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YOUR BEST FRIENDS: EEOC & DOL

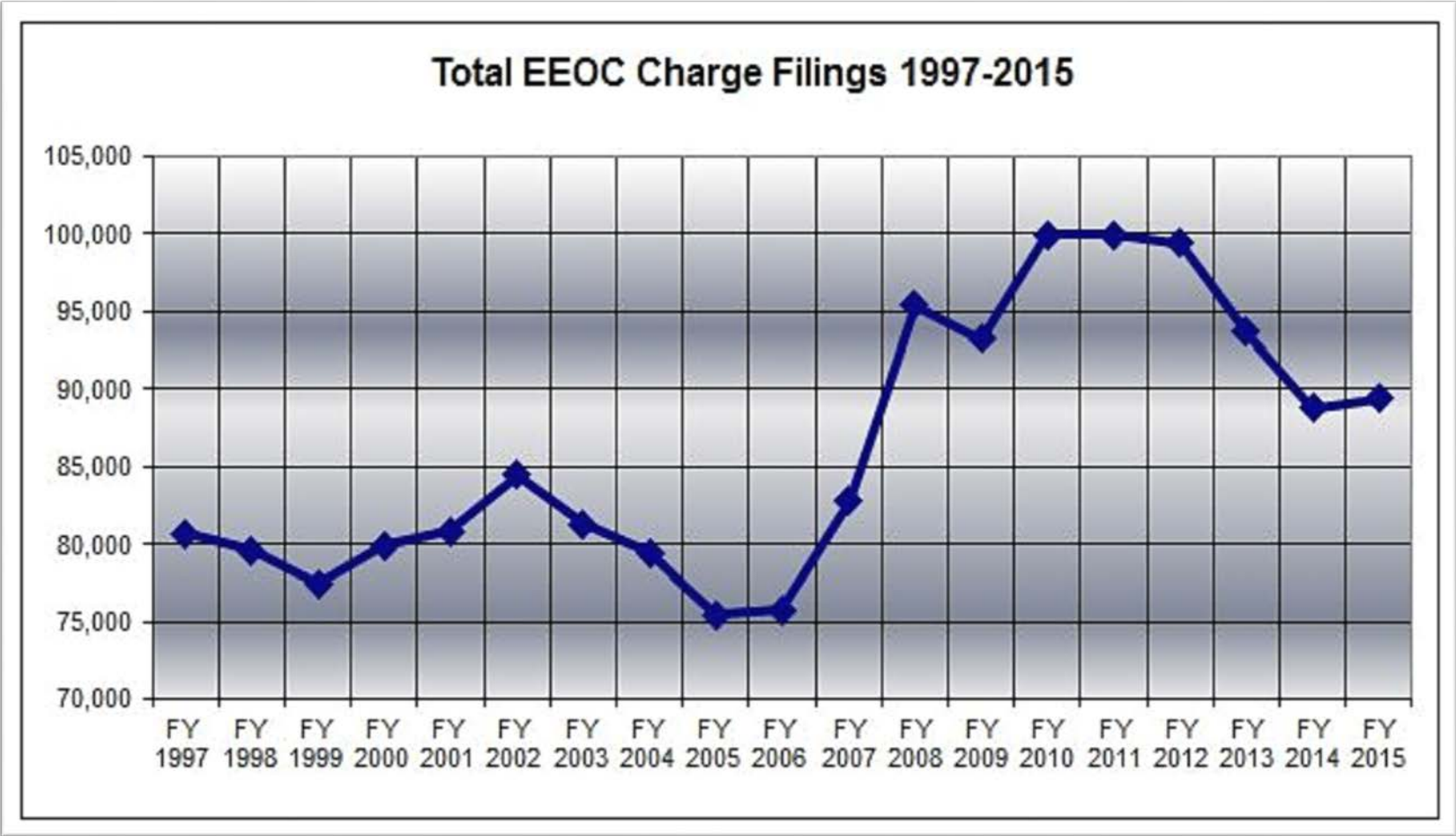
Employment Law - What You Don't Know May Hurt You

NWCCF Annual Conference – May 20, 2016

Attorneys for Employers

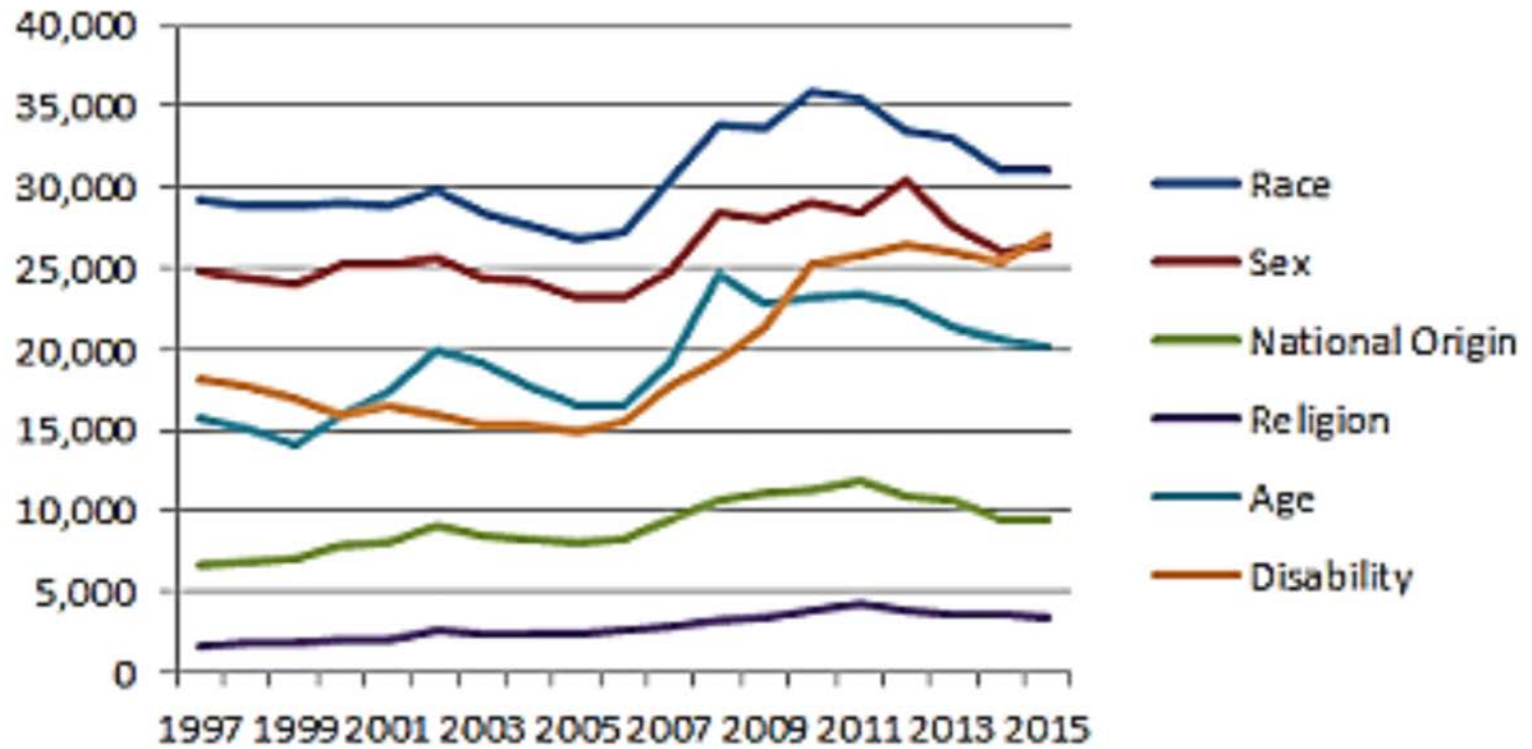
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EEOC



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EEOC Charges FY1997-2015



EEOC

Retaliation Guidance

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- Retaliation “Best Practices” (1-21-16)
 - Maintain written anti-retaliation policy complete with “practical guidance on the employer’s expectations.”
 - Maintain reporting mechanism for employees to voice concerns.
 - Train employees on the written anti-retaliation policy.
 - Investigate in a timely and professional manner.
- Manager Rule
 - Managerial employee with a duty to report or investigate may still have a retaliation claim.

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Electronic Sharing

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- Online Charge Status System
 - ▣ Responses filed electronically
 - ▣ Track charge status
- Employer's Answer to Request for Information
 - ▣ Shared with complainant and attorney for response
 - ▣ Complaint's rebuttal not shared – “free discovery”
- Lessons – Be Careful!
 - ▣ Preserve confidential, competitive information
 - ▣ Open door to new claimants
 - ▣ Avoid embellishing factual statement.

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Sexual Orientation

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- Title VII – No Protection for Sexual Orientation
 - US Supreme Court affirms right to same sex marriage
 - EEOC announces federal law prohibits sexual orientation discrimination
- Sexual Orientation = Gender Discrimination:
 1. inevitably involves treating employees differently because of their sex;
 2. is associational discrimination on the basis of sex; &
 3. necessarily involves discrimination based on gender stereotypes, including employer beliefs about person to whom the employee should be attracted.

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Transgender & Bathrooms

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- Transgender Discrimination = Sex Discrimination
 - Transgender employees have the right to a workplace free from discrimination and harassment on the basis of their gender identity
- EEOC's Bathroom Guidance (5-2-16)
 - Employer must allow employee to use bathroom that corresponds to gender identity
 - State law is *not* a defense (North Carolina)
 - Worker discomfort is *not* a defense
- Educational Institutions & Title IX

Americans with Disabilities Act

In a Nutshell

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- Disability Law:
 1. Prohibits disability-based discrimination
 2. Requires reasonable accommodations
- “Reasonable Accommodation”
 - Change in work environment enabling an individual with a disability to work
 - Eliminate essential function or cause undue hardship
- “Interactive Process”
 - Dialogue identifying precise limits of disability and potential accommodations to overcome them

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Leaves of Absences – ADA

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- EEOC Guidance (5-10-16)
 1. Equal access to leave under leave policy
 2. Grant leave as a reasonable accommodation.
 3. Leave and the interactive process generally
 4. Maximum leave policies
 5. Return to work and reasonable accommodation (including reassignment)
 6. Undue hardship
- Take-Away – Leave is now automatic unless undue burden

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Disability Red Flags

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- Status check-ups are acceptable, not mandatory reporting
- 100% healed policies are *per se* unlawful
- Automatic absence termination policies are *stupid*
- Reassignment to vacant position if qualified
- Pregnant individuals are entitled to light duty
- All requests for leave should be considered requests for reasonable accommodation
- No discussion of leave after FMLA leave expires

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EEO-1 & Gender

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- Employer Information Report (1-29-16)
 - Who – Federal contractors *and* private employers with 100 FTEs
 - What – Report pay and hours worked based on gender
 - Why – Discern pay discrimination
 - When – 9-30-17
- Securities & Exchange Commission
 - Require companies to annually disclose gender pay ratio information to investors

EEO-1

Reporting to Government

SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														Total Col A-N
		Race/Ethnicity														
		Hispanic or Latino		Non-Hispanic or Latino												
		Male						Female								
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		
Executive/Senior Level Officials and Managers 1.1	\$19,239 and under															
	\$19,240 - \$24,439															
	\$24,440 - \$30,679															
	\$30,680 - \$38,999															
	\$39,000 - \$49,919															
	\$49,920 - \$62,919															
	\$62,920 - \$80,079															
	\$80,080 - \$101,919															
	\$101,920 - \$128,959															
	\$128,960 - \$163,799															
	\$163,800 - \$207,999															
	\$208,000 and over															

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GINA & Employer Wellness Programs

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- Discrimination in Pay or Benefits Unlawful
 - Wellness programs reward healthy and penalize unhealthy violate GINA
- EEOC Exceptions: (5-16-16)
 1. *Maximum Incentive* – 30% of the total cost of employee-only or spouse coverage. Not kids.
 2. *Mandatory Participation* – No.
 3. *Reasonable Accommodation* – Yes.
 4. *Confidentiality* – Employer must safeguard health Info.
 5. *When* – January 1, 2017

U.S. Supreme Court – Notice

EEOC v. Abercrombie & Fitch (2015)

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□ Facts

- Manager “*assumed*,” because applicant wore headscarf to interview, she would require a religious accommodation violating store’s policy of no caps
- Applicant did not request accommodation in her interview

□ Holding

- The need for accommodation was the “motivating factor” in the employment decision – not actual knowledge
- Disability accommodation implications

DOL

Independent Contractors

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- DOL's Test – “Economic Realities”
 - ▣ Is worker economically dependent on the employer or in business for himself or herself?
 - 6 Factor Test
 - ▣ Effect: “most workers are employees under FLSA's broad definitions.”
- Label and Agreement *Not* Relevant
 - ▣ Independent contractor agreement
 - ▣ Worker and employer understanding

Wage and Hour Liability

Why should you care?

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- Damages
 1. Unpaid Wages
 2. Double or Liquidated Damages
 3. Prejudgment Interest of 12%
 4. Attorney's Fees and Costs
- Personal Liability Exposure
 - FMLA – *Graziado v. Culinary Institute of America*
- Double Damages
 - Acted in good faith
 - Reasonable grounds for believing wages not owed

DOL

“Economic Realities” Test

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1. Is the work an *integral part* of the employer’s business?
2. Does the worker’s *managerial skills* affect the worker’s opportunity for profit or loss?
3. How does the worker’s relative *investment* compare to the employer’s investment?

DOL

“Economic Realities” Test

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4. Does the work performed require *special skill and initiative*?
5. Is the relationship between the worker and the employer *permanent or indefinite*?
6. What is the nature and the degree of the *employer’s control*?

Uber Settlement

April 21, 2016

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- California & Massachusetts
 - ▣ Drivers misclassified as independent contractors
- Settlement Terms:
 - ▣ \$100 million to be distributed to 385,000 drivers
 - Nets most drivers \$24 (\$10-8,000)
 - ▣ Agreement not to deactivate for refusing rides
 - ▣ Internal appeals process
 - ▣ Driver's association to discuss issues with management
- NLRB files ULP re Misclassification

Independent Contractor *Solutions*

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1. DOL: Don't label employee as owner, partner, or member of LLC
2. Use independent contractor agreements
3. Pay worker's company, not worker
4. Avoid onboarding independent contractors
5. Hire as part-time or casual employee
6. Audit independent contractor relationships
7. Use independent contractors sparingly

DOL

Joint Employers

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- DOL's Administrative Opinion (1-20-16)
 - Employers that contract out work must ensure compliance with labor standards.
- DOL Identifies Two Types of Joint Employers:
 1. Horizontal Joint Employers
 - Two or more “each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee.”
 2. Vertical Joint Employers
 - An employee of an “intermediary employer is also employed by another employer.”

Joint Employers

Why Should You Care?

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- Wages and Hour
 - ▣ All hours worked are totaled for OT
 - ▣ Joint responsibility to pay wages and benefits
- Title VII & WLAD
 - ▣ Joint responsibility for workplace harassment, discrimination or retaliation
- Medical Leave
 - ▣ Paid sick leave and other benefits
 - ▣ Joint responsibility to provide FMLA leave and reasonably accommodate disabilities

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Horizontal Joint Employer Factors

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1. Does an entity own all or part of the other entity?
2. Are there overlapping officers, directors, executives, or managers?
3. Is there overlapping control of operations such as staffing, payroll, advertising, overhead costs?
4. Does one supervise the work of the other employer?
5. Is supervision of employee shared among the entities?
6. Are the employees of the entities intermingled?
7. Do they share clients or customers?
8. Is there any agreement between the joint employers?

Horizontal Joint Employer

DOL's Graphical Explanation

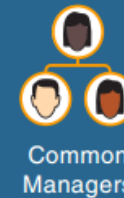
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Get the Facts on Joint Employment

Joint employment exists when an employee is employed by two (or more) employers and the employers are responsible, both individually and jointly, for that employee under the law. For example, an employee may be jointly employed by two restaurants that are organized as two different companies but share operations (Restaurants A and B, below).



OPERATIONS THAT MAY BE SHARED AMONG JOINT EMPLOYERS:



DOL

Vertical Joint Employer Factors

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1. Who directs, controls or supervises work performed?
2. Who sets employment conditions such as discipline, termination, rates of pay, and employment policies?
3. What is the permanency and duration of relationship?
4. How integral are employee's services to the business?
5. Is the work performed on the premises of potential joint employer?
6. Who performs admin functions such as payroll, provides workers' comp, or supplies tools, equipment or materials?

Vertical Joint Employer

DOL Graphical Explanation

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Get the Facts on Joint Employment

Joint employment exists when an employee is employed by two (or more) employers and the employers are responsible, both individually and jointly, for that employee under the law. For example, a worker placed by a staffing company to do housekeeping work at a hotel may be jointly employed by the staffing company and the hotel.

Joint Employers

THE HOTEL MAY BE A JOINT EMPLOYER OF THE EMPLOYEE IF SOME OF THE FOLLOWING ARE TRUE:

- The Hotel Handles Payroll or Performs Other Employer Functions
- The Hotel Sets Hours & Schedule
- The Hotel is Involved in Hiring or Supervising the Employee
- The Employee Works on the Hotel's Premises
- The Employee Has an Ongoing or Permanent Relationship with the Hotel
- The Employee's Work is Integral to the Hotel's Business

Joint Employer *Solutions*

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1. Review Joint Employer Factors.
 - Horizontal – separate out
 - Vertical – avoid control
2. Draft Agreement
 - Identify who is the employer and who is the customer
 - Provide defense and indemnity for customer
3. Purchase insurance coverage for risk
4. Limit usage – scope and time – of another's employees

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Overtime Exemptions

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- Overtime Test:
 1. Perform exempt duties (executive, administrative or professional); **and**
 2. Paid salary
- DOL Doubles Down on Salary Test (5-18-16)
 - \$455/week to \$913/week (\$47,476)
 - 40th Percentile – Updated @ 3 Years
 - Bonus and commission count up to 10% of threshold
- Highly Compensated Employee – \$134,004
 - Not in Washington!

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Litigation Avoidance

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1. Adjust payroll to maintain – 6½ months to fix
2. Review timekeeping system to determine who tracks time
3. Explain if move from exempt to non-exempt
4. Limit hours to forty per week
5. Negotiate fluctuating work week agreement
6. Eliminate problem areas = Be inflexible!
 - No more telecommuting, after hours email or texting, working through breaks or lunch, *etc.*

Wage and Hour Liability *Solutions*

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- Published Policies
 1. Require pre-approval before working overtime
 2. Forbid non-exempt employees from working during lunch or not taking breaks
- Time Entries
 - ▣ Daily sign off and certification of hours worked
 - ▣ Track start, finish, breaks and lunch time

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Wage & Hour Class Actions

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- *Wal-Mart v. Dukes* (2011)
 - +1 million female employees claiming gender discrimination
 - No “trial by formula” so no class certification
- *Tyson Foods v. Bouaphakeo* (2016)
 - Trial by formula accepted using sample evidence to extrapolate overtime claims for 3344 workers
- *Braun v. Wal-Mart* (2016)
 - No review of \$187 million judgement based on extrapolation

Class Actions

Litigation Avoidance

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- US Supreme Court matters for day-to-day business operations
- Class Action Hotspots:
 1. Minimum wage
 2. Paid rest and meal breaks
 3. Working off-the-clock or at home
 4. Preliminary and post-liminary activities
 5. Travel time between assignments or jobs
 6. Training time
 7. Overtime calculation with bonuses or commissions

Ten Ways to Avoid Lawsuits

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1. Prepare for the new overtime rules.
2. Update your FMLA forms and policy.
3. Review NLRB's handbook rules and update yours.
4. Distribute anti-harassment/anti-discrimination policy, obtain a signed acknowledgement and conduct training.
5. Educate supervisors regarding new protected classes.
6. Ensure compliance with Fair Credit Reporting Act.
7. Document. Document. Document.
8. Create a formal policy on disability accommodation.
9. Treat employees as you would want to be treated.
10. Keep me on speed dial.