

# Employment Law for Small Business Owners

Jordan M. Odo

Goodsill Anderson Quinn & Stifel LLP

August 6, 2016

# Disclaimer

This presentation is meant to assist in a general understanding of the current law relating to the issues discussed herein. It is not to be regarded as legal advice. Individuals with particular questions should seek advice of counsel.

This handout contains information that is proprietary to and is considered the sole property of Goodsill Anderson Quinn & Stifel LLP. It shall not be reproduced in whole or in part, disclosed, divulged, or otherwise made available, either directly or indirectly, to any person who has not attended this briefing. Reproduction of any portion of this handout is prohibited without the prior written authorization of Goodsill Anderson Quinn & Stifel LLP.

# Today

- Dispel common myths regarding:
  - Employee classifications
  - Exempt status
  - Wage and hour law
  - Discrimination, harassment, and retaliation
  - Reasonable accommodations
  - Workplace investigations
  - Recordkeeping

# MYTH → OR ← FACT

I can classify workers as “independent contractors” to avoid paying employment taxes and medical insurance.

**MYTH.**

# Employer Obligations

- Withhold payroll taxes
- Pay FICA/FUTA taxes
- Workers' compensation benefits
- Unemployment insurance
- Temporary disability insurance
- Medical insurance (if over 19 hours)
- Wage and hour laws apply
- And a lot of others...

# Substance Over Form

- It does not matter:
  - What you call a worker, or
  - Whether the worker agrees to be an “independent contractor”
- **Tip:** Start with presumption that worker is an “employee”

# What is an “Employee”?

## “Control Test”

- Does the employer control the **manner and means** of accomplishing the work?
- *Different from controlling the results of work*
- Source of instrumentalities and tools and location of work
- Method of payment
- Worker’s ability to hire and pay assistants
- Worker is in business

## “Economic Realities Test”

- Work is integral part of employer’s business
- Worker’s managerial skills affect his/her opportunity for profit/loss
- Investment in facilities and equipment
- Worker’s skill and initiative
- Permanency of worker’s relationship with employer
- Nature and degree of control by the employer

# More or Less?

- There is a written contract?
- The work is similar to that of employees on payroll?
- You supply computer, workstation, and e-mail address?
- You reimburse expenses?

# More or Less?

- You pay by the hour?
- You assign projects?
- You set hours of work?
- You hire an accountant for your accounting firm?
- The worker does work for other companies?

# What If You Make a Mistake?

- **IRS/State**: Pay back taxes
- **Immigration**: Penalties for failure to maintain I-9s
- **DLIR**: Pay back benefits
- **DOL**: Pay back wages (overtime and minimum wage) + liquidated damages
- Bad publicity

# MYTH → OR ← FACT

I can avoid paying overtime by making everyone a salaried employee.

**MYTH.**

# Exempt vs. Non-Exempt

- To avoid paying overtime, the employee must be “exempt”
- An employee is exempt generally if:
  - He/she is paid \$47,476 or more per year (effective 12/1/16), and
  - His/her job functions fall into one of the exempt categories

# Major Exempt Categories

- **Executive**: management of enterprise, department, or subdivision
- **Administrative**: office or non-manual work directly related to management or business operations
- **Professional**: work requires advanced knowledge
- **Outside Sales**: just as it sounds

# General “Exempt” Rules

- Employee should exercise discretion and independent judgment with respect to matters of significance
- Minimal repetitive tasks
- Applies to “white collar” workers only

# Very Small Employers

- For very small employers, there *may* be a lower salary threshold (\$210/week) if:
  - Annual gross volume of sales is less than \$500,000, *and*
  - Employer not engaged in health or education industries, *and*
  - Employee is not engaged in interstate commerce.

\* Check with your attorney.

# MYTH → OR ← FACT

It's okay to not to pay an employee overtime or for hours worked so long as he/she agrees.

**MYTH.**

# Employees' Rights

- Employees are entitled to:
  - Minimum wage: \$8.50/hr (\$9.25/hr on 1/1/17)
    - Tip credit of 75 cents
  - Pay for “hours worked”
  - Overtime pay (1½ of “regular rate of pay”)
- Employees cannot waive any of these rights

# Hours Worked

- “Suffered and permitted to work”
- Short rest periods (20 mins.): must compensate
- Meal breaks (30+ mins.): no pay required
  - Completely relieved from duty
  - Definite time
- On-call time: no pay required so long the employee is not constrained

# Unauthorized Work

- Can an employee be asked to wait before clocking in?
- What if an employee remains at his/her desk during lunch and answers calls?
- What if an employee leaves the premises for an unauthorized smoking break?
- What if an employee works over 40 hours without permission?

# Deductions

- Can deduct only if:
  - Required by federal or state statute or by court
  - Authorized in writing by employee
- Not deductible:
  - Fines, penalties, or replacement costs
  - Cash shortages
  - Losses due to dishonored checks
  - Losses due to defective workmanship and damage
  - Medical expenses incurred due to request by employer

MYTH  
→ OR ←  
FACT

I have an unfettered right to fire an employee who disparages my company.

**MYTH.**

# Retaliation

- Unlawful to terminate/discipline someone for:
  - Filing a claim
  - Reporting discrimination
  - Reporting a violation of law
  - Collectively complaining about the terms and conditions of employment

# Protected, Concerted Activity

- National Labor Relations Act prohibits retaliating against or chilling of protected, concerted activity
- Conduct is “protected” if:
  - Compensation
  - Working conditions
- Conduct is “concerted” if:
  - Group action
  - Intended to induce group action

# Protected, Concerted Activity

 **Dawnmarie Souza**  
November 8, 2009 

Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor.

[Like](#) · [Comment](#) · [Share](#)

 **Dawnmarie Souza**  
November 8, 2009 

Frank being a dick.

[Like](#) · [Comment](#) · [Share](#)

 **Dawnmarie Souza**  
November 8, 2009 

Yep he's a scumbag as usual.

[Like](#) · [Comment](#) · [Share](#)

 **Charging Party**  
Shared publicly - Jul 25, 2012

Just because you are having problems with your tv service does not mean you should call me a faggot! FUCK YOU!

[+1](#) [↪](#)

# **DISCRIMINATION & HARASSMENT**

# Discrimination

- Cannot discriminate on the basis of: race, sex, gender identity or expression, sexual orientation, pregnancy, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status
- Three major types of discrimination:
  - Disparate treatment (intentional)
  - Disparate impact (neutral rule or policy)
  - Harassment (verbal or physical conduct)

# Harassment

- Legal definition of “harassment”:
  - Employee subjected to verbal or physical conduct of a \_\_\_\_\_ nature
  - Conduct was unwelcome
  - Conduct was severe or pervasive
  - Working environment is subjectively and objectively abusive or hostile

# Practical Considerations

- If someone says “discrimination” or “harassment,” or complains about being treated unfairly because of \_\_\_\_, you should:
  - Investigate ASAP (if appropriate)
  - Take immediate, corrective action (if appropriate)

# Employer Liability

- For co-worker harassment, the employer is liable if it (1) knew or should have known of the harassment and (2) failed to take immediate, corrective action
- For supervisor harassment, the employer is automatically liable
- Supervisor can also be held personally liable for conspiracy or tort claims

# REASONABLE ACCOMMODATIONS

# Reasonable Accommodation

- Employers may need to provide reasonable accommodations if:
  - The employee is “disabled,”
  - The employee requests accommodation,
  - The accommodation would help the employee perform the “essential functions” of the job, and
  - The accommodation is not an “undue hardship.”

# Reasonable Accommodation

- Reasonable accommodation may be in the form of:
  - Granting unpaid leave
  - Providing or modifying equipment
  - Reassigning “marginal duties”
  - Part-time or modified work schedules
  - Reassigning employee to a vacant position (last resort)

# Reasonable Accommodation

- Always start the “interactive process” if employee requests an accommodation
- If disability is known, ask if there is anything that could help the employee perform job
- Cost of accommodation is not always an “undue hardship”
- Keep disability and accommodation confidential

# WORKPLACE INVESTIGATIONS

# Workplace Investigations

- Take every complaint seriously
- Train supervisors to forward all complaints to HR or someone trained
- Start investigation immediately
- Consider taking temporary action
- Follow your policy

# Workplace Investigations

- Select the right investigator
- Keep the investigation confidential, to the extent possible
- You cannot promise complete confidentiality
- Inform the employee of the results
- Document, document, document

# RECORDKEEPING

# Recordkeeping

- For each employee, keep two files: (1) employment records; and (2) medical records
- Medical records should be kept very confidential under lock and key
- Keep I-9s together in a separate file

# Recordkeeping

- Payroll records & basic info: 6 years
- Plan descriptions: 6 years-permanent
- Employment records: 1 year (but recommended for 3 years after termination)
- Leave notices: 3 years
- OSHA: 5-30 years

# Contact

Jordan M. Odo

Goodsill Anderson Quinn & Stifel LLP

E-mail: [jodo@goodsill.com](mailto:jodo@goodsill.com)

Phone: (808) 547-5618