

Overtime: What Every Employer Needs to Know Today

April 13, 2023

Littler[®]

Compliance **HR**

Today's Webinar Presenter

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Who We Are



- Artificial Intelligence
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



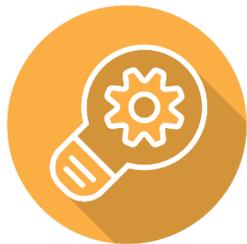
Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



Navigator Onboarding

Assemble and produce legally compliant onboarding documents



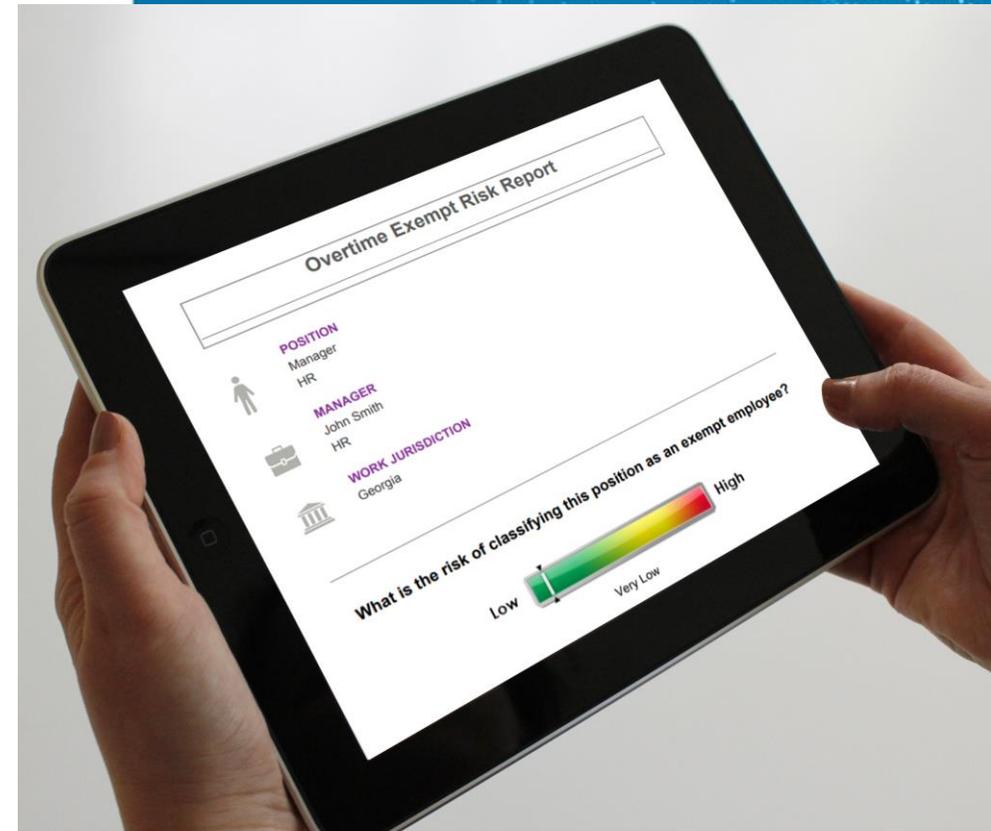
Navigator Leave

Reduce the risk and administrative burden of leave management



Navigator Overtime

- Determines employee as exempt or non exempt
- Applies all applicable federal and state tests
- Draws from a proprietary engine of 2,500+ reported court decisions and DOL opinion letters
- Delivers reasoned suggestions on how to lower the risk of misclassification
- Provides the risk result, a summary of relevant federal and state exemption standards, and a transcript of answers



State, Compensation, Exemption Type

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Work State

Where do employees in this position work?

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?

\$

Has the salary for this position ever been reduced for reasons other than standard payroll deductions for taxes, liens, and

- Yes No

< Back

Next >

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Exemption Analysis

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

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

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

- Yes No

Do employees in this position sell ComplianceHR Demo's products or services?

- Yes No

< Back

Next >

Job Duties

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Job Duties Selection

The next 3 pages list job duties. Please select the job duties that are performed by employees. Focus on the primary and most important job duties, and do not attempt to select every duty. Click [here](#) to learn more about what else to consider as you are selecting job duties.

Business Operations

- Conducting business or sales research
- Creating or modifying company policies or approving departures from company policies
- Managing significant projects or major assignments related to business operations
- Following established manuals, guidelines, policies or procedures
- Determining techniques and processes that other employees will use to perform work
- Selecting materials or equipment that other employees will use to perform the work
- Conducting ordinary inspections or grading within closely prescribed limits
- Planning or controlling a budget
- Planning or evaluating business objectives
- Providing expert advice to the company or its customers
- Managing or directing the safety or security of employees or property
- Purchasing, buying, procuring or managing inventory, materials, supplies or equipment
- None of the Above

Management of Employees

- Managing the performance of employees

Description

Select this duty for employees who have final authority over or provide recommendations to monitor employee compliance with company policies.

Examples

- Coaching employees and conducting performance reviews
- Administering and enforcing department policy
- Working with associates to implement a sales strategy
- Having authority to issue verbal warnings, write-ups, or removal to subordinates
- Managing the day-to-day functioning of a worksite

- Screening job applicants for minimum qualifications

Job Duties Selection

Note: You've selected 3 job duties from the previous page. As you select

Sales and Customer Relations

- Making sales
- Managing client or customer relationships with authority on significant issues
- Handling routine customer service complaints without authority to resolve
- Marketing or promoting the company's products or services
- Preparing bid materials or responses to requests for proposals
- Setting or changing prices
- None of the Above

Representing the Company

- Recommending selection or termination of contractors or vendors
- Negotiating and entering into contracts
- Managing compliance with contract terms with authority to resolve disputes
- Handling routine issues related to existing contracts (without authority to resolve)
- Managing the work or performance of non-employees
- Monitoring or implementing legal compliance measures
- Negotiating settlements or resolving disputes with contractors or vendors
- Representing the company before the press, public or government
- None of the Above

< Back

Next >

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Job Duties Selection

Note: You've selected 3 job duties from the previous pages. As you select job duties, consider focusing on the primary and most important job duties, rather than attempting to select every

Computer Systems and Other Equipment

- Applying computer systems analysis techniques and procedures
- Designing or modifying computer system or programs
- Troubleshooting complex or elevated computer issues
- Troubleshooting basic or routine computer issues
- Performing work dependent upon, or facilitated by, the use of computers
- Using established procedures to operate, manufacture, maintain or repair equipment
- Managing the proper functioning of equipment, machinery or systems
- None of the Above

Other Job Duties

- Analyzing or interpreting information to make recommendations on business operations

Description

Select this duty only if the employee makes recommendations on business operations after analyzing or interpreting the information. Do not choose this duty if the employee does not

Definitions

- "Business operations" include areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and compliance, and similar areas impacting how the business is operated.

Examples

- Analyzing financial numbers (such as costs, revenue, taxes, investments, budget, sales, etc.) in order to provide recommendations on financial reporting, performance or improvement

Time, Importance, Authority

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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.

To see the detailed descriptions of these duties, click [here](#).

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
Purchasing, buying, procuring or managing inventory, materials, supplies or equipment	20%	Important	Almost Always Followed
Planning or controlling a budget	20%	Important	Sometimes Followed
Managing the performance of employees	55%	Marginally Important	Never Followed

Note: If you click the Back button you will need to re-enter the information on this screen. Also, if you have selected many job duties, you may need to scroll through the table above.

< Back

Next >

Immediate Expert Guidance

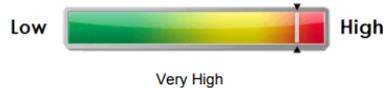
Overtime Exempt Risk Report

POSITION
 Manager
 HR

MANAGER
 John Smith
 HR

WORK JURISDICTION
 California

What is the risk of classifying this position as an exempt employee?



Employees in this position are very unlikely to meet the requirements for the following exemptions: Administrative and Executive.

Employees in this position do not qualify for the following exemptions: Computer, Creative Professional, Learned Professional and Outside Sales.

Understanding Your Risk

Riskiest Factors

This position's risk may be lowered as follows:

Exemptions	Risk Factor	Steps to Lower Risk
Executive	Employees Supervised	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 hour laws, full-time generally means 40 hours of work. Thus, this requirement limits the exemption to who supervise at least 80 hours of work each week employees. This could be 2 employees working 40 week, or 4 employees each working 20 hours each employee must supervise others on a regular basis more than occasionally. For example, a relief super not an exempt employee if he only occasionally has responsibility for directing the work of other employ Even though this position supervises 3.00 employee ComplianceHR Demo may be able to lower its risk that employees in this position supervise well above work each week and by ensuring that employees in supervise those employees on more than one occa
Executive	Hire/Fire Authority	To qualify for the executive exemption, an employee (1) have the authority to hire or fire other employees recommendations which are given particular weight firing, advancement, promotion or any other change other employees. Employees in this position do not have authority to fire, and it appears that their recommendations may particularly strong weight. ComplianceHR Demo m consider restructuring Employees in this position's i such that they have direct authority to make these c give their opinions more weight.

Transcript of Questions & Answers

Engagement Details

Job Title	Manager
Department	HR
Work Jurisdiction	California
Manager First Name	John
Manager Last Name	Smith
Manager Email Address	jsmith@abc.com
Manager Department	HR

Compensation

How are employees in this position paid?	On a salary
What is this position'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
Number of ComplianceHR Demo employees:	300.00

Applicable Exemptions

Do employees in this position perform work in a computer, software or information technology field?	No
Do employees in this position perform work in any of the following artistic or creative fields?	Not Applicable
How many employees do employees in this position supervise?	3.00
What is the highest level of education achieved by employees in this position?	Some college, no degree
Do employees in this position sell ComplianceHR Demo's products or services?	No

Duty Tests

Report Management and Rule Updates

155 Evaluations

Name	Review Descri...	Review Status	Owner	Assigned to	Manager	Employee/Position	Phase	Work State	Started	Ended	Report
Eval-1	Demo Review	Completed	Panza, Joe	Panza, Joe	Smith, John	Manager		Florida	2/14/2023	2/14/2023	
Eval-1	Demo Review	In Progress	Panza, Joe	Panza, Joe	Smith, John	Manager	Answer Review	Florida	2/14/2023		
Eval-1	Demo Review	In Progress	Worth, Michael	Worth, Michael	Smith, John	Manager	Answer Review	California	2/13/2023		
Eval-1	Demo Review	In Progress	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Olinzock, Claire	Olinzock, Claire	Smith, John	Manager					
Eval-1	Demo Review	Completed	Olinzock, Claire	Olinzock, Claire	Smith, John	Manager					
Eval-1	Demo Review	In Progress	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Olinzock, Claire	Olinzock, Claire	Smith, John	Manager					
Eval-1	Demo Review	Completed	Olinzock, Claire	Olinzock, Claire	Smith, John	Manager					
Eval-1	Demo Review	In Progress	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Health Industry Example	Completed	Keane, Sharon	Keane, Sharon	Martinez, Dan	Family Physician					
Eval-1	Demo Review	In Progress	Worth, Michael	Worth, Michael	Smith, John	Manager					
Eval-1	Demo Review	Completed	Fowler, Jennifer	Fowler, Jennifer	Smith, John	Manager					
Eval-1	Demo Review	In Progress	Fowler, Jennifer	Fowler, Jennifer	Smith, John	Manager					
Eval-1	Demo Review	In Progress	Fowler, Jennifer	Fowler, Jennifer	Smith, John	Manager					

[View all reviews](#)



[Home](#) / [Navigator OT](#) / [Reviews](#) / [Evaluations](#) / [Eval-1](#)

Review-125: Eval-1 (Very High Risk)

[Copy](#)

Basic Information

Started:	2/9/2023 @ 3:40 PM	Job Title:	Manager	Job Code:	-
Work State:	California	Ended:	2/9/2023 @ 3:45 PM	Outcome:	Very High Risk
Risk Assessment:	-	Job Salary:	70000		

Manager

First Name:	John	Last Name:	Smith
Email:	jsmith@abc.com	Department:	HR

Employee

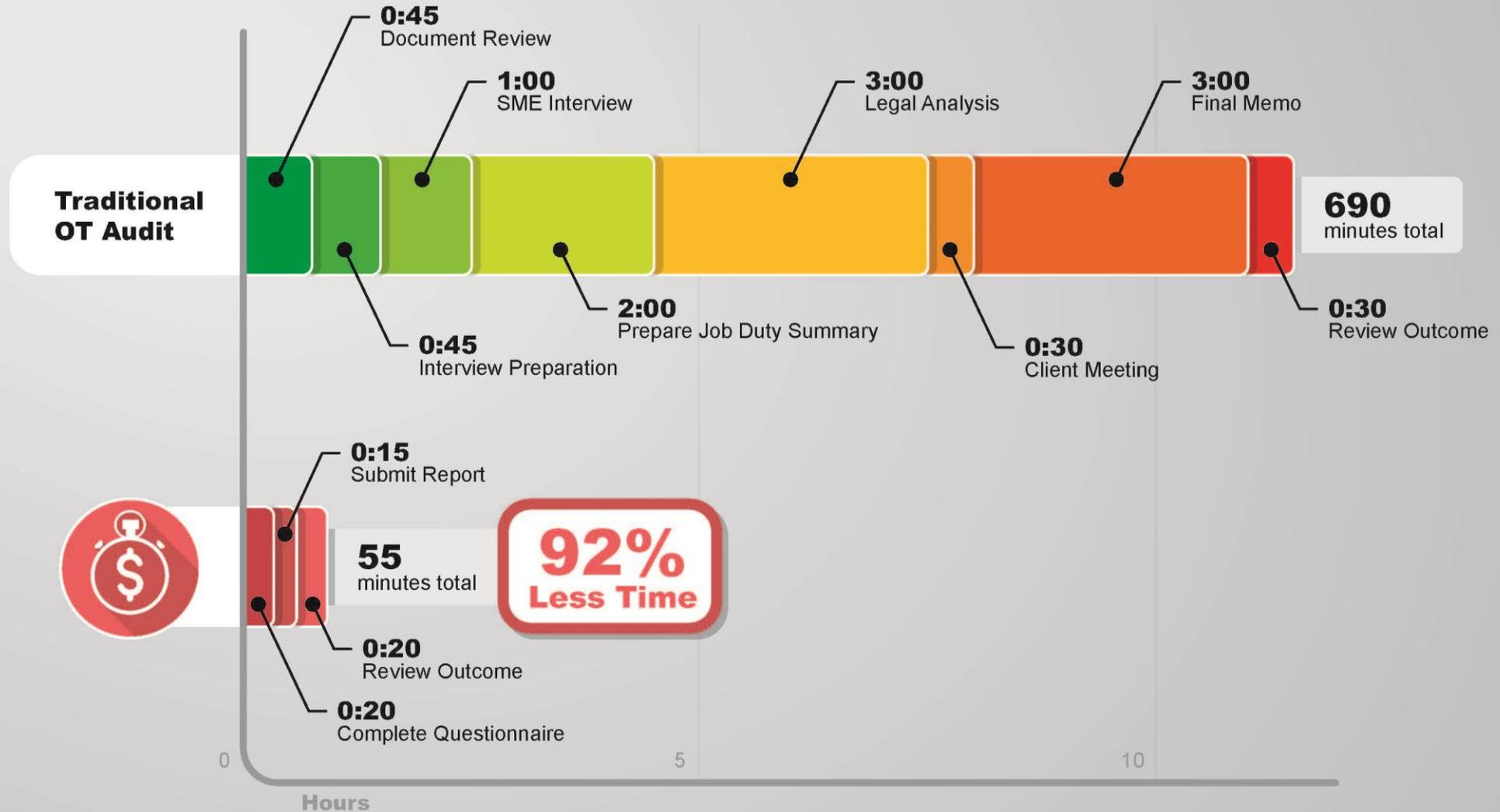
First Name:	-	Last Name:	-	Employee ID:	-
Email:	-	Department:	HR		

Assigned To

First Name:	Michael	Last Name:	Worth
Email:	worth-demo@compliancehr.com	Department:	ComplianceHR Demo

Phases

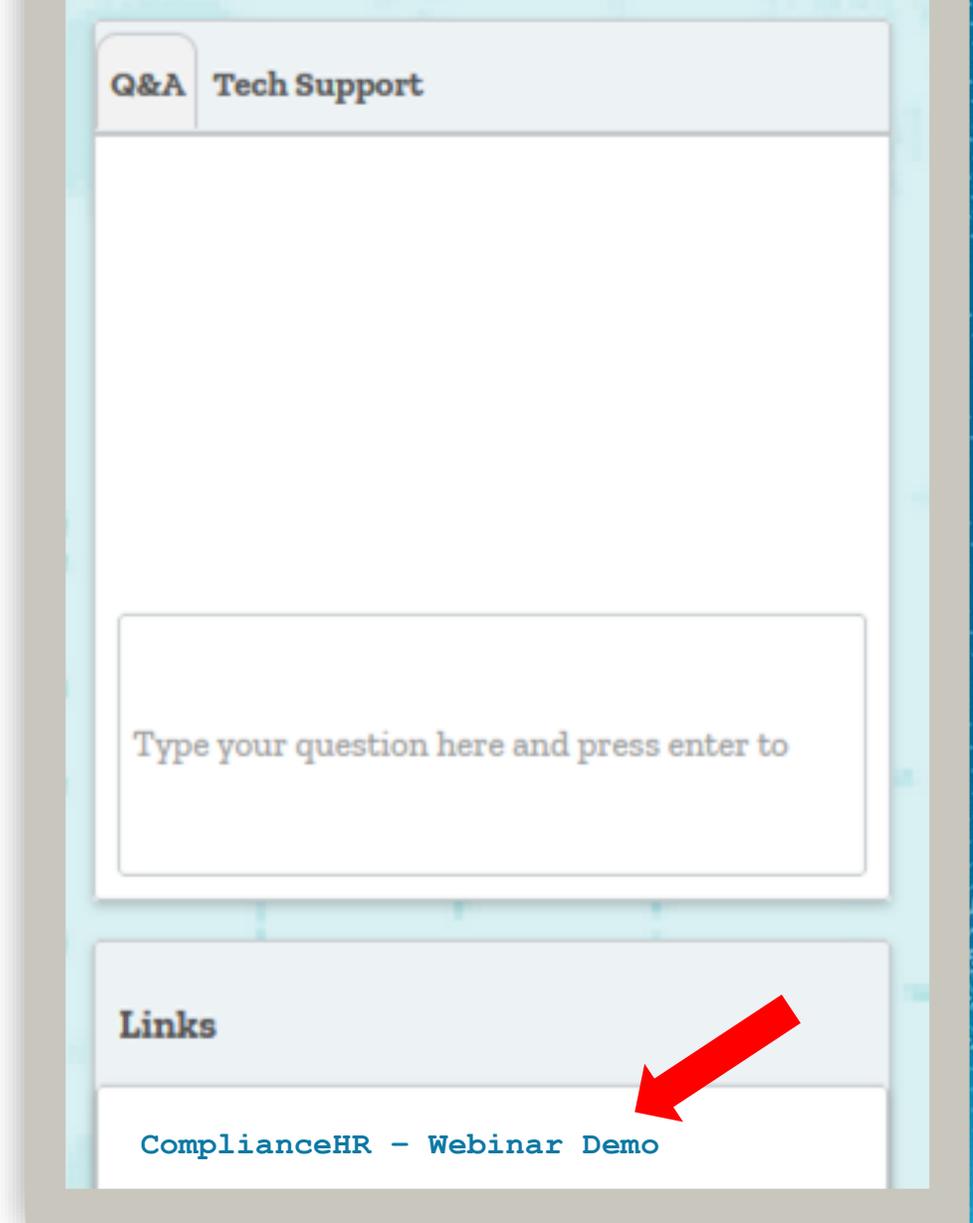
Time Savings with a Navigator OT Evaluation



Register for a Navigator Suite Demonstration and Free Trial

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



What Everyone Needs to Know About Overtime: Today!

David Jordan

Shareholder

Houston, TX

djordan@littler.com



Discrimination Lawsuits– A Comparison

Typical Lawsuit:

- Single Employee
- Back Wages / Maybe Front Pay
- \$10,000 - \$50,000 Typical Exposure Because of Mitigation
- Punitive Damages & Emotional Distress Capped at \$300,000
- Cases Typically Settle for \$5,000 - \$25,000
- Impacts a Few Supervisors and Employees, a Few HR Personnel
- Burden on Employee to Prove
- A Few Depositions
- A 2-3 Day Trial



FLSA Lawsuits – A Comparison

Typical Lawsuit:

- 100s or 1000s of Employees (or Independent Contractors)
- 3 Years Back Wages Plus Equal Amount in Liquidated Damages
- Only Need One Employee to Start Litigation
- Full Exposure Typically Range in 7, 8 and 9 Figures (Think \$545,000,000).
- Cases Typically Settle in Six and Seven Figure Range
- Automatic Attorneys Fees
- Exemption and Record Burdens on Employers

Most Prevalent 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

- **Federal law looks back 3 years...**



Chief Exemptions

- Executive
- Administrative
- Professional
- Highly Compensated “Exception”
- Computer
- Outside Sales
- Motor Carrier Act
- Retail Sales 7(i)
- Burden of Proof on Employer



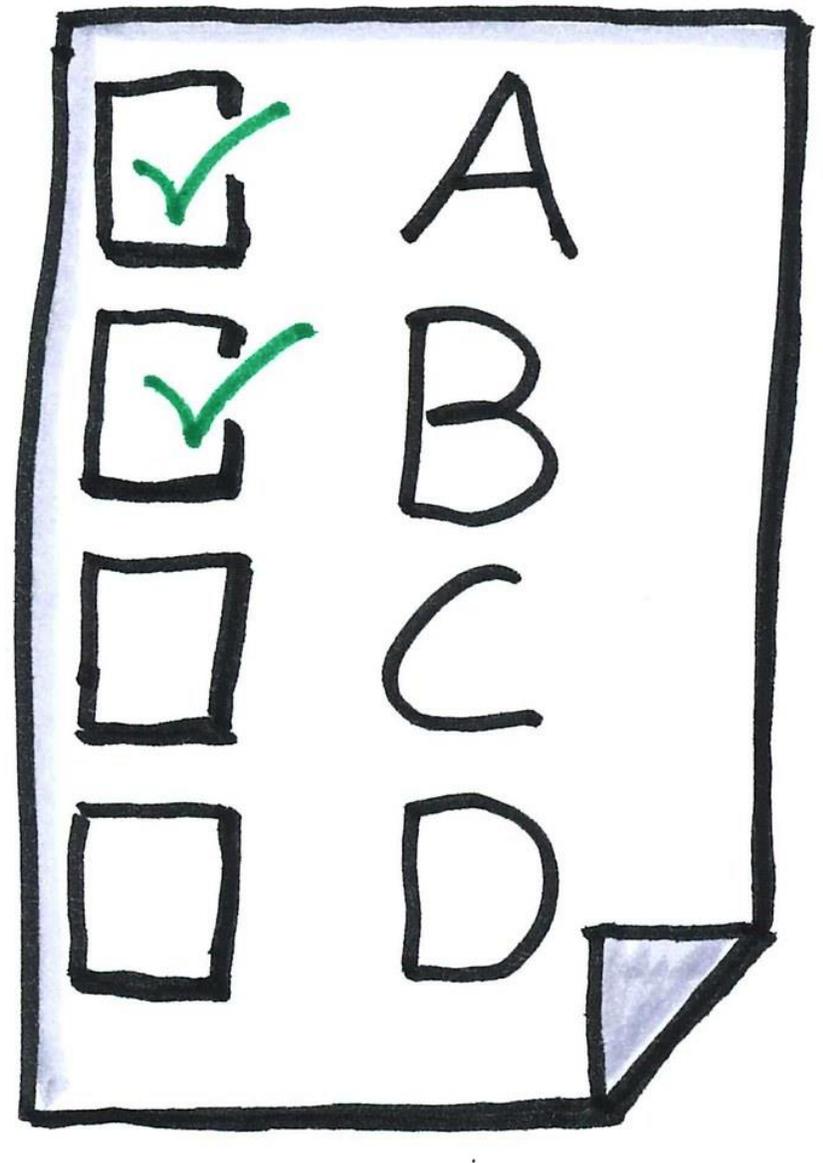
Highly Compensated Everywhere?

Highly Compensated Employee Overtime Exemption

Can Reasonably Rely on FLSA Exemption (34 States + D.C.)				
Alabama	Alaska (Per DOL)	Arizona	Arkansas	Delaware
District of Columbia	Florida	Georgia	Idaho	Indiana
Iowa	Kansas	Kentucky	Louisiana	Massachusetts
Michigan	Mississippi	Missouri	Montana	Nebraska
Nevada	New Hampshire	New Jersey	North Carolina	North Dakota
Ohio	Oklahoma	South Carolina	South Dakota	Tennessee
Texas	Utah	Virginia	West Virginia	Wyoming
FLSA Exemption Application Is Unclear (3 States)				
New Mexico	Rhode Island	Vermont		
State-Specific Exemption (3.5 States)				
Colorado	Connecticut (Mortgage Loan Originator)	Hawaii*	New York*	*Exemption is not HCE-specific but might otherwise be exempt under state law.
Cannot Use FLSA Exemption (9.5 States)				
California	Connecticut (Generally)	Illinois	Maine	Maryland
Minnesota	Oregon	Pennsylvania	Washington	Wisconsin

Tests for Exemptions

- Compensation Test
 - Minimum level of compensation – Salary Level
 - Type of compensation – Salary Basis
- Duties Test
 - Job duties, responsibilities and authority of the employee



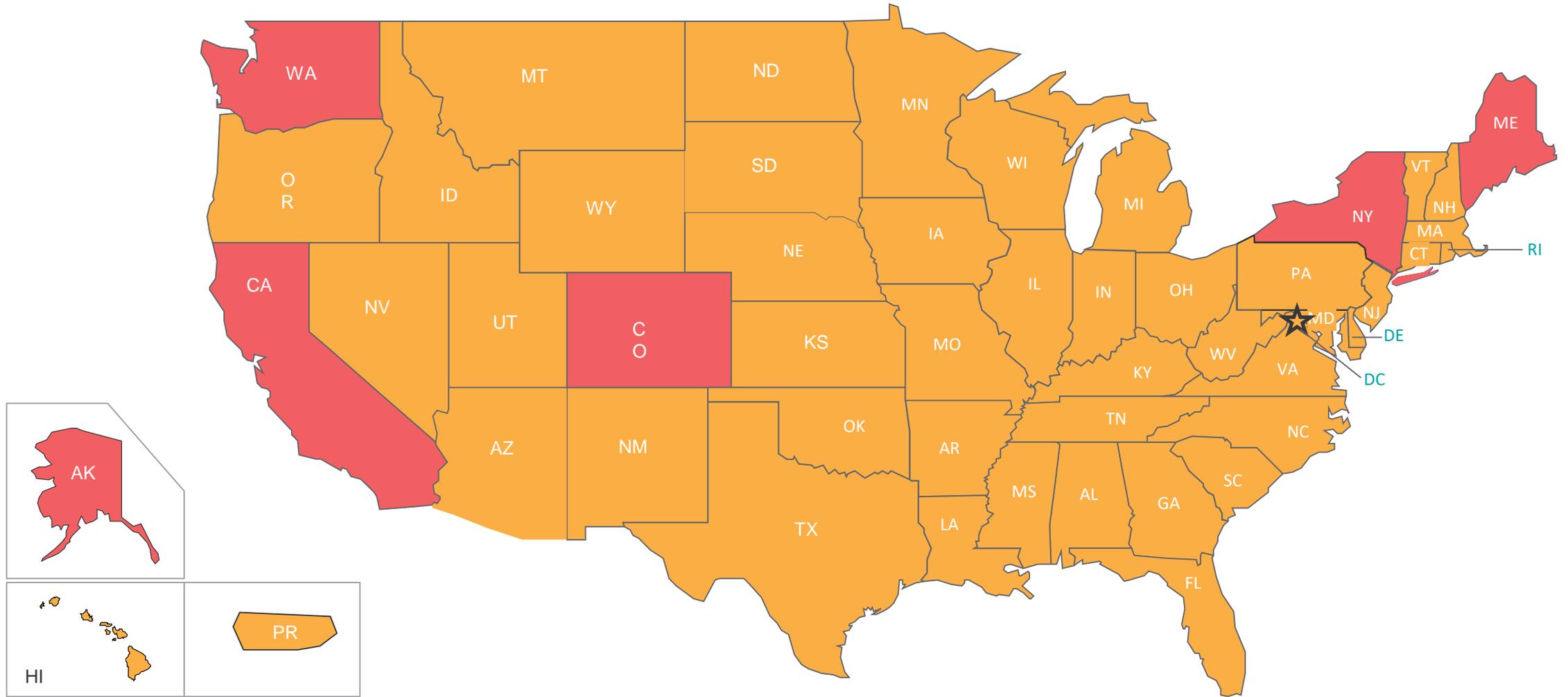
Tests for Exemptions

- Compensation Test
 - Minimum level of compensation – Salary Level
 - Type of compensation – Salary Basis
- Duties Test
 - Job duties, responsibilities and authority of the employee

Minimum Salary Level

- For most of the “white collar” exemptions, employees must be paid at least \$684 per week on a “salary basis”
- Exceptions:
 - No compensation requirements for outside sales, doctors, lawyers and teachers
 - Computer employees may also be paid on an hourly basis of at least \$27.63 per hour
 - Commissioned employees of retail or service establishments
 - Administrative and professional employees may be paid on a fee basis

States with Higher Salary Level than FLSA



Tests for Exemptions

Compensation Test

- Minimum level of compensation – Salary Level
- Type of compensation – Salary Basis

Duties Test

- Job duties, responsibilities and authority of the employee



No Regulatory Basis?

- Justice Kavanaugh's dissent in *Hewitt v. Helix*:
- *The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So it is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act.*

Deductions for Exempt Salary Workers?

Only:

- Full day deductions for personal reasons
- Full day deductions if you have a bona fide sick leave policy
- Smaller increments if qualifying FMLA leave
- Offset for jury, witness, or military pay
- Penalties imposed for violations of major safety violations
- Unpaid disciplinary suspensions of one or more full days related to violation of work rule
- First and last week of work

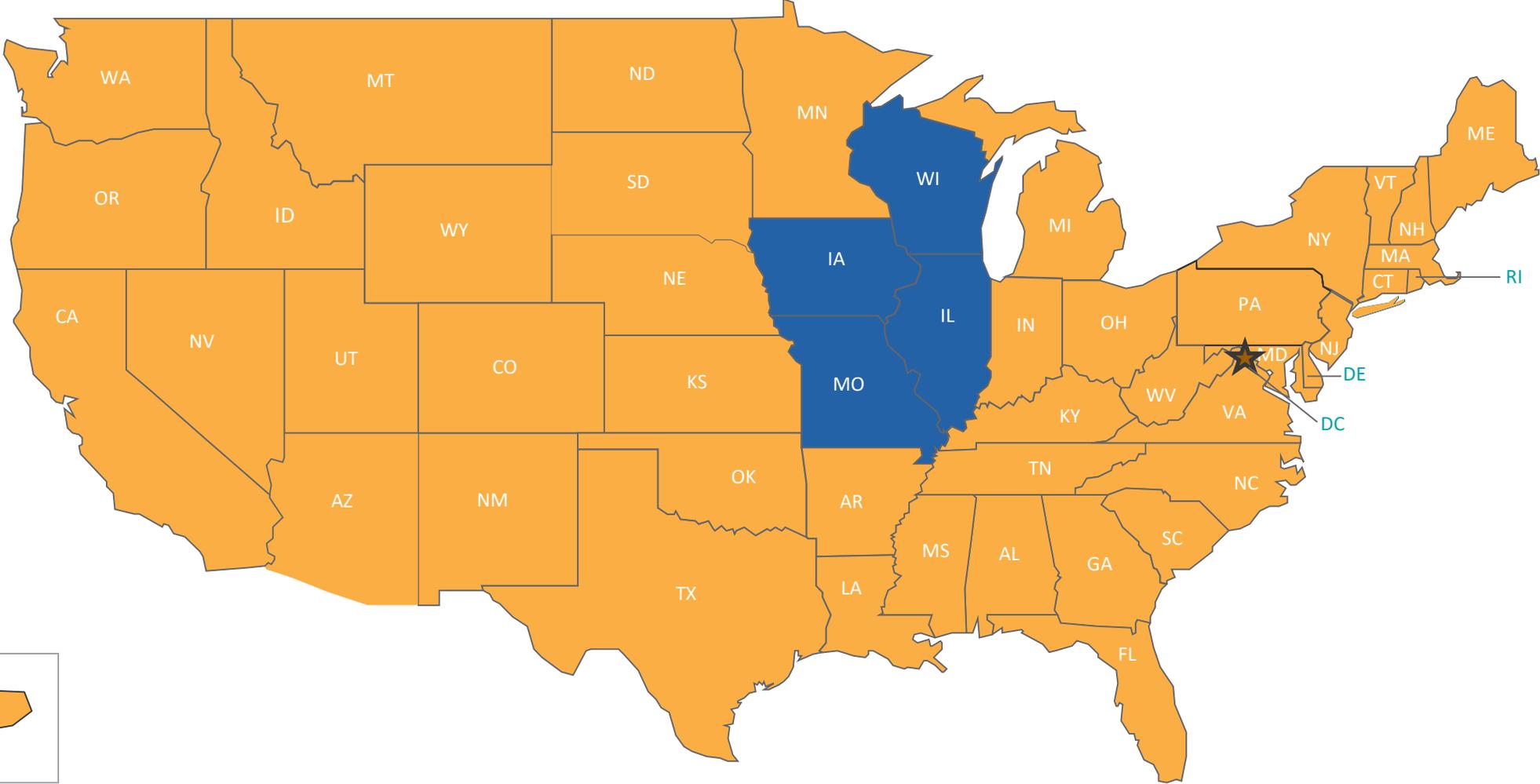
Primary Duty

- The principal, main, major or most important duty that the employee performs.
- Factors to consider include, but are not limited to:
 - Relative importance of the exempt duties;
 - Amount of time spent performing exempt work;
 - Relative freedom from direct supervision; and
 - Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.

Primary Duty

- Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement
- However, the regulations do not *require* that exempt employees spend more than 50% of time performing exempt work

EAP Exemptions Limit Nonexempt Work to 20%!



Executive Exemption - Duties

- 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 Duties

- 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 Duties

- 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



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



Computer Employees

- 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; or
 - A combination of the aforementioned duties, the performance of which requires the same level of skills.



Outside Sales Exemption

- There are no salary requirements for exemption as an outside sales employee
- Duties test
 - Primary duty of making sales or obtaining orders/contracts
 - Customarily and regularly engaged away from the employer's place of business in making sales or obtaining orders/contracts

Overtime

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 regular rate of pay for hours worked over 40 in a workweek

Overtime

Overtime (Generally Applicable Laws)

No Overtime Law (18 States)				
Alabama	Arizona	Delaware	Florida	Georgia
Idaho	Iowa	Louisiana	Mississippi	Nebraska
Oklahoma	South Carolina	South Dakota	Tennessee	Texas
Utah	Virginia*	Wyoming		
Daily Overtime for Working More than 8 Hours (3 States)				
Alaska (Day)		California (Day)		Nevada (Day or Consecutive)
Daily Overtime for Working More than 12 Hours (2 States)				
California (Day) (2x)			Colorado (Day or Consecutive)	

Overtime

Other Premium Pay

Work on 7th Day in Workweek (General Rule – Exceptions May Exist) (2 States)	
California	Kentucky
Work on Sunday (General Rule – Exceptions May Exist) (2 States)	
Massachusetts (Retail)	Rhode Island
Work on (Certain) Holiday (General Rule – Exceptions May Exist) (2 States)	
Massachusetts (Retail)	Rhode Island

The Regular Rate

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



Remember the Formula

$$\frac{\text{All Remuneration}}{\text{All Hours Worked}}$$

Compensation Included in OT Calculation

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



Compensation Excluded in OT Calculation

- Employee benefits
 - Wellness programs, gym access, employee discounts
- Payments for time not worked
- Business expense reimbursements: Need not be solely for employer benefit.
- Certain premium pay
- Gifts for Christmas or special occasions
 - Over \$25 creates tax obligations
- Discretionary team awards
- Vacation, sick or holiday hours also do not count toward determining whether an employee worked more than 40 hours in the week

Armoring and Auditing

- Job descriptions:
- Can undermine or support an exemption.
- Use self-assessments to reinforce exempt duties annually.
- Use job descriptions to show weight of primary duties that bolster job descriptions.
- Be weary of over-populating job descriptions with micro-non-exempt duties.

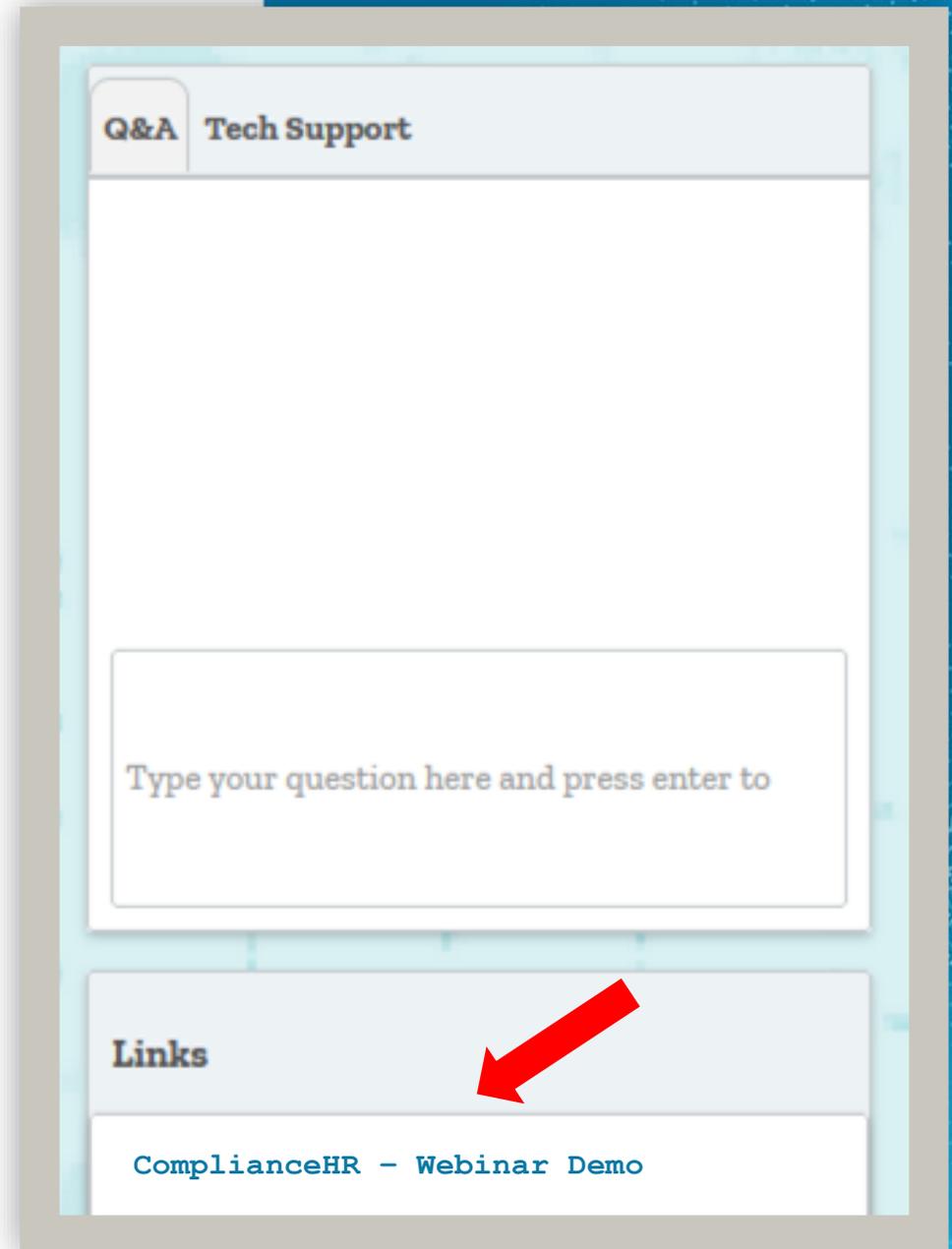
Armoring and Auditing

- Budget and plan review of:
- Regular rate mathematics
- Pay codes and whether they are, or are not, in regular rate calculation
- Overtime exemptions. Criteria to consider:
 - EAP Exemptions under \$85,000 annually.
 - EAP Exemptions with unique compensation arrangements.
 - EAP Exemptions with few supervisors, or large number of peers.
 - Exempt sales employees.
 - Exempt workers with blue collar or manual duties.
 - Has remote work changed position profile since last audit?

Register for a Navigator Suite Demonstration

Benefits of a custom demonstration:

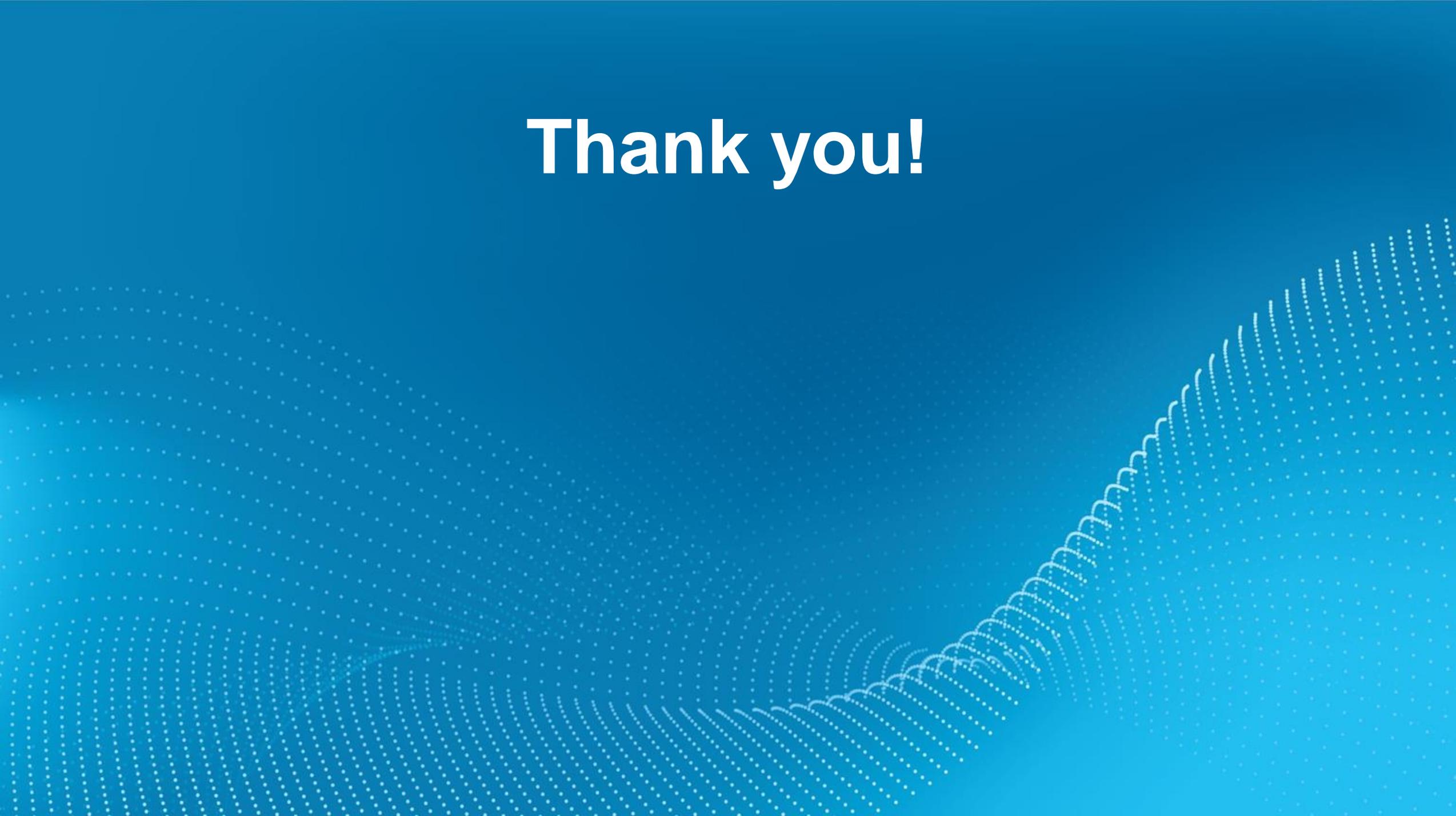
- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Questions?

Please add any additional questions to the Q&A box

Thank you!

The background is a solid blue color. On the right side, there is a decorative graphic composed of many small white dots. These dots are arranged in a series of parallel, slightly curved lines that sweep upwards and to the right, creating a sense of motion and depth. The overall effect is a modern, digital aesthetic.

Did you know...



- 2500+ Federal and state statutes, regulations and cases on exempt/non-exempt
- Attorneys must read every case to identify the job duties performed by the employees discussed in the case, and whether the court found the employee exempt or non-exempt