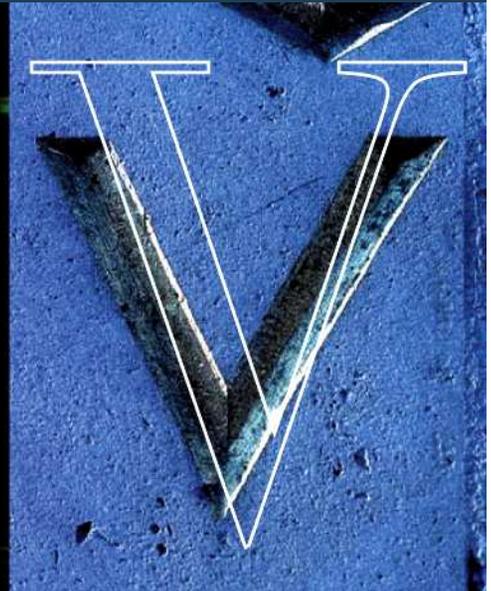
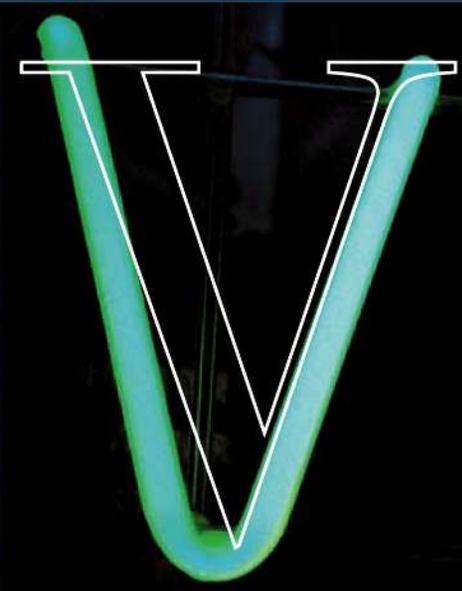
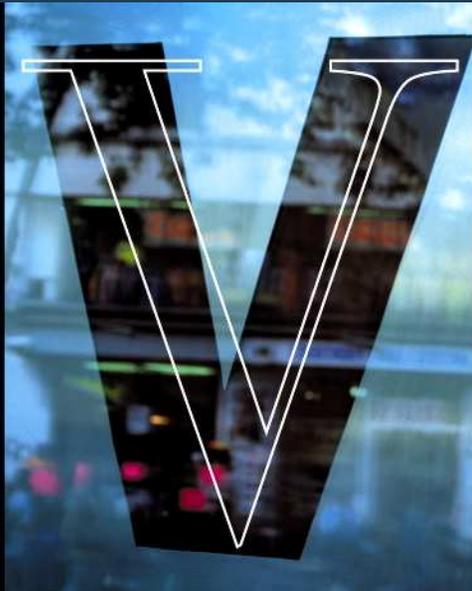
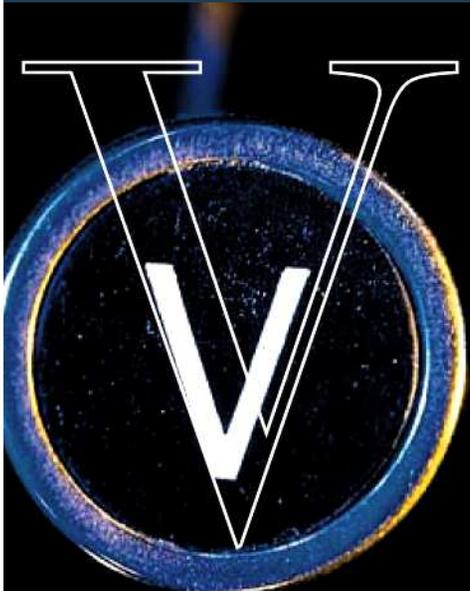


Payroll Pitfalls: What Nonprofit Leaders Need to Know

September 20, 2012
10:00 a.m. – 12:00 p.m.
Popular Community Bank
120 Broadway, New York, New York

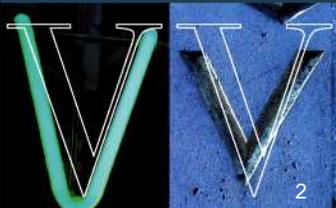
Education and Research Foundation
of the Better Business Bureau of
Metropolitan New York

Moderator: Jeffrey S. Tenenbaum, Esq.
Presenters: Megan H. Mann, Esq.
Nicholas M. Reiter, Esq.



Overview

- **Why payroll problems must be addressed**
- **Topics covered today:**
 - Common exemptions from the FLSA
 - Independent contractors
 - Unpaid interns
 - Volunteers
 - Waiting around at the workplace
 - Employee seminars, lectures, and training
 - Off-the-clock work
 - Job-related social events
 - Travel time
 - New York’s nonprofitmaking institution exemption



Preliminary Questions & Issues: FLSA Application

- **Most Common Exemptions from the FLSA:**
 - Executive Exemption
 - Administrative Exemption
 - Professional Exemption
 - Highly Compensated Employee Exemption



Preliminary Questions Continued: Independent Contractors

- **Employees v. Independent Contractors:**
Classification Factors To Consider
 - *No one factor is dispositive!*
 - Written Agreement
 - Control: Behavioral & Financial
 - Relative Investments
 - Opportunity for Profit/Loss
 - Required Skill & Initiative
 - Permanency of Relationship
 - Separate Entity Question
 - Tax Forms & Benefits



Independent Contractors Continued ...

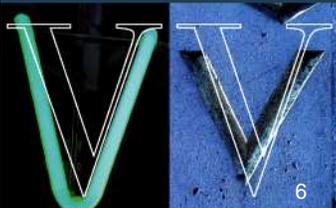
- **Employers Should:**
 - Review and update employment and independent contractor agreements and related documents
 - Review and update practices related to independent contractors
 - Regularly perform classification audits



Unpaid Interns

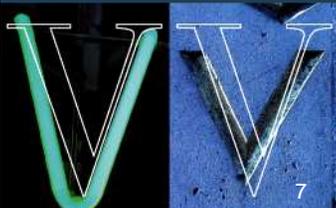


"Hey! How about a little something for the intern?"



When May an Intern Be Unpaid?

- **Six Part DOL Test after a U.S. Supreme Court Opinion:**
 - Training similar to that of an educational institution;
 - Training is for the benefit of the intern;
 - The intern does not displace paid employees;
 - No direct advantage for employer;
 - Internship will not necessarily lead to employment; *and*
 - No expectation of compensation
- **Special treatment for charitable organizations:**
 - “Unpaid internships in the public sector and for non-profit *charitable* organizations, where the intern volunteers without expectation of compensation, are generally permissible.”
 - *Wage and Hour Division Policy Statement, April 2010 (emphasis added)*



“Must Haves” for Unpaid Internship Programs

- **Written unpaid internship policy**
 - No expectation of compensation
 - Clear tasks that differ from those of employees
 - Educational mission
- **Develop relationships with academic institutions**
- **Recordkeeping related to educational benefits and non-expectation of compensation**
- **Designate an intern coordinator**

How often have you heard . . . ?

“We could sure use an intern this summer.”



Volunteers

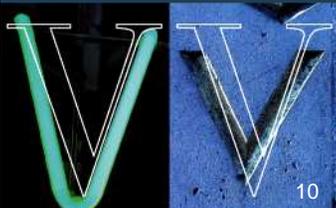
- **The DOL limits volunteer status to individuals performing charitable activities for not-for-profit organizations**
- **Under the FLSA, a VOLUNTEER:**
 - Receives no compensation other than expense and/or a nominal fee to perform services, AND
 - Such services are not the same type of service for which the individual is employed
 - **Other Considerations:**
 - Clear understanding
 - Willingly offer services without coercion



“Volunteering” Time: Time Spent Performing Civic & Charitable Work

- **Working Time =**
 - Time spent at work for public or charitable purposes at employer’s request; or
 - Under employer’s direction or control; or
 - While employee is required to be on the premises

- **Not Working Time =**
 - Time spent voluntarily in such activities outside of employee’s normal working hours



Waiting Time

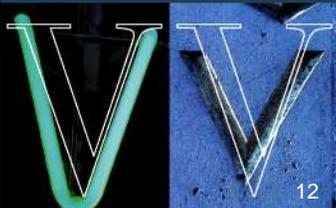
- **Is your employee engaged to be waiting, or waiting to be engaged?**
- **Engaged To Be Waiting: Compensable Time**
 - Time is controlled by and belongs to the employer
 - Employee cannot use time effectively for personal purposes
- **Waiting To Be Engaged: Off-Duty**
 - Completely relieved from duty
 - Employee told in advance that s/he may leave and will not have to work until a specified time



On-Call Time

- **Compensable**
 - Required to remain on employer premises
 - Or so close that s/he cannot use time effectively for own purposes

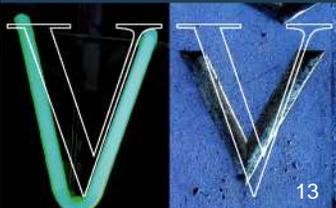
- **Non-Compensable**
 - Employee merely needs to inform employer of where/how to reach him or her



Training Time: Seminars, Lectures, and Other Training Programs

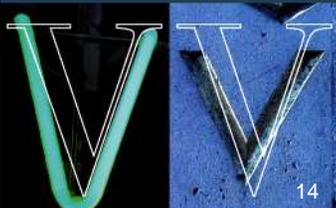
Training time is generally compensable time, unless ALL of the following criteria are met:

- Attendance is outside the employee's regular working hours, AND
- Attendance is voluntary, AND
- The course, lecture, meeting, etc. is not directly related to the employee's job, AND
- The employee does not perform any productive work during attendance



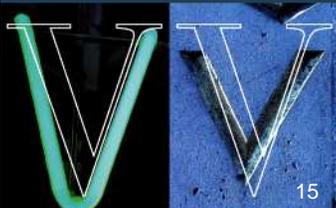
Training Time Continued ...

- **If it is not voluntary, then it is compensable time!**
- **Directly related to the employee's job:**
 - Designed to help the employee handle the job more effectively? = YES
 - For a new job or new skill? = NO, even if it happens to improve existing skills and work
- **Not compensable:**
 - Independent training, courses, and college after work
 - Employer-sponsored lecture or training for employee benefit where voluntary attendance is outside of work hours



Meetings and Conventions

- **Non-exempt employees must be compensated for all *hours worked* at an organization's meeting/convention**
 - **Conference meals**
 - During normal working hours?
 - Is attendance truly voluntary?
 - **Free time at the hotel is *not* compensable time**



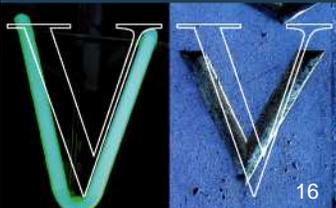
Attendance at Social Functions: Receptions, Dinners, and Other Social Events

- **Factors to consider:**

When, where, and what is the employee's role?

- **If the event is after hours and purely social, then there is One Simple Rule:**

Is the employee required to attend?



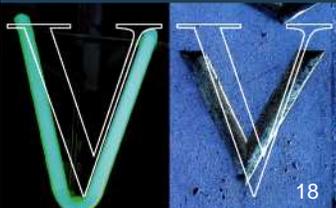
Off-the-Clock Work

- **One of several new target areas**
- **Pre- and post-shift work** (*but see Travel Time, infra*)
 - Logging in/out
 - Security measures
 - Uniforms
 - Mobile phone work
 - Picking up/dropping off vehicles
 - Unexpected or unauthorized overtime
- **Policy and disciplinary issues**
 - Employee arrival times
 - Waiting rooms
 - Training



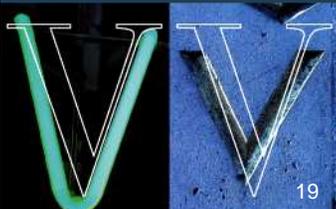
Travel Time

- **Federal Portal-to-Portal Act, 29 U.S.C. § 254**
 - Generally, employers do not have to pay employees for time spent “traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform.”
 - **“Normal” home-to-work travel is not compensable**
 - 9am to 5pm employees
 - Return trips to the worksite
 - Telecommuting employees who need to travel
 - Use of employer’s vehicles
 - **The clock can start early**
 - *IBP v. Alvarez*, 546 U.S. 21 (2005) (anything integral and indispensable to a principal activity, e.g., donning and doffing protective gear, is considered a principal activity for purposes of the Portal-to-Portal Act)



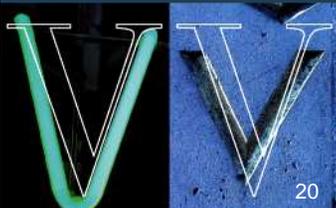
Travel Time Continued ...

- **Out-of-town travel**
 - Not compensable so long as three conditions met:
 - Travel on plane, train, boat, or automobile;
 - Travel during non-shift hours; and
 - No work performed during travel
 - Common mid-work-shift travel compensable time scenarios:
 - Plane travel during employee's work-shift
 - Plane travel during the weekend
- **Work performed while traveling**
 - Work performed while traveling is work performed
 - *De minimis* exception
 - Common examples include mobile devices and monitoring radios while driving
- **Recommended Policies**



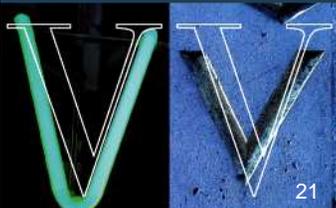
New York's Nonprofitmaking Institution Exemption from the New York Labor Law

- **New York Labor Law § 652(3)(b)**
 - Qualified nonprofitmaking institutions are exempt from state-law wage orders
 - In order to qualify, institution must file a Statement of Non-Profitmaking Institutions with the NYDOL:
 - Within six months of organization or hiring of first employee; and
 - In which it certifies that it will pay all employees no less than the minimum wage
 - Will apply so long as:
 - Timely filing of the Statement of Non-Profitmaking;
 - Continue to pay all employees at least the minimum wage;
 - No request that the State's wage order applies;
 - No NYDOL determination that the institution failed to pay the minimum wage



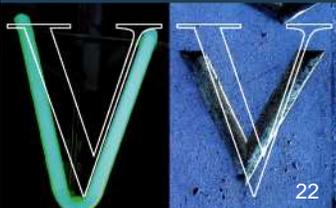
Top Ten Compensable Time Quandaries for Nonprofits

Number	Hypothetical	Is the Time Compensable?	
		Yes	No
1	Administrative assistant is reading a romance novel at her desk while waiting for an assignment.	✓	
2	Research assistant attends continuing education seminar that will improve research skills during regular work hours.	✓	
3	Employee arrives to work thirty minutes early every day due to her commuter bus schedule and starts working but does not record this time on her weekly timesheet.	✓	
4	Employee is invited to dinner with members of the association at the annual conference but is not required to attend and is free to make other dinner plans.		✓ (as long as no coercion)
5	Employee volunteers to participate in employer-organized company-wide trip to build houses for Habitat for Humanity.	✓ (if under employer direction or control)	



Top Ten Compensable Time Quandaries for Nonprofits

Number	Hypothetical	Is the Time Compensable?	
		Yes	No
6	Employee takes four-hour plane trip to a week-long conference during non-shift hours but performs no work on the plane.		✓
7	Employee whose regular commuting time is 30 minutes takes a three-hour train ride for a one-day trip to another city during regular shift hours and performs no work on the train.	✓ (the 2.5 hours not part of regular commute is compensable)	
8	IT specialist volunteers to be a greeter at her nonprofit's annual fundraiser for two hours outside of regular working hours.		✓ (as long as no coercion)
9	A nonprofit which provides job training services to homeless men hires an intern to assist in conducting intake interviews of program participants.	✓ (but, probably not if intern receives academic credit)	
10	Teacher's assistant feels dizzy during regular shift hours and supervisor instructs her to lay down for 15 minutes in the employee lounge.	✓	



Questions?

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