

The SESCO Report

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Your “Human” Resource Since 1945

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Navigating Political Speech in the Workplace

As we quickly approach Election Day in November, political discussions can dominate daily life, including in the workplace. Employers are often faced with the question of how to handle political speech in the workplace, particularly when that speech involves polarizing views. In addition to practical concerns about employees getting along, employers should remember legal considerations related to employee political speech in the workplace.

When discussing issues related to speech, the First Amendment to the U.S. Constitution is often the first source of law that comes to mind. However, the First Amendment prohibits government actors from restricting an individual’s speech, with some limitations, and does not generally apply to private employers. While private employers may have more leeway to place limitations on employee political speech in the workplace, employers should be aware of the federal and state laws that may protect employee political speech.

- **National Labor Relations Act:** Section 7 of the National Labor Relations Act, or NLRA, allows non-supervisory employees “to engage in concerted activities for purposes

of mutual aid or protection.” This provision protects an employee’s ability to do things like talk to other employees about working conditions and compensation. Some political discussions may trigger NLRA rights, like discussions about discrimination or minimum wage increases. In recent years, the General Counsel for the National Labor Relations Board, or NLRB, has suggested that an employee’s political or social justice advocacy is protected by Section 7.

- **Federal EEO Laws:** Certain EEO laws may also come into play. “Political affiliation” is not a protected characteristic under federal laws like Title VII of the Civil Rights Act of 1964. However, employees may express opinions in the workplace that are couched as “political beliefs” but which may be perceived as hostile to another group, such as if the discussion involves race, sexual orientation, religion, or any other similar protected category. Those discussions may contribute to an employee’s hostile work environment claim.
- **State laws:** At least 11 states have laws prohibiting employers from disciplining or restricting employees from expressing political affiliations or views, including some states with protections for off-duty conduct like participating in political demonstrations, campaigning, and voting. Some states, like Connecticut and California, provide broader protections to employees, and Connecticut extends First Amendment protection to employee speech, even if the employer is not a government actor.

- **Social Media Considerations:** Social media platforms provide additional outlets for employees to express political opinions. At least 26 states have social media privacy laws that prohibit employers from accessing an employee’s non-public social media posts. Section 7 of the NLRA may also come into play if the subject of the employee’s post can be considered to be seeking mutual aid or protection. Employers should be mindful about accessing, or taking any action relating to, an employee’s social media post.

Best Practices for Employers

- **Be prepared.** Employers should not wait until a problem arises before developing plans and policies to address employee political speech in the workplace. While handling employee political speech in the workplace can seem daunting, employers should not shy away from being prepared.
- **Review internal policies for compliance with applicable laws.** Employers should consider creating policies and/or reviewing existing policies which cover political speech in the workplace. Such policies can serve as the first line of communication to employees to convey the employer’s expectations about maintaining a respectful workplace.
- **Ensure consistent application of internal policies.** Once a policy is in place, employers should apply that policy consistently across the

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POLITICAL SPEECH

workforce, regardless of an employee's political affiliation or any other characteristic.

- **Train leaders, management, and HR staff about applicable policies.** Employers should ensure that leadership is prepared to handle situations

related to employee political speech as those situations arise.

- **Communicate with employees.** Employers should establish clear lines of communication with employees in order to encourage respectful dialog despite differing viewpoints. These

communications are not limited to an election year and can foster a positive workplace culture.

- **When in doubt, call SESCO!**
[SESCO's Election Year Tips for Employers](#)

FLSA Checklist: Exempt vs. Nonexempt Status

To comply with the FLSA, employers need to regularly review their employee classifications. Generally, two requirements must be met to classify an employee as exempt: 1) they must earn a salary and 2) hold a position with duties the U.S. Labor Department designates as appropriate for exempt positions. Those positions generally fall into six (6) categories: executive, administrative, learned professional, computer professional, creative professional and outside sales.

But it's not that simple. That's why SESCO prepared this checklist. Use it to determine whether your employees are exempt from the FLSA.

SESCO Basic Exemption Checklist

Executive Exemption

1. Is the employee's **primary** duty managing the enterprise or a department or subdivision of the enterprise? Yes No Don't Know
2. Does the employee customarily direct the work of two (2) or more other employees or their equivalent? Yes No Don't Know
3. Does the employee have the authority to hire or fire, and do his/her recommendations carry significant weight if unauthorized to make the final decision? Yes No Don't Know
4. Is the employee paid the equivalent of at least \$844 per week on a salary basis? Yes No Don't Know

If you answered "No" to any of these questions, you may be in non-compliance and overtime is due.

Administrative Exemption

1. Is the employee's **primary** duty performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers? Yes No Don't Know
2. Does the employee exercise discretion and independent judgment with respect to matters of significance? That is, does he/she evaluate and compare possible courses of action and then make a decision or recommendation after considering the various possibilities? Yes No Don't Know
3. Is the employee paid the equivalent of at least \$844 per week on a salary basis? Yes No Don't Know

If you answered "No" to any of these questions, you may be in non-compliance and overtime is due.

Learned Professional Exemption

1. Is the employee's **primary** duty to perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction? Yes No Don't Know
2. Is the advanced knowledge obtained by completing an academic course of study resulting in a four-year college degree or leading to certification? Yes No Don't Know

Exempt Guaranteed Salary Level Set to Increase January 1, 2025

As widely reported, the Department of Labor implemented its new overtime rule establishing a raise of the salary-threshold on July 1 (\$43,888 - already in effect) and a second on January 1, 2025 to \$58,656.

Unlike the last time the DOL issued such a mandate which was eventually blocked, we have yet to see any legal push back blocking this significant and, frankly for many, an unaffordable increase.

SESCO will continue to monitor any legal developments that may block and/or reduce the amount of the increase. In the meantime, conduct a thorough audit of exempt-nonexempt positions as well as an analysis of either increasing current exempt salaries that fall below the \$58,656 requirement.

3. Is the employee paid the equivalent of at least \$844 per week on a salary basis? Yes No Don't Know

If you answered "No" to any of these questions, you may be in non-compliance and overtime is due.

See "FLSA CHECKLIST", page 3

FLSA CHECKLIST

Creative Professional Exemption

1. Is the employee's **primary** duty to perform work requiring invention, originality or talent in a recognized field of artistic endeavor such as music, writing, acting and the graphic arts? Yes No Don't Know
2. Does the work require more than intelligence, diligence and accuracy (i.e., does it require "talent")? Yes No Don't Know
3. Is the employee paid the equivalent of at least \$844 per week on a salary basis? Yes No Don't Know

If you answered "No" to any of these questions, you may be in non-compliance and overtime is due.

Computer Professional Exemption

1. Is the employee paid at least \$844 per week on a salary or fee basis or, if paid hourly, at a rate of not less than \$27.63 per hour? Yes No Don't Know
2. Is the employee's **primary** duty:
 - Application of system analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or
 - Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
 - Design, testing, documentation, creation or modification of computer programs related to machine operating systems; or
 - Any combination of the aforementioned duties requiring the same level of skills? Yes No Don't Know

If you answered "No" to any of these questions, you may be in non-compliance and overtime is due.

Outside Sales Exemption

1. Is the worker's **primary** duty making outside sales? Yes No Don't Know
2. Does he/she regularly work away from the company's place of business? Yes No Don't Know
3. Does the worker sell tangible or intangible items, such as goods, insurance, stocks, bonds or real estate, or obtain orders or contracts for services or the use of facilities? Yes No Don't Know
4. There is no minimum salary level required for this exemption.

If you answered "No" to any of these questions, you may be in non-compliance and overtime is due.

Allowable Pay Deductions

Some deductions won't destroy the exemption. These include:

- Deductions for a workweek in which the exempt employee performs no work at all, such as when the plant the employee manages shuts down for a holiday period.
- Deductions from vacation or sick-leave entitlement as discipline if the infraction involved safety rules of major significance. This deduction need not be for a full day or more.
- Absences for personal reasons lasting at least a day if the worker is voluntarily away handling personal matters. In other words, if the employee is absent more than a day, the person isn't ready and willing to work, so the employer can reduce his or her salary.
- Absences for illness lasting more than a day. However, you can't make a deduction if the employee is simply leaving early for a doctor's appointment. (Make sure you have a bona fide policy in place regarding absences for illness.)
- Partial deductions for jury duty and temporary military duty, but only to

the extent that the employee received jury pay or military pay.

SESCO Staff Recommendations

It is strongly recommended that all organizations conduct a wage-hour compliance assessment. As founded in 1945 by an ex-Department of Labor - Wage and Hour Investigator - SESCO's history and expertise is rooted in FLSA-wage and hour accounting compliance.

- Determine those positions who are, in fact, exempt and nonexempt based upon duties and responsibilities (not salary).
- Once exemption classifications are confirmed, conduct an analysis of the affordability of meeting the increased salary requirement of \$58,656 per year.
- If the increase is unaffordable and/or creates significant compression on your compensation with existing exempt staff who currently meet the \$58,656 threshold, then we need to consider altering pay plans.
- Altering pay plans may include:
 - Salaried-nonexempt
 - Use of Fluctuating Workweek Method of Payment
 - Nonexempt pay plan with salary plus half-time for hours worked in excess of 40 hours per week
 - Conversion to an hourly rate with overtime pay for hours worked in excess of 40 hours per week
 - Maintain the current salary level and limit hours of work to 40 hours per week

For those clients who retain SESCO via our **Professional Service Agreement**, an audit is provided. For those who are not a current client, we are available either via developing a Professional Service Agreement or on a per-fee basis to not only conduct a compliance assessment, but also to provide strategy to ensure compliance as well as compensation affordability.



P.O. Box 1848
Bristol, TN 37621
(423) 764-4127 • FAX (423) 764-5869
www.sescomgt.com
email: sesco@sescomgt.com

RETURN SERVICE REQUESTED

SESCO Client Feedback

"Wow, this is really well done! Nice job guys!" ~
Clark Phipps, People and Culture Sr. Business
Partner -- Modivcare - Norton, VA

*"Thanks Dennis. I spoke with Bill; he was a big
help." ~ Sal -- All Star Tool & Mold - Chicago, IL*

*"I'm convinced that nothing we do is more important
than hiring and developing people. At the end of the
day, you bet on people, not on strategies."*

Lawrence Bossidy
Former CEO of Honeywell

Special Thanks to New SESCO Clients!

Tennessee Association of Utility Districts (TAUD)
Murfreesboro, TN

Mid-Missouri Legal Services
Columbia, MO

Appalachian Plastics, Inc.
Glade Spring, VA

Eastern Eight CDC
Johnson City, TN

Buckeye Complete Auto Care
Columbus, OH

Schmitz and Mitchell, Inc. (Toyota of Dothan)
Dothan, AL

Virginia Carolina Civil
Suffolk, VA

North Lenoir Water Corporation
Kinston, NC

Town of Newport
Newport, NC