

## Sign-On Bonuses, Retention Bonuses and Commissions:

Keeping Staff while avoiding common pitfalls



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## Agenda

- ♦ Current Environment
- ♦ Legal Background




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## Hiring Challenges

- ♦ Where did everybody go?
  - ♦ Openings everywhere, but no workers to be found.
  - ♦ From 2020-2021, number of RNs decreased by 100,000. (Significant number were under 35).
  - ♦ By 2035, Michigan expected to be in the top 5 for statewide nursing shortages.
  - ♦ Shortages in other staff as well.
  - ♦ Providers struggling to care for patients or to expand due to lack of staffing.



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## Hiring Challenges

- ◆ Reasons for nurses moving. According to a 2022 study reasons for nurses moving included:
  - ◆ Higher pay (58%)
  - ◆ Search for a different role (33%)
  - ◆ Improved schedule (31%)
  - ◆ Preferred location (25%)
  - ◆ Career advancement or training (24%)
  - ◆ Better staffing (24%)



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## Hiring Challenges

- ◆ Where did everybody go?
  - ◆ Not just nursing - pandemic led to a significant decline in the overall labor participation rate. The rate has improved but has not returned to pre-pandemic levels.
  - ◆ Homecare is facing the same challenges as hospitals when it comes to nursing.
  - ◆ Homecare also competing with non-health care businesses for personnel to fill aide roles.
  - ◆ In this environment it is not only hard to find staff, but the cost is going up.



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## Impact of shortages

- ◆ The result is an exacerbation of pre-pandemic staffing shortages
- ◆ Staffing shortages are impacting patient care.
- ◆ Agencies expected to only admit patients for whom they reasonably expect they can meet their needs.
- ◆ The inability to recruit staff means agency may not be able to fill all scheduled hours on one or more patients' plans of care.
- ◆ If you cannot provide all of the care called for in the plan of care, you may need to discharge.
  - ◆ Surveyors will cite agency for missing visits.
- ◆ Reducing census will free up staff for other patients.
- ◆ This is not a preferred option.



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## Response to the Shortage

- ◆ Providers are assessing a number of different potential responses.
  - ◆ Raising wages.
    - Homecare providers limited by reimbursement. Cannot stay in business by paying staff more than you receive in reimbursement.
    - Has not necessarily led to satisfying staffing shortages.
    - Nursing base pay has climbed as a result of the shortage.
  - ◆ Recruiting Foreign nurses – limited visa availability, challenging process.



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## Response to the Shortage

- ◆ Sign-on and Retention Bonuses
  - Many employers offering sign-on and retention bonuses.
  - Sign-on bonuses have become very popular recruiting strategy. May work to recruit, may not lead to retention. One study found sign-on bonuses only made a 5% difference in retention over a 2-3 year period.
  - Same study found a spike in resignations at 12-month point – period when sign-on bonus paid and not subject to return.
  - Data suggests they can be effective to bring a nurse in, but may not work to keep them.
- ◆ Career Paths
  - Providing paths to career advancement.
  - Training, clear promotion pathways, etc.



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## Response to the Shortage

- ◆ Because many nurses who are looking to change positions are looking for increased pay many healthcare providers utilize sign-on bonuses for recruiting and retention bonuses.
- ◆ Provides a financial incentive to join provider and to stay.
- ◆ Bonuses do not create an ongoing financial obligation.
- ◆ May not create long term commitment.
- ◆ Bonuses can be tailored to candidates' credentials, experience, etc.
  - More experienced nurse gets a larger bonus, etc.
- ◆ May be used with other staff. When restaurants and other employers are offering sign on incentives, we have to consider for Aides, etc.



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## Sign-on and Retention Bonuses

- ◆ Sign-on bonus. Refers to a bonus paid to an individual as a reward for accepting employment with the company. Usually mentioned in the job opening listing.
- ◆ Retention Bonus. Refers to a bonus paid to an employee for remaining with the company for a set period of time.



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## Sign-on and Retention Bonuses

- ◆ A few considerations:
  - ◆ The market in which you are recruiting. Homecare employers in some jurisdictions have offered bonuses as large as \$10,000 without receiving a single application.
  - ◆ Parameters for bonuses. If you are offering a range, need to have some criteria for the ranges you will offer. Ad hoc bonus decisions can lead to allegations of discrimination. For retention bonuses need clear criteria regarding when they are earned.
  - ◆ Wage and Hour compliance. Bonuses may impact overtime for non-exempt employees. How bonus programs are defined in employer policies will be important.



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## The FLSA and Bonuses

THE FLSA AND BONUSES



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## Fair Labor Standards Act

- Because payment of bonuses falls under the Fair Labor Standards Act ("FLSA") and Michigan's Wages and Fringe Benefits Act, it is important to understand how the FLSA and Michigan law apply to Sign-on and Retention Bonuses.
- Non-compliance with the FLSA can lead to DOL investigations, employee litigation.



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## Fair Labor Standards Act

Basic rules:

**Minimum Wage:** All covered employees must receive a Regular Rate that is at least the minimum wage for hours worked. (Michigan \$12.48/hour)

**Overtime Pay:** All covered employees must be paid one-and-one-half times the employee's Regular Rate for all hours worked in excess of 40 hours in a workweek.

**Important Concept:** the Regular Rate.



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## Fair Labor Standards Act

**REGULAR RATE:** the hourly rate the employee is actually paid for working.

Regular rate includes "all remuneration for employment paid to, or on behalf of, the employee" during the workweek. (29 U.S.C. § 207(e))

Michigan law treats bonuses as fringe benefits. An employer must "pay fringe benefits to or on behalf of an employee in accordance with the terms set forth in the written contract or written policy." M.C.L.A. 408.473.



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## Fair Labor Standards Act

Michigan law makes the written policy that governs your sign-on and retention bonuses very important.

Discretionary v. Mandatory is important, both for whether they are owed under your policy and, as we will see, whether they are wages under the FLSA.



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## Fair Labor Standards Act

Bonuses are Remuneration. Do they figure into the Regular Rate?

Important for non-exempt personnel.

For exempt personnel, this is not a significant issue, because exempt personnel are not entitled to overtime.



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## Bonuses, the Employee's Regular Rate and Gifts

THE EMPLOYEE'S REGULAR RATE



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## FLSA Exclusions

- ◆ The FLSA excludes certain amounts from the employee's Regular Rate.
- ◆ One such exclusion applies to "sums paid as gifts; payments in the nature of gifts made at Christmas time *or on other special occasions*, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." 29 U.S.C. § 207(e)(1)
- ◆ If the bonus is a gift, then it is not included in the regular rate and does not impact overtime.



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## FLSA Exclusions

- ◆ Michigan law defines wages as "all earnings of an employee whether determined on the basis of time, task, piece, commission, or other method of calculation for labor or services except those defined as fringe benefits."
- ◆ Michigan defines fringe benefits as "compensation due an employee pursuant to a written contract or written policy for holiday, time off for sickness or injury, time off for personal reasons or vacation, bonuses, authorized expenses incurred during the course of employment, and contributions made on behalf of an employee."



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## FLSA Exclusions

- ◆ Under Michigan law, bonuses are not wages.
- ◆ That does not mean they do not impact overtime for non-exempt employees..
- ◆ Issue: FLSA applies. Still follow the FLSA.



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## FLSA Exclusions

- ◆ How do you determine if a bonus is a gift? ◆  
Key factors:
  - ◆ A gift is not earned.
  - ◆ If the employee is entitled to receive an amount, it is not a gift.
  - ◆ Your policy will be very important here.



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## FLSA Exclusions

- ◆ A bonus that is earned is not a gift. ◆
  - ◆ This means a bonus that is tied to “hours worked, production, or efficiency ... is geared to wages and hours during the bonus period” 29 C.F.R. 778.212(b).
  - ◆ Examples: Nursing productivity bonus (visits), marketer bonuses.
  - ◆ If the employee earned the bonus by achieving defined goals, it is not a gift and must be included in the Regular Rate.



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## FLSA Exclusions

- ◆ A bonus to which the employee is entitled is not a gift. An employee is entitled to a bonus if: ◆
  - ◆ Contractual right to bonus that is enforceable in court.
  - ◆ Required by Statute.
  - ◆ Required by ordinance.
  - ◆ Required by collective bargaining agreement.



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## FLSA Exclusions

- ◆ Additional issue: Large Bonuses:
  - ◆ If a bonus is so large an employee would consider the bonus “part of the wages for which they work”, then it must be included in the employee’s regular rate.
  - ◆ How large is too large?
  - ◆ Does bonus have to be recurring? Can you consider a one-time bonus part of your wages?



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## Gifts and Clawbacks

- ◆ Employers occasionally want to be able to clawback sign-on bonuses.
  - ◆ Employee performance
  - ◆ Employee discipline
  - ◆ Employee quits
- ◆ Issues
  - ◆ Still a gift?
  - ◆ How to legally clawback.



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## Gifts and Clawbacks

- DOL Guidance on when an amount that is clawed back is still a gift.
- **A sign-on bonus with no clawback provisions is excluded from the employee’s regular rate.** This type of bonus cannot be linked to the employee’s hours worked or productivity, because they have not worked yet.
- A sign-on bonus that has a clawback provision due to an ordinance, collective bargaining agreement or policy must be included in the employee’s regular rate.
- A sign-on bonus that has a clawback provision that is not due to an ordinance, collective bargaining agreement or policy and that complies with 29 C.F.R. 778.212 can be excluded from the regular rate.

84 Fed. Reg. 68751.



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## Gifts and Clawbacks

- ◆ This makes it clear that a sign-on bonus that has no clawback provision is not included in the employee's regular rate.
- ◆ No clawback is the safest approach.
- ◆ If you want to utilize a clawback, 2 considerations:
  - ◆ Cannot be due to statute, ordinance or CBA.
  - ◆ Must comply with DOL Guidance.



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## Gifts and Clawbacks

- ◆ To comply with DOL guidance, the clawback must not be linked to hours worked, production or efficiency.
- ◆ This means clawing back a bonus due to employee quitting early may prove the bonus was not a gift.
- ◆ A clawback linked to employee discipline is not linked to hours worked, production or efficiency.
- ◆ If considering a clawback provision, need to seek advice of counsel.



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## Bonuses

THE FIVE TYPES OF BONUSES



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## Sign-on Bonuses

- ◆ Sign-on bonuses that are not subject to a clawback provision are generally considered gifts and excluded from remuneration.
- ◆ Because they are paid at time of hire, simply because employee started working, they cannot be linked to hours worked, efficiency or productivity.
- ◆ Safest to not include any clawback provision. Recovering some or all of the bonus may not be worth your time and effort.



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## Retention Bonuses

- ◆ Retention bonuses are not as straightforward. They are linked to length of service, but same rules apply.
- ◆ Important that retention bonus is linked to nothing more than length of service with the company. Employee receives bonus for years with company, no consideration of hours worked, efficiency or productivity.
- ◆ Example: Three employees all with same length of service, but different numbers of hours worked, productivity, etc., all receive the same bonus. This is because bonus linked to time with the company, not what they accomplished with that time.



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## Retention Bonuses

- ◆ A retention bonus can be a gift even though:
  1. "it is paid with regularity so that the employees are led to expect it."
  2. "amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm."
  3. "so long as the amounts are not *measured by or directly dependent upon* hours worked, production, or efficiency."

29 C.F.R. § 778.212(c)(emphasis added).



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## Retention Bonuses

- ◆ This means having 1-year, 5-year, 10-year, etc. bonuses does not transform them from gifts to remuneration.
- ◆ Employees in different positions and with different lengths of service can receive different amounts. The 1-year gift and 10-year gift can be different. Employees in different roles can receive different amounts as well.
- ◆ KEY is that bonus is never tied to hours worked, productivity or efficiency.



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## Bonuses and Overtime

### THE DIFFERENCE BETWEEN BONUSES



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## Bonuses and Overtime

- ◆ If the Sign on Bonus or Retention Bonus is tied to hours worked, productivity, etc., then it is not a gift.
- ◆ This means it must be included as employee remuneration.
- ◆ Two situations:
  - ◆ Employee is Exempt.
  - ◆ Employee is non-Exempt.



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## Bonuses and Overtime

- ◆ If the Employee is an Exempt Employee, the impact of "getting this wrong" is minimal.
- ◆ Exempt employees are not entitled to receive overtime.
- ◆ Only issue might be if employee bonus and salary together are greater than 1.5 times the employee's guaranteed salary.
- ◆ DOL – If the ratio of salary and bonus is greater than 1.5 times the guaranteed salary this violates salary basis of payment.



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## Bonuses and Overtime

- ◆ If employee is non-exempt, then failing to get this correct has compliance implications.
- ◆ Non-exempt employees are entitled to overtime.
- ◆ Bonuses that must be included in the employee's regular rate impact the employee's overtime.



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## Example of Risk- DOL

**DOL case:** Three Rivers Home Care failed to pay an overtime premium on sign-on bonuses for 26 home health aides. The bonuses were contingent upon each employee's continuing employment until the time of payment. The Fair Labor Standards Act requires the bonuses be included in the regular rate of pay for overtime purposes.

The DOL was not clear if the sign-on bonuses were paid and then clawed back or payment of the sign on bonus was made once the required number of weeks achieved.

This makes it clear sign-on bonuses with clawback provisions related to length of service are very risky.



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## Bonuses and Overtime

- ◆ Bonuses can complicate overtime calculations for non-exempt staff.
- ◆ Need to understand how bonuses impact overtime.
- ◆ “Bonuses which do not qualify for exclusion from the regular rate...must be totaled in with other earnings to determine the regular rate on which overtime pay must be based.” 29 C.F.R. § 778.208



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## Bonuses and Overtime

- ◆ When a bonus is part of the regular rate, it must be included in overtime calculations.
- ◆ If the bonus is earned in the same workweek it is paid, then the calculation is straight forward.
- ◆ If it is earned over multiple weeks, then the calculation becomes more difficult.



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## Bonuses and Overtime

- ◆ When a bonus is earned over multiple workweeks, the “bonus must be apportioned back over the workweeks of the period during which it may be said to have been earned.” 29 C.F.R. § 778.209.
- ◆ Example: A sign on bonus requires a non-exempt employee to stay with the company for four weeks. This would need to be apportioned back across the four weeks. Overtime would then need to be recalculated for any of the four weeks in which the employee worked more than 40 hours. (This is the DOL Case.)



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## Bonuses and Overtime

Example Cont'd: Apportioning the bonus back over the four week period shows the impact on overtime.

Week 2 -  $\$250.00/46 \text{ hours} = \$5.43$   
Additional overtime =  $(\$5.43 * 6)/2 = \$16.29$ .

Week 4 -  $\$250/50 \text{ hours} = \$5.00$ .  
Additional Overtime =  $(\$5.00 * 10)/2 = \$25.00$ .  
 $\$16.29 + \$25.00 = \$41.29$ .

The employee should have been paid \$1,041.29 to allow for the impact of the bonus on his regular rate (\$1,000.00 bonus + \$41.29 overtime).



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## Bonuses and Overtime

- ◆ Is there a simpler option?
- ◆ Yes. DOL does allow a percentage of compensation method.
- ◆ Bonus is paid as a percentage of the employee's total wages (straight time and over time) for the period over which the bonus was earned.



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## Clawbacks

THE 10 COMMON MISTAKES



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## Clawbacks

- ◆ Taking back a sign-on or retention bonus can lead to the bonus no longer being categorized as a “gift.”
- ◆ This means it needs to be included in overtime calculations.
- ◆ If not handled properly, clawbacks can lead to other problems as well.



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## Clawbacks – Wage Deduction

- ◆ Michigan law limits deductions from the employee's wages.
- ◆ General Rule: Employee must consent to the deduction.
- ◆ There is an exception for deducting amounts where wages were paid in excess of what was owed, but does not apply. Only applies to mistakes, the sign-on bonus was not paid by mistake.
- ◆ Clawback efforts should be discussed with counsel.



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## Clawbacks – Sue Employee

- ◆ The last option would be to sue the employee to recover the bonus.
- ◆ Cost of litigation likely exceeds the amount of the bonus.
- ◆ Employee may not have the funds anyways.



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## Clawbacks

- ◆ Best approach – understand the bonus is a gift. We don't take back gifts.
- ◆ There is a risk that the employee will not last as long as employer hopes.
- ◆ There is a risk that they employee will not meet the employer's expectations.
- ◆ If you are going to utilize sign-on and retention bonuses, need to accept that this is risk.



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## Commissions

THE DIFFERENCES



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## Commissions

- ◆ Commissions are a bonus provided to create incentives for employees to generate referrals.
- ◆ Commissions offered to marketing staff. Creates financial incentives for performance.
- ◆ Some providers have “refer a friend” bonuses available to all staff.
- ◆ Both types of commission need to be considered under the FLSA.



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## Sale Bonuses

- ◆ Michigan has a law that addresses Commissions.
- ◆ Applies to sales of goods and products, not services.



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## Sale Bonuses

- ◆ FLSA/overtime compliance is not the only concern.
- ◆ Commissions are a payment to your marketing staff to “induce or reward referrals.”
- ◆ Need to consider not only FLSA compliance, but Fraud and Abuse issues.
- ◆ Primary consideration – Anti-Kickback Statute Compliance



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## Sale Bonuses and FLSA

- ◆ Remember: workweek, regular rate?
- ◆ A commission is remuneration paid to an employee.
- ◆ Need to consider its impact on the employee’s regular rate and overtime. This is an issue for non-exempt staff, because they are entitled to overtime.
- ◆ Impact of referral bonus may be different for marketers than it is for staff who refer a friend.



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## Sale Bonuses and Regular Rate

- ◆ New business bonuses to non-marketing staff are different from commissions paid to marketers.
- ◆ These types of bonuses may not need to be included in the Regular Rate.
- ◆ DOL says they can be excluded from the regular rate, if they are for activities:
  - ◆ Outside of normal working hours;
  - ◆ Beyond the scope of the employee's normal duties;
- ◆ But note: Location may matter.



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## Sale Bonuses and Regular Rate

- ◆ DOL also addressed a new business bonus to non-marketing employees in an opinion letter. DOL determined the bonus did not have to be included in the regular rate, because:
  - ◆ Employee participation was voluntary;
  - ◆ It involved negligible amounts of time;
  - ◆ Time spent on solicitation during normal hours was paid;
  - ◆ Time spent after hours was social.
- ◆ If these factors apply, bonus may not impact regular rate.



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## Sale Bonuses and Regular Rate

- ◆ Commissions paid to marketers are treated differently. They are paid to marketers as a financial incentive.
- ◆ Commissions paid to marketers must be included in the regular rate. 29 C.F.R. § 778.117, 803 K.A.R. 1:060 section 7(7).
- ◆ For non-exempt marketers, commissions will impact overtime to employee.



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## Sale Bonuses and Regular Rate

- ◆ Most marketer bonuses are earned over a period of time that is longer than a workweek.
- ◆ The bonus, once earned, must then be apportioned back over the period in which it was earned.
- ◆ Overtime must be recalculated accordingly.
- ◆ As we saw earlier, this can make calculating overtime very complicated. These are performance bonuses.



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## Sale Bonuses and Exemptions

- ◆ If employee who earns commissions is exempt from FLSA Overtime requirements, commissions are easier to address.
- ◆ FLSA includes several exemptions. An employee whose job duties meet all of the elements is not entitled to overtime.
- ◆ Burden is on employer to show exemption applies. Must meet all of the elements.



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## Commissions and Exemptions

- ◆ There are several potential exemptions (all addressed under MI Law):
  - ◆ Administrative Exemption
  - ◆ Executive Exemption (only for sales managers who have two or more FTEs reporting to them.)
  - ◆ Outside sales professional.
- ◆ Michigan courts recognize that FLSA and MI law “largely parallel each other so they are analyzed in the same manner.”



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## Commissions and Exemptions

- ◆ Administrative Exemption
  - ◆ Must be paid on a salary basis. SALARY ALONE IS NOT ENOUGH.
  - ◆ Individual's primary duties must:
    1. Be the performance of office or non-manual work directly related to management policies or the general business operations of his or her employer; and,
    2. Involve the exercise of discretion and independent judgment regarding "matters of significance."



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## Commissions and Exemptions

- ◆ Executive Exemption (Must be directing others)
  - ◆ Must be paid on a salary basis. SALARY ALONE IS NOT ENOUGH.
  - ◆ Individual's primary duties must:
    1. Include management of the enterprise or recognized department;
    2. Regularly direct the work of two or more employees; and,
    3. Have authority to hire/fire or whose recommendations carry particular weight.



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## Commissions and Exemptions

- ◆ Outside sales exemption
  - ◆ Applies to employee:
    1. Whose primary duty is making sales or obtaining orders or contracts for services; and
    2. Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Do not need to be paid on a salary basis. 29 C.F.R. § 541.500(c).



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## Commissions and Exemptions

### ◆ Outside sales exemption

- ◆ The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. 28 C.F.R. § 541.502



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## Commissions and Exemptions

### ◆ Customarily and Regularly

- ◆ The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks. 29 C.F.R. § 541.701
- ◆ "[n]othing in [29 C.F.R. § 541.701] requires that, to meet the definition of 'customarily and regularly,' a task be performed more than once a week or that a task be performed each and every workweek." 69 Fed. Reg. at 22,187.



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## Commissions and Exemptions

- ◆ Are homecare sales, outside sales? We don't sell directly to customers.
- ◆ In 2012, U.S. Supreme Court addressed this issue: *Christopher v. Smithkline Beecham*.
- ◆ Plaintiffs were pharmaceutical sales representatives. Employer argued they were exempt outside salesmen.
- ◆ Supreme Court ruled the employees were exempt outside salesmen, even though the doctors to whom they "sold" could only make a "non-binding" agreement to prescribe.



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## Commissions and Exemptions

- ◆ This case is important for homecare sales. Homecare salespersons are like pharmaceutical salesperson.
- ◆ They do not usually sell directly to patients. They "sell" to facilities, physicians and other referral sources.
- ◆ Can sell to patients. However, a patient, in most cases, still needs a physician's order.
- ◆ Most agencies focus on other providers as a source of referrals. This case says that is still selling.



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## Commissions and Fraud

- ◆ Compensation paid to reward referrals must be paid in a way that complies with Anti-Kickback Statute and other fraud and abuse requirements.
- ◆ In a response to comments regarding expanding the employee Safe Harbor to the Anti-Kickback statute, OIG specifically stated its concerns about commissions being paid to independent contractors in response to request to expand employee Safe Harbor. OIG noted that commissions are compensation that is directly linked to volume or value of business.

**NEED TO IDENTIFY A SAFE HARBOR.**



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## Commissions and Fraud

- ◆ Two options: Bonafide Employee Safe Harbor and the Personal Services Safe Harbor.
- ◆ Bonafide Employee Safe Harbor: AKS does not apply to "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services; 42 U.S.C.A. § 1320a-7b (West)"



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## Commissions and Fraud

- ◆ OIG has promulgated regulations to implement the statute:
- ◆ “remuneration” does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).” 42 C.F.R. § 1001.952(i)



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## Commissions and Fraud

- ◆ The reference to 26 U.S.C. is a reference to the Internal Revenue Code requirements for employment.
- ◆ 26 U.S.C. 3121 (d) lists a number of relationships considered employment. The two most important ones are:
  - ◆ Any officer of a corporation;
  - ◆ Any individual that qualifies as an employee under the usual common law rules.



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## Commissions and Fraud

- ◆ Usual common law rules is a broad category.
- ◆ There are many different tests for "employer/employee" these tests include:
  - ◆ IRS test – 21 factors, looks at "control."
  - ◆ DOL test – financial realities.
  - ◆ Agency test – looks at control.
- ◆ OIG looks to IRS test and IRS interpretations.
- ◆ Does employee receive a W-2? Has employee been correctly classified?



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## Commissions and Fraud

- ◆ Burden is on provider to prove employee is “bonafide.”
- ◆ OIG and DOJ will investigate the nature of the employment. OIG and DOJ have prosecuted employers for what they determined were “sham employment arrangements.”
- ◆ Bonafide employee must be employee.



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## Commissions and Fraud

- ◆ Bonafide employee safe harbor says, “any amount paid by an employer to an employee” is not remuneration.
- ◆ It does not mention Fair Market Value.
- ◆ This is important. “Any amount” can include amounts linked to generating referrals.
- ◆ This is how the statute is written.
- ◆ OIG does not like the fact it does not say Fair Market Value.



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## Commissions and Fraud

- ◆ **OIG VIEWS THE BONAFIDE EMPLOYEE EXEMPTION VERY NARROWLY.**



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## Commissions and Fraud

- ◆ What about third parties? **Personal Services Safe Harbor.** ◆
- ◆ Used for independent contractors.
- ◆ **Requires FMV compensation.** This is a major difference from bonafide employees.
- ◆ Problem: OIG has repeatedly stated that commissions are not FMV compensation.
- ◆ **YOU CANNOT PAY INDEPENDENT CONTRACTORS COMMISSIONS.**



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## Practical Considerations

### THE PRACTICAL CONSIDERATIONS



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## Practical Considerations

- ◆ Sign on and retention bonuses need to be gifts. Bonus must not be linked to hours worked, productivity, required by contract, etc. ◆
- ◆ If you link it to productivity, hours worked etc., you need to include it in the employee's regular rate calculation.
- ◆ If bonus earned over a period AND IS NOT A GIFT, (employee required to work for several weeks to get bonus), then bonus must be apportioned back over the period.



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## Practical Considerations

- ◆ Retention bonus can only be linked to length of service, not productivity, etc.. Longer period of time.
- ◆ Remember: DOL recently investigated and prosecuted an agency where sign-on bonuses were contingent upon a set length of service.
- ◆ Retention bonuses are, by definition, based on length of service. Must not be a “contractual right”. Must not be linked to hours worked, etc.



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## Practical Considerations

- ◆ Other options? Although pay was an important consideration in healthcare employees moving, a recent survey showed there were other considerations: Search for a different role and Career advancement or training were two important factors.
- ◆ Consider these areas as well when thinking about recruitment and retention.



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## Practical Considerations

- ◆ Career advancement and training:
  - ◆ Are there clear paths of advancement/promotion? Where does an employee “go from here”.
  - ◆ Opportunities to learn new skills? Develop leadership? Move into positions with more responsibility?
  - ◆ Opportunity for aides to move up? CNA training? Assistance with pursuing nursing?



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## Practical Considerations

- ◆ Because our financial resources are limited, need to consider not just bonuses and pay, but other options.
- ◆ There is a risk that when we help an employee develop and improve personally, they will take those skills and move on to other roles.
- ◆ There is also the potential that these employees will stay longer and be more invested in the company's success.



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## Practical Considerations

- ◆ Commissions:
  - ◆ Need to consider both wage and hour and AKS compliance.
  - ◆ Also need to consider compliance oversight of marketing.
  - ◆ Marketers will be focused on achieving goals to earn commissions. Need to be sure that this does not lead to compliance problems. Improper sales strategies, improper admissions, etc.
  - ◆ Marketers may copy competitor's tactics. Competitors tactics may be non-compliant.



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## Practical Considerations

- ◆ Commissions:
  - ◆ Structure of incentive program – you get what you pay for.
  - ◆ Educate marketers on compliance. They need to understand what is allowed and not allowed in marketing.
  - ◆ Train them to respond properly to competitor's tactics.
  - ◆ Do not let a race for commissions become a source of liability for agency.



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## Conclusion

- ◆ Bonuses and commissions can be useful tools to recruit, retain and incentivize employees. However, they must be implemented properly to avoid creating liability under the FLSA, AKS, False Claims Act and more.
- ◆ Providers must understand how federal law applies to bonuses and commissions and implement them properly.
- ◆ Providers must also consider how commissions can lead to unintended consequences and structure the bonuses appropriately.



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## Questions?

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## The End



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