

ComplianceHR Webinar Series: Spring Into Compliance

Session 2 - Understanding FLSA Overtime: Who Gets it?



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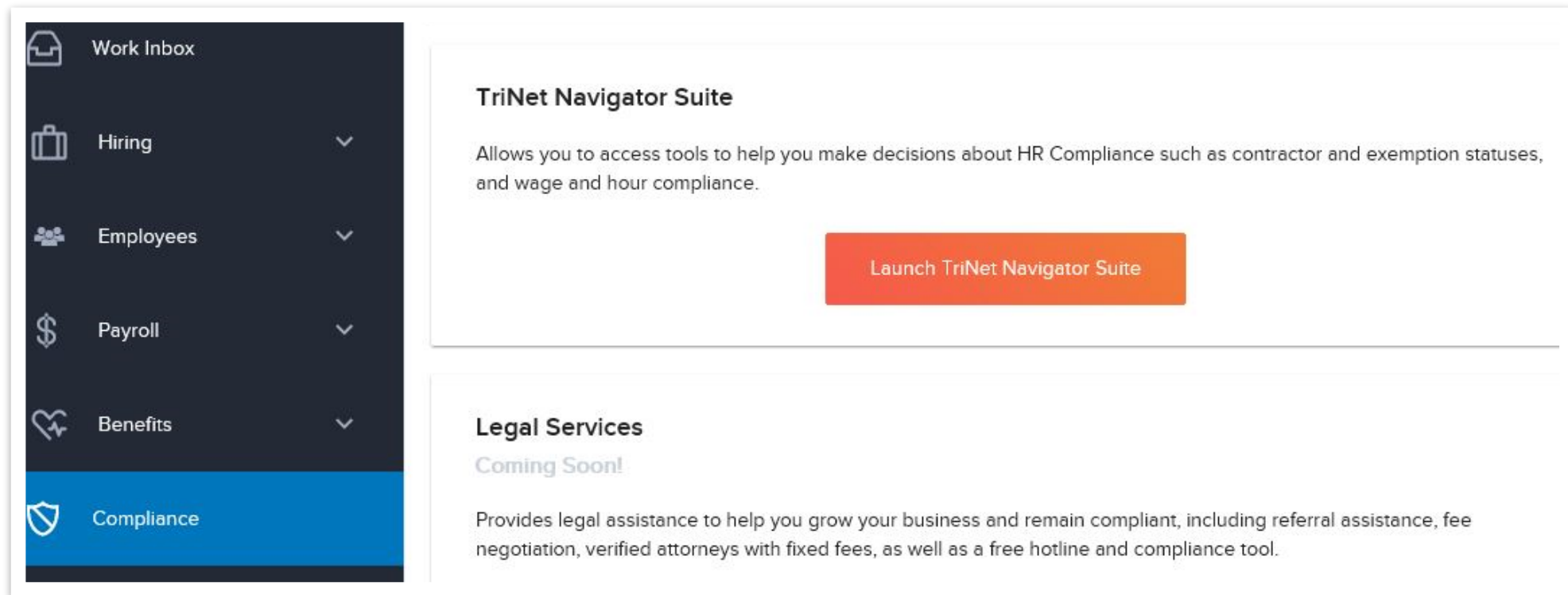
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- Former Littler Shareholder
- Former General Counsel / HR Chief of Global Security Organization

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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

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

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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



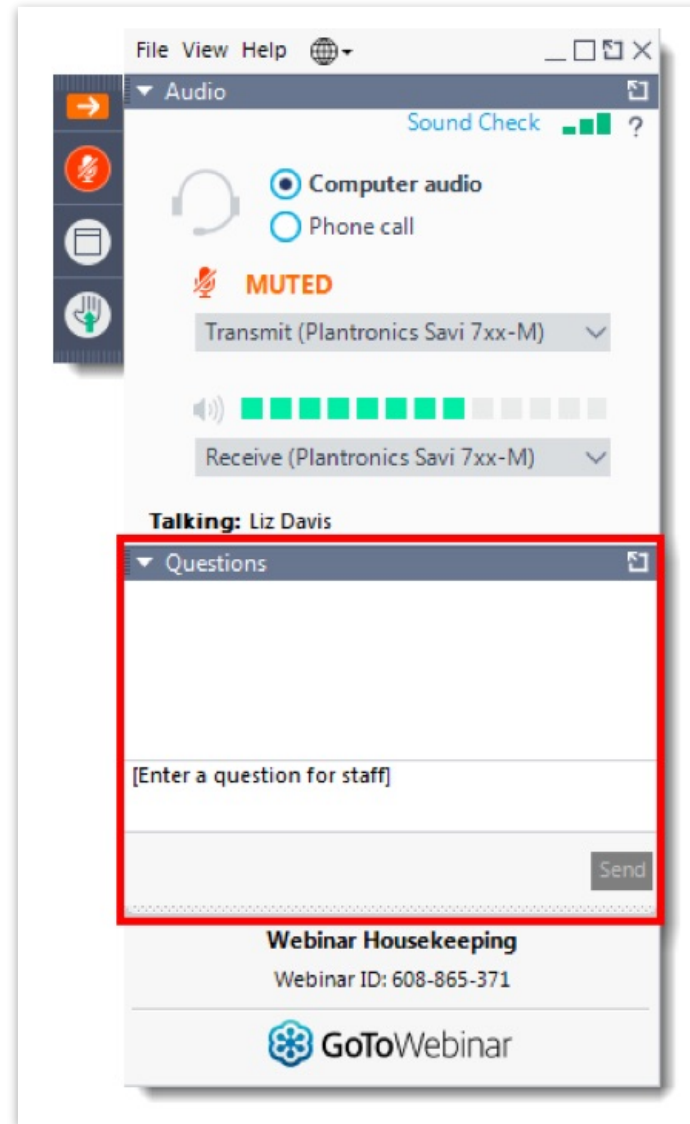
Onboarding Document Production

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

- I. FLSA Basics
- II. Exempt/Non Exempt: Common Mistakes
- III. Let's review the Exemptions!!
- IV. Navigator OT can help assess your risk and be prepared to *Spring into Compliance*
- V. Questions and Answers

The Fair Labor Standards Act



- The FLSA requires employers to pay non-exempt employees:
 - ✓ At least the minimum wage for all hours worked
 - ✓ Overtime for all hours worked over 40 in a week at 1.5 times the employee's regular rate of pay
- Employers also must maintain accurate and complete time and payroll records

Compliance is Complicated!

- The FLSA is highly technical – this stuff is complicated!
- DOL estimates that 70% of employers are not in full compliance
- To comply, you need to understand:
 - Who is exempt and non exempt?
 - When are employees working?
 - How to calculate overtime pay rate?



Common Wage-Hour Claims



- Not paying the minimum wage
 - “I had to pay for my own uniforms.”
- Not paying all hours worked
 - “I had to work through my lunch but didn’t get paid for it.”
 - “My manager told me to clock out after I had worked 40 hours.”
- Misclassification
 - “I worked the phones 50 hours every week selling our products and was never paid overtime.”

How do you define exempt vs. nonexempt employees?

- While most employees are eligible for overtime pay, some employees are “exempt” from the FLSA overtime requirements
- The most common exemptions are for “white collar” workers – executive, administrative, professional, outside sales, and computer employees

To be considered exempt, employees must generally satisfy three tests:

■ Salary-level test

- Currently, employers must pay employees at least \$455 per week (the minimum salary requirement) to qualify for the executive, administrative, and professional employee exemptions.

■ Salary-basis Test

- With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.

■ Duties Test

- To qualify for an executive, administrative or professional exemption an employee must meet specific duties tests.



Cory Glen Walker

Littler Shareholder

Phoenix, AZ

cgwalker@littler.com

- 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

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

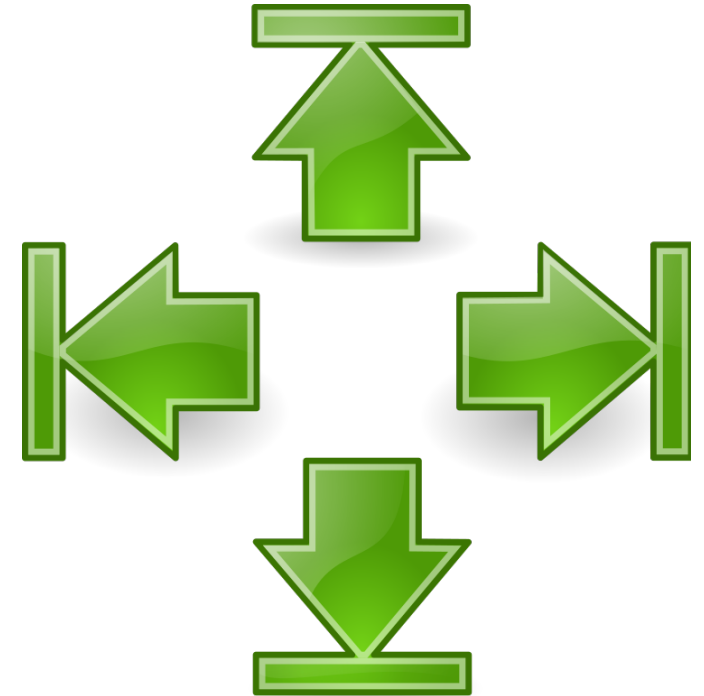
Discretion and Independent Judgment

- 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



The Reclassification Decision: Salary

Increase Salary or Reclassify?

- Pull salary and incentive pay data for all employees earning below \$35,309
- Calculate the cost of increasing salary to the minimum \$35,309
- Compare with the cost of paying overtime: $(\text{weekly salary} / 40) * 1.5 * \text{expected OT hours}$



There is an easier way....

The Manual Process

- Review HRIS data
- Review documents
- Conduct interviews
- Research and apply the law

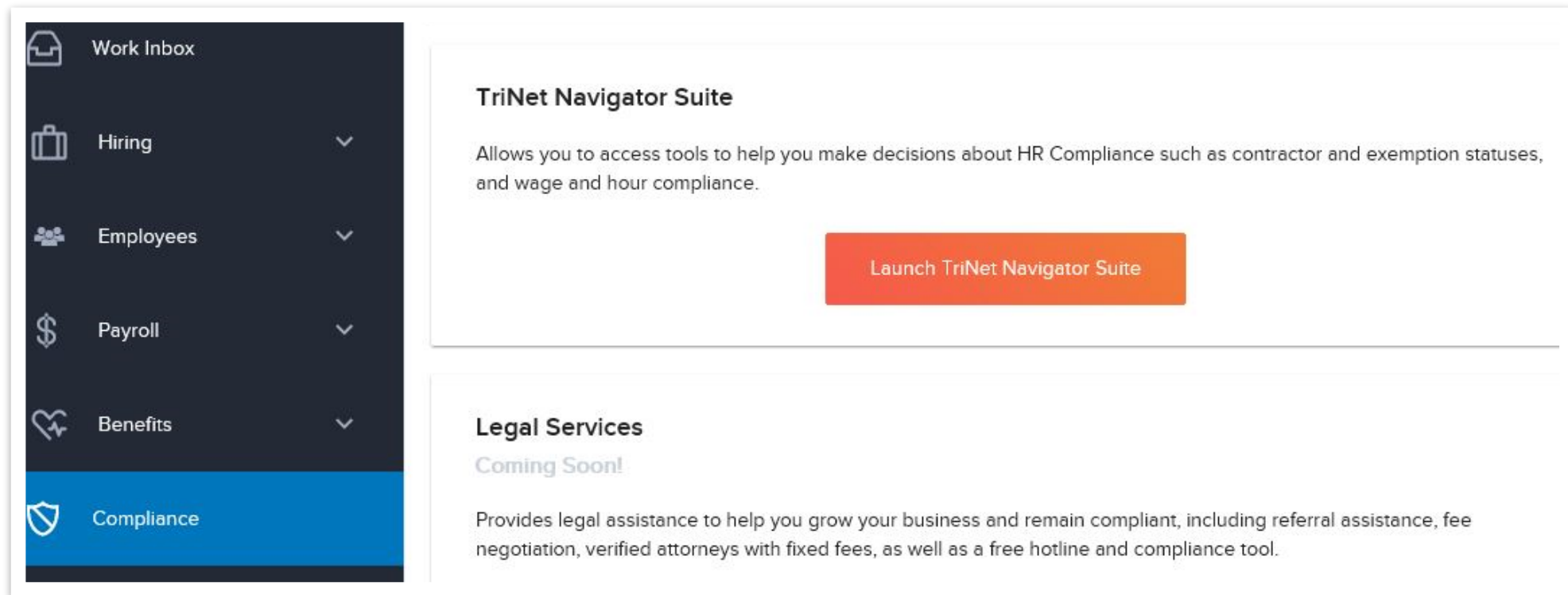
Or...

- Use ComplianceHR's artificial intelligence app, Navigator OT
- Complete a questionnaire
- Get an answer

Compliance **HR**

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)



Giving You the Tools You Need!

- Online exemption analysis solution
- Expert level guidance on exemption decisions
- Assessment in as little as 15 minutes
- Tool applies federal and state exemptions tests, and over 2400 reported court decisions and DOL opinion letters
- Provides suggestions to lower risk of misclassification

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Review Set Up

Navigator OT

Initialize Your Review

Please note that Navigator OT has been updated with 2019 Rates.

Review Details

Please enter the following information. An * indicates a required field. All other fields are optional.

Brief name to describe and identify this [review](#)?:*

Assistant Manager - Illinois

How would you like to enter the evaluation data?:*

☒ Manual Entry ☐ Prefilled CSV File

Would you like to evaluate employees or positions?:*

☒ Employees ☐ Positions

Who will complete the evaluation(s)?:*

I will ▼

Please fill out the fields below. Click the ➕ icon to add another entry

Employee First Name*	Employee Last Name*	Employee Email	Work State*	Employee ID	Employee Dept
<div><div>➕</div><div>✖</div><div>Mark</div></div>	McHenry	MMcHenry@abccompany.com	Illinois ▼	12345	Retail Operations

Navigator OT Questionnaire

Navigator OT

Abc Inc.: Mark McHenry

Work State

Where does Mark McHenry [work](#) ⓘ?

Illinois ▼

Compensation Details

How is Mark McHenry 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 Mark McHenry's annual salary?

\$

Has Mark McHenry's salary ever been reduced for reasons other than standard payroll deductions for taxes, liens, and employee benefits?
[More information](#) ⓘ

☐ Yes ☒ No

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Navigator OT Questionnaire

How many [employees](#) ⁱ does Mark McHenry supervise?

If no employees, enter 0

3

Does Mark McHenry perform work in a computer, software or information technology field?

☐ Yes ☒ No

Does Mark McHenry [sell](#) ⁱ Abc Inc.'s products or services?

☒ Yes ☐ No

Exemption Analysis

What is the highest level of education Mark McHenry has achieved?

Associates Degree ▼

Does Mark McHenry 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

Navigator OT 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 manuals, guidelines, policies or procedures
- ☐ Determining techniques and processes used to perform work or to carry out business programs or initiatives
- ☐ Determining type of materials, supplies, machinery, equipment or tools to be used to perform the work
- ☐ Conducting ordinary inspections, examinations or grading within closely prescribed limits to determine adherence to established standards described in manuals, check lists or similar sources (NOT including supervisors reviewing work of employees or ensuring adherence to company policies)
- ☒ Planning or controlling a budget
- ☐ Planning short-term or long-term business objectives
- ☐ Providing expert advice to the company or the company's customers in areas such as accounting, finance, tax, actuarial computation, benefits, insurance, law, legal compliance, engineering, architecture, the sciences (physical, chemical, biological), health and safety, public relations, media relations or government relations
- ☐ Providing for the safety and security of employees or property
- ☐ Purchasing, buying, procuring or managing inventory, materials or supplies
- ☐ None of the Above

Navigator OT Questionnaire

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 ▼

Navigator OT Questionnaire

Exemption Analysis

Select the statement that best describes Mark McHenry's management role:

Mark McHenry manages a department, subdivision or other functional group with permanent status and continuing functions ▼

Select the statement that best describes Mark McHenry's supervision of other employees:

Mark McHenry regularly supervises other employees ▼

Select the statement that best describes Mark McHenry's role in personnel management:

Mark McHenry makes recommendations on hiring, promoting, disciplining or firing employees ▼



How are Mark McHenry's recommendations on hiring, promotion, discipline, and firing employees followed?

Almost always followed ▼

How much time does Mark McHenry spend in a typical week performing the same work as direct reports or other non-managerial employees?

31 - 40% ▼

Navigator OT Questionnaire

Exemption Analysis

What percentage of time during a typical week does Mark McHenry spend on exempt work?

31-40% ▼

What percentage of time during a typical week does Mark McHenry spend on exempt work?

11-20% ▼

Does Mark McHenry perform sales or sales-related work at any of the following locations?

Check all that apply

- ☒ Abc Inc. office(s)
- ☐ Personal home
- ☐ Customer place of business
- ☐ Customer home
- ☐ Other locations away from a fixed home or Abc Inc. office

Exemption Analysis

Is Mark McHenry currently in training for this position (e.g., manager-in-training, trainee engineer or an apprentice)?

☐ Yes ☒ No

Select the statement that best describes how closely Mark McHenry is supervised:

Mark McHenry is not closely supervised (e.g., Mark McHenry provides updates to manager on a regular basis, but manager does not often direct or review work) ▼

Does Mark McHenry use any manuals, guidelines, or other established standard procedures (SOPs) in the performance of this job? [More information](#) ⓘ

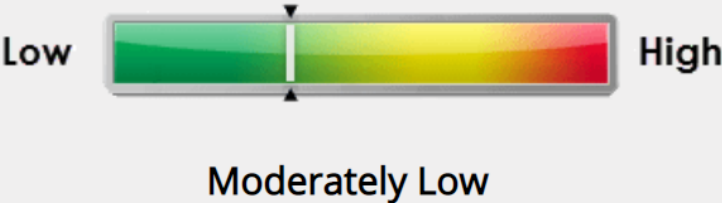
☐ Yes ☒ No

To what degree does Mark McHenry use any templates, checklists, computer assisted design or other computer applications in the performance of job duties?

Mark McHenry does not use any tools ▼

Navigator OT Results

What is the risk of classifying Mark McHenry as an exempt employee?



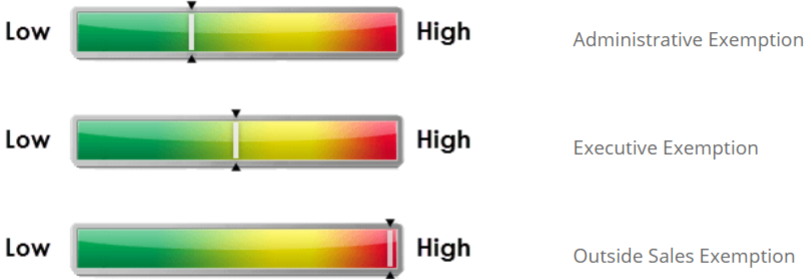
Mark McHenry is likely to meet the requirements for the following exemption: Administrative.

Mark McHenry does not clearly meet the requirements for the following exemption: Executive. However, in the "Understanding Your Risk" section below, there is more information about how to reduce the risk of classifying the employee based on this exemption.

Mark McHenry is extremely unlikely to meet the requirements for the following exemption: Outside Sales.

Mark McHenry does not qualify for the following exemptions: Computer, Creative Professional and Learned Professional.


Individual Exemption Risks




Note: Mark McHenry does not qualify for the Computer, Creative Professional and Learned Professional exemptions.

On Screen Summary


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

Additional Report Resources

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 40 hours of compensable work. Thus, this requirement limits the exemption to employees who supervise at least 80 hours of work each week by other employees. This could be 2 employees working 40 hours per week, or 4 employees each working 20 hours each week. Also, the employee must supervise others on a regular basis, which means more than occasionally. For example, a relief supervisor is likely not an exempt employee if he only occasionally has some 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 those employees on more than one occasional basis.</p>

Failure to Qualify

Mark McHenry has failed to meet the most basic qualifications required in order to be classified as exempt under the Computer, Creative Professional 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

Why Navigator OT Now?

- The new law is coming and also brings a unique opportunity to get your house in order
- Through traditional methods, exempt audits are costly & time consuming – can take up to 6 months
- Diagnose your vulnerabilities now in minutes not weeks or months, for free

Questions?



Thank you!

Save the dates for the final session:

- Thursday, May 16 – Wage and Hour Mistakes: How to Recognize and Avoid Common Landmines

