

# Classifying & Paying Exempt Employees

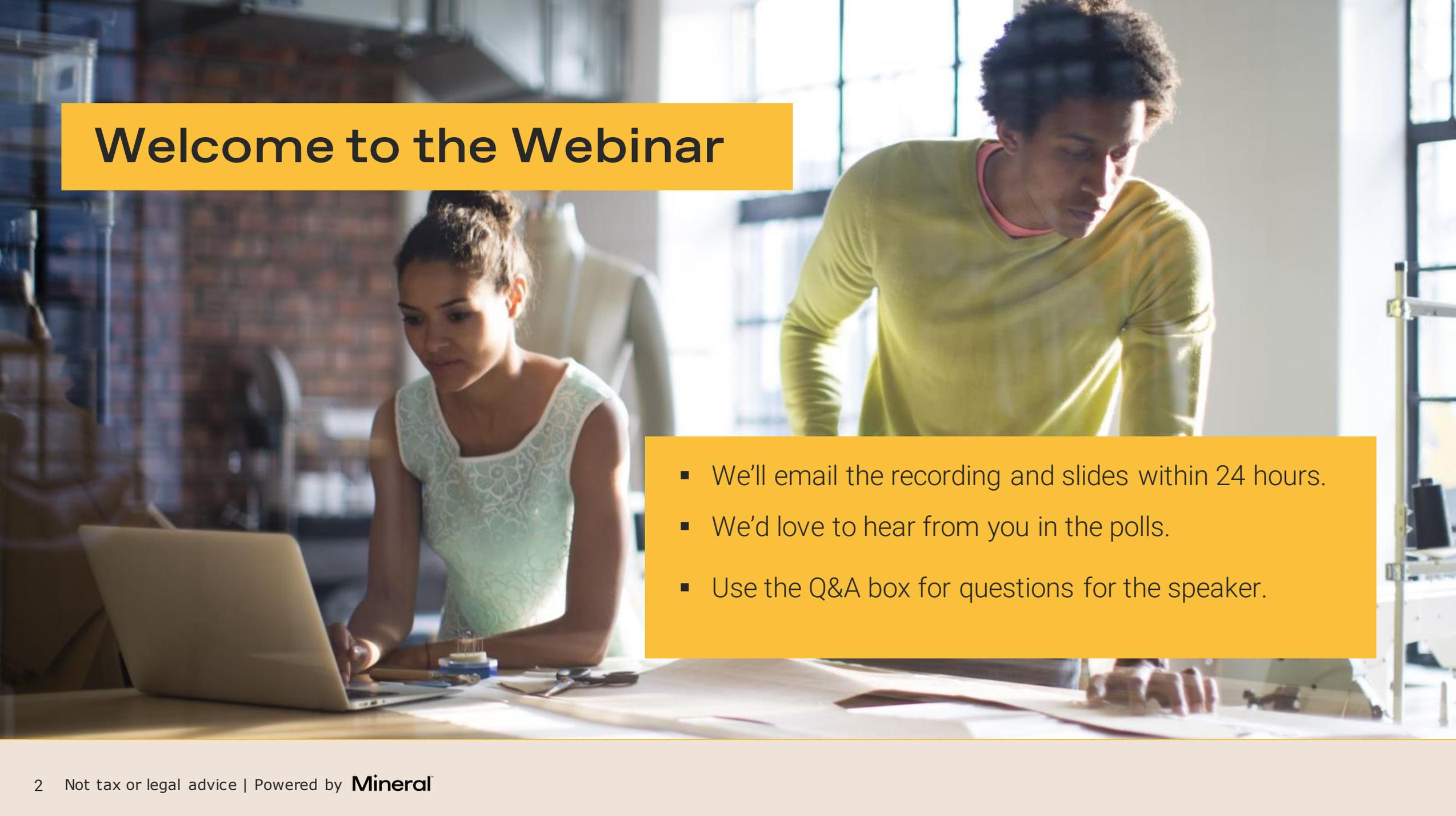
Presented by Kara Govro, JD, SPHR

October 20<sup>th</sup>, 2022

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# Welcome to the Webinar

A woman with her hair in a bun, wearing a white lace top, is seated at a desk and working on a laptop. A man in a bright yellow sweater is leaning over her shoulder, looking at the screen. They are in a workshop or studio with a brick wall and a mannequin in the background.

- We'll email the recording and slides within 24 hours.
- We'd love to hear from you in the polls.
- Use the Q&A box for questions for the speaker.

# Agenda

- Fair Labor Standards Act Overview
- Determining Exempt Status
- Salary, Deductions, and Schedules
- Q & A

# Overview



# Brief FLSA History

- Signed into law in 1938: a ceiling on hours and a floor on wages
- Set rules for hours and wages: originally 25 cents per hour, 44 hours per week
- Limited child labor: created a minimum age and maximum hours



# Brief History of the Fair Labor Standards Act

Most employers, whether public or private, are covered.

## Regulates:

- Minimum wage
- Overtime pay
- Recordkeeping
- Youth employment standards

## Does NOT Regulate:

- Vacation and holiday leave or pay
- Meal and rest breaks
- Premium pay, pay raises, fringe benefits

# ex·empt

- (adj.) 1. Freed from an obligation, duty, or liability to which others are subject; excused: persons exempt from jury duty; income exempt from taxation.
2. Not subject to certain federal workplace laws or protections, especially those requiring overtime compensation: exempt employees.
- (n.) One who is exempted from an obligation, duty, or liability.

# Ignorantia Juris Non Excusat

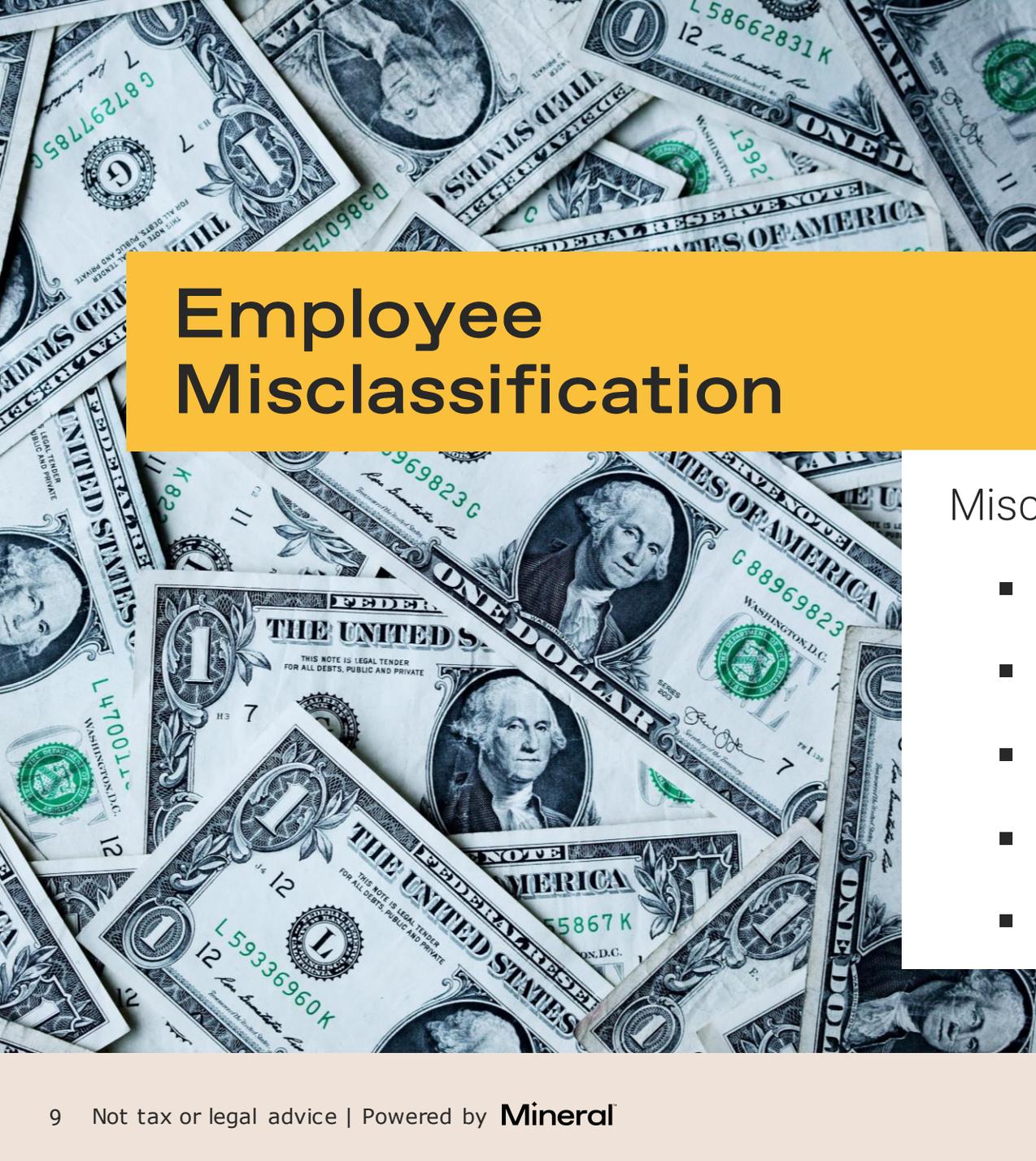
“Ignorance of the law excuses not.”



*The burden is on you!*

Because the FLSA exemptions deprive workers of a statutory benefit, they are narrowly construed by the courts.

Consequently, it is the employer's obligation to prove that each employee classified as exempt is legitimately covered by a statutory exemption.



# Employee Misclassification

Misclassifications can be very costly

- Back pay
- Liquidated damages
- Interest
- Penalties
- State damages and penalties

# Results of Employee Misclassification

Employee was paid a flat rate of **\$800 per week** to cook for an entertainment group on tour for 10 weeks. She worked approximately **17 hours per day**.

## Damages:

- Minimum wage back wages: \$210
- Minimum wage federal penalty: \$210
- Minimum wage state penalty: \$1,740
- Overtime back wages: \$8,591
- Overtime federal penalty: \$8,591
- Overtime state penalty: \$1,740
- Late payment state penalty: \$1,740
- Attorneys Fees: \$15,000
- Filing Fees: \$500



## Poll Question

Approximately  
what percentage of  
your workforce is  
exempt?

# Determining Exempt Status



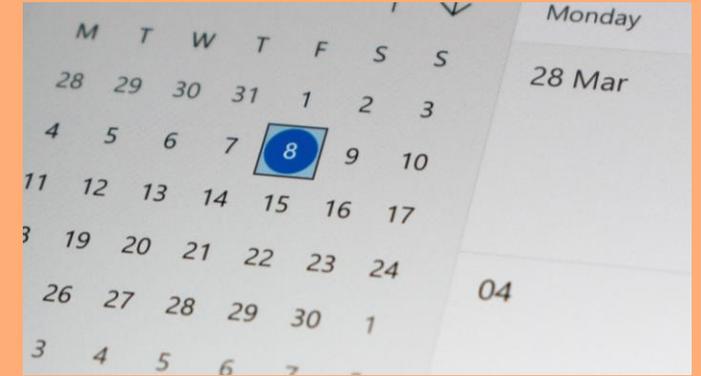
# FLSA White Collar Exemptions



Duties



Salary Level



Salary Basis

# White Collar Exemption: Primary Duties

**Duties:** For an exemption to apply, an employee's job duties must meet all the Department of Labor's standards.

To the right is a list of the most commonly used exemptions, referred to as the EAP or White Collar Exemptions.

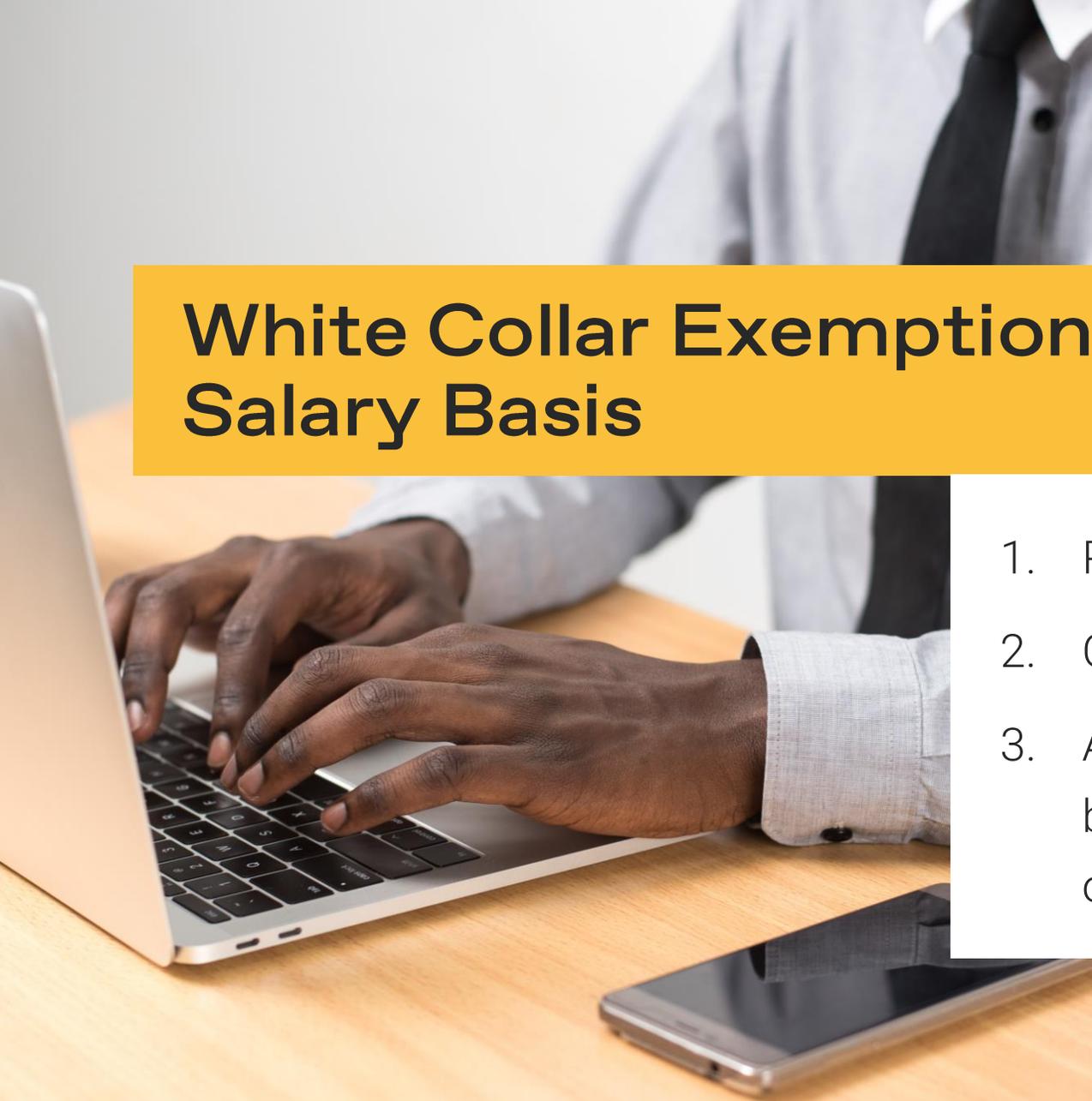
- Administrative
- Executive
- Professional
- Outside Sales
- Computer
- Highly Compensated

# White Collar Exemption: Salary Level

*As of January 1, 2020*

Executive, Administrative, Professional*, Salaried Computer	\$684 per week
Hourly Computer	\$27.63 per hour
Highly Compensated	\$107,432 per year (and at least \$684 per week)
Outside Sales	No minimum

*\*Bona fide teachers and practicing doctors and lawyers are exempt from the minimum salary requirement*



## White Collar Exemption: Salary Basis

1. Paid a predetermined amount; and
2. On a weekly or less frequent basis; and
3. Amount must not be subject to reduction because of variations in the quality or quantity of the work performed

# Executive



1. Primary duty is the management of an enterprise in which the person is employed or a customarily recognized department or subdivision, *and*
2. Has authority to hire, fire, or promote other employees or effectively recommend similar actions, *and*
3. Customarily and regularly directs the work of two+ full-time employees (or equivalent)

# Executive – Business Owner



1. Owns at least a bona fide 20% equity interest in the company; and
2. Actively engaged in its management

# Administrative



1. Primary duty is office or non-manual work directly related to the implementation of management policies or general business operations of the company or its customers, *and*
2. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

# Learned Professional

1. Primary duty is the performance of work requiring advanced knowledge, predominantly intellectual in character, and includes the consistent exercise of discretion and judgment; and
2. The advanced knowledge must be in a field of science or learning and such learning must be customarily acquired by a prolonged course of specialized intellectual instruction.

*Note: Under the FLSA, teachers, doctors, and lawyers are exempt from the salary level and basis tests, but a number of states don't allow this deviation*



# Creative Professional

Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

If another creative professional would produce very similar results if assigned the same task, it is less likely the employee qualifies for the exemption.



# Highly Compensated

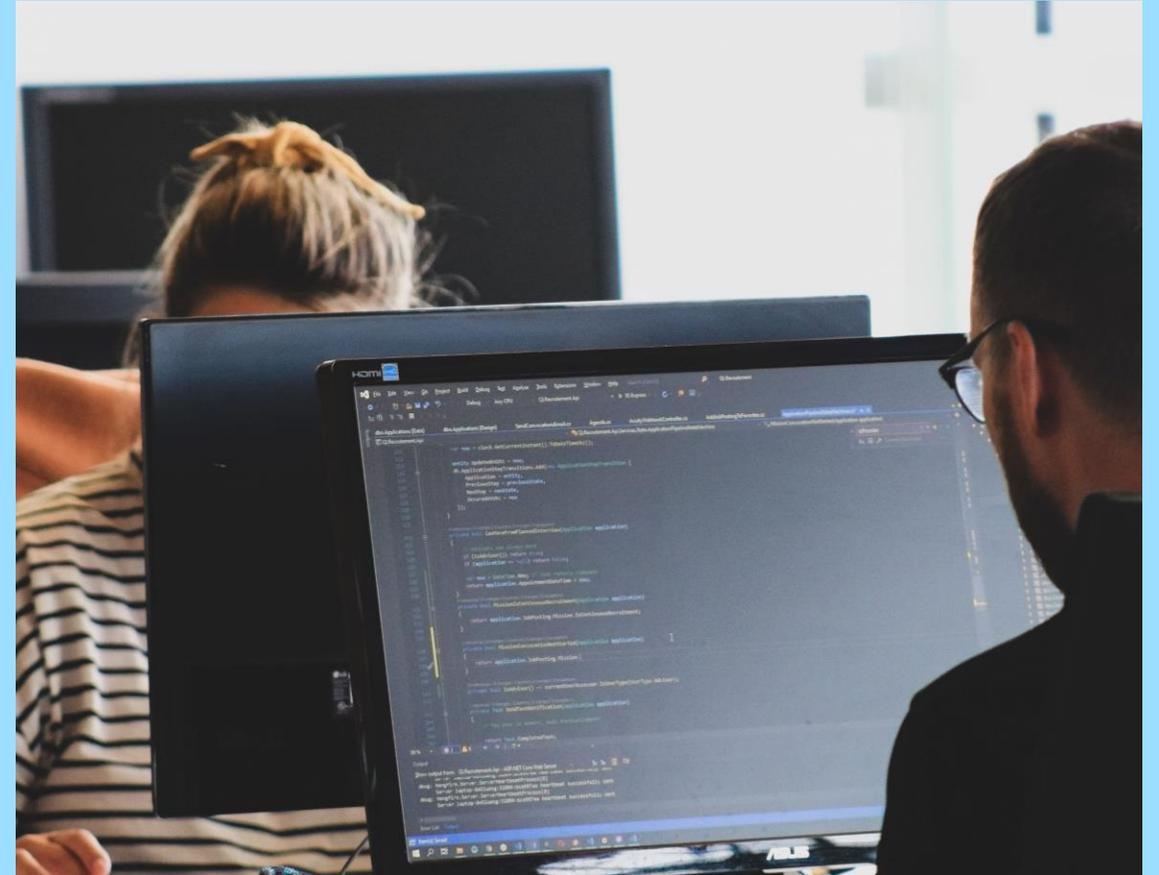


1. Primary duty is the performance of office or non-manual work; and
2. Customarily and regularly performs at least one duty of an exempt executive, administrative, or professional employee; and
3. Paid a total annual compensation of at least \$107,432; at least \$684 per week must be paid on a salary basis

# Computer Employees

1. The application of systems analysis techniques to determine hardware, software or system specifications; or
2. The design, development, analysis, testing or modification of computer systems or programs, based on and related to user or system design specifications; or
3. The design, testing, creation or modification of computer programs related to operating systems

*Note: Not for employees who build or repair computers!*



# Outside Sales



1. Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities; and
2. The employee is customarily and regularly engaged away from the employer's place or places of business

*Note: Any site used by a salesperson as headquarters for sales or telephone solicitations is regarded as the employer's place of business*

# Other Exemptions

## Commissioned Employees:

- Employee must be employed in retail or service establishment, *and*
- Their regular rate of pay must exceed 1.5x the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked (i.e., they must make 1.5x minimum wage for all hours if they work more than 40), *and*
- More than half of their total earnings in a representative period (at least one month, and up to one year) must consist of commissions



# Other Exemptions

- Some police, fire fighters, paramedics, and other first responders
- Agricultural employees
- Babysitters on a casual basis
- Live-in domestic employees
- About 20 more: boat salespeople, livestock auction workers, seamen on American vessels, airline employees, etc.

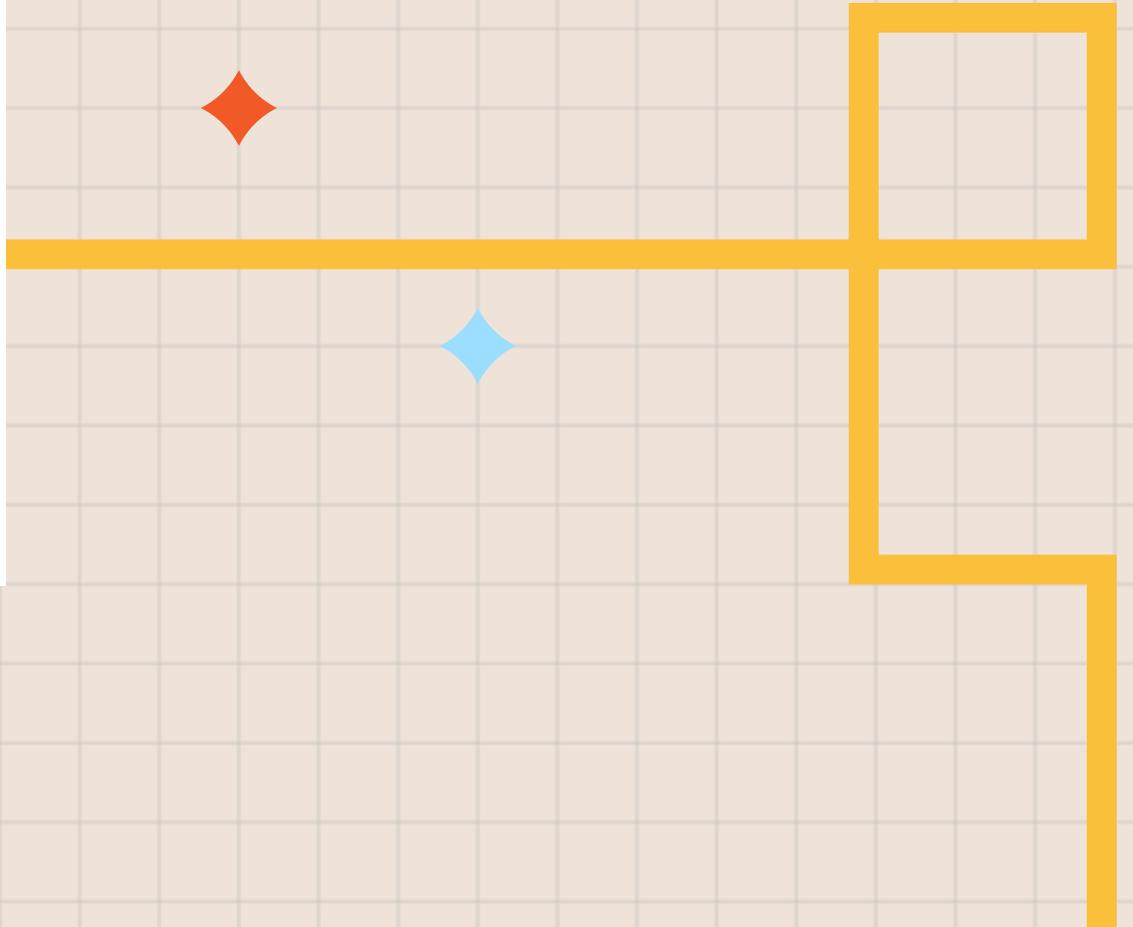




# Poll Question

How confident are  
you in your  
classifications?

# So You Have an Exempt Employee . . . Now What?





## Salary Basis: Best Practices

- May be expected to work more or less than 40 hours per week
- Do not track hours for purpose of calculating pay
- Base bonuses on projects completed or objectives met rather than hours worked
- Be very careful when making any pay deductions



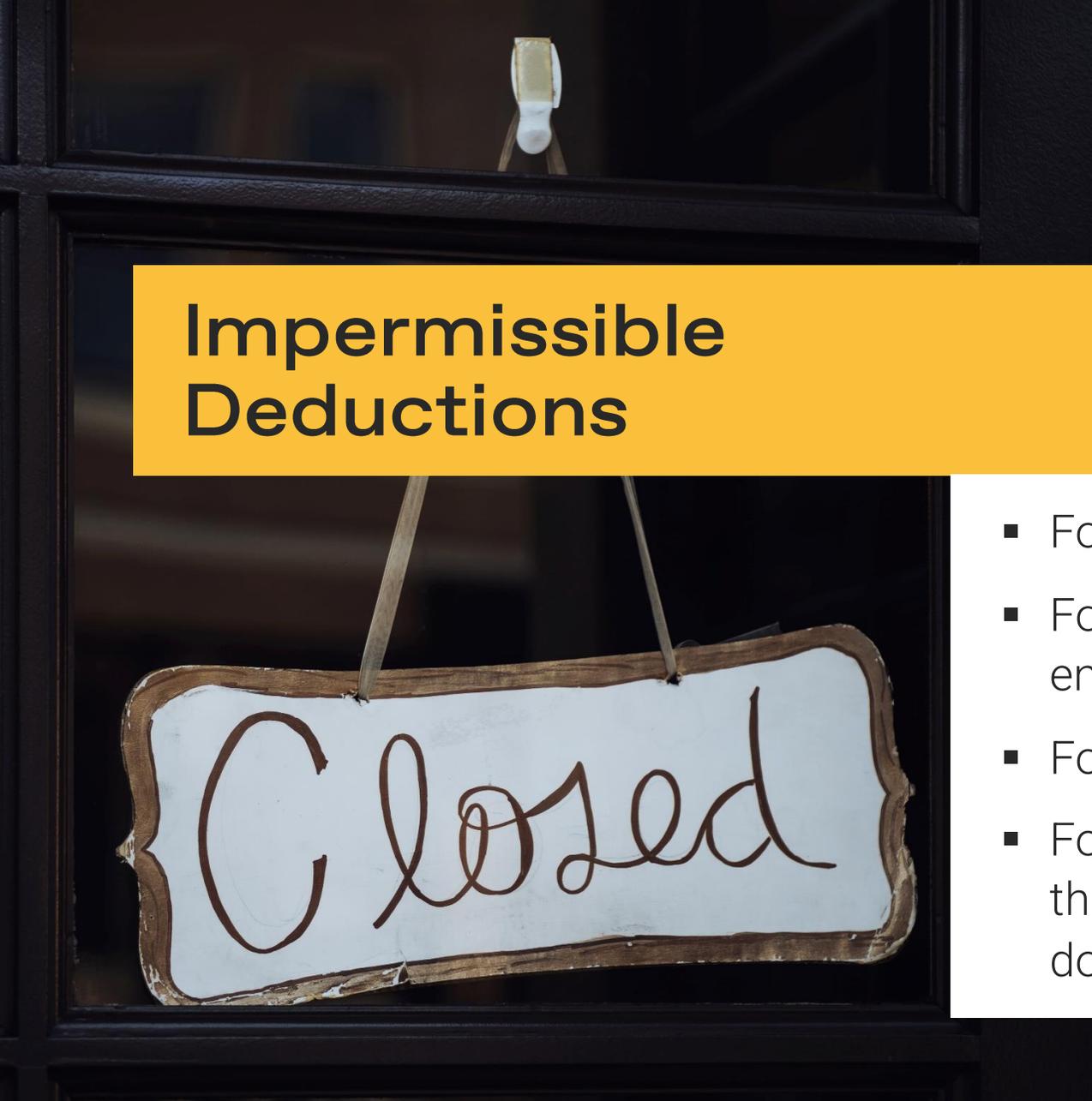
# Permissible Deductions

- To offset amounts paid for serving as a witness or juror, or for military pay
- Unpaid FMLA or medical leaves
- Disciplinary suspensions of one or more days in accordance with the company discipline policy or for major safety infractions
- Partial weeks in the first and last weeks of employment
- Full day absences for personal reasons
- Full day absences for sickness or disability if the employer offers a bona fide paid leave plan

# Bona Fide Sick Leave Plan

- Defined sick leave benefits
- Benefits have been communicated to eligible employees
- Plan operates as described
- Plan is administered impartially
- Plan is not designed to evade the requirements that exempt employees be paid on a salary basis
- Plan provides at least five paid days per year



A wooden sign with the word "Closed" written in cursive, hanging from a window. The sign is white with a dark wood border and is suspended by two wooden sticks. The background is a dark window frame.

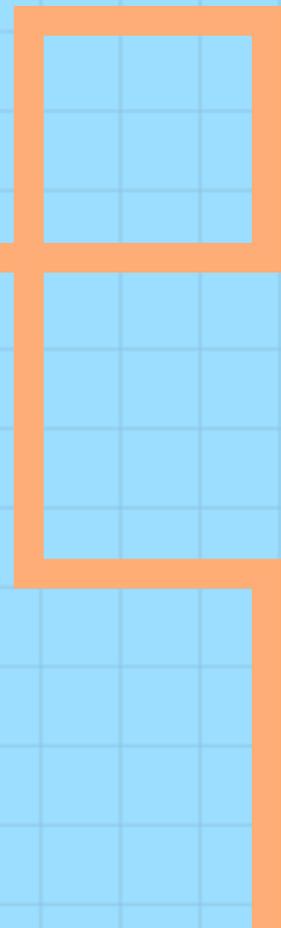
## Impermissible Deductions

- For partial day absences
- For jury duty (unless no work is done in an entire work week)
- For temporary military leave
- For absences caused by employer (e.g., closing the office for bad weather, email server goes down, you have nothing for them to do)

# Exempt Employees' Schedules

- Can be held accountable to an attendance policy
- Can be required to work a set schedule, whether more or less than 40 hours
- Failure to adhere to that schedule can result in progressive discipline

Q+A



Thank you!

