

# Be (A) ware – Employment Laws are Changing

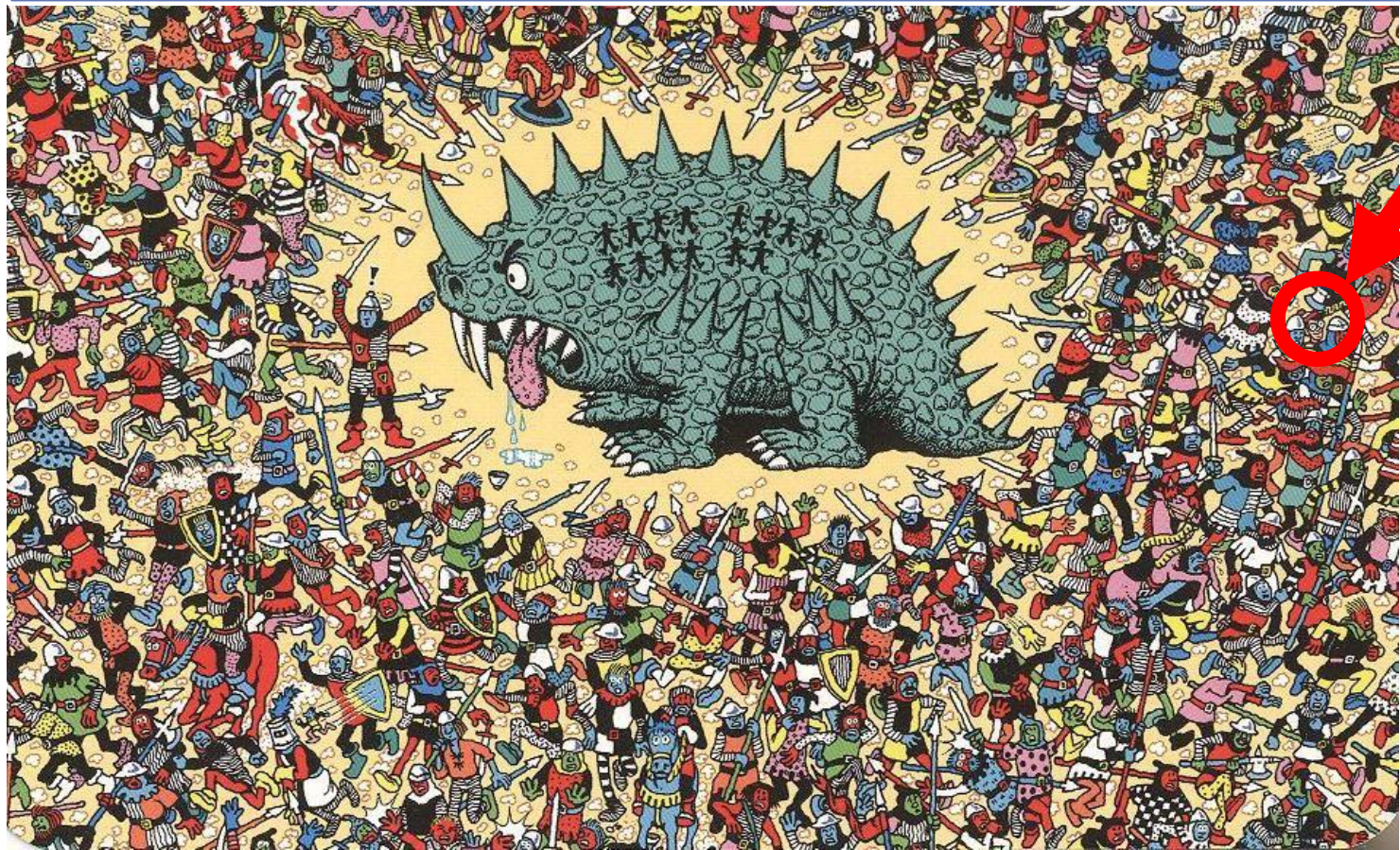


## **Central VA Employees Benefits Council**

Presented by:  
Betsy Davis  
October 11, 2016



# Issue Spotting



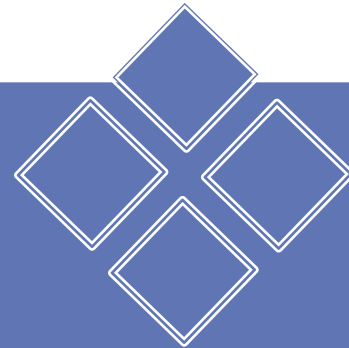


# Presentation at a Glance

- ❖ War on Misclassification
  - White Collar Exemption
  - Independent Contractor/Employee
- ❖ Sexual Orientation as a Protected Class?
- ❖ Interaction of FMLA/ADA



# WAR ON MISCLASSIFICATION



# War on Misclassification

- ❖ Since 2011 administration promised to aggressively pursue misclassification in employment:
  - ❖ exempt vs. non-exempt
  - ❖ employee vs. independent contractor
- ❖ Presumption: most workers are likely *someone's* employee
- ❖ DOL has plenty of field investigators on its payroll

# Overview of FLSA

- ❖ The FLSA requires that most employees in the United States receive:
  - Federal minimum wage for all hours worked; and
  - Overtime pay at time and one-half the regular rate of pay for all hours worked over 40 in a work week





# FLSA Violation Penalties

- ❖ Department of Labor
  - Changes in employment practices
  - Payment of any back wages due to employees
  - Liquidated damages
- ❖ Willful Violators
  - Criminal prosecution, fines up to \$10,000
  - Imprisonment
- ❖ Civil Suit
  - Back wages
  - Liquidated damages
  - Attorneys' fees
  - Injunctions



**HAVE YOU PROPERLY  
CLASSIFIED EMPLOYEES AS  
EXEMPT/NON-EXEMPT?**





# Determining Exempt v. Non-Exempt

Currently, to be exempt an employee must meet two tests:

1. Job duties
2. Salary basis and level (\$23,660)

Final Rule amending white collar exemption will make a drastic change



# What's Changing?

- ❖ Raises from \$23,660 to (\$455/week) \$47,476 (\$913/week) for:
  - Executive Exemption
  - Professional
  - Computer
  - Administrative
- ❖ Raises from \$100,000 to \$134,004 for:
  - Highly Compensated
- ❖ Salary level will increase **AUTOMATICALLY** every **three** years



# Duties Test

No changes to Duties Test



# When is the Final Rule Effective?

**December 1, 2016** (1 month, 20 days)

DECEMBER 2016						
SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Download Free Printable December 2016 Calendar From [www.calendar24.com](http://www.calendar24.com)





# What Employers Can (and Should) Do Now

- ❖ Assess your situation: Identify current exempt employees paid less than \$47,476 (\$23,660 - \$47,476)
- ❖ *Confirm* that duties tests are met
- ❖ *Develop* a plan to come into compliance on a salary basis before **December 1, 2016**



# Compliance Strategies

- ❖ **Option 1:** Increase salary level and retain exempt status
  - Strategies to absorb the additional cost
    - Reduce fringe benefits
    - Reduce pay for non-exempt
    - Provide slower or smaller wage increases to non-exempt
    - Delay promotions
    - Reduce pay of exempt employees earning above the new salary basis



# Compliance Strategies

- ❖ **Option 2:** Reclassify as non-exempt and pay overtime
  - Cost containment strategies:
    - Set an hourly rate to create a cost neutral reclassification
    - Reduce hours to avoid overtime
    - Hire more part-time employees



# Challenges

- ❖ Recording time
- ❖ Loss of flexibility
- ❖ Loss of guaranteed income
- ❖ Employee morale
- ❖ Cost increase to employer
  - Overtime
  - Hiring additional workers







# HAVE YOU PROPERLY CLASSIFIED INDEPENDENT CONTRACTORS?



# “OLD” 20 Factor Test

1. Instruction
2. Training
3. Integration into company's operations
4. Services required to be performed by specific individual
5. Hiring supervision and payment of assistants
6. Continuing relationship
7. Set hours of work
8. Full-time commitment required
9. Work performed at company's facilities
10. Company determines order of performance
11. Oral or written reports required
12. Payment by hour, week, month (vs. lump sum or percentage completion payments)
13. Payment of business expenses
14. Furnishing tools and materials
15. Significant investment by individuals
16. Potential for profit or loss
17. Working for more than one firm
18. Services available to public
19. Right to discharge
20. Worker's right to terminate



# Independent Contractors

What you thought you knew has now changed:

**OLD:** Control and independence

**NEW:** Economic realities

**“Is the worker economically dependent on the employer or in business for him or herself?”**

If **dependent** = employee

If **in business** = independent contractor



# Independent Contractors – Economic Reality Test

The 6 Factors to Consider in the Economic Reality Test are:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect his or her opportunity for profit or loss?
3. How does the worker's relative investment compare to the employer's investment?
4. Does the work require special skill and initiative?
5. Is the relationship between the worker and the employer permanent or indefinite?
6. Is the worker economically dependent on the employer or truly an independent business person?





## Independent Contractors – Economic Reality Test

**DOL: “In sum, most workers are employees under the FLSA’s broad definitions.”**



# IS SEXUAL ORIENTATION A PROTECTED CLASS?





## Is it a Protected Class?

- ❖ No Court within the Fourth Circuit has recognized as a protected class
- ❖ July 16, 2015 EEOC – **YES**
- ❖ May 5, 2016 Payne Opinion – **NO**
- ❖ May 10, 2016 Attorney General of Virginia Advisory Opinion - **YES**



## Sexual Orientation - EEOC

- ❖ Baldwin v. Foxx, Appeal No. 0120133080, July 16, 2015
  - Sexual orientation is inherently a “sex based consideration”
  - Allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII
  - EEOC in Richmond is accepting charges based on sexual orientation





## Sexual Orientation – 4<sup>th</sup> Circuit

- ❖ Hinton v. Va. Union Univ., 2016 U.S. Dist. LEXIS 60487 (E.D. May 5, 2016)
  - It is explicitly the law of the Fourth Circuit that Title VII does not protect against discrimination based on sexual orientation.



## Sexual Orientation – Attorney General Advisory Opinion

- ❖ Attorney General of Virginia Advisory Opinion
  - Five days later, May 10, 2016
  - Opinion interpreting Virginia Human Rights Act
  - Opined: act “may well conclude too that sexual-orientation discrimination is *per se* discrimination on the basis of sex.”



## Sexual Orientation – Virginia Localities

- ❖ Localities have enacted legislation that makes it unlawful for an employer to discriminate on the basis of sexual orientation:
  - City of Alexandria, Code of Ordinances § 12-4-5;
  - Arlington County Code § 31-3(B); and
  - Under the City of Charlottesville Human Rights Ordinance, City of Charlottesville Code, Art. XV, § 2-431 (2013), (specifically includes gender identity and transgender status)

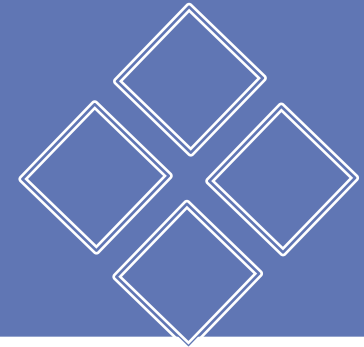


## What are employers to do?

- ❖ Know your audience
- ❖ Be aware of issue
- ❖ Be up to date on legal changes in this area before you take action



# FMLA/ADA INTERACTION





# FMLA Employer Coverage

- ❖ Private-sector employers who:
  - Employ 50 or more employees
  - In 20 workweeks
  - In the current or preceding year





# Employee Eligibility

- ❖ To be eligible, an employee must:
  - Have worked for the employer for a total of 12 months
  - Have worked at least 1,250 hours over the last 12 months
  - Work at a location where at least 50 employees are employed by the employer within 75 miles
- ❖ **Hard and Fast eligibility requirements!**



# Employee Eligibility

❖ Eligible employees are entitled to up to 12 weeks of unpaid leave during a 12 month period:



- For the birth and care of a newborn child;
- For the placement of a child for adoption or foster care;
- To care for an immediate family member with a serious health condition; or
- Care for employee's own serious health condition
- Military FMLA



# FMLA Benefits

- ❖ 12 weeks of unpaid leave
- ❖ Job protection while on FMLA Leave
- ❖ Restoration to the same or equivalent position upon returning from leave
- ❖ Health insurance coverage while on leave



# The Americans with Disabilities Act

- ❖ ADA covers employers with 15 or more employees
- ❖ VHRA covers employers with 5 – 15 employees
- ❖ Protects applicants and employees



# The Americans with Disabilities Act

- ❖ ADA prohibits discrimination based on disability
- ❖ Requires employers to make reasonable accommodations, unless to do so would cause an undue hardship







## Who is Protected?

- ❖ Physical or mental impairment that substantially limits major life activities
- ❖ Record of having such an impairment
- ❖ Regarded as having such an impairment



# ADAAA

- ❖ Broadened definitions
- ❖ Question was: “Is he disabled?”
- ❖ Now: “Did company provide a reasonable accommodation?”



# ADA Accommodation Examples

- A deaf applicant may need a sign language interpreter during the job interview
- An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels
- An employee with cancer may need leave to have radiation or chemotherapy treatments
- Transfer to an open position



• **Unpaid Leave!**



# Areas of Intersection

1. **Employer Coverage**
  - FMLA (50)
  - ADA (15)
2. **Employee Eligibility**
  - FMLA (serious health conditions)
  - ADA (disability)
3. **Length of Leave**
  - FMLA (12 weeks)
  - ADA (no specific period)



## Areas of Intersection (cont'd)

4. Reinstatement Rights
  - FMLA (same or equivalent)
  - ADA (same job/undue hardship)



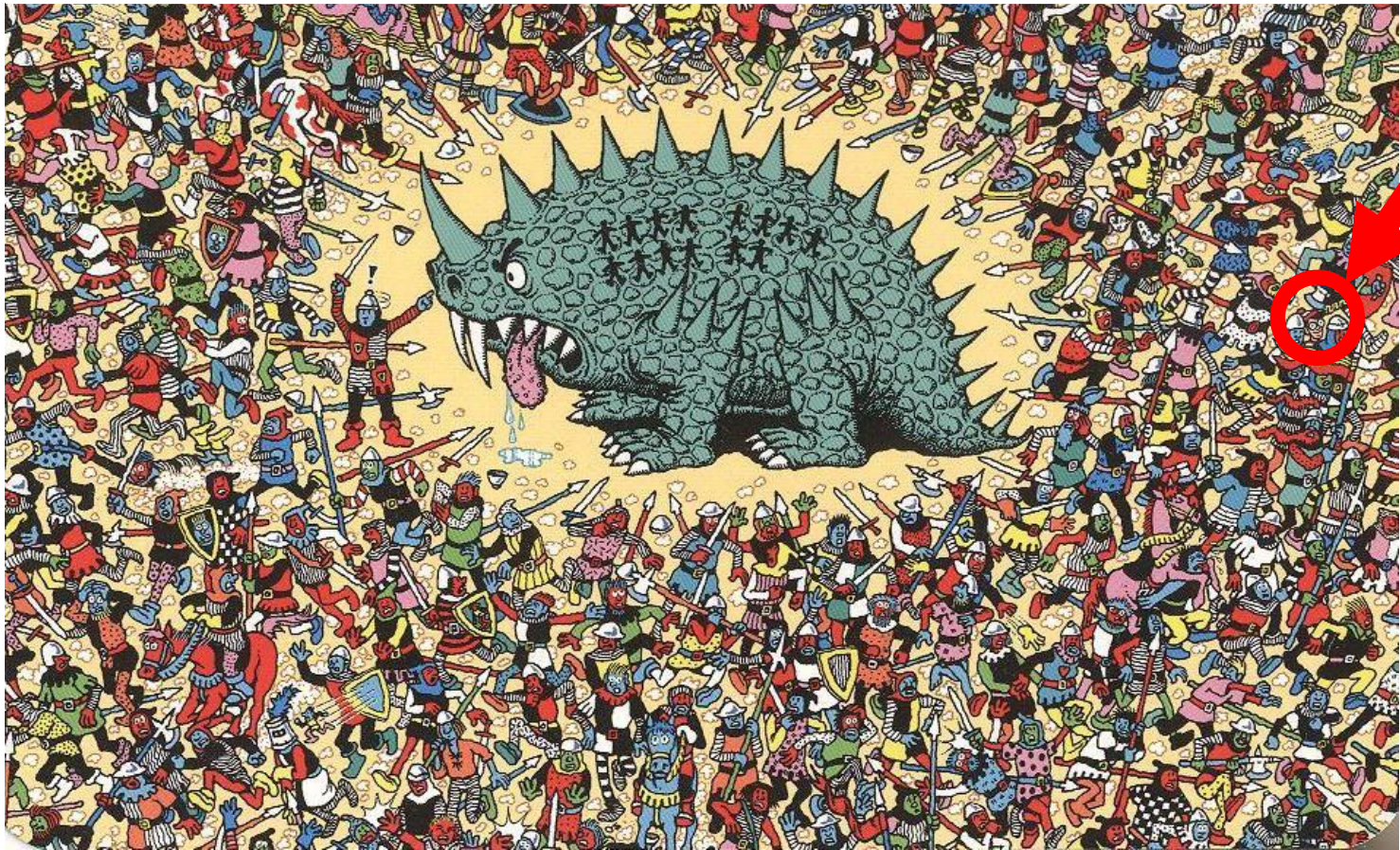
## Remember

- ❖ Consider both FMLA / ADA
- ❖ Provide greatest benefit
- ❖ FMLA leave is exhausted, evaluate ADA unpaid leave as a reasonable accommodation
- ❖ Have/document accommodation discussions
- ❖ Indefinite leave is not reasonable





# Issue Spotting







## Be (A) Ware



- ❖ Be ready for new salary basis for white collar exemptions
- ❖ Be aware of the economic realities test
- ❖ Be mindful of changes regarding sex discrimination
- ❖ Be careful to consider both FMLA and ADA for leave issues

Questions?



**Thank you!**

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