

 **2024**
CLUB SUMMIT

Club Legal & HR Issues – A Discussion About What To Avoid




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1

Private Club Consultants

- PCC was created to provide in-depth legal/operational answers for America's top clubs
- We help club leaders:
 - Resolve legal issues, including those from staff, members and guests
 - Modernize club bylaws, rules and other governance documents
 - Protect their private and tax-exempt status, and
 - Implement new legislative and regulatory mandates
- We are "Your Trusted Source for Answers"



2

Our Roadmap



DOL's Independent Contractor Classification Rule
 DOL's Proposed Overtime Exemption Rule
 NLRB's Independent Contractor and Jt. Employer Rules
 Open Discussion – Legal Potpourri



3

DOL's Independent Contractor Classification Rule



4

DOL's New IC Classification Rule

- What is worker misclassification?
 - It's when a club treats ICs like employees but doesn't provide the benefits of employment
 - Club control and direction of these workers can lay the groundwork for these claims
- It's often thought of as a tax problem, but it's really a wage problem
 - When there is an "employment relationship," workers are entitled to min. wage and overtime
 - Simply labeling a worker an IC isn't enough to avoid an employment relationship
 - The worker is usually required to do more than what he/she was hired to do
 - Those workers can get disgruntled and lawyers get called
 - Lawyers allege federal (or state) wage and hour law violations under Fair Labor Standards Act (FLSA)
 - Federal (and state) governments can pursue action, too



5

The Federal Government Acts

- Return to the "Economic Realities Test"
 - The Independent Contractor Rule is a 6-factor review:
 - Whether the club controls the worker and the work to be performed;
 - Whether the worker creates an opportunity for profit or loss based upon his business acumen;
 - Whether the worker invests in the business to support growth/reduce costs – not just to do the job;
 - Whether the service rendered requires a special skill;
 - Whether there is a more permanent working relationship between the worker and club; and
 - Whether the service rendered is an integral part of the club's business
 - This is a totality of the circumstances review
 - No single factor is more important than another – unlike the old rule....
 - Economic dependence is the key
 - If he's economically dependent on the club for work, then he's an employee
 - If he's economically dependent on his business for work, then he's an IC
 - Rule went into effect 3/11/24, but lawsuits are pending...



6

How To Protect Your Club

- Best practices to help ensure workers are truly Independent Contractors
 - Don't have ICs attend staff mtgs, ask for time off, do separate work at club or wear the club's logo
 - Don't set ICs' prices, schedule or pair them with members and don't train them
 - Three options for ICs
 - Have members hire their ICs themselves – club is completely out of it
 - Educate members on their responsibilities and use CaddieNow, ClubUp or other apps
 - Engage third party entities to do the job – valet, fitness company, massage company, CaddieMaster
 - Reclassify ICs as employees – could provide best protection
 - Club has control over training, work, discipline, and pay – ambassadors of the club
 - Members expect this service & will pay for it – caddie fee vs. cart fee, fitness class fee
 - They can still be tipped employees – so they can still receive cash
- This applies to all caddies, fitness & yoga instructors, massage therapists, etc.



7

DOL's Proposed Overtime Exemption Rule



8

DOL's New OT Exemption Rule

- For standard employees to be exempt, they must meet 3 requirements
 - Be paid a predetermined salary – not an hourly/daily fee wage
 - Be paid at least the minimum weekly salary – currently \$684
 - Satisfy the entire “Duties Test” of at least 1 of the 3 main White Collar Exemptions (WCEs)
- The new minimum weekly salary is set at \$1,059
 - An increase of nearly 55% = from \$35,568/year to \$55,068/year (could be \$60,209 per SBA)
 - A club may still pay 10% less each week (\$953/week) if the yearly rate is paid in annual (or more frequently) nondiscretionary bonuses or commissions
- 2 choices for current exempt workers who make between \$35,568 & \$55,068
 - Increase their weekly salary to \$1,059 and ensure they comply w/ the other requirements
 - Keep them at their current weekly salary and ensure they don't work 40+ hours/week



9

DOL's New OT Exemption Rule

- For Highly Compensated Employees to be exempt, they must meet 4 requirements
 - Be paid at least the minimum yearly salary – currently \$107,432
 - Be paid at least the minimum weekly salary – currently \$684
 - Meet at least one part of the “Duties Test” found any of the 3 applicable WCEs, and
 - Perform office or non-manual work
- The new HCE salary threshold is set at \$143,988
 - An increase of nearly 35%
 - They must also earn at least \$1,059/week
- Problems for current exempt HCE making between \$107,432 & \$143,988
 - They must meet all of the “Duties Test” for a WCE worker – not just one part



10

What are the WCEs and the “Duties Test”?

- Executive exemption
 - Manages a dept., supervises two FTers, and has a say in hire/fire of employees
- Administrative exemption
 - Performs office work (no manual labor) related to the management of club and exercises discretion on matters of significance
- Professional exemption
 - Learned Pro performs work requiring advanced & prolonged training (lawyers, doctors, etc.)
 - Creative Pro performs work requiring invention, imagination, & originality (artists, actors, etc.)
 - Teaching Pro performs work requiring teaching, but only in an educational establishment
- **FYI the Commission Employee exemption doesn't apply
 - Works at “retail/service establishment” where goods/services sold “to the general public”
 - As a truly private club, we do not sell to the general public



11

Options When Increasing Salaries Won't Work

- Change salaried employees to hourly – usually your pros, but could be mid-managers
 - Determine what he/she has earned each year (include lesson fees, stipends, etc. if they are pros)
 - Create an hourly rate that yields the same yearly income (consider new OT, too)
 - Don't forget to control their work hours to control those OT costs!
 - Review quarterly to ensure lesson income goals are met (more for your pros)
 - Provide merit bonus if they are met and reprimand if they aren't
- Use the Fluctuating Workweek Method (it may not be allowed in your state...)
 - Pay a fixed salary regardless of hours worked per week – hours MUST fluctuate each week
 - Pay overtime of 1/2 the regular rate for any hours over 40 – “regular rate” is the fixed salary (including commissions/fees) divided by the total hours worked that week
 - Both parties must have a “clear, mutual understanding” that the FWM will be used
- Comments on the rule were due 11/7/23; it could be effective SOON
- Remember, if state laws offer better OT protections, then they apply



12

NLRB's Independent Contractor and Joint Employer Rules



13

NLRB's Regulatory Action

- Two new NLRB Rules
 - New Independent Contractor Ruling (The Atlanta Opera case) – in effect now
 - An 11-factor test to see if a worker is an IC or employee – why do we care?
 - If he's an employee, then he's covered by NLRA for **unfair labor practices** and **union purposes**
 - “Entrepreneurial Opportunity” was the key factor under old Rule; now it's just 1 of 11 factors....
 - New Joint Employer Rule – delayed
 - If a club, directly or indirectly, has control or exercises the power to control or has the right to exercise control over one or more essential term and condition of employment = joint employer
 - Rule establishes 7 “essential terms and conditions” of employment:
 - Wages/benefits; hours/scheduling; duties to be performed; supervising the work; directions governing the manner, means, and methods of doing the work and the grounds for discipline; hiring/firing ability; and providing for safety and health of employee
 - The Rule was struck down by a Fed. Ct. in Texas on 3/8/24, but NLRB appealed....



14

Open Discussion – Legal Potpourri



15

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16



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