Employment Law for Small Business Owners

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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.

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Today

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

Frank being a dick.

Yep he’s a scumbag as usual.
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

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