

Guest,

Welcome to:

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

Presented by
Lighthouse Consulting Services, LLC



Featured Guest:
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Introduction

- Common mistakes can lead to significant liability
- Be careful: the laws don't always make sense!

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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.

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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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Retail Sales Exemption

- Be **employed in retail** or service establishment - 75% of annual dollar volume = sales of goods and/or 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

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Outside Sales Exemption

- **Primary Duty:**
 - Making sales or obtaining orders or contracts for services or for the use of facilities for which IER 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

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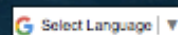


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Computer Exemption

- 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;
OR
 - ♦ 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;
OR
 - ♦ The design, documentation, testing, creation or modification of computer programs related to machine operating systems;
OR
 - ♦ A combination of the aforementioned duties, the performance of which requires the same level of skills.
AND
 - ♦ Salary of \$455/week OR fee basis 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

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When are SALARY Deductions OK

- Initial / Final Work – OK to pay EE 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 TDI, 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 - in 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

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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!

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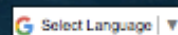


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Mistake #3

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

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How to Calculate

Total Remuneration ÷ Total Hours Worked = Regular Rate of Pay

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

Straight time		\$14.00	40	\$560.00
OT Hours		\$14.00	3	\$ 42.00
OT Premium	50%	\$ 7.00	3	\$ 21.00
Weekly Incentive				\$150.00
Total pay to be included in Regular Rate:				\$752.00
Divided by total hours worked ÷ 43				\$17.49

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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/M meal Break penalties
 - CA – 1 hour per missed break
 - WA – missed break results in time being paid again

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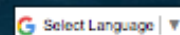


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Mistake #4

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

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Back to Our Example

The Bonus causes incremental add'l OT to be due:

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

Paid	ST		\$14.00	40	\$560.00
	OT		\$14.00	3	\$ 42.00
	OT 50% premium	(\$14.00 x 50%)	\$ 7.00	3	\$ 21.00
	Weekly Incentive				\$150.00
					\$773.00
Add'l OT due using Regular Rate of Pay					
	ST		\$14.00	40	\$560.00
	OT		\$14.00	3	\$ 42.00
	OT 50% premium	(\$17.49 x 50%)	\$ 8.75	3	\$ 26.25
	Weekly Incentive				\$150.00
					\$778.25
	Difference				\$ 5.24

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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

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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 1 OT due for each week

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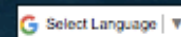


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Mistake #5

Misclassifying Independent Contractors that should be Employees!

- NOT up to the Employer and the worker
- Multiple factors
- Concept of control
- Liability & penalties

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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.

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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

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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:

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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 EEE 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

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Mistake #7

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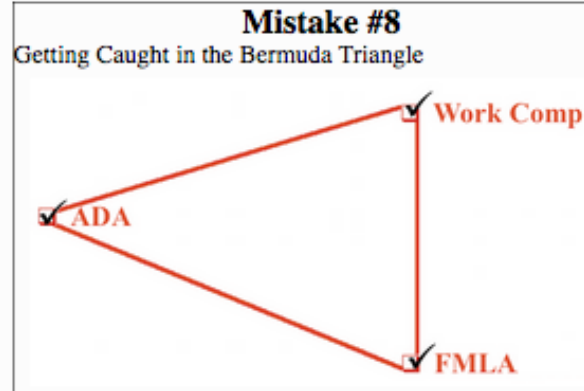
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Where ERs get in trouble

- 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

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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

Authorization	Effective Date	Account Begins	New Hire Waiting Period for Hire	Account Rate	Yearly Accrued Time Cap
California	7/1/2015	Upon Hire	90 days	1 hr / 30 worked or 24 hrs / 7 days (comp time)	24 hrs (avg) / 48 hrs (accrued)
Connecticut	1/1/2012	Upon Hire	480 working hours	1 hr / 40 worked	40 hrs
Massachusetts	1/1/2015	Upon Hire	90 days	1 hr / 30 worked	40 hrs (Deposited 10 or fewer 10s)
Oregon	1/1/2014	Upon Hire	90 days	1 hr / 30 worked	40 hrs (avg) / 80 hrs (accrued) (Deposited 10 or fewer 10s)
Vermont	1/1/2017, 2018	Upon Hire	Up to 1 year	1 hr / 32 worked	2017 - 24 hrs 2018 - 40 hrs
Arizona	7/1/17	Upon Hire	90 days	1 hr / 30 worked	15x 10s - 40 hrs Average 15 10s - 24 hrs
Washington	1/1/18	Upon Hire	90 days	1 hr / 40 worked	No accrual cap. Comp time can be banked to 40 hrs
New Jersey	7/1/18	Upon Hire	90 days	1 hr / 35 worked	2018 - 24 hrs, 2019 - 32 hrs, 2020 - 40 hrs



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The Cities

Jurisdiction	Effective Date	Accrual Begins	New Hire Waiting Period for Use	Accrual Rate	Yearly Accrued Time Cap
Washington?	DC 11/1/2008	Upon Hire	90 days	1 hr / 87 / 43 / 37 worked	24 / 40 / 36 hours
Montgomery County?	MD 10/1/2014	Upon Hire	90 days	1 hr / 30 worked	36 hours
New York City?	NY 4/1/2014	Upon Hire	120 days	1 hr / 30 worked	40 hours
Philadelphia?	PA 3/1/2013	Upon Hire	90 days	1 hr / 40 worked	40 hours
Pittsburgh?	PA 90 days after hire	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Tacoma	WA 2/1/2014	Upon Hire	180 days	1 hr / 40 worked	24 hours
Seattle?	WA 6/1/2012	Upon Hire	180 days	1 hr / 40 / 40 / 30 worked	40 / 36 / 72 hours
Spokane?	WA 1/1/2017	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Minneapolis?	MN 7/1/2017	Upon Hire	90 days	1 hr / 30 worked	48 hours
Portland?	OR 1/1/2014	Upon Hire	90 days	1 hr / 30 worked	40 hours
Cook County & Chicago	IL 2/1/2017	Upon Hire	180 days	1 hr / 40 worked	40 hours
St. Paul	MN Jan 31/2017 Rever 1/1/2018	Upon Hire	90 days	1 hr / 30 worked	48 hours

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The Cities (notes)

NOTES

- | | |
|--|------------------------------------|
| 1 Methodologies differ | 6 Fewer than 15, 15+ EEs |
| 2 Fewer than 25, 25 to 99, 100+ EEs | 7 5 to 49, 50 to 249 EEs, 250+ EEs |
| 3 Fewer than 5 EEs, 32 hrs paid, 24 hrs unpaid | 8 Fewer than 10, 10+ EEs |
| 4 Fewer than 5 EEs, unpaid | 9 5 or fewer EEs, unpaid |
| 5 Fewer than 10 EEs, unpaid | 10 Fewer than 6 EEs, unpaid |

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California

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San Francisco ²	2/5/2007	90 days after hire	none	1 hr / 30 worked	40 / 72 hours
Oakland ³	3/3/2015	Upon hire	90 days	1 hr / 30 worked	40 / 72 hours
Emeryville ⁴	7/1/2015	Upon hire	90 days	1 hr / 30 worked	48 hrs / 72 hours
Los Angeles	7/1/2016	Upon hire	90 days	1 hr / 30 worked	48 hours
Santa Monica ⁵	1/1/2017	Upon hire	90 days	1 hr / 30 worked	2017 - 32 / 40 hours 2018 - 40 / 72 hours
San Diego	7/1/2016	Upon hire	90 days	1 hr / 30 worked	40 hours
Berkeley	10/1/2017	Upon hire	90 days	1 hr / 30 worked	48 hrs / 72 hours

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California (notes)

NOTES

- | | |
|------------------------------|------------------------------|
| 1 Methodologies differ | 4 55 or fewer, 56+ EEs |
| 2 Fewer than 10 EEs, 10+ EEs | 5 25 or fewer EEs, 26+ EEs |
| 3 Fewer than 10 EEs, 10+ EEs | 6 Fewer than 25 EEs, 25+ EEs |

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New Jersey

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Bloomfield ¹	6/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Jersey City ²	1/1/2014	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Montclair ³	3/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Newark ⁴	5/1/2014	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Trenton ⁵	7/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
East Orange ⁶	1/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Irvington ⁷	1/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Passaic ⁸	1/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Patterson ⁹	1/1/2015	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Plainfield ¹⁰	7/1/2016	Upon Hire	100 days	1 hr / 30 worked	24 / 40 hours
New Brunswick ¹¹	1/8/2016	Upon Hire	120 days	1 hr / 30 worked	24 / 40 hours
Elizabeth ¹²	3/3/2016	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours
Morristown ¹³	1/1/2017	Upon Hire	90 days	1 hr / 30 worked	24 / 40 hours

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Featured Guest:
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New Jersey (notes)

NOTES

- 1 Methodologies differ 3 9 or fewer 24 paid / 16 unpaid, 10+ EEs 40 paid
- 2 9 or fewer, 10+ EEs

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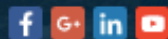
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Mistake #10

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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