Guest,

Welcome to:
Staying Out Of The Quicksand When It Comes To Employment Law Issues

Presented by
Lighthouse Consulting Services, LLC
Introduction

- Common mistakes can lead to significant liability
- Be careful: the laws don’t always make sense!
And before we even start...

Ignoring State Law

- State Labor Codes
- State-specific legislation, court decisions
- Requirements frequently more advantageous to EEs than FLSA
- Typically governs paydays, final pay, min. wage, deductions, exemptions, etc.
Mistake #1

FLSA Misclassifications

- Relying on salaries or titles
- Ignoring the Retail Sales & Outside Sales exemption rules
- Commission Only
- Over utilizing the Computer exemption
- Docking policies – reductions due to quantity or quality of work
- Deduction prohibitions

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In-Depth Work Style Personlity Testing

Talent Development

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Retail Sales Exemption

- Be employed in retail or service establishment - 75% of annual dollar volume = sales of goods and services not for resale
- Earn more than 1.5 x federal minimum wage (per pay period)
- Have 50%+ of compensation during representative period be in form of commissions
  - not less than 1 month
  - not more than 1 year
Outside Sales Exemption

- Primary Duty:
  - Making sales or obtaining orders or contracts for services or for the use of facilities for which ER will be paid
- Customarily and regularly engaged in work away from ER’s place of business (no mail, phone, internet sales unless activity is incidental to in-person sales call — no home/satellite office)
- Beware of promotional work
- No minimum salary requirement
Computer Exemption

- Computer systems analyst, computer programmer, software engineer, or other similarly skilled

Primary Duty:
- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- The 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;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems;
- As a combination of the aforementioned duties, the performance of which requires the same level of skills.
- Salary of $55,000 or more or $27.63 hour

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When are SALARY Deductions NOT OK

- Business Closures / Unavailability of Work
- Arriving Late / Leaving Early
- Sickness or Accident – unless company has bona fide sick pay plan
- Jury Duty, Witness, Military Leave
- Fines, damaged or lost equipment
**When are SALARY Deductions OK**

- Initial / Final Work – OK to pay EEs daily or hourly equivalent for time actually worked.
- Vacation/Personal Time/Religious Holiday – FULL days
- Sickness or Accident – FULL days
  - If the EE has a bona-fide sick pay plan
  - NOTE: New sick leave laws, mandated TDL/SDI
  - AND the EE has exhausted leave or is not yet eligible
- To offset Jury/Witness Fees
- To offset Military Pay
- Good faith penalties for major safety infractions
- Good faith disciplinary suspensions – FULL days
- Workers’ Comp – prior to benefits being paid and while benefits being received – FULL day
  - FMLA Intermittent Leave – smallest increment used for other types of leave

---

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DOL’s Safe Harbor

- Clearly communicated policy prohibiting improper deductions and including a complaint mechanism
- Reimburses employees for any improper deductions
- Good faith commitment to comply in the future
Mistake #2
No Timesheets, Minimum Wage, OT for piece rate EEs

- No Timesheets, Minimum Wage, OT for piece rate EEs
- EE paid per unit produced
- Need:
  - Log time
  - Calculate Regular Rate of Pay
  - Ensure minimum wage
  - Pay OT
- Very challenging in certain states – CA!
Mistake #3
Not using the Regular Rate of Pay

- Applies when non-exempt EE has multiple rates of pay or receives pay on top of base hourly rate
- Does not include:
  - Discretionary bonuses
  - OT or weekend premium pay
  - Pay for Time Off
  - Expenses
  - Benefits
How to Calculate

Total Remuneration + Total Hours Worked = Regular Rate of Pay

Example: EIE Earns $14/hr Works 43 Hrs and gets $150 bonus

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<td>Total to be included in Regular Rate:</td>
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<tr>
<td>Divided by total hours worked + 43</td>
<td>$17.49</td>
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</tbody>
</table>

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When Do You Use It?

- Some Paid Sick Day laws
  - Oregon – regular rate of pay in prior pay period
  - CA – regular rate of pay in prior 90 days
- Some State Missed Rest/Meal Break penalties
  - CA – 1 hour per missed break
  - WA – missed break results in time being paid again
Mistake #4
The Un-Blended Overtime

- OT must be paid at Regular Rate of Pay
- Many ERs pay OT at rate in effect at time OT occurs OR at Base Hourly Rate of Pay
- Calculation challenges most payroll and timekeeping systems
- Class action lawsuit material
Back to Our Example
The Bonus causes incremental add'1 OT to be due:
Example: EEl Earns $14/hr Works 43 Hrs and gets $150 bonus

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<th>OT 1</th>
<th>OT 2</th>
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<td>$14.00 x 30%</td>
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<td>OT 1 OT done using regular Rate of Pay</td>
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<tr>
<td>Weekly Incentive</td>
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<td>$1.50</td>
<td>$0.50</td>
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</table>

The difference is $5.24
**Commissions & Bonuses**

- Determine the period over which the incentive was earned
- Determine how many workweeks are involved
- Pro-rate the incentive over those workweeks
- Calculate Regular Rate of Pay for each workweek
- Calculate incremental OT due for each workweek
Retro Calculations

- $500 commission paid in March for sales in February
- $100 would be added to each of 5 weeks pay
- Regular rate calculated for each week
- Add’l OT due for each week
Mistake #5
Misclassifying Independent Contractors that should be Employees!
- NOT up to the Employer and the worker
- Multiple factors
- Concept of control
- Liability & penalties
DOL – Economic Realities Test

1. Nature and the degree of control;
2. Amount of investment in facilities and equipment;
3. Degree to which opportunity for profit and loss is determined by the employer;
4. Skill and initiative necessary;
5. Permanency of the relationship; and extent to which the work is an integral part of the employer’s business.
IRS's Updated 11 Factor Test

- As of 2006, replaces previous 20 Factor Test
- Pressure to simplify and refine
- 3 Major Categories:
  - Behavioral
  - Financial
  - Type of Relationship
- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
  - Instructions
  - Training
IRS's Updated 11 Factor Test

- Financial: Are the business aspects of the worker's job controlled by the payer?
  - Business Expenses
  - Investment
  - Services provided to Market
  - Method of Payment
  - Profit/Loss
- Type of Relationship:
  - Type of Relationship:
Mistake #6
Poor Workers Comp Practices

- Illegal to discriminate against employee who has suffered work-related injury
- Role of physician
- Medical insurance/ FMLA
- Exclusive Remedy
- But the EEO said he/she didn’t want to file a claim...
- Seek counsel prior to any termination

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Mistake #7
Not paying Day Travel Time correctly

- Travel between home and work at beginning of day and at end - not compensable.
- If EE required to report to a location prior to 1st work site, travel is compensable from that stop to 1st work site. Same applies at end of day.
- Day travel to another city – additional time over regular home commute is compensable.
Mistake #7
Not paying Day Travel Time correctly

- Travel between home and work at beginning of day and at end – not compensable.
- If EE required to report to a location prior to 1st work site, travel is compensable from that stop to 1st work site. Same applies at end of day.
- Day travel to another city – additional time over regular home commute is compensable.
Mistake #8
Getting Caught in the Bermuda Triangle

- Work Comp
- ADA
- FMLA

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Where ERs get in trouble

- Failure to run leaves concurrently
- File work comp and forget about FMLA
- Using the wrong notices
- Failure to recognize when ADA kicks in during/after protected leave
- Failure to engage in interactive process
- Failure to consider leave extension as reasonable accommodation
- Terminations during/just after leave
Mistake #9
Assuming Paid Sick Days is Easy!

- On the rise across U.S.
- Currently 8 states, 32 cities/ counties
- Federal Order requiring for all contractors as of 1/1/17
- Obama pushed for federal legislation
- What will Trump do?
- Huge compliance challenges

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### The States

<table>
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<th>New Hire Minimum</th>
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<td>30</td>
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<td>30</td>
<td>4 weeks</td>
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</tbody>
</table>

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California (notes)

NOTES
1. Methodologies differ
2. Fewer than 10 EE's, 10+ EEs
3. 50 or fewer, 56+ EEs
4. 25 or fewer EEs, 26+ EEs
5. Fewer than 25 EE's, 25+ EEs

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- Happy Holidays from LCS!}

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New Jersey

<table>
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<tr>
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<th>Near Accuracy Time</th>
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<td>1.1/3 worked</td>
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<td>7/1/15</td>
<td>1.1/3 worked</td>
<td>24.40 hours</td>
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New Jersey (notes)

NOTES
- Methodologies differ
  9 or fewer 24 paid / 16 unpaid, 10+ EEs 40 paid
- 9 or fewer, 10+ EEs

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Mistake #10
Thinking You’ll Never be Sued!

- It's a question of when
- It's a numbers game
- No such thing as 'One Big Happy Family'
- 'But my competitors do it this way, and they've never had a problem'
- Average cost to settle out of court: $75,000
- Average cost to take case to jury verdict: $250,000
- 67% of cases rule in favor of plaintiff
- 10% result in jury verdict of $1+ Million
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Staying Out Of The Quicksand When It Comes To Employment Law Issues
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It's Always Time To Raise The Hiring Bar
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