

Ten Ways to Stay Out of Court

September 4, 2019



NFIB Small Business Legal Center

- We are the voice for small business in the courts and the legal resource for small business owners nationwide.
- While the information provided in this presentation is intended to be accurate, it should not be considered legal advice. The Legal Center cannot be held responsible for any errors or omissions.

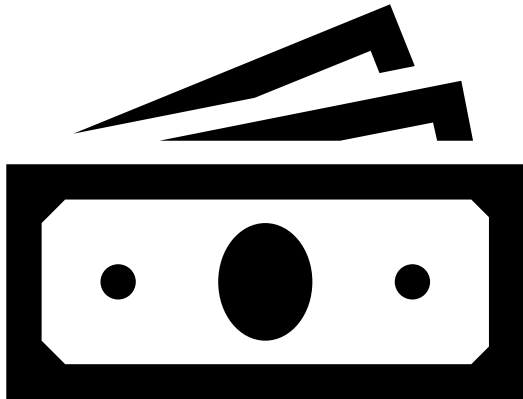


Agenda



- General best practices.
- Guidance on hiring and managing employees.
- Self-Audits for wage and hour compliance.
- Common pitfalls and issues to watch.

The Economics of Litigation



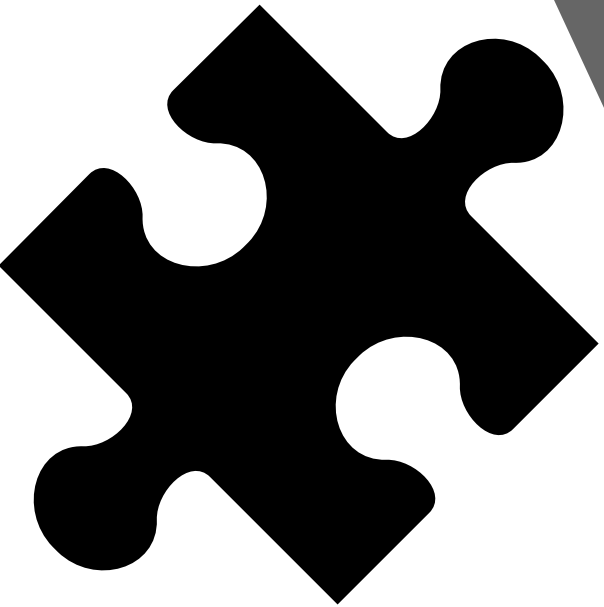
- Its easy to make an allegation, but difficult to disprove.
- Litigation is exorbitantly expensive.
- Vast majority of suits settle.
- Save money by seeking competent counsel.

Litigation Statistics



- U.S. tort system costs over \$260 billion per year – a staggering \$880 per person!
- 70 percent of the world's attorneys live in the United States.
- 94 percent of all lawsuits in the world are filed here.
- Small business bears significant tort costs.

General Liability Rules



Rule #1: Incorporate



- Asset protection and tax benefits.
- Have your attorney or accountant review your corporate records once a year.

Rule #2: Stay Alert



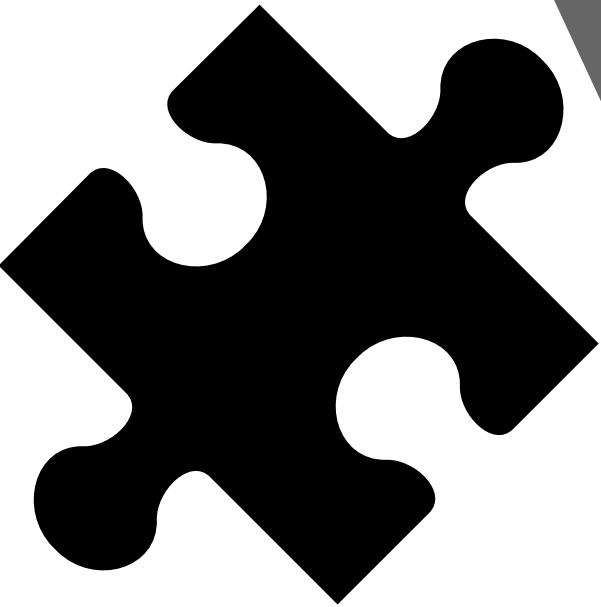
- Keep good records!
- Carefully record transactions you make with your business.
- Deposit all business receipts in a separate account.
- Proactively talk with CPA or tax attorney about tax planning.

Rule #3: Maintain Adequate Insurance



- Read the fine print!
- Comparison shop—specialty broker might help.
- Don't be cheap—increase liability coverage, consider umbrella, business interruption, disability, and employment practices liability insurance.

Employment Practice Rules



Rule #4: Hire Smart – Applications

- Make good hiring decisions.
- Require job applications from all candidates.
- Check references.



Rule #4: Hire Smart – Interviews

- Prepare a list of standard questions!
- Only ask appropriate questions that shed light on the applicant's capacity to perform functions and duties of the job.



Rule #4: Hire Smart - Interviews

- Do not ask questions that could reveal whether the person belongs to a protected group (questions about sexual orientation, religion, race, etc).
- Do not ask questions about the employee's medical history.



Rule #4: Hire Smart - Interviews

Don't ask:

- Do you have any medical conditions that would interfere with your ability to perform the job?
- Have you ever been treated for drug abuse?
- Have you ever been arrested?
- Are you taking any prescription drugs?
- Have you ever been a member of a union?
- Do you have small children?
- Have you ever filed for workers compensation?



Rule #4: Hire Smart – Background Checks



- Adopt a uniform policy for running background checks.
- Get applicant's permission in writing.
- Clearly identify the information you will be checking.
- Evaluate criminal history findings on a case-by-case basis.

Rule #4: Hire Smart – Immigration

- I-9 for all new hires.
- I-9 penalties range from \$275 to \$2,200.
- If your business has established a pattern or practice of hiring illegal workers, you may face jail time.



Rule #4: Hire Smart – Immigration

- If you find incorrect information, correct and initial or have employee fill out a new form and attach to the old form.
- If information is missing, fill in the information and initial and date that section. **(Do Not Backdate!)**
- Store all I-9s together.



Rule #5: Manage Fairly & Wisely

- Prohibit discrimination and harassment.
- ALL employees should be aware of antidiscrimination laws.
- Be aware of what goes on outside of your workplace.
- Train all supervisors on good personnel practices.
- Can be sued for “hostile” environment even if you are not personally involved.

Rule #5: Manage Fairly & Wisely

- It's a good idea to provide harassment training for supervisors every second year.
- This is especially true in the #metoo era.

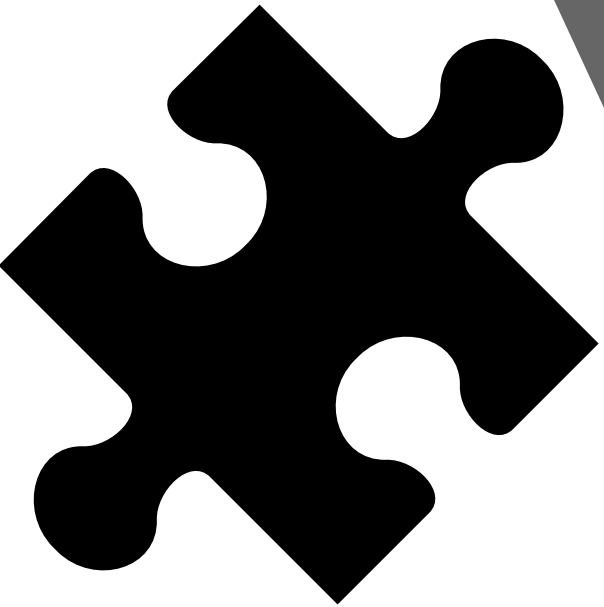


Rule #5: Manage Fairly & Wisely

- Performance Issues and Company Policies.
- Set out expectations for new employees.
- Tackle poor performance early.
- Document corrective action.
- Enforce company policies consistently.
- Avoid any inference of retaliation, discrimination, or other improper motive.



Wage & Hour Rules



Rule #6: Catch & Correct Wage & Hour Violations

- Fair Labor Standards Act (FLSA) = federal wage & hour law since 1938.
- Enforced by U.S. DOL.
- Requires minimum wage: **\$7.25**.



Rule #6: Catch & Correct Wage & Hour Violations

Who is covered by the FLSA?

- **Employees** who are engaged in interstate commerce, or work in activities closely related to such work (includes use of e-mail, phones, credit cards and U.S. mail).
- **Employers** who are engaged in interstate commerce and have an annual gross income of \$500,000.

Rule #6: Catch & Correct Wage & Hour Violations

- State Laws

- Follow the law that provides for the higher rate of pay.
- Pay attention to new developments.

U.S. DEPARTMENT OF LABOR

All DOL WHD

SEARCH

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Wage and Hour Division

DOL Home > WHD > State Minimum Wage Laws

State Minimum Wage Laws

Map Legend

- Higher than federal
- Same as federal
- No state minimum wage - federal applies
- Lower - federal applies
- Special minimum wage

Select a State

Table of minimum wage by state

Historical Table

Use the legend on the left to highlight different minimum wage categories, and click on any state to learn about applicable minimum wage laws.

Updated July 1, 2019

Rule #6: Catch & Correct Wage & Hour Violations



- Wage & Hour Risks
 - Misclassifying employees.
 - Not paying employees correctly for work time.

Rule #6: Catch & Correct Wage & Hour Violations

Nonexempt Employees

- Must keep records of time worked.
 - E.g., timecards or timesheets.
- Must earn at least minimum wage for all hours worked.
- Entitled to overtime for any hours worked over 40 in a 7-day work week.

Rule #6: Catch & Correct Wage & Hour Violations

Exempt Employees

- Must perform executive, administrative, professional, computer-related or outside sales work.
- Must pass the salary basis and salary level tests.

Rule #6: Catch & Correct Wage & Hour Violations

Exempt Employees

- Federal Rule: \$455 per week (\$23,660 per year).
- DOL's 2016 Rule: \$913 per week (\$47,476 per year).
- DOL's New Proposal: \$679 per week (\$35,308 per year).

Rule #6: Catch & Correct Wage & Hour Violations

An employee may
NOT waive his or
her right to
overtime pay!



Rule #7: Be Careful With Independent Contractors

A few scenarios:

- Retail store hiring a plumber to fix a leak:
- Coffee shop hiring an electrician to install an electrical line:
- Clothing manufacturer hiring a work-at-home seamstress:
- Baker hiring a cake decorator to work on custom cakes:
- Contract with HR consulting firm:
- IT professional to maintain website:



Rule #7: Be Careful With Independent Contractors

Key Questions:

- Are they using their own tools?
- Are you telling them when and where to work?
- Are you telling them how to work?
- Are they performing services for other companies?
- Are they free to reject work?
- Are they subject to discipline?
- Is there labor essential to your business model?

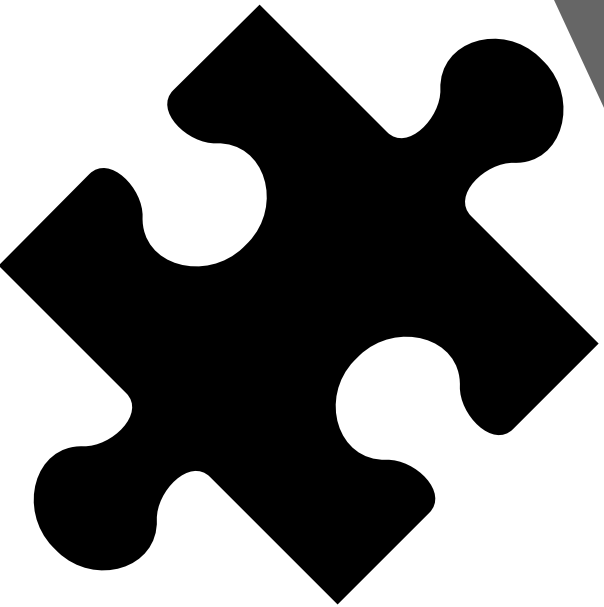


Rule #7: Be Careful With Independent Contractors

Minimize Risk

- *Require documentation* to establish that the consultant is truly an independent contractor, such as business cards, licenses, and certificate of insurance.
- *Put your agreement in writing* – set forth the terms of your relationship with a consultant to show the IRS and state agencies that the consultant is an independent contractor.
- *Do **not** treat contractors like employees.*

State and Local Rules



Rule #8: Know Special Local and State Rules

Background Checks:

- A growing number of states and localities have enacted “ban the box” legislation.
- Requires a conditional offer before an employer may run a background check.



Rule #8: Know Special Local and State Rules

Marijuana Laws

- Numerous states have legalized medical and or recreational use.
- Some states allow zero tolerance policies; other states require accommodations and or place restrictions on drug-testing.



Rule #8: Know Special Local and State Rules

State Disability and Discrimination Laws:

- Americans with Disabilities Act applies to employers with 15 or more employees.
- State law may apply anti-discrimination rules to smaller employers.



Rule #8: Know Special Local and State Rules

Sexual Harassment:

- New harassment training requirements.
- Revised standards for proving sexual harassment.
- Prohibitions on non-disclosure provisions.



Rule #8: Know Special Local and State Rules

Equal Pay Enactments:

- Several states have enacted legislation making it more difficult to justify pay disparities between workers in similar roles.
- Some states provide incentives for performing self-audits.



Rule #8: Know Special Local and State Rules

Meal & Rest Breaks:

- Many states require meal & rest break periods.
- Generally require that these breaks are uninterrupted.
- Find rules here:

<https://www.dol.gov/whd/state/meal.htm>

<https://www.dol.gov/whd/state/rest.htm>



Rule #8: Know Special Local and State Rules

Minimum Wage, Overtime & Piece Rate:

- States vary greatly in their requirements.
 - *E.g.*, Nevada's minimum wage is tied to health care coverage.
 - *E.g.*, California requires overtime pay after 8 hours.
- Watch out for local enactments!



Rule #8: Know Special Local and State Rules

Sick Leave:

- A growing number of states and localities require employers to provide paid sick leave.
- Enactments vary significantly in defining employee and employer rights—including basis for accrual.



Rule #8: Know Special Local and State Rules

Medical and Family Care:

- State FMLA enactments?
- Pregnancy and lactation accommodations?
- Maternity/paternity leave?
- Workers compensation?



Rule #8: Know Special Local and State Rules

Other Employment Matters:

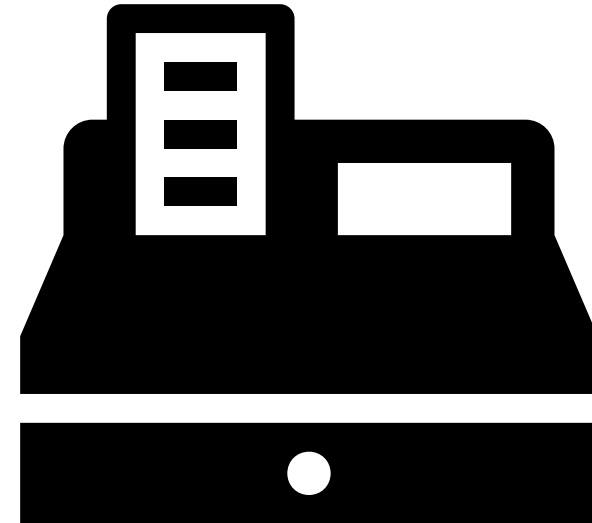
- *E.g.*, Policies discouraging employees from disclosing their hourly pay or salary?
- *E.g.*, Charging employees for lost or damaged property?
- *E.g.*, Final paycheck rules?



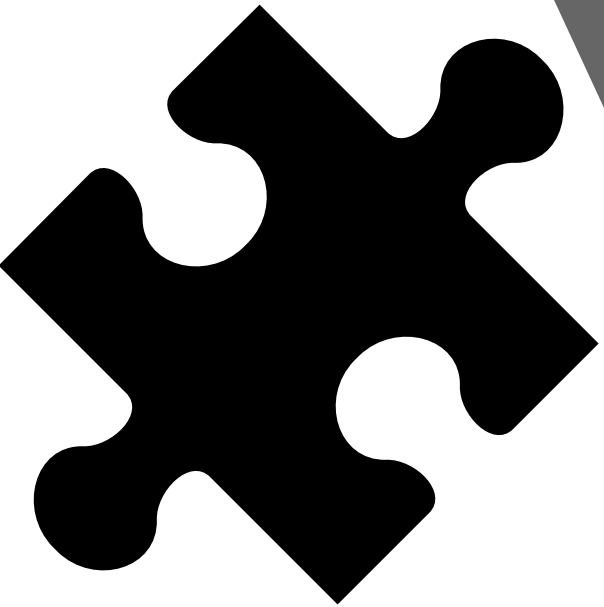
Rule #8: Know Special Local and State Rules

Consumer Protection Laws:

- Credit card surcharges are prohibited in some states, but not in others.
- State law may require special notices to consumers for certain products.



Best Practice Rules



Rule #9: Get Expert Help

- Consider hiring an attorney – it can be \$\$\$ well spent.
- Don't be afraid to ask for clarification when hiring an expert.
- Don't sign any contract until you have had time to review and ask questions.



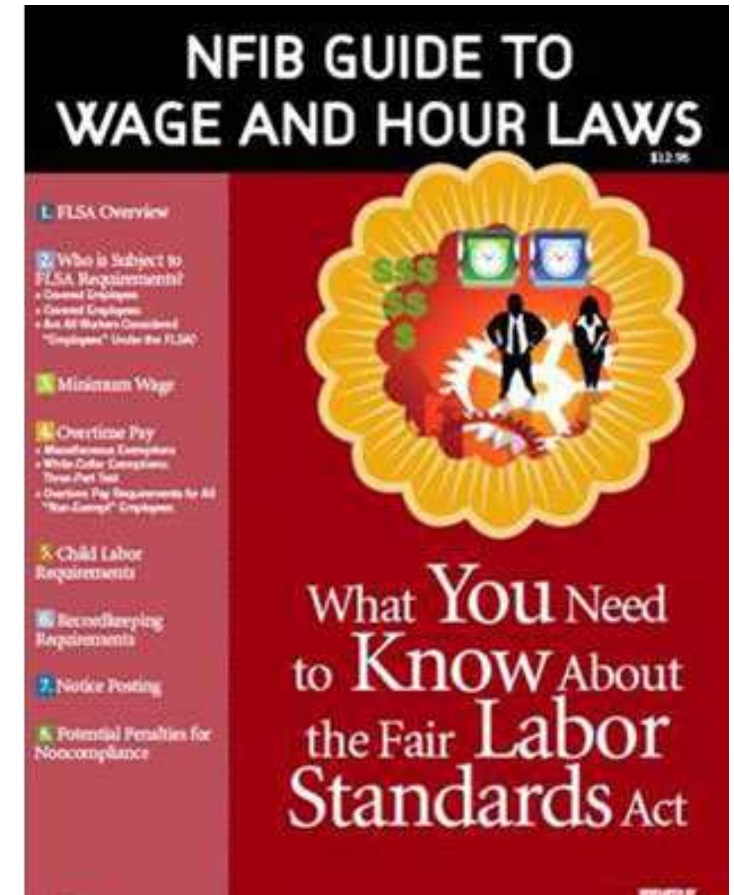
Rule #10: Get it in Writing (& keep it)!

- Institute a document retention policy.
- Keep tax-related records for at least eight years.
- Document employment actions.
- Retain employee records (under lock and key!) for term of employment plus five years.
- Keep OSHA logs for five years.

Help is Available!

NFIB Small Business Guides

- Guide to Wage and Hour Laws
- Model Employee Handbook for Small Business
- Small Business Guide to Document Retention
- Guide to Independent Contractors
- Guide to OSHA inspections.





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