PRESENTATION

10 WAYS YOUR BUSINESS MAY BE BREAKING EMPLOYMENT LAWS

aka *Top 10 Things Employers Do to Get Sued*

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EXPAND YOUR EXPECTATIONS℠

SALARIED EMPLOYEE = EXEMPT EMPLOYEE

1. SALARIED EMPLOYEE = EXEMPT EMPLOYEE

The Fair Labor Standards Act (FLSA) is the federal law that governs wage and hour. The FLSA has three basic requirements:

- employees must be paid at least federal **minimum wage** ($7.25) for all hours worked
- employees must be paid an **overtime premium** (at time and one-half the regular rate of pay) for all hours worked over 40 hours in a workweek
- record-keeping

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"EXEMPT"

1. SALARIED EMPLOYEE = EXEMPT EMPLOYEE

Exemption depends on three things:

1. how employees are paid: **SALARY BASIS**
   - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
   - no partial day deductions
2. how much they are paid: **SALARY LEVEL**
   - currently $455/week or $23,660/year (proposed to increase to $970/week or $50,440/year)
3. what kind of work do they do: **JOB DUTIES TEST**
   - each category of exemption has different required job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

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Must satisfy ALL THREE of these tests to be exempt from overtime.

Paying salary alone is not enough!

Salaried employee is not the same as "exempt" employee.

…S TEST

NOT PAYING FOR “OFF THE CLOCK” WORK

2. NOT PAYING FOR “OFF THE CLOCK” WORK

taking work home/reading required paperwork

making/receiving job-related calls at home

checking voicemails or emails

working through lunch

working before or after regular work schedule

taking care of work-related equipment

job-related "volunteer" work

attending outside training

loading or stocking equipment

2. NOT PAYING FOR “OFF THE CLOCK” WORK

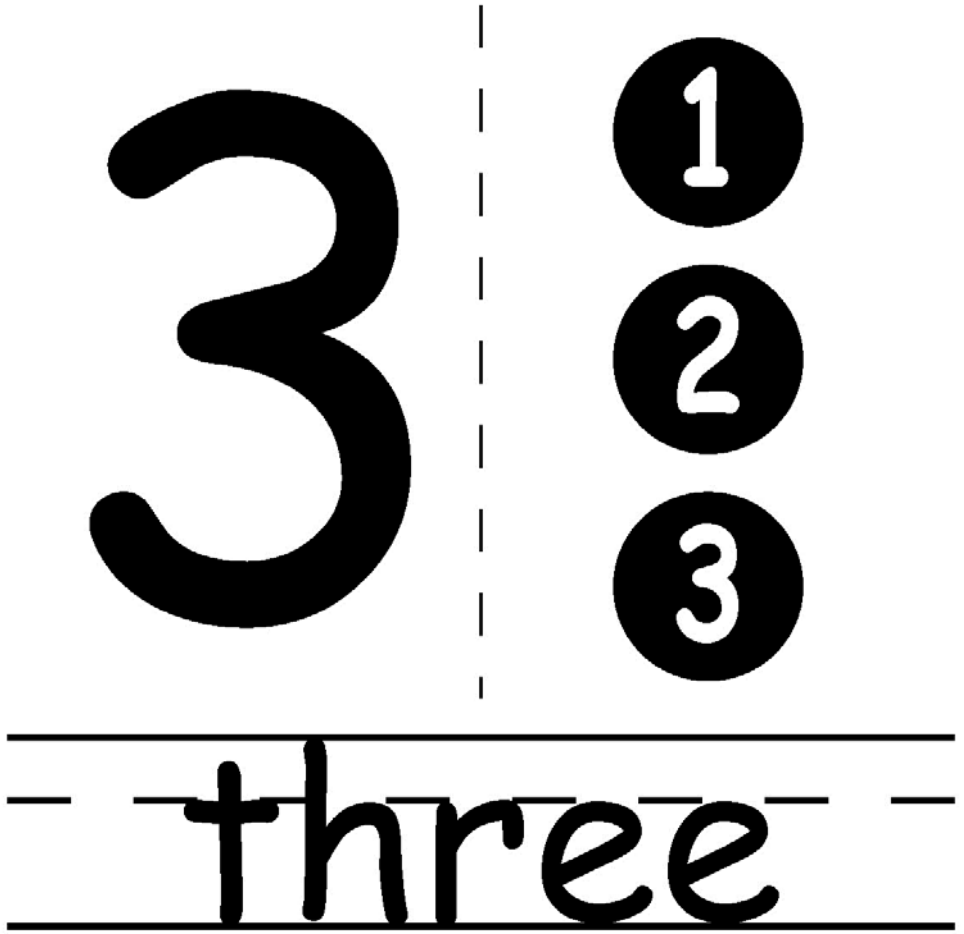
- under the FLSA, it is an absolute rule that employers must pay their employees for **all hours the employees work**
- all time spent by an employee performing job-related activities is potentially "work time"
  - includes the employee's regular "on the clock" work time, plus "off the clock" time spent performing job-related activities (which benefit the employer)
  - many FLSA lawsuits involve employers failing to pay employees for work activities outside of their normal work schedule

2. NOT PAYING FOR "OFF THE CLOCK" WORK

- it is compensable work time if:
  - employer "suffered or permitted" the employee to do it
  - an employer "suffers or permits work" if:
    - knows the employee is doing the work OR
    - could have found out by looking

KNEW OR SHOULD HAVE KNOWN

- "off the clock" policies
  - "unauthorized" or "unapproved" off the clock work is still compensable
  - can discipline, but must pay



CLASSIFYING EMPLOYEE AS INDEPENDENT CONTRACTOR

3. CLASSIFYING EMPLOYEE AS INDEPENDENT CONTRACTOR

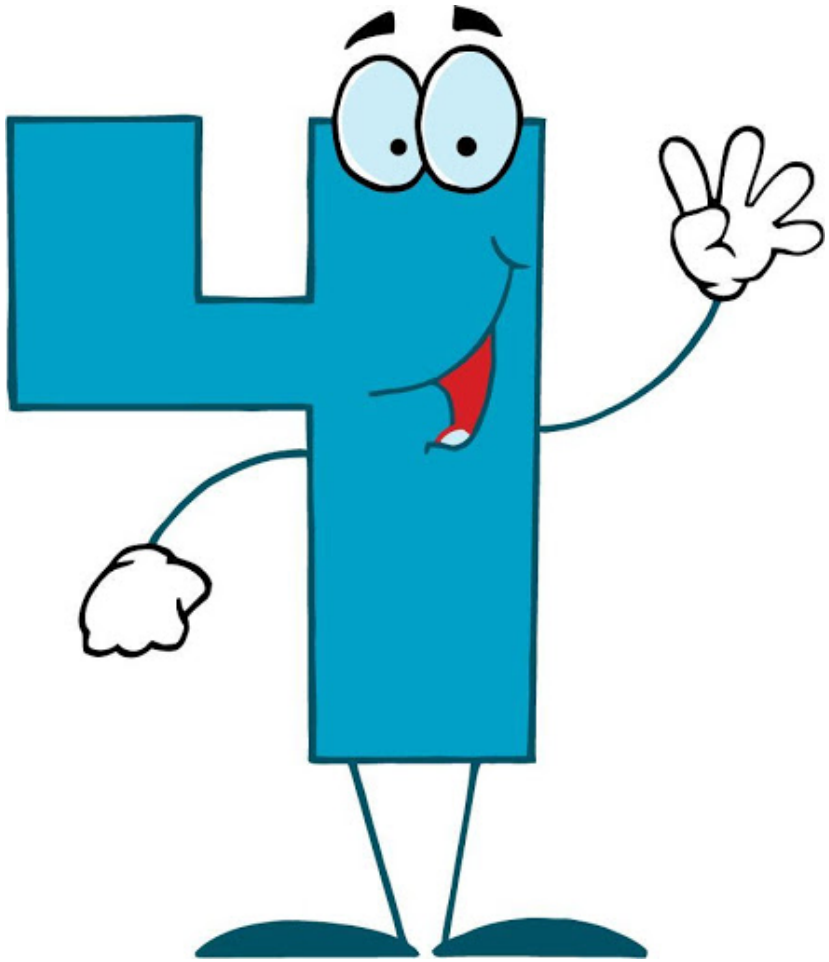
- DOL's long standing six-part "economic realities" test (http://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp)
- U.S. Department of Labor - Administrator's Interpretation No. 2015-1 (July 15, 2015) www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf
  - "determining whether the worker is economically dependent on the employer (and thus its employee) or is really in the business for him or herself (and thus and independent contractor)"

3. CLASSIFYING EMPLOYEE AS INDEPENDENT CONTRACTOR

- "most workers are employees under the Fair Labor Standards Act"
  - do you have employees performing essentially the same duties as your independent contractors?
  - have you classified the independent contractor as an employee in the past while she was performing essentially the same tasks as she is now?
  - is the employee "economically dependent" on your business? (e.g. is your company the only place they work?

3. CLASSIFYING EMPLOYEE AS INDEPENDENT CONTRACTOR

- employers have the burden to prove their classification of a worker as an independent contractor is correct
- if it's a close question, the best choice is to classify the worker as an employee
- penalties for misclassification include:
  - payments to the government: unpaid payroll taxes (both portions), interest, statutory penalties
  - payments to the worker: back pay (typically overtime), value of lost benefits, coverage of workers' comp., unemployment comp.



PROHIBITING EMPLOYEES FROM DISCUSSING SALARY

4. PROHIBITING EMPLOYEES FROM DISCUSSING SALARY

- prohibiting discussion of wages violates the National Labor Relations Act (NLRA)

  1. form unions;
  2. engage in collective bargaining;
  3. take collective action (including strikes);
  4. engage in ***"other concerted activities for the purpose of collective bargaining or other mutual aid or protection"***

4. PROHIBITING EMPLOYEES FROM DISCUSSING SALARY

- **NLRA applies even if your employees are not in a union**
  - Section 7 of the NLRA protects the rights of all employees covered by the act to engage in "other concerted activities for mutual aid and protection," **whether or not they are in a union**
  - since union membership is at an all-time low, the NLRB is focusing more on protecting non-union employee rights, including engaging in "protected concerted activities"

4. PROHIBITING EMPLOYEES FROM DISCUSSING SALARY

- "protected concerted activities," include the rights of the employees to:
  - discuss wages
  - discuss terms and conditions of employment
  - discuss working conditions with both other employees and third parties

TERMINATING EMPLOYEES FOR POSTS ON SOCIAL MEDIA

5. TERMINATING EMPLOYEES FOR POSTS ON SOCIAL MEDIA

- last few years NLRB has made it a priority to scrutinize employee policies for violations of the NLRA
  - specifically policies that “chill” an employee’s exercise of Section 7 rights to engage in protected, concerted activity
  - the NLRB’s focus has been on an employee’s right to use social media to engage in protected, concerted activity concerning their working conditions
    - RIGHT TO PUBLICLY COMPLAIN!

5. TERMINATING EMPLOYEES FOR POSTS ON SOCIAL MEDIA

- **Overbroad** policies:
  - prohibit “inappropriate behavior,” “inappropriate postings,” “inappropriate conversations”
  - reference communications which could “embarrass,” or “harass,” or “defame” companies and/or staff; those which “lack truthfulness” or could “damage the goodwill” of a company and/or its employees;
  - prohibit “talking about company business on their personal accounts”

5. TERMINATING EMPLOYEES FOR POSTS ON SOCIAL MEDIA

- **NLRB blessed** social media policies:
  - offer examples of specific prohibited conduct ("maliciously false" comments, "engage in unlawful harassment," "violate company privacy/ethics policies")
  - include an NLRA disclaimer (though this alone won't save you)
  - may limit contacts with the media on behalf of the company
  - and may restrict employees from discussing "embargoed information" under securities laws, "personal health information" HIPAA laws, etc.

NOT TRAINING MANAGERS *and* EMPLOYEES ON DISCRIMINATION OR HARASSMENT

6. NOT TRAINING ON DISCRIMINATION OR HARASSMENT

- employers often underestimate the importance of providing training until they find themselves defending a claim of harassment or discrimination
  - conducting appropriate training can mean the difference between having a defensible claim and being automatically liable for the unlawful conduct of a supervisor
  - companies can prevent employee discrimination by properly training its employees and managers on how to identify, avoid and deal with prejudicial behavior

6. NOT TRAINING ON DISCRIMINATION OR HARASSMENT

- The United States Supreme Court sent a strong message to employers in the *Burlington Industries, Inc. v. Ellerth* case
  - employers are always liable for a supervisor's harassment if it culminates in a tangible employment action (i.e. firing, demotion, reduction in salary).
  - if there is no tangible action, an employer may be able to avoid liability or limit damages from a supervisor's unlawful conduct **if** that employer had an appropriate anti-harassment policy and **educated its employees on that policy**

6. NOT TRAINING ON DISCRIMINATION OR HARASSMENT

- educate employees that harassment and discrimination will not be tolerated
- supervisors and managers need to be trained on their obligation to be proactive and monitor workplace behavior

DISCIPLINING EMPLOYEES FOR TAKING LEAVE

7. DISCIPLINING EMPLOYEES FOR TAKING LEAVE

- several laws give employees right to take leave
  - ADA
  - FMLA
  - Workers' compensation
  - PDA
- when employees take such protected leave, it is illegal to punish them for it in any manner

7. DISCIPLINING EMPLOYEES FOR TAKING LEAVE

BEFORE disciplining employees for leave or absences need to ask . . . Does the three-headed beast apply?

7. DISCIPLINING EMPLOYEES FOR TAKING LEAVE

- **ADA** - prohibits discrimination against applicants and employees who are "qualified individuals with a disability"
- **FMLA** - leave for employees for the birth and newborn care of a child, placement of a child for adoption or foster care, to care for an immediate family member with a serious health condition, and for employee's serious health condition (military exigency and care leave)
- **Workers' Compensation** - provides for payment of compensation and rehabilitation for workplace injuries and minimize employer liability

7. DISCIPLINING EMPLOYEES FOR TAKING LEAVE

- **ADA** – "qualified individual with a disability" - employee (or applicant) who is disabled as defined by the ada; qualified for the position; can perform the essential functions of the position, with or without a reasonable accommodation.
- **FMLA** – Employee who has worked at least 12 months and 1250 hours prior to the start of the leave.
- **Workers Compensation** – employee who has an injury arising out of or in the course of employment - state law exceptions for willful misconduct or intentional self-inflected injuries, willful disregard of safety rules, or intoxication from alcohol or illegal drugs.

NOT ENGAGING IN INTERACTIVE PROCESS

8. NOT ENGAGING IN INTERACTIVE PROCESS

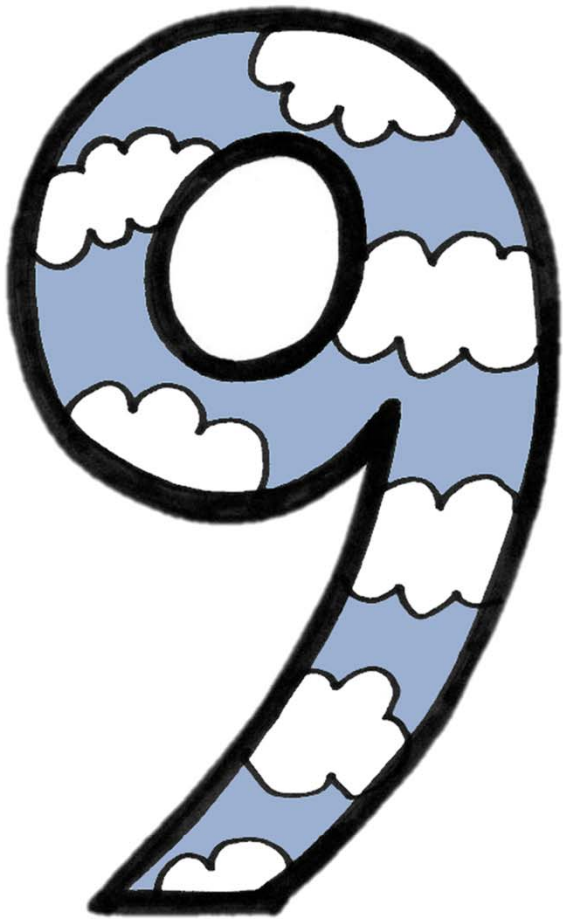
- **ADA** – "qualified individual with a disability"
  - employee (or applicant) who is disabled as defined by the ADA
  - qualified for the position
  - can perform the essential functions of the position, **with or without a reasonable accommodation**

8. NOT ENGAGING IN INTERACTIVE PROCESS

- reasonable accommodation
  - duty to provide unless “undue hardship”
    - factors include: nature & cost of accommodation, size and resources of employer, and the type of operation involved
  - extends to all employment decisions
    - hiring/firing, promotions, transfers, etc.
  - extends to all services and programs
  - direct threat defense

8. NOT ENGAGING IN INTERACTIVE PROCESS

- how do you determine the reasonable accommodation? **INTERACTIVE PROCESS**
  - required by the ADA
  - duty to engage in **a flexible, interactive discussion** with the disabled employee so that together the employer and individual can identify the precise limitations and discuss potential accommodations
    - good faith duty to cooperate
    - duty of reasonable inquiry
    - individualized assessment
    - duty to consider alternatives
    - timely



INCONSISTENT APPLICATION OF POLICIES

9. INCONSISTENT APPLICATION OF POLICIES

- there are two types of employment discrimination claims:
  - Disparate Impact
    - involves an employment practice that, although neutral on its face, has an adverse impact upon members of a protected class (such as race, sex, age, or religion).
  - Disparate Treatment
    - similarly situated employees are treated differently or inconsistently based, at least in part, on the employee's protected class

9. INCONSISTENT APPLICATION OF POLICIES

COMPARISON

between employee alleging discrimination and other similarly situated employees not in protected class

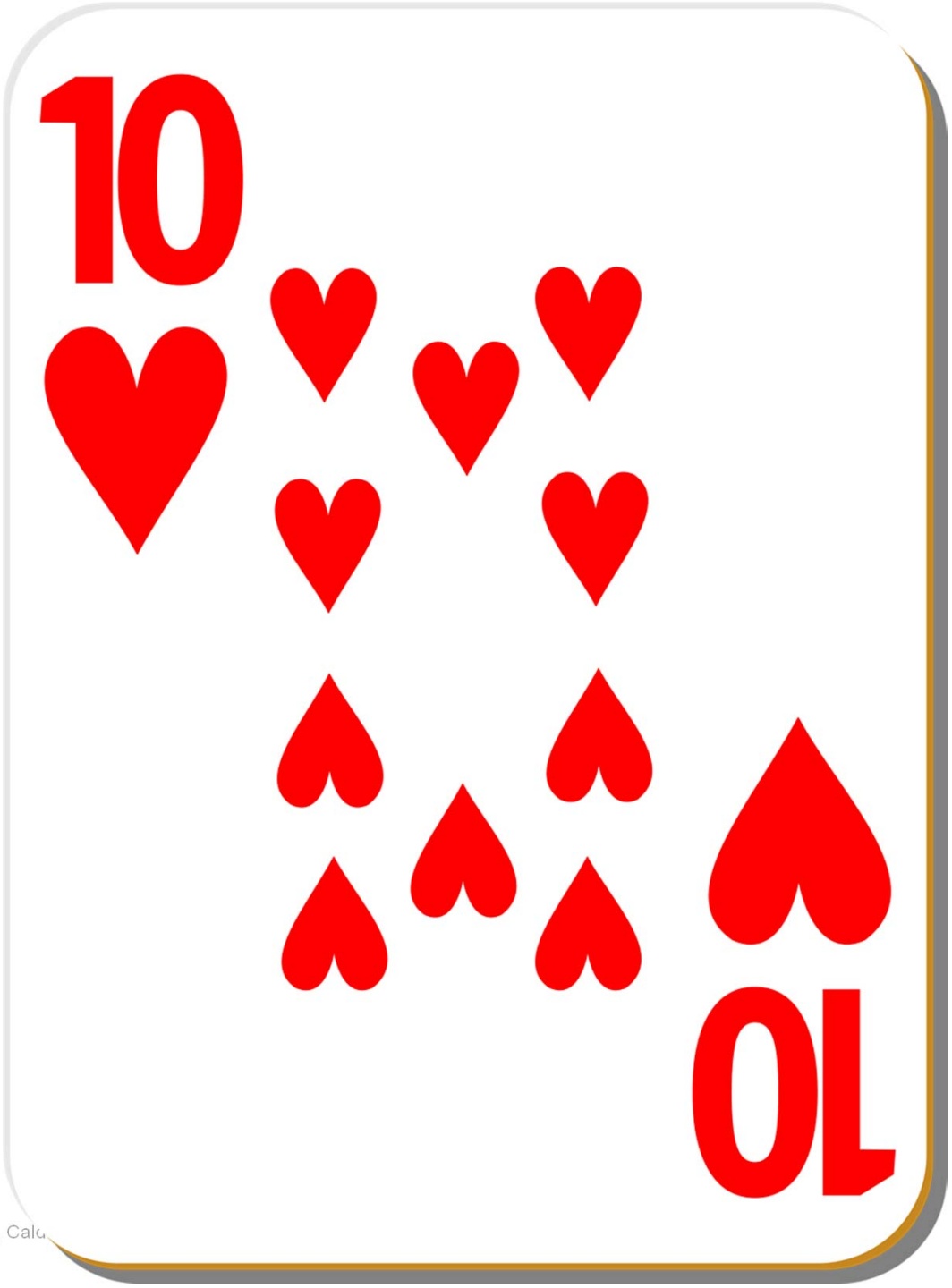
9. INCONSISTENT APPLICATION OF POLICIES

COMPARISON

Did we treat the employees the same?

If not, why?

If you are making an exception to a practice or policy, make sure you have a legitimate, documented reason.



INCOMPLETE OR INCONSISTENT EVALUATIONS

10. INCOMPLETE OR INCONSISTENT EVALUATIONS

- next to discipline, evaluations most dreaded tasks by managers
- gold or dynamite?
  - evaluations are very important for legal reasons.
  - avoid lawsuits by limiting surprises
  - don’t provide ammunition to a disgruntled employee
  - give yourself proper ammunition
  - follow cardinal rules: record any performance or conduct problems; record only true and relevant information

10. INCOMPLETE OR INCONSISTENT EVALUATIONS

- common problems with evaluations
  - leniency & inflation – “everybody is a star”
  - making excuses
  - ignoring problem areas
  - inconsistency among and within evaluations
- causes of overrating
  - guilt
  - conflict avoidance
  - desire to be liked
  - compensation impact

10. INCOMPLETE OR INCONSISTENT EVALUATIONS

- dangers of poor evaluations
  - lack of information and support for decisions
  - increased litigation risks
  - continuing performance and production problems
  - morale problems
- well executed evaluations
  - effective management tool
  - ensures employees are aware of employer expectations
  - no surprises or confusion

THAT'S ALL FOLKS!!

Our Footprint