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Breakout 2:  
**Wage & Hour - Making Sure the Math is Right**

Presenters  
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### Recording Reminder

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New Challenges in the New Year

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### Today's Discussion – Wage & Hour Issues

- Wage and hour lawsuits can cost employers *millions*.
  - 2x wages
  - Attorney fees and costs
- General trend: lawsuits increase when economy is unstable.
- In midst of COVID-19 pandemic, employers may disregard critical wage and hour problems to address more imminent problems and constantly-shifting rules and regulations.
- Our goal: identify emerging trends and common pitfalls to avoid *before* you are facing a seven-figure demand letter!



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### The Remote Workplace: Issue #1

- "Suffer or permit to work"
  - Does employer know *or have reason to believe* that employee is working?
  - Most common issue: work-related emails and phone messages after regular working hours
- Teleworking employees
  - Must base pay on actual knowledge or constructive knowledge of work
  - Must exercise "reasonable diligence"
  - Employers might be deemed to have constructive knowledge if they could have acquired information regarding additional work done through exercise of reasonable diligence.
    - Not obligated to cross-reference non-payroll records (i.e., phone records) to evaluate whether employees worked beyond their scheduled hours



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### The Remote Workplace: Solution #1

- Document your "reasonable diligence"
  - Includes having a "reasonable reporting procedure" to report unscheduled work hours
  - Policy should be in writing.
  - Cannot discourage or prevent employees from accurately reporting time
- Do not have to ask about unscheduled hours if procedure is in place and no reason to believe working such hours



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### The Remote Workplace: Issue #2

- Should we reimburse employees for expenses associated with working from home, including cell phone and internet usage?
- Employers are generally obligated to reimburse expenses incurred by their employees only to extent that those expenses would otherwise cut into wages protected under FLSA.
- Some states have more expansive reimbursement laws, and should be carefully monitored.
  - California, Illinois (in particular)



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## The Remote Workplace: Solution #2

- Audit expenses to make sure the math is right:
  - Are items truly “business expenses” (incurred for benefit of employer); and (if so)
  - Is it reducing employee’s earnings below required minimum wage or overtime rate?
    - In Michigan: \$9.65/hour
- Also remember: employers may not require employees to pay or reimburse employer for such items if telework is being provided to qualified individual with disability as a reasonable accommodation under the ADA.



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## Not So Fast: Independent Contractors

- February 2021 – DOL announced that it had rescinded significant Trump-era guidance on when businesses can classify workers as independent contractors.
  - FLSA 2021-9: motor carrier analysis
  - FLSA 2021-8: whether certain distributors of a manufacturer’s food products are employees
  - FLSA 2021-4: whether a restaurant may institute a tip pool under the FLSA that includes both servers (for whom employer takes tip credit) as well as hosts and hostesses (for whom no tip credit is taken)

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## Not So Fast: Independent Contractors

- January 2021: Biden administration requested DOL freeze implementation of final rule regarding independent contractors (issued in early January 2021 under Trump administration) pending further agency review.
  - Would not be effective until March 8, 2021 (in practicality: likely never will)
- What do we expect?
  - More close scrutiny of whether businesses (especially those in Silicon Valley and app-based) can continue to avoid responsibility for wage and hour requirements by treating their workforce as independent contractors.



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## On the Hook: Joint Employment

- In January 2020, DOL issued final rule adjusting joint-employer standard under the FLSA.
  - Generally seen as “business friendly”
  - Has the effect of making fewer workers, like those of franchises, “joint employees”
  - September 2020: enjoined by a federal court in New York
  - Now, Marty Walsh (expected Secretary of Labor) will likely claw back the rule.



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## While We Wait . . .

- Review classifications of contractors / potential “joint employer” scenarios
  - If joint employer, liable for all applicable FLSA violations
- Do not feel confident that Trump-era guidance will “save the day” in litigation commenced in 2021 or beyond.
- Watch for employees returning to workplace in a changed capacity
  - Store manager coming back and handling more “grunt” work
  - Key: performing duties of exempt employee *in addition* to receiving minimum salary
  - Title is not dispositive.



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## Wage & Hour Issues: FAQs

- Our work is down, can we ask certain managers to work four days per week for the next two months and pay them 80% of their salary during that time period?
- We are contemplating a RIF and have a few employees working from home with our equipment. Can we deduct from their final paycheck cost of our equipment until returned?
- We have a C-suite reluctant to make changes to our compensation structures, what else can we do to potentially limit our exposure to a costly FLSA collective action lawsuit?

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## Wage & Hour Issues: FAQs

- In your experience, what are most common “math” errors employers make when calculating and paying wages?
- Is there any easy way for us to determine whether “travel time” is compensable?
  - Note: Fact Sheet #22
- We are incentivizing our employees to (work, get vaccinated, etc.) . . . How does that affect OT calculations, if at all?



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## Questions?



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