

Mineral™

A thick orange line that starts horizontally, turns 90 degrees down, then 90 degrees left, then 90 degrees down again, and finally 90 degrees left to end horizontally.

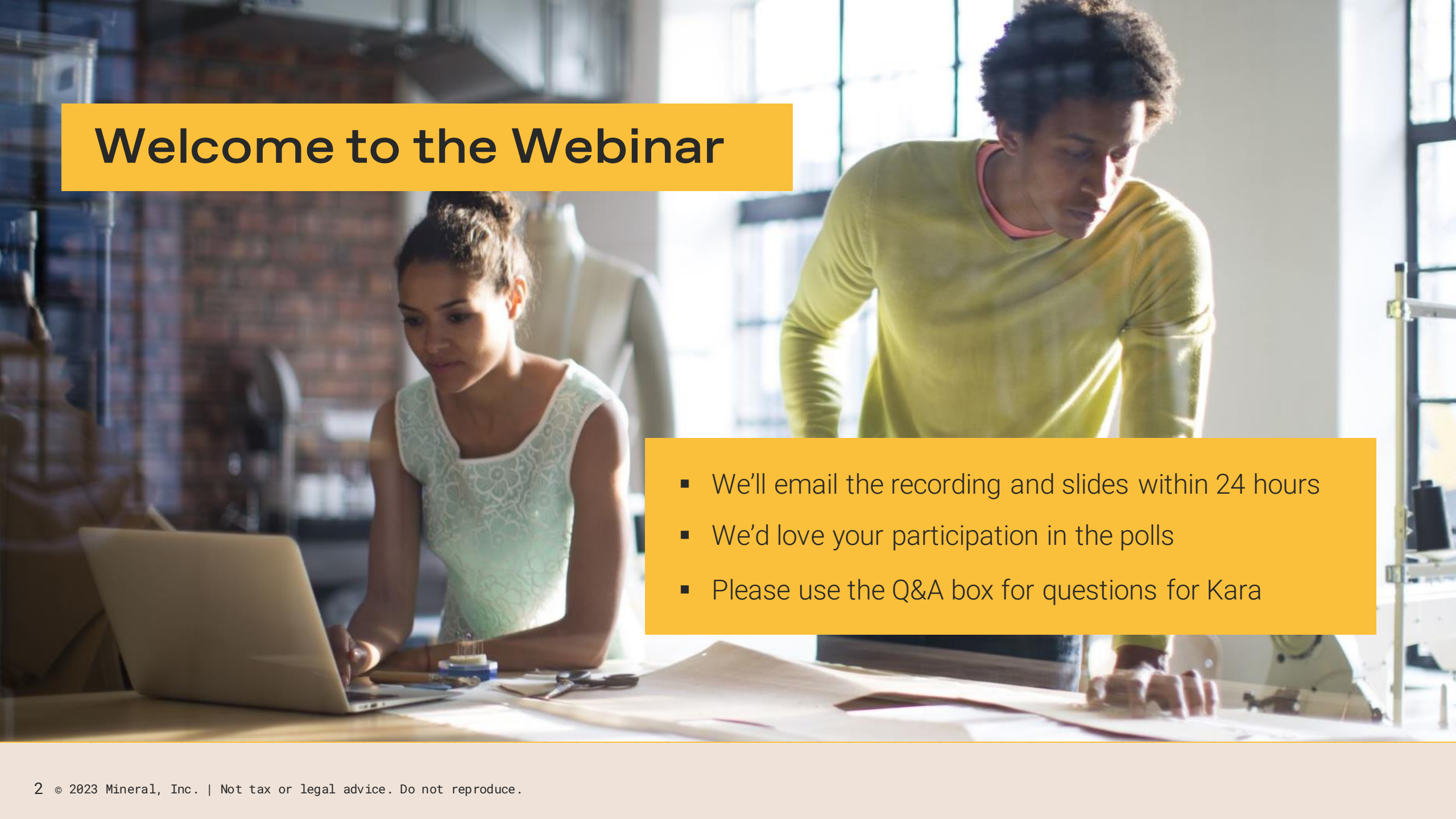
Employment Law 101 for Non-Lawyers

Presented by Kara G., JD, SPHR
Principal Legal Analyst

July 20th, 2023

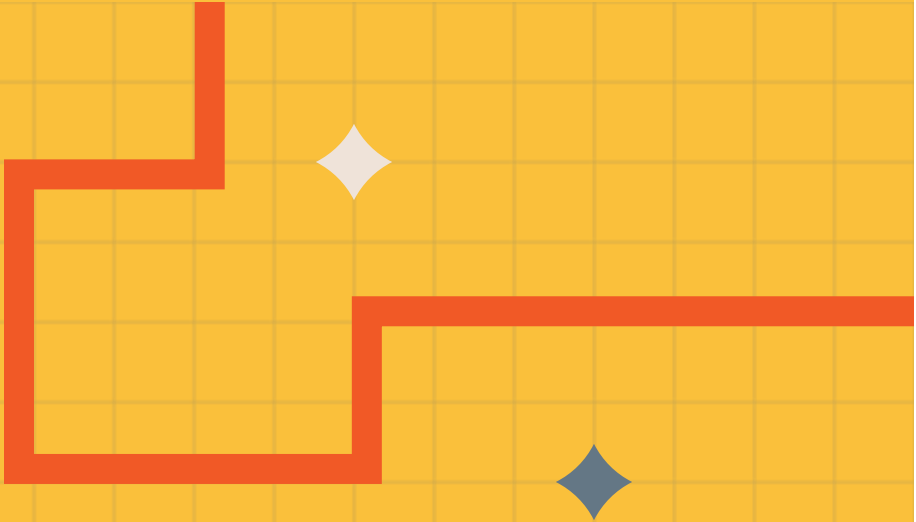


Welcome to the Webinar

A woman with dark hair tied back, wearing a white lace top, is seated at a wooden table, focused on a laptop. A man with dark curly hair, wearing a bright yellow long-sleeved shirt, stands behind her, looking down at the laptop screen. The setting appears to be a workshop or studio, with a brick wall and a mannequin visible in the background. The lighting is warm and natural, coming from a window on the right.

- We'll email the recording and slides within 24 hours
- We'd love your participation in the polls
- Please use the Q&A box for questions for Kara

Agenda



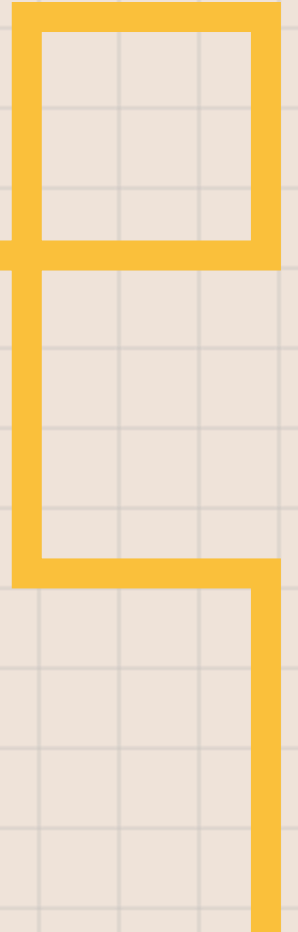
- At-Will Employment
- Unlawful Harassment
- Section 7 of the NLRA
- Wage and Hour



Poll Question

**Which of today's
topics do you feel
least comfortable
with?**

At-Will Employment



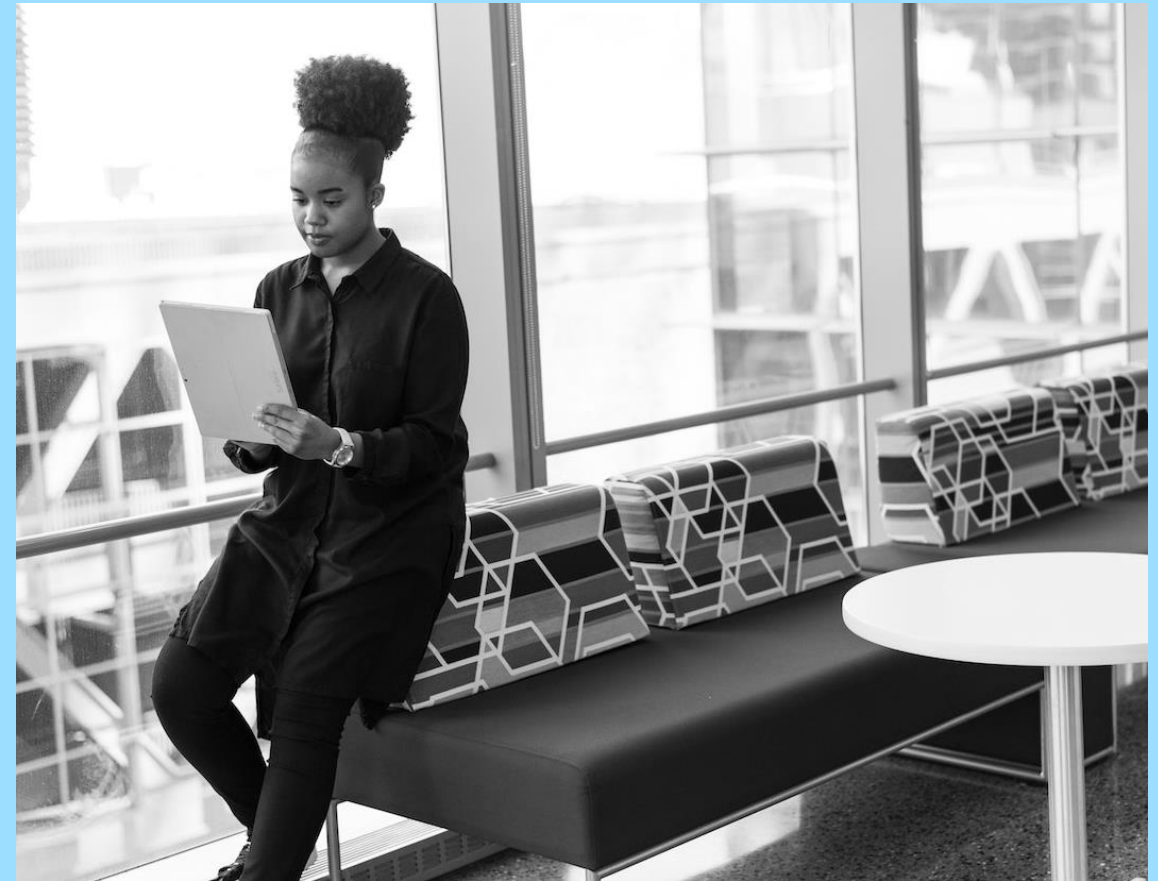


No Guarantee of Longevity

- Employment is open-ended
- Nothing will earn the employee tenure or a guaranteed continued employment
- The employee makes no promises to stay
- “Probationary periods” may hinder at-will

No Guarantee of Notice

- At any time, an employer can terminate, or an employee can quit, without giving notice
- *Requesting* notice is fine, but *requiring* it might create a contract obligating you give notice too
- If an employee gives notice but you don't want them to work through the notice period, consider paying them anyway so the UI department doesn't see it as a termination





No Good Cause Required

- You can have a good reason, a bad reason, or no reason at all, so long as it's not an *illegal* reason
- Illegal reasons are those based on an employee's inclusion in a protected class, use of a protected right or leave, or contrary to public policy

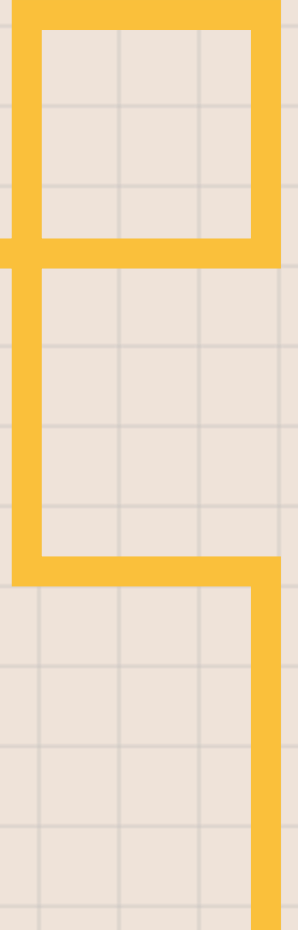


At-Will is Not a Blank Check

- Weak reasoning and documentation make it easier for an employee to claim the termination was for illegal reasons
- Likewise, refusing to tell employees why they've been terminated is prelude to lawsuits
- When attorneys get involved, it will cost you money, even if you win



Unlawful Harassment



Not Everything is Harassment



Unwelcome Conduct

+ Based on Protected Class

= Harassment

Federally protected classes: Race, color, religion, national origin, sex (including sexual orientation and gender identity), pregnancy, age, disability, genetic information, military or veteran status, citizenship or immigration status

And Not All Harassment is Unlawful

Harassment becomes unlawful where:

1. Enduring the offensive conduct becomes a condition of continued employment, or
2. The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. (Some states have lower thresholds, and it will be easier to show harassment there.)





The Hostile Workplace

- Just a type of harassment, so must still be related to a protected class or characteristic
- Not created by universally crabby bosses
- Not created by personality differences
- Not (usually) created by supervisors playing favorites. But beware the impact of internalized and unconscious bias

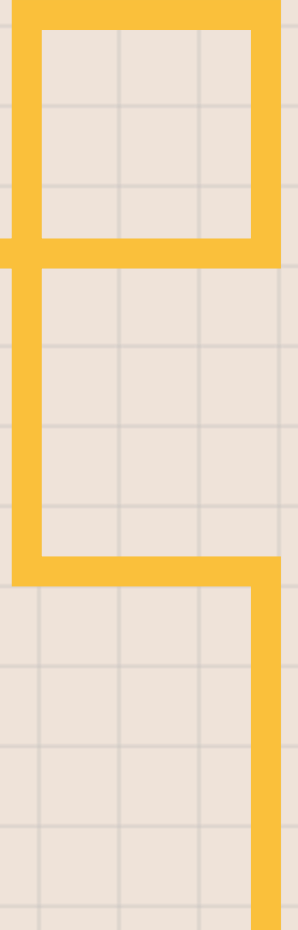
Employer Liability for Harassment

If there is tangible employment action (discrimination in terms or conditions of employment), the employer is always liable. If there is no tangible action (usually a hostile workplace claim), employers have a defense *if*:

1. The employer exercised reasonable care to prevent and promptly correct any harassing behavior, *and*
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or failed to avoid harm otherwise

(Note: “Avoid harm otherwise” generally means the employee ignored a readily available employer-provided option for getting help – not that they failed to change their own patterns to avoid the harassment.)

Section 7 of the National Labor Relations Act



The NLRA: Not Just for Unions

- Section 7 of the NLRA grants all employees the right to organize and engage in concerted activity for the purpose of mutual aid or protection
- Section 8 makes it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights
- The biggest error non-union employers make is prohibiting salary discussions



Examples of Protected Concerted Activity

- Employees discussing their wages, in any setting
- Employees complaining about safety concerns
- Employees organizing in opposition to a vaccine mandate, operational changes, or pay cuts
- Individual employee complaints regarding wages or employment conditions, if they are sharing general workforce discontent
- Employees discussing improving working conditions with other employees
- Circulating a petition asking for better hours
- Employees joining with coworkers to talk directly to the employer, a government agency, or the media about problems in the workplace



Social Media is (often) Protected

- If they can say it in the workplace, they can say it on their Facebook page
- But it still needs to be *concerted* and it still needs to be *truthful* (in the mind of a reasonable employee)
- Language and activities can lose protection if they are so *disloyal* as to cause damage to the company's reputation or income



Policies and Agreements Can't Squash Section 7 Rights

Even if your policy appears neutral, look at the nature and extent of the potential impact on NLRA rights, and the legitimate justifications associated with the rule.

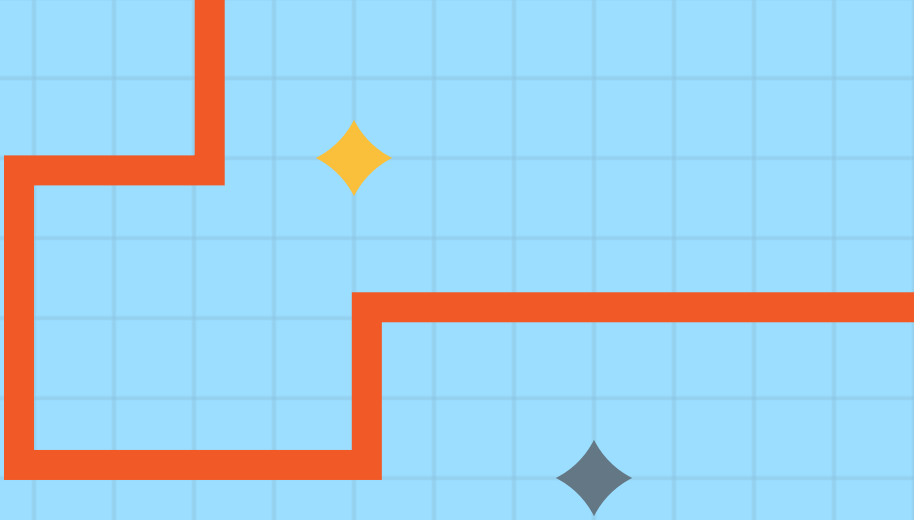
Confidentiality and non-disclosure clauses in severance agreements may be unlawful unless narrowly tailored to trade secrets, proprietary information, or actual defamation.



Wage and Hour



Fair Labor Standards Act



- Passed in 1938
- Regulates minimum wage, overtime, recordkeeping, child labor
- Essentially duplicated in many state laws, creating multiple opportunities for wage and hour claims

FLSA Minimum Wage and Overtime

Minimum wage and overtime is for all employees who are non-exempt.

- Can I make this worker an independent contractor instead of an employee?
- Can the employee be exempt?



Do I Have an Employee?

Probably. But you might also have:

- An independent contractor
 - Someone who qualifies to be an unpaid intern
 - A volunteer
- 
- 

The IRS's Independent Contractor Test

Behavioral Control: refers whether there is a right to direct or control how the worker does the work.

*Types of Instructions Given * Degree of Instruction * Evaluation System * Training*

Financial Control: refers to facts that show whether the business has the right to control the economic aspects of the worker's job.

*Significant investment * Unreimbursed expenses * Opportunity for profit or loss * Open for hire * Method of payment*

Type of Relationship: refers to facts that show how the worker and business perceive their relationship to each other.

*Written Contracts * Employee Benefits * Permanency of the Relationship * Whether Services are a Key Activity of the Business*

Can the Employee be Classified as Exempt?

Only if one of the exemptions listed in the FLSA applies

- Commissioned sales employees
- A smorgasbord of interesting jobs
- White Collar Employees: Perform specific duties, earn a minimum salary, and are paid on a salary basis

*Executive * Administrative * Professional*

*Computer * Outside Sales * Highly Compensated*

White Collar Duties Tests

Executive Employee

1. Primary duty is the management of an enterprise or a customarily recognized department or subdivision; *and*
2. Customarily and regularly directs the work of two or more full-time employees (or equivalent); *and*
3. Has authority to hire, fire, or promote other employees or effectively recommend similar actions

Administrative Employee

1. Primary duty must be the performance of office or non-manual work *directly related to the management or general business operations* of the employer or the employer's customers.
2. Primary duty includes exercise of discretion and independent judgment *with respect to matters of significance*.

Learned Professional

1. Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual and requires the consistent exercise of discretion and judgment; *and*
2. The advanced knowledge must be in a field of science or learning; *and*
3. The knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction (usually an advanced degree, such as a Master's, JD, MD, or PhD)

Non-Exempt Employee Traps



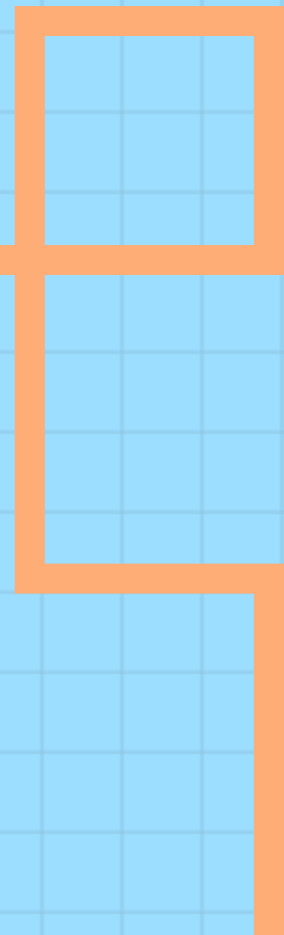
- Track time, including state-mandated breaks, carefully
- Don't deduct for breaks under 20 minutes unless you offer shorter paid breaks *and* have clear policy language that extra break time will be disciplined
- Pay for all time worked, including unauthorized time and time worked off the clock
- Ensure overtime is paid at 1.5x their *regular rate of pay*
- Be wary of payroll deductions for your benefit



Poll Question

**Which of today's
topics did you get
the most new or
helpful insight
about?**

Q+A



Thank you!

