



# Nonprofit HR Collaborative Navigating the Legal Minefield in 2016 and Beyond

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# Today's Presentation

- ◀ FLSA Changes and Overtime Issues
- ◀ Medical Marijuana and E-cigarettes
- ◀ FMLA, ADA, and Sick Leave Traps
- ◀ Independent Contractors
- ◀ Changes in Rollover Rules
- ◀ Department of Labor Audits
- ◀ Mini-COBRA Coverage
- ◀ Annual Notices



## Employment Law Agenda

- ◀ FLSA and Overtime Changes
- ◀ Medical Marijuana and E-Cigarettes
- ◀ FMLA and ADA Traps
- ◀ Independent Contractors



## Exemptions from Overtime

- ◀ In general – in order to be exempt from overtime, an employee has to be paid on a **salary-basis**; the salary has to be of a **certain amount** (soon to be \$47,476 annually); and the employee **must perform certain exempt duties**.
  - Is your entity covered by the Fair Labor Standards Act (“FLSA”) and Ohio law?
  - What are the changes to the federal law on salary levels?
  - If the changes impact your organization, what can you do to achieve compliance?





# Overtime Basics

- ▶ General Overtime Rules under FLSA
  - 40-hour work week / 1 ½ times the regular rate of pay
- ▶ Common exemptions under FLSA – focus on primary duties
  - Executive
  - Administrative
  - Professional
  - Computer
  - Seasonal
  - Highly Compensated Employee





# Exemption Application

## ◀ Duties Test –

- Focus is on the primary duty
- Factors to consider
  - ◀ Importance of exempt duties
  - ◀ Amount of time spent on exempt duties (does not have to be a majority of time)
  - ◀ Relative freedom from supervision



# Exemption Application

## ◀ Salary Test

### – Requirements

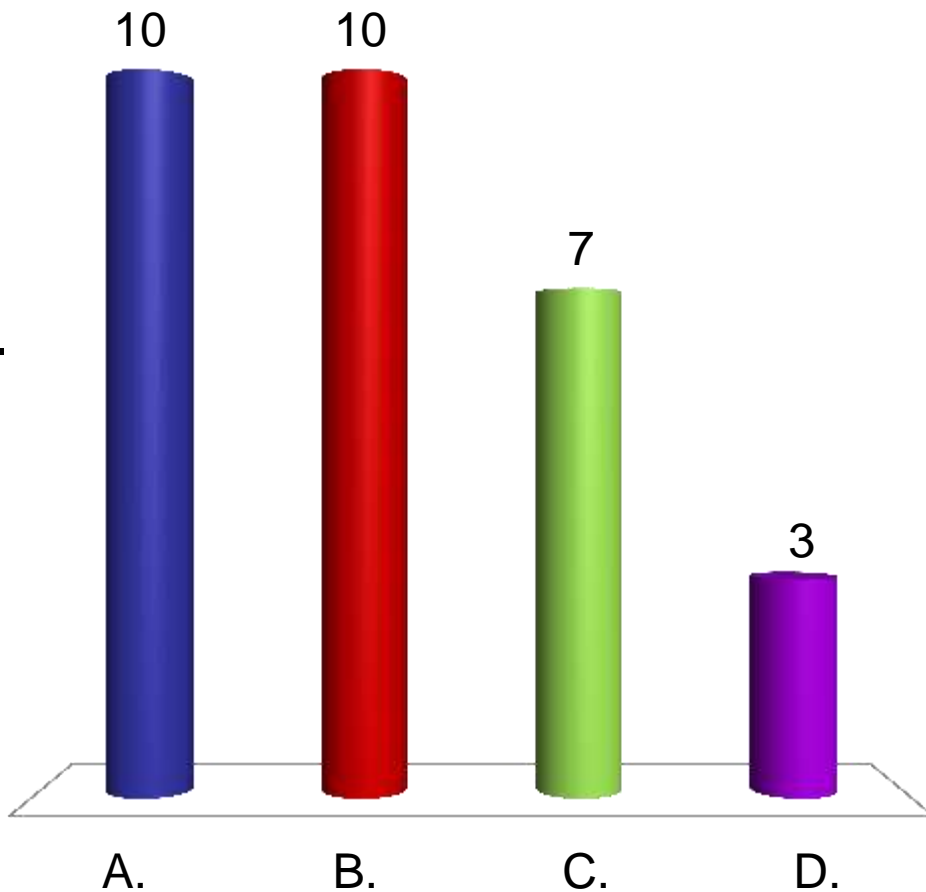
- ◀ Paid \$913 per week (starting December 1, 2016)
  - Currently \$455 per week
- ◀ Paid on a salary basis
- ◀ Pay NOT subject to deductions because of quality or quantity of work performed
  - (Those issues may be addressed through discipline or evaluations)
- ◀ Salary requirement does NOT apply to *bona fide* teachers (in an educational establishment), lawyers, doctors or outside salespeople





# Do you believe that the changes in the Fair Labor Standards Act apply to you?

- A. Yes, definitely.
- B. No. We are not covered by federal or state law for purposes of paying overtime.
- C. I am not sure.
- D. I did not know about the changes.





# Does the FLSA apply?

## ◀ Two Types of Coverage:

- Enterprise Coverage (i.e., the employer is covered)
- Individual Coverage (i.e., certain employees are covered *even if the enterprise is not*)



## Does the FLSA apply?

- ▶ **Enterprise Coverage** for certain businesses/ organizations with at least two employees who either:
  - have an annual dollar volume of sales or business done of at least \$500,000; or
  - are hospitals, businesses providing medical or nursing care for residents, schools and preschools, and governmental agencies.
- ▶ The rules under **Ohio law** are different for coverage. Ohio's wage laws apply to “employers”:
  - any individual or corporate entity acting in the interest of an employer **except** if the *annual gross volume of sales made for business done is less than \$150,000*. ORC Sec. 4111.03(D)(2).



## Does the FLSA apply?

- ▶ **Individual Coverage** – applies where the employer is not covered, but the employee's work regularly involves them in **interstate commerce**. Examples include:
  - buying or selling items across states lines
  - secretary typing letters that will be sent out of state
  - regularly making phone calls or sending emails to persons located in other states
  - travel to other states (conferences, meetings)



## Non-Profit Organizations: Are You a Covered Entity?

- ▶ The FLSA covers employees who work for an organization with annual gross volume of **sales made or business done** of at least \$500,000.
- ▶ Non-profits are **NOT** covered **UNLESS:**
  - they engage in “ordinary commercial activities” that result in “sales made” or “business done;” or
  - fall within one of the stated exceptions.



## How do you calculate what is included in the FLSA's \$500,000 threshold?

- ▶ It does not include contributions, donations, membership fees, dues except as provided below.
  - If a benefit is provided in exchange for dues or membership, the value of that benefit has to be included in revenue amount.
- ▶ It does include interest or dividends earned on investments.
- ▶ If the non-profit engages in these activities at the \$500,000 level or above, employees are covered by the FLSA (\$150,000 to be covered under Ohio law).



## What are “ordinary commercial activities”?

- ▶ Engaging in activities that are in “substantial competition with other businesses.”
  - Examples: Gift shop, restaurant, consulting services, veterinary services for a fee, internet sale of retail items
- ▶ Does NOT include charitable activities – for example:
  - Providing free services to the indigent
  - Feeding or housing the homeless
- ▶ Note: Certain activities are automatically covered: hospitals, institutions that care for sick, aged or mentally ill, schools, preschools, and government agencies



# Individual Coverage

- ◀ Even when there is no enterprise coverage, individual employees are protected by the FLSA if their work regularly involves them in commerce between states ("interstate commerce").
  - The FLSA covers individual workers who are "engaged in commerce or in the production of goods for commerce."
- ◀ Be aware that employees of non-profits may be covered by state or local laws that include minimum wage or overtime requirements that overlap or exceed the FLSA
  - e.g., in Ohio -- \$150,000 in gross volume of sales.



## Interstate Commerce

- ▶ Examples of employees who are involved in interstate commerce include those who produce goods that will be sent out of state, regularly make phone calls to persons located in other States, handle records of interstate transactions, or travel to other States on their jobs.
- ▶ If an individual is engaged in interstate commerce, then the employee is covered by the FLSA; **if the employee spends an insignificant amount of time on interstate commerce**, the Department of Labor has repeatedly indicated that it will not assert that such insignificant time supports FLSA coverage.



## Final Rule

- ▶ Final rule becomes effective **December 1, 2016**.
- ▶ Changes the standard salary level from \$455 per week to **\$913 per week or \$47,476 annually**.
- ▶ New salary level equates to the 40th percentile of earnings.
- ▶ Changes the annual compensation requirement for highly compensated workers to **\$134,004**.
- ▶ Compensation requirement for highly compensated workers now equals the 90th percentile of full-time salaried employees.



# The Silver Lining

- ▶ As you evaluate your options for compliance, use this opportunity to examine exempt and non-exempt positions, job descriptions and actual duties being performed.
- ▶ If you have “close calls” on the duty test, this is your chance to include those positions into the overall change without suggesting that misclassification has occurred in the past.





## “White Collar” Exemptions

- ▶ Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who meet a salary threshold and who are employed in a bona fide:
  - Executive; Administrative; or Professional position.
- ▶ Outside Sales capacity
- ▶ Seasonal Exemption
- ▶ Minister/Religious Exemption
- ▶ Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA.



## Primary Duty

- ▶ The principal, main, major or most important duty that the employee performs.
- ▶ Factors to consider include, but are not limited to:
  - Relative importance of the exempt duties;
  - Amount of time spent performing exempt work;
  - Relative freedom from direct supervision; and
  - Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.



# Highly Compensated Employees

- ▶ As of December 1, must be paid at least \$134,004 annually
- ▶ Primary duty is performing office or non-manual work;  
AND
- ▶ Employee customarily performs at least one of the exempt duties or responsibilities of an executive, administrative or professional employee.



# Handling Part-Time Employees

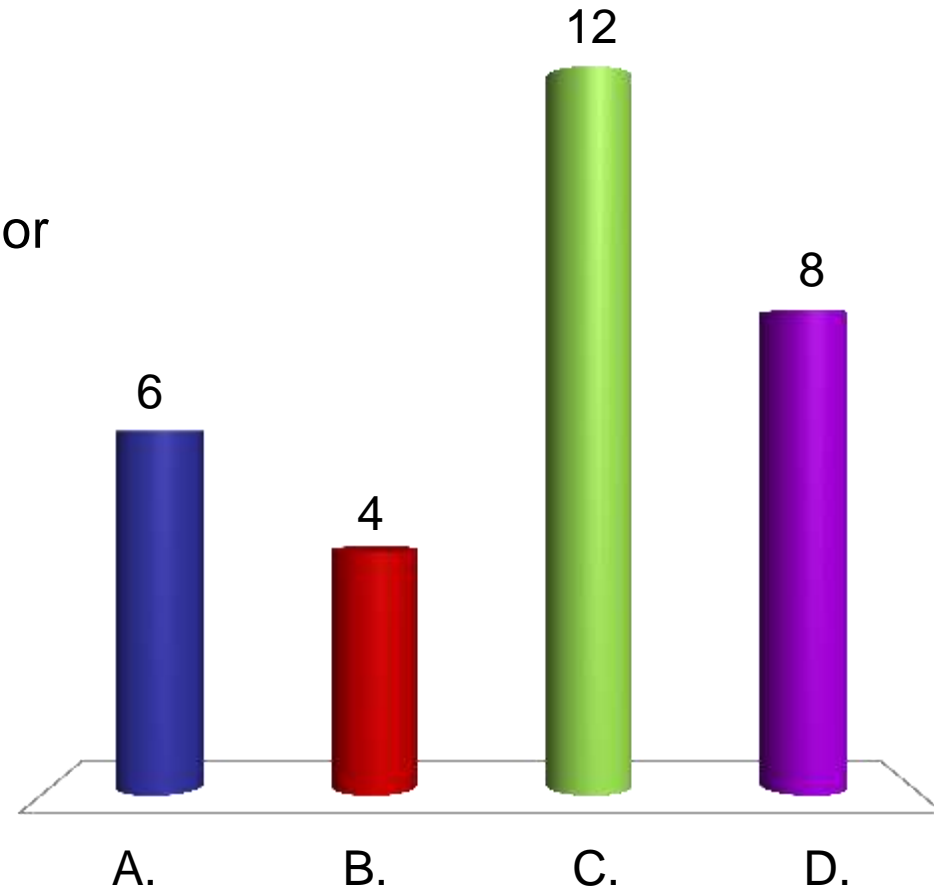
- ▶ Part-time employees are still technically covered by the FLSA
- ▶ If they are part-time, they are unlikely to be working more than 40 hours per week and thus, the overtime rules would not impact them.
- ▶ Salary requirements, however, are not pro-rated for part-time employees.

**PART-TIME**



# Now that you have heard the tests – do the changes impact any of your employees?

- A. Yes. I have employees who are impacted, and we have made the necessary changes to comply.
- B. No. I am not covered under state or federal law.
- C. No. None of my employees work more than 40 hours per week.
- D. I think so, and we need to start or are still working on implementing necessary changes to comply.





## Handling Non-Exempt, Salaried Employees

- ◀ Still have to track hours and pay overtime if employee works more than 40 hours per week
  - Option 1: Set a fixed salary for a specific number of hours per week. You then have to pay the base rate or overtime rate for any hours that are in excess of the agreed upon hours. For example -- \$500 per week for 35 hours of work. Pay base rate for hours over 35 and overtime rate in excess of 40.
  - Option 2: Set a fixed salary that covers all straight time hours in a week (fluctuating work work). If over 40 hours are worked, take the fixed salary, divide by the number of hours worked and then calculate the overtime owed for that week. This agreement should be clearly stated in writing.



# Preliminary Assessment

- ▶ Identify all employees who may be affected by new rule.
- ▶ Gather information about the number of hours worked on average by affected employees.
  - Consider peak periods and variations
- ▶ Do the math – based on the information above, what is financial cost of compliance?
- ▶ Consider effect on other employees (e.g., would subordinate be making as much as supervisor if raised to new exempt requirements?)





# Options to Achieve Compliance

- ▶ Raise Salary.
- ▶ Convert employee to hourly, non-exempt.
- ▶ Convert employee to salaried, non-exempt.
- ▶ Continue as salaried, but limit or prohibit overtime.
- ▶ Restructure roles, hours and functions within department to manage eligibility for overtime and overall compensation.





# Common Classification Errors for Non-Profits

- ◀ “Everyone who is salaried is exempt.”
  - As we have discussed, you can have employees who are paid on a salary basis but who must be treated as non-exempt and thus are eligible for overtime.
    - ◀ Duties not exempt
    - ◀ Do not meet threshold for \$47,476
  - **Being paid a salary is only PART of the test.**
  - If the worker is non-exempt and works more than 40 hours per week, the worker has to receive overtime pay.
  - “Comp. Time” does not apply in the private sector as a substitution for overtime pay.



# Common Classification Errors for Non-Profits

- ◀ “The employee volunteered so these are not hours worked.”
  - Be very careful about employee volunteer time.
  - It cannot be “coerced” or “required.” If it is, then it is working time.
  - If the employee is performing the same functions that they perform as a paid employee, it is more likely to be seen as hours worked, which must be paid.





# Common Classification Errors for Non-Profits

- ◀ “The job description says that it is an ‘exempt’ position that does not pay overtime.”
  - Job descriptions are helpful but do not control the ultimate decision about whether the employee is eligible for overtime.
  - The focus is on what the employee actually does day to day.
  - It is important and a best practice to have job descriptions for all positions and can be helpful in defining reasonable expectations and the essential functions of a job.
  - Job descriptions should be updated to conform to the duties actually being performed.



# Common Classification Errors for Non-Profits

- ◀ “All supervisors are exempt.”
  - The focus is on the primary duty.
  - If supervision is a minor part of the job, then the supervisor may be entitled to overtime.
  - If the supervisor has very little authority, then the supervisor may be entitled to overtime.



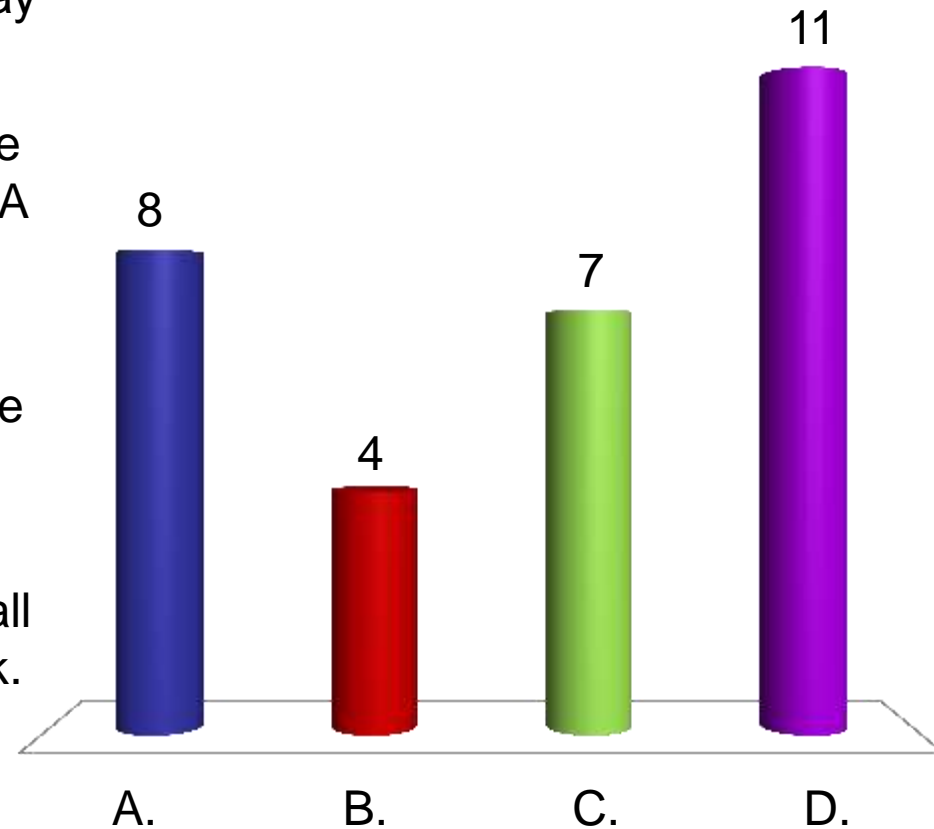
# Exemptions and Deductions

- ▶ Sam is a salaried, exempt employee. He has chronic poor performance issues and frequently is not in the office during regular business hours. His boss is fed up with him and tells Sam during their weekly meeting that he needs to be in the office between 9 and 5. He also tell Sam that he has no more PTO or sick leave for the year so he expects Sam to be in the office every working day other than when the organization is closed for holidays. The following week, Sam is one hour late on Monday because of a migraine. On Tuesday, he calls off sick for the entire day. On Thursday, he leaves at 4:00 to see his doctor pursuant to a FMLA certification, and on Friday, he leaves at 1:00 to go out of town for the weekend.



# Can the company make any deductions from Sam's pay for that week given that he has exhausted his PTO?

- A. No. You can never make deductions from an exempt employee's weekly pay due to absences.
- B. Yes. The company can deduct for one hour of time due to Sam's use of FMLA leave.
- C. Yes. The company can deduct one hour for FMLA time and 8 hours for the full-day absence due to illness.
- D. Yes. The company can deduct one hour for FMLA time and 13 hours for all of the other absences during the week.





# Common Classification Errors for Non-Profits

- ▶ “The employee is out of PTO – we can deduct time off from her salary.”
  - Exempt employees are guaranteed their salary if they worked during the week. The salary cannot fluctuate week to week.
  - Deductions for late arrival and early departures are impermissible.
  - Employees do not need to be paid for time off under FMLA.
  - Employees can lose pay for disciplinary suspensions.
  - Employees who are out of sick pay can lose pay for full day absences due to illness or disability.



# Medical Marijuana and the Workplace

- ▶ On June 8, 2016, Governor Kasich signed the medical marijuana legislation into law. It took effect on September 6, 2016. It will likely take 2 years or more for the Medical Marijuana Control Program (MMCP), which will oversee the law, to become fully operational.
  - Patients must have qualifying medical condition (e.g., AIDS, epilepsy, cancer)
  - Patient will have to be registered with the state
  - Marijuana is still a controlled substance under federal law
  - Under the law, employers can still enforce drug testing, drug-free workplace and other policies.





# Medical Marijuana

- ◀ Under the new Ohio law:
  - Employers do not have to permit or accommodate employee's use, possession, or distribution of medical marijuana (although you may still have to accommodate the underlying condition)
  - Employers may still take adverse action against an employee because that person is using, possesses or distributes medical marijuana
  - Employees do not have a cause of action against their employers for refusing to hire or disciplining the employee for use of medical marijuana
- ◀ Many other states do not provide this explicit protection for employers.



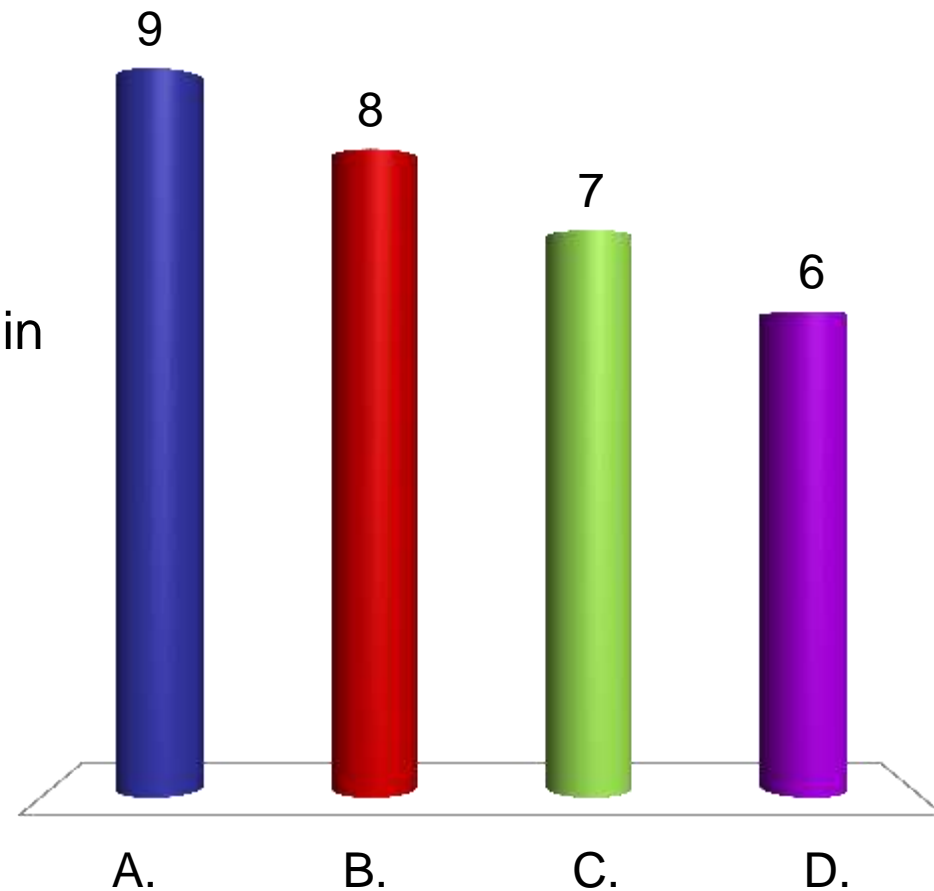
## Recommendations

- ▶ Take a look at your existing policies and be sure that illegal drug use is prohibited regardless of when or where it occurs.
- ▶ Be sure illegality is defined **as a matter of federal, state or local law**. You want your employees to be on notice that even if the use of a drug is permissible under state law, your policy covers federal law as well.
- ▶ Make it clear that medical marijuana (even if permitted by state law) is still considered an illegal drug under your policy.



**Employer has a policy that prohibits chewing or smoking tobacco products on the employer's premises. Does this policy prohibit the use of e-cigarettes?**

- A. Yes. E-cigarettes are included as smoking devices.
- B. No. An employer cannot legally restrict the use of e-cigarettes.
- C. No. E-cigarettes are not included in the policy as written.
- D. No. Employers cannot prohibit the use of e-cigarettes because no studies have shown that they are dangerous and they are used by some employees who are in smoking cessation programs.





## FMLA and ADA

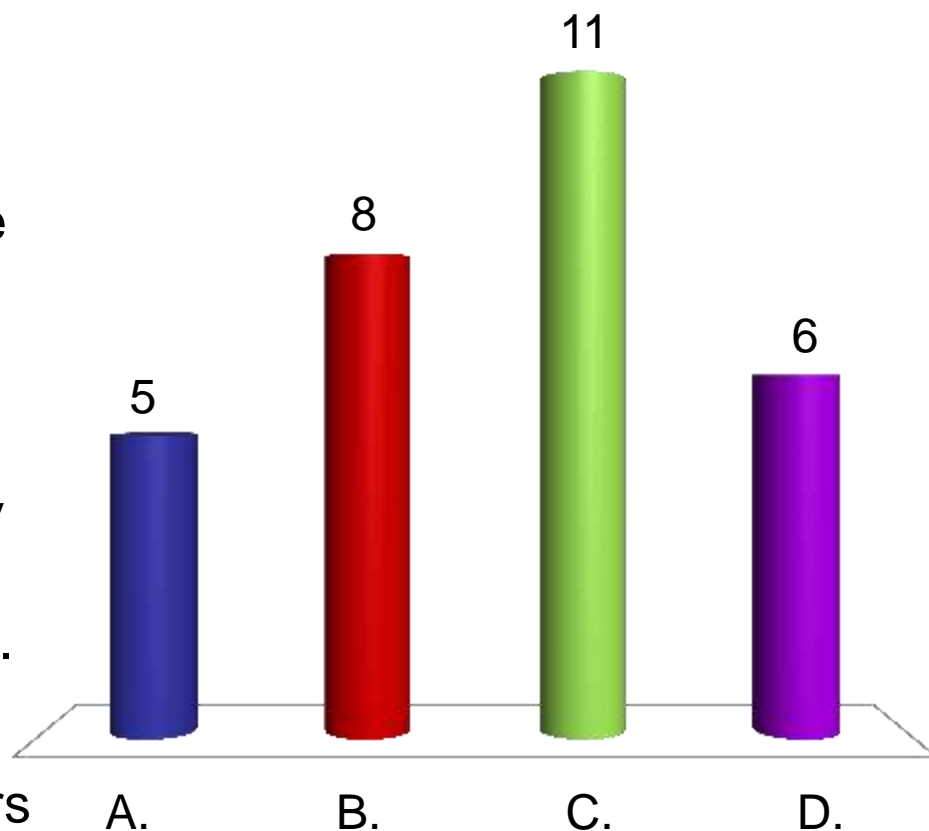
- ▶ Ann has been with the organization for 11 months as a full-time employee. She is an administrative assistant who was hired after she worked as a temporary employee through a temp agency in the same role for a period of 3 additional months. Ann's domestic partner, Susan, was in a car accident that requires Ann to care for Susan during her recovery for the next two months. The organization's leave policies include domestic partners. Ann comes to HR and asks for time off to care for Susan under FMLA and the company's leave policy.



# Is Ann entitled to FMLA leave?



- A. No. Susan is a domestic partner and not a spouse.
- B. Yes. Ann is entitled to FMLA leave because Susan is covered under the organization's leave policies.
- C. No. Ann has not been at the organization long enough to qualify for FMLA leave, and Susan is a domestic partner and not a spouse.
- D. Yes. As a full-time employee, Ann has worked the required 1250 hours to qualify for FMLA leave.





## FMLA and ADA

- Ann took leave for two months to care for Susan. Ann and Susan subsequently decide to adopt a baby six months later. Ann applies for FMLA leave to take three months off to care for the newly adopted child. What should HR's response be?

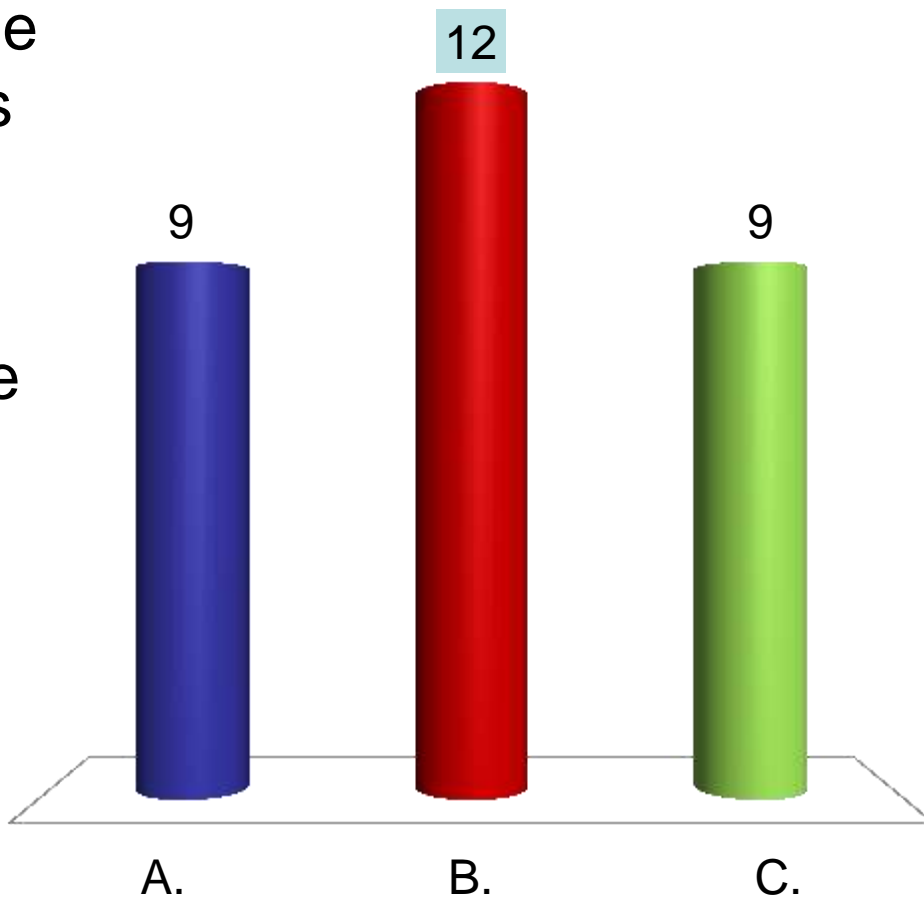




## FMLA and ADA



- A. HR should grant leave for one month only because Ann has already taken two months of leave to care for Susan.
- B. HR should grant leave for the full three months as requested.
- C. HR should deny the leave because Ann is not qualified to take leave.





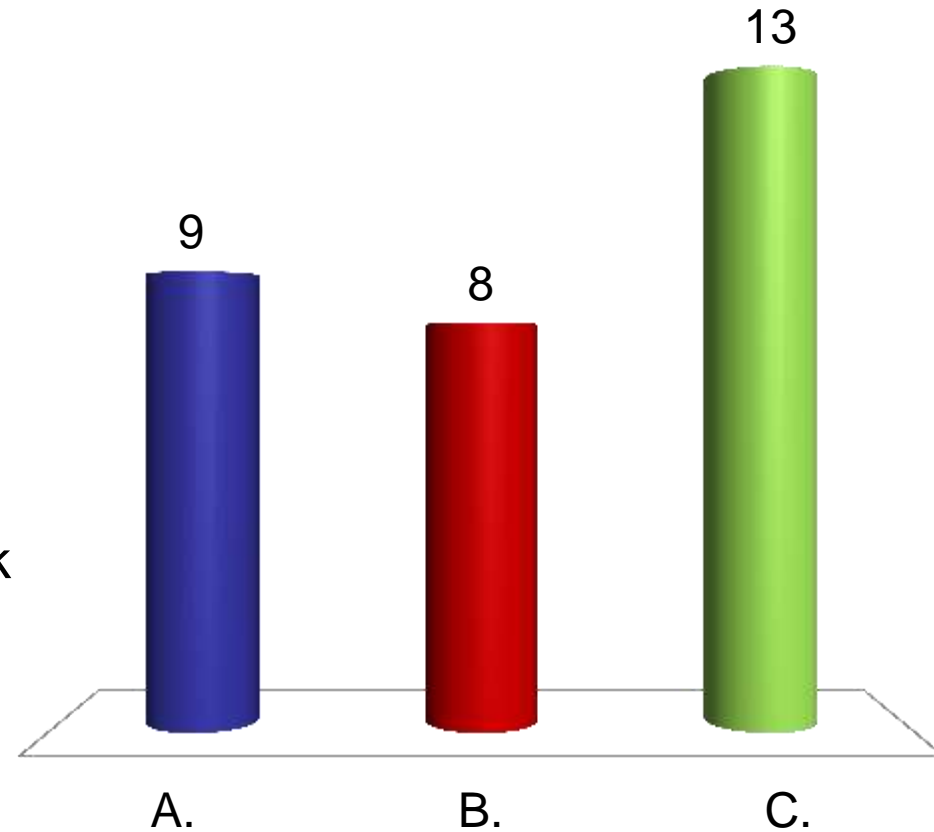
## FMLA and ADA

- ◀ Assume the Ann has only been on the job for a total of 6 months. She comes to HR and reports that she has been diagnosed with a stress-related, anxiety condition that causes headaches and panic attacks on occasion. These attacks are unpredictable and can last from a few hours to a few days. Ann is not yet eligible for intermittent FMLA leave and works for a boss who is very demanding and cannot tolerate anyone whose attendance is unpredictable. Ann provides medical documentation that she needs an accommodation that permits her time off when she experiences these attacks a couple of times per month. What should HR do?



# FMLA and ADA

- A. Reject the accommodation and tell Ann that if she cannot perform the essential functions of the job, she will be fired.
- B. Allow the accommodation and tell her boss that he simply has to accept the work restrictions and absences necessitated by Ann's condition.
- C. Allow the accommodation, but track Ann's performance of essential functions to determine whether the accommodation is reasonable if required in the long-term.





# Independent Contractors

- ▶ Many organizations prefer independent contractors, but there are significant risks associated with misclassification.
  - Unpaid overtime
  - Unpaid taxes
  - Unpaid benefits (including issues with unemployment and workers' compensation)
  - Policies applicable to employees (e.g., FMLA)
  - Note: Claims typically arise when the relationship ends.





# Independent Contractors

- ▶ Behavioral: Does company control what the worker does and when it is done? Can worker provide services to others?
- ▶ Financial: Does the worker have the ability to make a profit or lose money depending on how efficiently the work is performed? Expenses? Tax Reporting?
- ▶ Documentation of Relationship:
  - Written contract?  W2
  - How long?  1099
  - How paid?



# **Nonprofit HR Collaborative Navigating the Legal Minefield in 2016 and Beyond**

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# Changes in Rollover Rules

- General Rollover Rule: Amount distributed from a qualified plan or IRA is excluded from income if it is transferred to an eligible retirement plan no later than the 60<sup>th</sup> day following receipt
- Exception to the Rollover Rule: 60 day requirement waived in certain circumstances

# Changes in Rollover Rules

- Waiver applies if:
  - ▣ No previous waiver has been denied by the IRS with respect to the distribution; and
  - ▣ There is an approved reason for missing the deadline



# Changes in Rollover Rules

## ■ Approved reasons:

- Financial institution error
- Distribution check misplaced and never cashed
- Deposit made to an account mistakenly believed to be an eligible retirement plan
- Severe damage to principal residence
- Death of family member
- Participant or family member severely ill
- Participant incarcerated
- Restrictions imposed by a foreign country
- Postal error
- Distribution made as a result of a tax levy and the levy proceeds are returned
- Distributing plan delayed providing information to the receiving plan to complete the rollover despite participant's best efforts

# Changes in Rollover Rules

## ■ Revenue Procedure 2016-47

- ▣ Model participant letter
- ▣ Rollover must be completed as soon as reasonably practicable
  - ▣ Within 30 days after approved reason no longer exists
- ▣ Plan sponsor can rely on participant self-certification

# Changes in Rollover Rules

## ■ Plan sponsor actions

- ▣ Discuss with recordkeeper
- ▣ Determine cost implications
- ▣ Determine additional administrative burden



# Department of Labor Audits

## ■ Retirement Plans

- ▣ 408(b)(2) disclosures
- ▣ Fees

## ■ Health and Welfare Plans

- ▣ ACA Compliance
- ▣ HIPAA Compliance
- ▣ MHPA



# Department of Labor Audits

## ■ Why talk about this now?

### ▣ DOL's current national enforcement projects:

- ▣ Health Benefits Security Projects
- ▣ Contributory Plans Criminal Project
- ▣ Rapid ERISA Action Team (REACT)
- ▣ Employee Stock Ownership Plans
- ▣ Consultant/Advisor Project (CAP)



# Health Benefits Security Projects

- DOL's comprehensive national health enforcement project, combining DOL's established health plan enforcement initiatives with the new protections under the Affordable Care Act
- Broad range of health care investigations, including
  - ▣ Compliance with ERISA Part 7 and ACA
  - ▣ Compliance with the Mental Health Parity Act
  - ▣ Investigations of insurance companies and claim administrators to ensure that promised benefits are actually provided
  - ▣ Criminal investigations of fraudulent medical providers
- Plans' and claims administrators' failure to provided promised health benefits

# Why does the DOL Want to Audit My Plan?

- Participant complaints
- Information provided on reports filed with the DOL
  - ▣ Forms 5500
- Information received from other governmental agencies
  - ▣ HHS
  - ▣ IRS
  - ▣ State Insurance agencies
- News stories, leads from advocacy groups, private litigation
- Compliance research/education process

# What Happens in a Typical Investigation?

- Phone call/document request letter
- Document production
- On-site interviews
- Follow-up questions and document requests
- Letter with DOL's findings
- Plan's response to DOL findings letter
- Closing letter

# What Types of Documents will They Request?

- Signed plan documents and summary plan descriptions
- Signed annual reports and SARS for the last 3 years
- Insurance and service provider contracts and fees schedules
- Minutes of board of directors or any plan committees
- Enrollment materials
- Proof of compliance with the Newborns and Mothers Act and the Women's Health and Cancer Rights Act
- Documents relating to the use or collection of genetic information
- Copies of participant notices
- Health insurance billing invoices, premium schedules, employee and employer contribution schedules, COBRA premium schedules, payroll records
- Proof of compliance with HIPAA
- Wellness program materials
- Information to justify grandfathered plan status, if applicable
- Documents to confirm compliance with PPACA
- Others – see sample letter

# How Do We Prepare?

## ■ Have the basics in place

- ▣ Written plan documents
- ▣ Signed and dated copies
- ▣ Forms 5500 – conduct careful review before filing
- ▣ Reporting and disclosure documents (SPDs, notices, etc.)

## ■ Establish a fiduciary process

- ▣ Train fiduciaries
- ▣ Document activities

# How Do We Prepare?

- Conduct regular compliance audits of your plans
  - ▣ Confirm that you can locate all plan documents
  - ▣ Confirm that employees involved in plan administration are knowledgeable about the documents
  - ▣ Confirm that documents comply with all applicable legal requirements
    - ▣ Use the DOL self-compliance tool available at <http://www.dol.gov/ebsa/pdf/CAGappA.pdf>
    - ▣ Engage an ERISA attorney to do a legal review
    - ▣ Obtain documents from third-party administrators (COBRA notices, EOBs, etc.)
  - ▣ Confirm plan administration is consistent with document and applicable legal requirements

# How Do We Prepare?

- Once you receive notice of an investigation:
  - ▣ Contact an ERISA attorney
  - ▣ Organize documents to be provided
  - ▣ Correct any known issues
  - ▣ Prepare a private space where the investigator can work when on site
  - ▣ Designate a knowledgeable contact person to handle communications with the investigator
  - ▣ Prepare employees for interviews with the investigator

# What Do We Say in the Interview?

- Limit the answers to the questions asked
- If the interviewee does not know the answer, he/she should not try to guess
- “My administrator handles that” is generally not an acceptable answer
  - ▣ Interviewees should be familiar with the plan’s administrative processes – even those conducted by outside parties
- Consider post-interview debrief

# How Do We Respond to a Findings Letter?

- If the letter indicates found or apparent violations, consult with legal counsel
- Prepare a written response setting forth facts and your position
  - ▣ Reduces opportunity for miscommunication or careless statements
- Materials provided to the DOL may be available to other parties
  - ▣ To any person actually affected by any matter that is the subject of an investigation
  - ▣ Pursuant to the Freedom of Information Act
  - ▣ In response to certain subpoenas
  - ▣ To other government agencies

# What is a Typical Outcome?

- If no violations are found, the DOL will issue a closing letter
- If violations are found or suspected:
  - ▣ Violations involving reporting and disclosure, de minimus improper administrative practice or prohibited transaction(s) already corrected:
    - ▣ DOL will issue a closing letter or voluntary compliance letter that requires corrective action
    - ▣ DOL may assess a penalty
  - ▣ Violations involving breach of fiduciary duty, violation of participant rights under ERISA Section 510, prohibited persons serving as fiduciaries or criminal conduct:
    - ▣ DOL will refer the matter for further investigation

# How Long Will This Take?

## ■ Response to Document Request

- ▣ 2-3 weeks to respond
- ▣ Most agents will grant an extension

## ■ On-site investigation

- ▣ 1-2 days

## ■ Closing

- ▣ Depending on the results of the investigation – a few months to a few years



# What's the Worst Case Scenario?

- DOL generally pursues voluntary compliance
  - ▣ Penalties may be assessed
- Where voluntary compliance efforts have failed or are not appropriate, DOL can recommend to the Solicitor of Labor that litigation be initiated
  - ▣ In FY 2013, 190 cases were referred for litigation and litigation was filed in 111 civil cases
- Participants may sue
  - ▣ Closing the investigation does not prevent participants from suing over issues addressed in the investigation

# Examples of Issues Raised by the DOL

- Plan expenses
- Bonding requirements
- Timing of deposits
- Insurance certificates may not satisfy ERISA's SPD requirement
- Pre-authorization requirements may not satisfy the Mental Health Parity rules
- Plan cannot show proof that SPDs were distributed
- Plan does not meet the requirements to remain grandfathered under the Affordable Care Act



# Mini-COBRA Coverage

- Federal COBRA does not apply to employers that employed fewer than 20 employees on a typical business day during the preceding calendar year
  - ▣ Complicated rules for counting employees
- Ohio Mini-COBRA Coverage
  - ▣ Applies to Ohio employers with fewer than 20 employees

# Who is Eligible for Ohio's Mini-COBRA?

## ■ Eligible employees:

- Continuously insured under a group policy during the entire 3-month period preceding termination of employment
- Involuntarily terminated employment for reasons other than gross misconduct
- Not covered by or eligible for Medicare coverage
- Not covered or eligible for coverage under any other insured or uninsured arrangement that provides hospital, surgical, or medical coverage for individuals in a group other than the group coverage in effect immediately before termination of employment

# What Notices Must be Provided?

- Certificate of coverage
- Notice of continuation rights upon termination of employment
  - ▣ Monthly premium cost for continuation coverage



# What is the Election Period?

- Written election of continuation and premium payment by the earliest of:
  - ▣ 31 days after the coverage otherwise terminates
  - ▣ 10 days after the date coverage otherwise terminates if employer has notified former employee of the continuation right before that date
  - ▣ 10 days after the employer provides notice of continuation coverage if provided after the date coverage otherwise terminates

# How Long Does Mini-COBRA Last?

## ■ 12 months

- ▣ Premiums must be paid timely
- ▣ Applies to eligible dependents also

## ■ Or, if earlier

- ▣ Cease to be an Eligible Employee (Medicare/other Coverage)
- ▣ Failure to make timely payments
- ▣ The policy is terminated and the employer does not replace the policy

# Annual Notices

- Health and Welfare Plan Notices
- Retirement Plan Notices



# Annual Health and Welfare Plan Notices

- Medicare Part D Notice of Creditable Coverage/non-Creditable Coverage
  - ▣ October 14, 2016
- CHIP Notice
- HIPAA Notice of Privacy Practices
  - ▣ Every three years, unless material changes
- Women's Health and Cancer Rights Act Notice
- ACA Patient Protection Notice
- SBCs

# Annual Retirement Plan Notices

- Automatic Enrollment Notice
- QDIA Notice
- Safe Harbor Notice
- Fee Disclosure Notice
  - ▣ Also required quarterly

# Electronic Disclosure

- DOL Rules
- IRS Rules
- HHS Rules
- CMS Rules



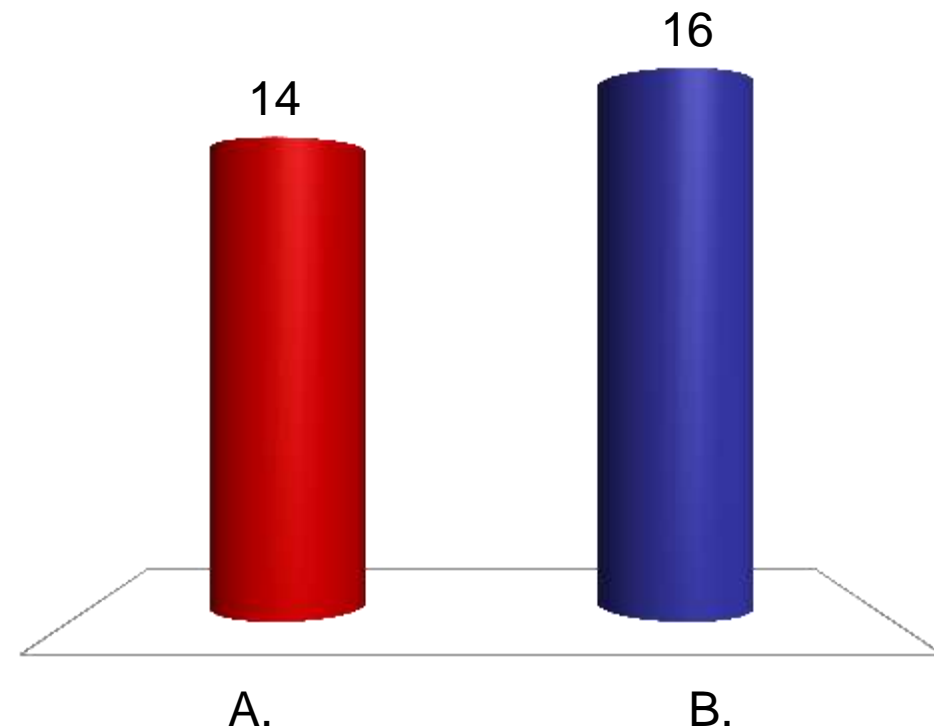
# Pop Quiz – Question 1

An employee requests a direct rollover from his prior employer's 401(k) plan to your 401(k) plan and the rollover is deposited into your 401(k) plan on the 90<sup>th</sup> day after the employee requests the distribution.

Is the rollover contribution to your 401(k) plan timely?

A. Yes

B. No



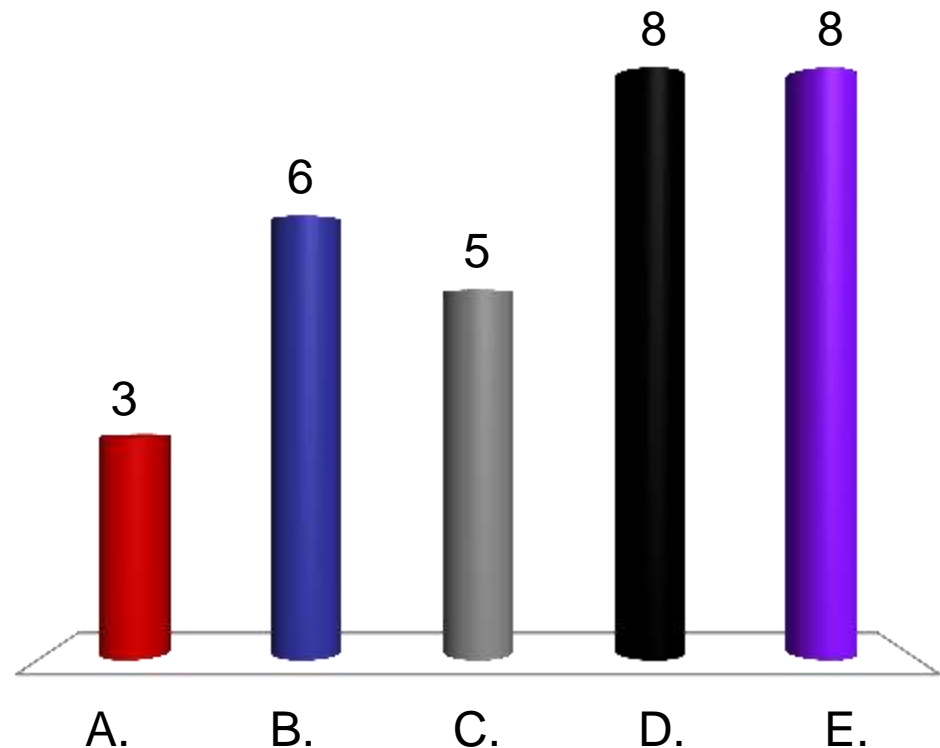
## Answer

- A - Yes
- Direct rollovers are not subject to the 60 day rule. If the rollover was instead an indirect rollover (paid to the employee and then deposited into your plan), the rollover could be considered timely if the employee completes a self-certification that his rollover contribution was late due to an approved reason.

## Pop Quiz – Question 2

**I receive a document request letter from the DOL relating to my medical plan.  
What should I do?**

- A. Panic
- B. Contact my ERISA lawyer
- C. Gather and organize requested documents
- D. Prepare employees for interviews with investigator
- E. All of the above



# Answer

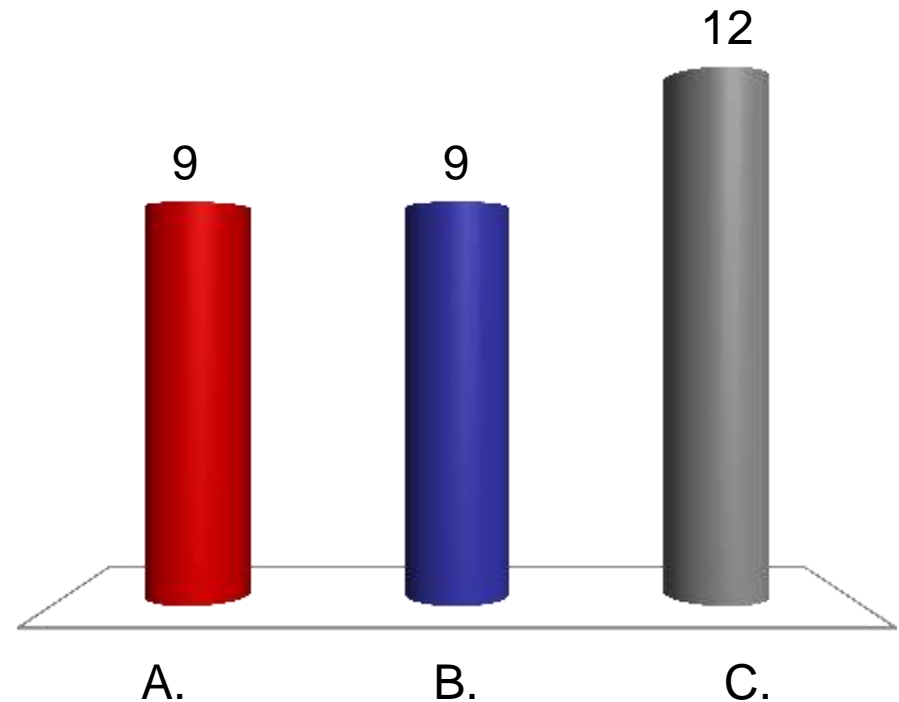
- E - All of the above

# Pop Quiz – Question 3

My employer is subject to the Ohio Mini-COBRA law. Employee X is terminated due to theft from the petty cash drawer. Employee X is age 70.

Am I required to offer Ohio Mini-COBRA to Employee X?

- A. Yes, because my employer is subject to the Ohio Mini-COBRA law
- B. No, because Employee X was terminated for cause
- C. No, because Employee X is eligible for Medicare



# Answer

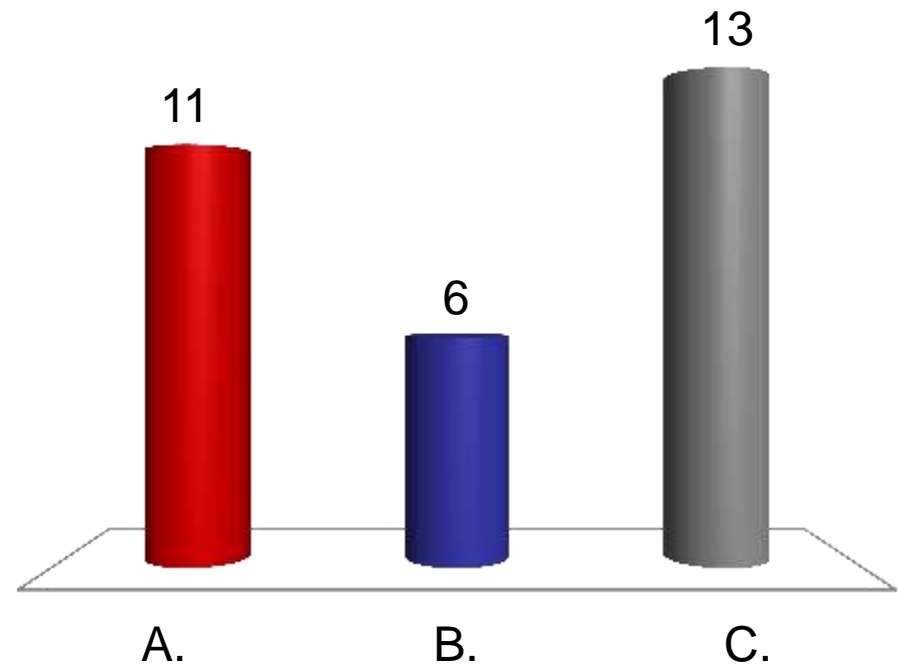
- B - No, because Employee X was terminated for cause (gross misconduct)

# Pop Quiz – Question 4

I'm preparing my open enrollment materials for 2017 coverage and I really don't want to kill so many trees this year.

**Can I distribute my open enrollment materials via e-mail this year?**

- A. Yes, all of my employees have desk top access and are required to check e-mail as part of their daily job functions
- B. Yes, all of my employees have consented to receive all notices electronically
- C. No



## Answer

- B - Yes, all employees have consented to receive all notices electronically.
- This is the best answer because it covers the electronic disclosure rules of all of the applicable government agencies



# **Nonprofit HR Collaborative Navigating the Legal Minefield in 2016 and Beyond**

Nancy M. Barnes, Partner  
Thompson Hine LLP

Julia Ann Love, Partner  
Thompson Hine LLP

**QUESTIONS?**