

HR 101: Basic and Crucial Employment Concepts for Small Businesses

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Wage and Hour Law

Fair Labor Standard Act (“FLSA”)

- Requires overtime pay for hours worked over 40 hours in week by non-exempt employee. Exempt employees do not receive overtime pay. The exempt versus non-exempt status is determined by an employee’s duties and salary.
- There are a host of HR headaches, such as training and travel time, which we’ll discuss.
- Employers often try to work around FLSA provisions by contracting with independent contractors rather than hiring employees, but this approach has its own risks.

Non-Exempt Employees – Off-the-clock Work



Off-the-clock work:

Answering emails and text messages; taking business phone calls; loading or unloading trucks; paperwork; post-shift work such as cleanup; any work that is done on behalf of the employer, *even if the employer doesn't explicitly request the work.*

Non-Exempt Employees – Off-the-clock Work

- The key words of the Fair Labor Standards Act (“FLSA”): “suffer or permit to work.”
- If you know or have reason to know that an employee is performing off-the-clock work and she or he is not being compensated for it by you, you may be in violation of the FLSA.
- Employees can claim violations of the FLSA for up to three years after the alleged violation, and employees can also recover “liquidated damages,” which is another amount equal to the amount of the back pay added on to the back pay.

Non-Exempt Employees – Off-the-clock Work

What can you do about it?

- **Institute clear policies** – off-the-clock work is not allowed, period.
 - Provide clear guidelines – what is off-limits, etc.
- **Train supervisors and managers** - help them understand what counts as off-the-clock work.
- **Limit access to technology** – if employees can't access email or other work tech after hours, they can't perform off-the-clock work.
- **Don't let employees stay late/keep working if they aren't on the clock** – if they have clocked out, send them home and don't let them stick around to "finish up" something. That is compensable time.
- **Breaks and lunches** – Enforce policies where employees must leave desks during breaks, so they do not work during unpaid lunch hours, for example.

Non-Exempt Employees – Off-the-clock Work

Also, although this should go without saying:

DO NOT EVER ask your non-exempt employees to work off-the-clock. **DO NOT** ask them to answer emails, text messages or phone calls unless you have a robust system of time-keeping to make sure that work is compensated.

Non-Exempt Employees – Travel Time

Only travel time to overnight stays, when such travel occurs outside of the normal work hours of the employee, regardless of the day of the week, and only when the employee is not otherwise working, is exempt from payment.

- Travel during work hours or travel to one-day assignments in another city should be paid time.
- ANY driving that is done at the direction of the employer is paid time, unless the employee has the option to use another form of travel and chooses to drive instead.

Non-Exempt Employees – Training Time

Must employees be paid for time spent in trainings?

Yes. 29 C.F.R. § 785.27

- Participation in training programs need not be counted as working time if all of the following criteria are met:
 - Attendance is outside of the employee's regular working hours;
 - Attendance is in fact voluntary;
 - The course, lecture, or meeting is not directly related to the employee's job;
 - The employee does not perform any productive work during such attendance.



Independent Contractors

- Many employers choose to classify certain workers as independent contractors rather than employees.
- Some of the potential benefits of this classification decision include: avoiding payroll-related administrative costs; avoiding fringe benefit obligations; avoiding employment taxes; avoiding worker's compensation liabilities and costs; avoiding unionization; avoiding paying overtime compensation; and establishing a short-term, readily terminable relationship with workers.
- However, as many businesses are now experiencing firsthand, independent contractor arrangements are coming under increased scrutiny by state and federal government agencies and are the subject of a growing number of class action lawsuits.

Independent Contractors

- There is no universal test for determining whether a worker is an independent contractor. In fact, agencies and courts use many different tests depending on which law is involved. A worker who may be considered an independent contractor under the IRS Code may not be considered an independent contractor under the FLSA.
- Determining whether a worker is an independent contractor requires a fact-intensive inquiry into the duties of the specific worker. The parties' designation of a worker as an independent contractor, **even if agreed upon**, is not dispositive.
- While the Department of Labor recently rescinded earlier guidance that found that most independent contractors were misclassified, employers should still tread very cautiously in choosing to use independent contractors.

Production Bonuses



- Nondiscretionary bonuses MUST be included in overtime pay calculations. Bonuses tied to production fall into this category and must be included.

Discrimination and Harassment

Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Pregnancy Discrimination Act
- Veterans Act
- Kentucky Civil Rights Act (all of the above, and smokers/non-smokers)
- Fairness Ordinances (if enacted in your local jurisdiction)

Workplace Harassment

- **FIRST STEP – EMPLOYEE HANDBOOK POLICIES**

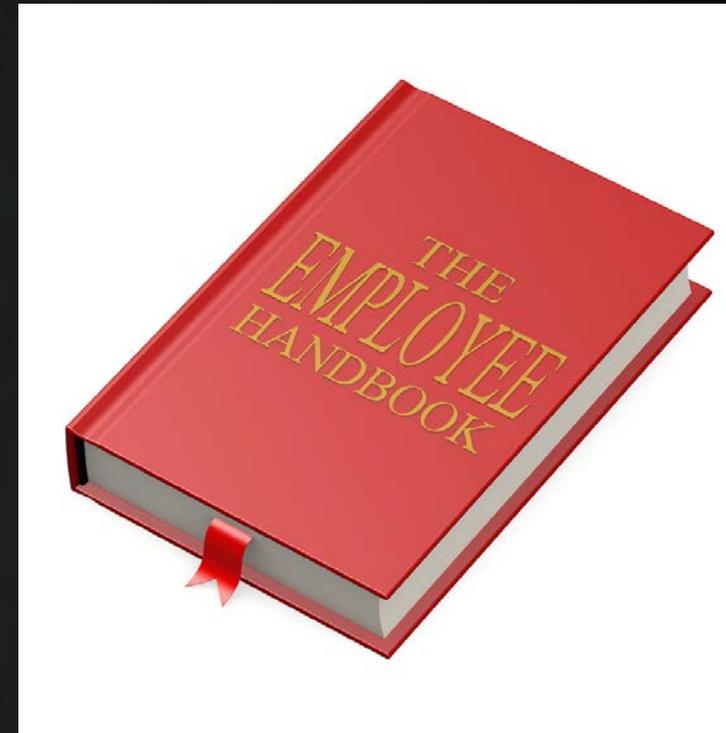
- Equal Opportunity Employment
- No Harassment Policy
- Anti-Retaliation Policy
- FMLA (If applicable)
- Leave Policies, including Sick, Maternity, Disability and Military Leave

- **SECOND STEP – TRAINING**

- Train managers and employees upon hire about policies and laws.
- Retrain periodically as well as after an incident.

- **THIRD STEP – IMPLEMENTATION**

- Investigate all claims.
- Institute corrective action or preventative measures when necessary.



Sexual Harassment

- Sexual harassment occurs when submission to or rejection of unwanted sexual conduct is made, explicitly or implicitly, a term of an individual's employment, or used as the basis for employment decisions; or when sexual conduct has the purpose or effect of substantially interfering with an individual's work performance or of creating an intimidating, hostile or offensive working environment.
- Sexual conduct includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, and other verbal, physical, or visual conduct of a sexual nature, by an employee, a customer or any visitor.

Sexual Harassment – the Law

Harassment/Hostile Work Environment, defined:

1. Unwelcome conduct based on a protected characteristic (like gender) and enduring it becomes an express or implied condition of maintaining employment

OR

2. Conduct that is severe and pervasive enough to create a work environment that an average person would consider intimidating, hostile, or abusive

[Types of Sexual Harassment – Quid Pro Quo]



Quid Pro Quo (Latin, meaning “something for something”):

using the power of your position to obtain sexual favors, coupled with a tangible employment action

“If you want that raise, then you’ll date me.”

“It would be a shame if you lost your job, but I could help you if you helped me.”

Types of Sexual Harassment – Hostile Environment

Hostile environment: unwelcome behavior that discriminates against a protected class (for example, women) and makes the workplace intimidating or offensive

- “Hey, have you seen the new hot chick?”
- Explaining very sexually explicit details of a date to co-workers
- Inappropriate physical touching



Types of Sexual Harassment – Third Party

Third party: employee claims of harassment by others (customers, etc.) for which employer may also be liable

- Bob, a regular at a microbrewery taproom, gropes Jill, a bartender. This is the third time this has happened while Bob has visited the taproom, and Jill complained to her manager after both the first and second times. Her manager does nothing.



ADA/ADAAA

- The Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act (ADAAA) prohibit employers from discriminating against applicants and individuals with disabilities. These laws require employers to provide **reasonable accommodations** to **applicants and employees** who are **qualified** for a job, with or without reasonable accommodations, so that they may perform the **essential job duties** of the position.
- The ADA applies to a **person who has** a physical or mental impairment that substantially limits one or more major life activities (like sitting, standing, or sleeping).
- The ADA also protects a **person with a record** of a substantially limiting impairment.
- And the ADA protects a **person who is regarded** (or treated by an employer) as if s/he has a substantially limiting impairment.

ADA/ADAAA

- Employers covered by the ADA have to make sure that people with disabilities:
 - Have an equal opportunity to apply for jobs and to work in jobs for which they are qualified;
 - Have an equal opportunity to be promoted once they are working;
 - Have equal access to benefits and privileges of employment that are offered to other employees, such as employer-provided health insurance or training; and
 - Are not harassed because of their disability.

Retaliation

- Title VII prohibits employers from retaliating against employees who oppose any unlawful employment practice under Title VII or report such practice to the EEOC or equivalent state agency.
- Fair Labor Standards Act prevents retaliation for employees filing claims or cooperating with government investigations.
- The ADA, ADEA and others prevent employers from retaliating against employees for filing a charge with enforcing agencies or participating in government investigations.
- There are state law provisions prohibiting retaliation as well.

Leave Policies

FMLA

- The **Family and Medical Leave Act (“FMLA”)** entitles employees of covered employers to take unpaid, job-protected leave for specific reasons. During this time, employees also receive a continuation of group health coverage under the same terms and conditions as if they hadn’t taken leave.
- FMLA is an employee entitlement, not a right - the employee must be eligible AND the employer must be covered by the FMLA.
- Employee must provide medical documentation to support leave claim.

FMLA



An Eligible Employee:

- Must work for a covered employer
- Must have worked for that employer for at least 12 months
 - The 12 months of employment DO NOT have to be consecutive, unless there was a break in employment that lasted seven years or more
- Must have at least 1,250 hours of service for that employer during the 12-month period immediately preceding the leave
- Must work at a location where the employer has at least 50 employees within a 75-mile radius

FMLA

Leave:

- **Eligible employees may take up to 12 workweeks of leave in a 12-month period for one or more of the following reasons:**
 - The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
 - To care for a spouse, son, daughter, or parent who has a serious health condition;
 - For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
 - For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status

	ADA	FMLA
Covered employers	Applies to employers (including state or local governments) with 15 or more employees.	Applies to private employers, public agencies and schools with 50 or more employees working within 75 miles of the employee's worksite.
Covered employees	Individuals with a disability who are qualified for the job.	Worked for their employer for at least 12 months & have worked for at least 1,250 hours over the 12 months immediately prior to the leave.
Time off	ADA does not specifically require employers to provide medical or disability-related leave, but leave can be a reasonable accommodation.	Up to 12 weeks of unpaid leave for treatment of or recovery from serious health conditions or care for immediate family. (After FMLA is exhausted, the ADA may require more leave.)

[FMLA – Curbing Abuse]

- An employer has a right to request recertification every 30 days
- This prevents employees from taking extended FMLA leave after the purpose of the leave has expired

[The Headache]

- My exempt employee took all the mandated leave under the Family and Medical Leave Act, but still remains absent. What can I do?
- My employee needs time off for illness, but is not covered by FMLA. What can both I and the employee do?



Absence beyond FMLA Leave

- Leave for illness and disability
 - FMLA leave is 12 weeks in a 12-month period
 - ADA leave is unlimited so long as it is provided as a reasonable accommodation for a disability and doesn't create undue hardship on the employer
 - An employee may be eligible for ADA leave after FMLA leave, but only if the illness qualifies as a disability under ADA
 - Both FMLA and ADA provide job protection, although reasonable accommodations under the ADA cannot create undue hardship on the employer

Employee Handbooks

[Employee Handbooks]

- Handbooks provide employers and employees with several positives:
 - Consistency
 - Expectations
 - Defense against unemployment claims
- HOWEVER, an employee handbook is NOT a contract
 - Don't include non-disclosure provisions or confidentiality agreements in them

Any questions?

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