changed job duties of exempt employees
- d. More than one of the above
- e. None of the above

# Exemptions

## Salary Tests

- Salary reductions
- Work performed during unpaid furloughs



# Exemptions

## Duties Tests

- Exempt executives with direct reports on furlough?
- Outside sales employees stuck at home?
- Exempt employees asked to perform non-exempt work?

### **§ 541.706 Emergencies.**

**(a)** An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

**(b)** An "emergency" does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

# Breaking News!



U.S. DEPARTMENT OF LABOR

## Wage and Hour Division

WHD > Wages and Hours  
COVID-19

16. Can a salaried executive, administrative, or professional employee who is exempt from the Fair Labor Standards Act's (FLSA's) minimum wage and overtime requirements under Section 13(a)(1) perform other nonexempt duties during the COVID-19 public health emergency and continue to be treated as exempt?

## COVID-19 and the Fair Labor Standards Act Questions and Answers

# COVID-19 as FLSA Emergency

COVID-19 is a rare event affecting the public welfare of the entire nation that an employer could not reasonably anticipate and is consistent with the FLSA's regulatory criteria for emergencies.

Employees who are temporarily required to perform nonexempt duties due to COVID-19 may do so without losing the FLSA exemption, **as long as they continue to be paid on a salary basis of least \$684 per week.**



# Polling Question

**Do you screen, or plan to screen your employees for COVID-19 symptoms before they can report to work?**

- Yes, we are screening now.
- We plan to screen when employees come back to work.
- We currently have no plans to screen.
- Not applicable.

# Off-the-Clock Work

- Tracking time for employees working from home
- What is work?
  - Required check-ins while on unpaid furlough -  
- unclear
  - Donning & doffing of masks and PPE –  
probably yes
  - Temperature checks and health screenings –  
depends on the state
  - Long lines to get on elevators – no, just part of  
the normal commute



# Overtime Pay Calculations



- New types of incentives for non-exempts to continue or return to work
  - “Hazard Pay”
  - Hardship Bonuses
  - Return to Work Bonus

# State Law Issues

- Payout of accrued vacation/PTO to furloughed or terminated employees
- Mandating or prohibiting use of PTO during a furlough
- Required notices to employees of pay reductions, benefit changes, layoffs
- Pay for/reimbursement of business expenses
  - Cost of equipment necessary to work from home
  - Cost of masks and PPE



# Ready, Aim, File!



## Cook County Jail officers sue for overtime spent sanitizing for COVID-19

**CHICAGO** - Correctional officers at Cook County Jail are suing Sheriff Tom Dart to be paid for spending time cleaning up after their shifts because of COVID-19.

Eleven officers at the jail filed a lawsuit Tuesday in federal court, asking for at least one week of compensation for "sanitation activities" since March 9 — the day Gov. J.B. Pritzker declared a state of emergency for the coronavirus, the Chicago Sun-Times is reporting.

Published April 22 | Crime and Public Safety | Sun-Times Media Wire


# This Just In...

- 364 COVID-related lawsuits have been filed
- Alleging retaliation, wrongful termination, discrimination, workplace safety and wage/hour
- California, Florida, New Jersey & New York leading the way





# COVID-19 Resource Center on TriNet Platform



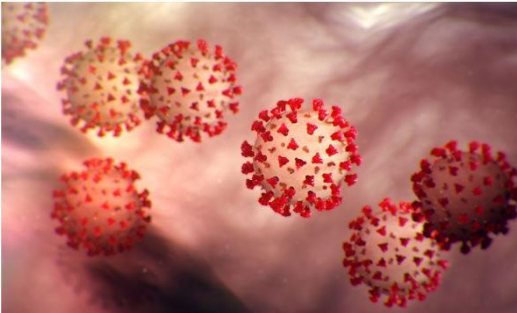
View Content for Admin/Managers


Dashboard > COVID-19 Resources

## COVID-19 Resources

As we navigate COVID-19 together, we understand it can be difficult to find the critical information you need to keep informed and up to date on the latest developments. This site was built just for you—our valued customer—to make it easy to find the resources you need. We've engaged our trusted partners and selected trustworthy resources to bring you the most current information on a wide range of topics. The site will be updated frequently, so check back often.

If you have questions, please reach out. We are here to help and are committed to providing the support you need to meet today's challenges.







Dashboard > COVID-19 Resources > State and Local Compliance Updates

## State and Local Compliance Updates

The latest COVID-19 state and local compliance updates, including summaries of new regulations and suggested guidance on unemployment, paid sick leave and stay at home orders.





COVID-19 Resource Center



The spread of the novel coronavirus (COVID-19) across the globe creates extraordinary challenges and concerns in the workplace. Employers are faced with a deluge of difficult questions and operational challenges that are changing at a rapid pace.

ComplianceHR's COVID-19 Resource Center helps you navigate through these new and pressing challenges. These resources are **updated regularly**. Check back often for additional content and functionality. The two parts of the **COVID-19 Resource Center** are:

 **Frequently Asked Questions**  
The most common questions about staying compliant with COVID-19 challenges

 **COVID-19 Compliance References**  
More thorough documentation and a compiled list of useful links

If there are any other compliance problems you're facing or additional COVID-19 topics you'd like covered, please let us know. Our best products come from listening to our users. We would love to hear your [feedback](#).

# Correction Through the PAID Program

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# Polling Question

**What is your level of interest in the PAID program to correct an FLSA issue?**

- No interest
- Some interest
- Great interest
- I don't know what PAID is

# What is PAID?

**Wage and Hour Division**ABOUT US


[TOPICS](#) [FOR WORKERS](#) [FOR EMPLOYERS](#) [RESOURCES](#) [INTERPRETIVE GUIDANCE](#) [STATE LAWS](#) [NEWS](#)

WHD > PAID

## PAID

The Wage and Hour Division's (WHD) new nationwide 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 PAID, 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 3<sup>rd</sup> 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



Reduced  
Liability



Waiver of  
Claims



No Plaintiffs'  
Attorneys' Fees

# Employer Eligibility & Obligations

## Not Available to Employers:

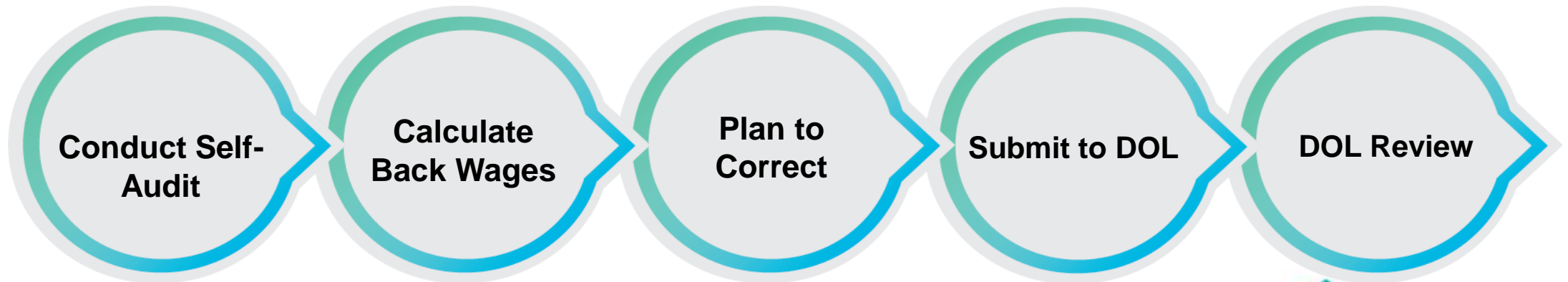
- With prior or existing DOL or state agency investigations on same issues
- When private litigation has already been threatened or filed
- With a history of violations in DOL's enforcement database

## Employer's Obligations:

- Review compliance assistance materials on the DOL website
- Conduct a self-audit
- Correct issues going forward
- Pay 100% of back wages due for last 2 years

# How Does PAID Work?

- Conduct a self-audit to identify non-compliant practices
- Calculate back wages
- Create a plan to correct the compliance issues going forward
- Prepare and submit materials to DOL
- DOL will conduct due diligence of back wage calculations and compliance plan



# 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?

Read what some recent participants in  
the PAID program are saying:



The PAID program worked exactly as designed. A conscientious employer identified a mistake, wanted to correct it, and had a mechanism to do the right thing without being penalized for its honesty and without years of expensive litigation and exposure to pay legal fees. We were able to work constructively with WHD to solve a problem and to do it in a collaborative manner. The result was exactly as intended: the mistake was fixed, the impacted employees were made whole, and the matter was resolved without unnecessary litigation and acrimony.

*Mr. Haller, Employer Representative, Manufacturing Industry*

**VISIT:**

[www.dol.gov/agencies/whd/paid](http://www.dol.gov/agencies/whd/paid)

# Using Navigator OT to Self Audit

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# Navigator OT – *The Smart Solution*

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# Questionnaire

## Business Operations

- ☐ Conducting business or sales research
- ☒ Creating, modifying, interpreting or approving departures from company policies, procedures or operating practices
- ☐ Managing projects or major assignments related to the operations of the business (e.g., projects in areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, legal and regulatory compliance, and similar areas impacting how the business is operated)
- ☐ Performing work that strictly follows established
- ☐ Determining techniques and processes used to
- ☐ Determining type of materials, supplies, machin
- ☐ Conducting ordinary inspections, examinations described in manuals, check lists or similar sour company policies)
- ☒ Planning or controlling a budget
- ☐ Planning short-term or long-term business obje
- ☐ Providing expert advice to the company or the c insurance, law, legal compliance, engineering, a media relations or government relations
- ☐ Providing for the safety and security of employe
- ☐ Purchasing, buying, procuring or managing inve
- ☐ None of the Above

## Selected Job Duties

Below is a list of all the duties you selected. If this list is complete, please answer the following questions about each duty. If you need to remove a job duty, you can select "None" from first drop down.


The total time spent should not exceed 100%, even if multiple duties are handled **concurrently**. The total time spent **can** be less than 100%.

You are currently allocating: 95%


Selected Job Duty	Approx Time Spent ⓘ	Importance ⓘ	Authority ⓘ
Planning or controlling a budget	15% ▼	Important ▼	Sometimes Followed ▼
Managing performance of employees, including but not limited to coaching and conducting performance reviews, ensuring compliance with company policies and procedures, and evaluating the work of employees	10% ▼	Important ▼	Almost Always Followed ▼
Planning or directing the work of employees	35% ▼	Critical ▼	Always Followed ▼
Making Sales	35% ▼	Very Important ▼	Always Followed ▼

# Risk Report


Overtime Exempt Risk Report for Mark McHenry

EMPLOYEE

Mark McHenry  
Retail Operations

MANAGER

Robert Smith  
HR

WORK JURISDICTION

Illinois

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

▶ Understanding Your Risk


▶ Summary of Law

▶ Profession-Specific Exemptions

▶ Transcript of Your Questions and Answers

▶ Disclaimer

PRINT THIS REPORT:

 Printable Report

Riskiest Factors

Mark McHenry's risk may be lowered as follows:

Exemptions	Risk Factor	Steps to Lower Risk
Executive	Employees Supervised	<p>To qualify for the executive exemption, an employee must supervise the work of two or more full-time employees or their equivalent on a regular basis. Under the FLSA and state wage-hour laws, full-time generally means compensable work. Thus, this requirement limits the exemption to employees who supervise at least one full-time employee each week by other employees. This could be 2 employees working 40 hours per week, or 4 employees working 20 hours each week. Also, the employee must supervise others on a regular basis, which means on an occasional basis. For example, a relief supervisor is likely not an exempt employee if he only occasionally has responsibility for directing the work of other employees.</p> <p>Even though Mark McHenry supervises 3.00 employees, Abc Inc. may be able to lower its risk by ensuring that Mark McHenry supervises well above 80 hours of work each week and by ensuring that Mark McHenry supervises employees on more than one occasional basis.</p>

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▶ Transcript of Your Questions and Answers

▶ Disclaimer

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How to Qualify

Mark McHenry has failed to meet the most basic qualifications required in order to be classified as exempt under the Computer, Creative, and Learned Professional 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 intellectual instruction. For example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.</p> <p>Mark McHenry doesn't clearly qualify for the Learned Professional exemption because Mark McHenry does not have at least a Bachelor's Degree. However, if you feel that Mark McHenry may nonetheless qualify for the learned professional exemption because they have substantially the same knowledge level and performs substantially the same work as the degreed employees also in the same job, it may still be possible for Mark McHenry to still qualify under this exemption. However, based solely on the information provided, Mark McHenry is not clearly qualified for this exemption.</p>

Transcript of Questions & Answers

Engagement Details

Employee First Name	Mark
Employee Last Name	McHenry
Job Title	Assistant Manager
Job Code	Assistant Manager
Department	Retail Operations
Work Jurisdiction	Illinois
Manager First Name	Robert
Manager Last Name	Smith
Manager Department	HR

Compensation

How Mark McHenry paid?	On a salary
What is Mark McHenry's annual salary?	\$70,000.00
Has the salary ever been reduced for reasons other than standard payroll deductions for taxes, liens, and employee benefits?	No

Applicable Exemptions

Does Mark McHenry perform work in a computer, software or information technology field?	No
Does Mark McHenry perform work in any of the following artistic or creative fields?	Not Applicable
How many employees does Mark McHenry supervise?	3.00
What is the highest level of education achieved by Mark McHenry?	Associates Degree
Does Mark McHenry sell Abc Inc.'s products or services?	Yes

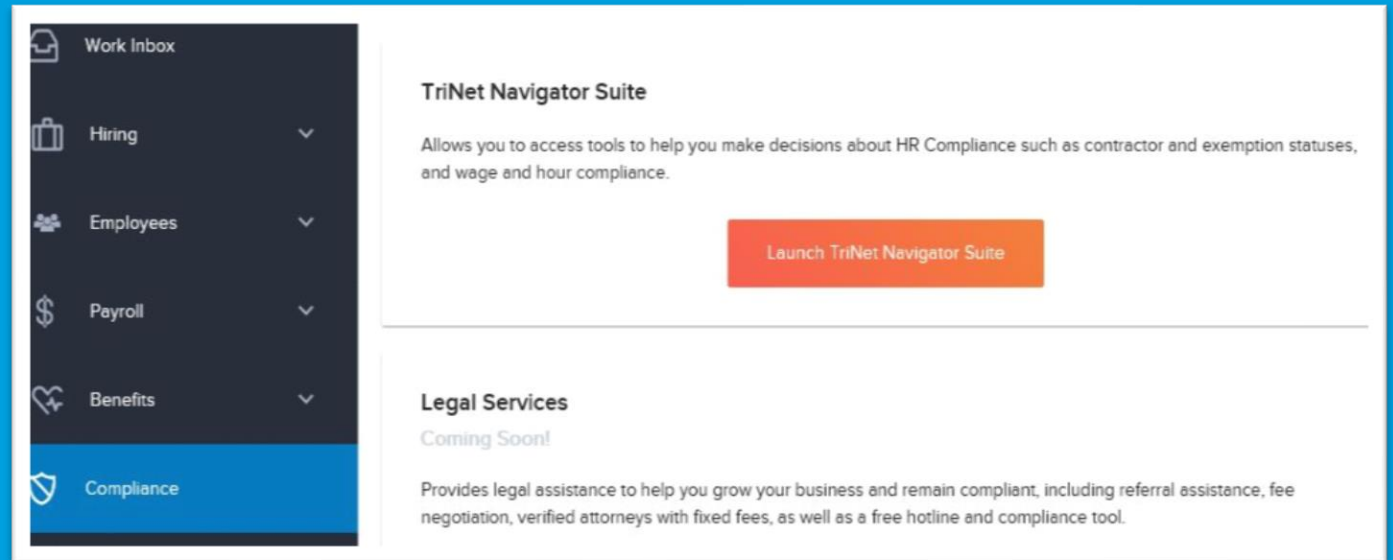
Duty Tests

Job Duty	Time Spent	Importance	Authority
Creating, modifying, interpreting or approving departures from company policies, procedures or operating practices	5%	Important	Almost Always Followed
Planning or controlling a budget	10%	Important	Sometimes Followed

35

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# Surviving a DOL Investigation

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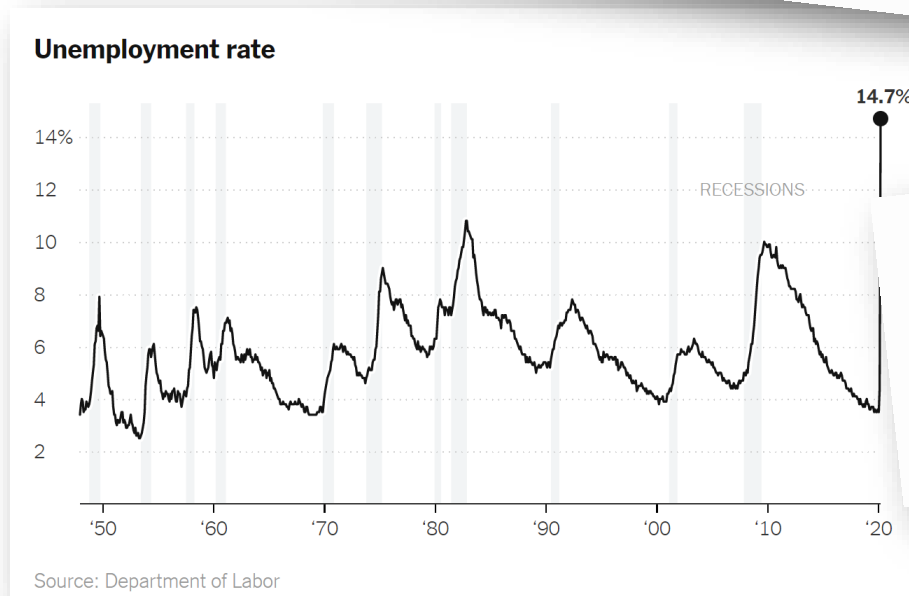
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# Why Will COVID-19 Investigations/Litigation Start?

- Targeted initiatives
- Employee complaint
  - Lots of unhappy/terminated employees
- Competitors
- Unions

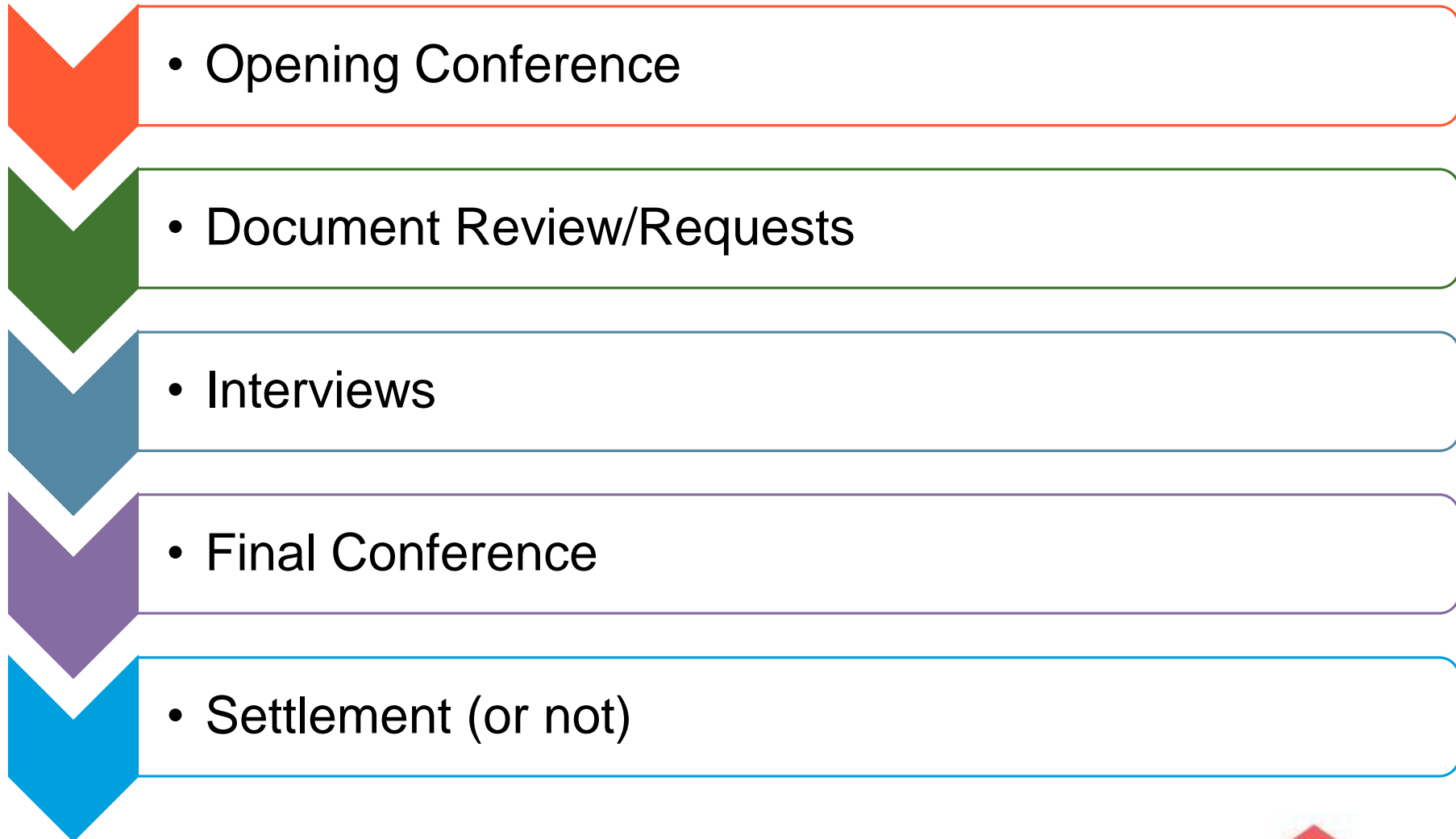
**Record 20.5 million American jobs lost in April.  
Unemployment rate soars to 14.7%**



**'Rolling Shock' as Job Losses Mount Even  
With Reopenings**

Nearly three million new unemployment claims brought the two-month total to more than 36 million, even with some still frustrated in seeking benefits.

# The Life of an Investigation



# Investigators Will Want To:

- Make sure you are covered by the FLSA
- Look at your time and payroll records to ensure you are paying MW and properly calculating OT
- Review business records to ensure you are properly classifying workers
- Interview management and employees about work and pay practices to confirm what business and payroll records show
- Review your FMLA policy
- Ensure no child labor violations





# The Opening Conference

## Investigator

- Shows credentials
- Explains process
- Requests interviews and documents



## Employer

- FLSA compliance efforts
- Who should attend?
- Should you disclose violations?

# Document Requests



- Financials
- List of employees with email address, telephone number, and exempt status
- Payroll records
- Time records
- Child labor records
- FMLA policies
- IC agreements
- Government contracts (SCA/DBA)

# Interviews

- Who?
- Where Conducted?
- Interview Questions?
  - What are your job duties?
  - How are you paid (hourly, salary, commissions, other)?
  - What is your normal work schedule? More than 40 hours a week?
  - Are you paid overtime? How (1.5, 0.5, ST)? How?
  - Are there any activities before you clock in or after you clock out?
  - Are you paid during lunch? Do you work during lunch?
  - Do you keep a personal record of hours?



# Can I Attend the Interviews?

- Employee has the right to a representative, but must be voluntary
- Company representatives may not be present during interviews of non-exempt employees
- More and more frequently, investigators also try to exclude company reps from interviews of exempt employees



# What Can I Tell Employees?

- Have a right to participate, but it's voluntary
- Answer honestly
- We will not retaliate
- Carefully review the witness statement before signing, and ask for a copy at the beginning of the interview

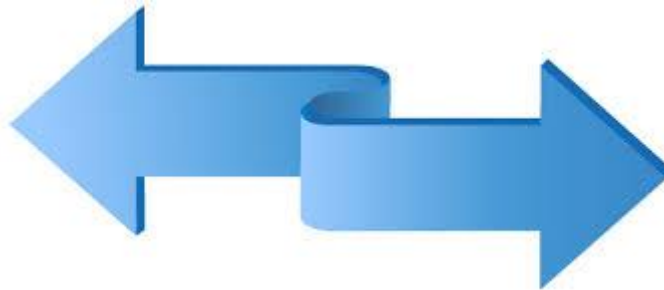




# The Final Conference

## The Investigator:

- Presents findings and requests back wages
- Asks company to agree to future compliance
- May ask for liquidated damages
- Will not make a decision on civil penalties



## Company Options:

- A. Agree to comply/pay
- B. Request time to respond (position statement)
- C. Request a second-level review

# Settlement

DOL may compromise on:

- Hours worked (when no time records)
- Exemption status
- 2 v. 3 years of back wages
- Liquidated damages
- Civil penalties



# What Happens if the Investigation is Not Resolved with the Wage & Hour Division?



- Informal appeal process
  - Request meeting with District Director
  - Appeal to Regional and/or National Office
- If employer refuses to pay, DOL will decide whether to:
  - Refer to the Solicitor's Office
  - Issue 16(b) letters to employees



# Key Takeaways

- Employees who took pay cuts or who were laid off are more likely to file wage-hour complaints, especially after unemployment payments end
- Employers may have lurking wage-hour compliance issues as a result of COVID19 work changes, which ComplianceHR can help you uncover
- Employers should correct violations now through the PAID program, rather than waiting for a DOL investigation or private litigation



Questions?

Thank you!

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