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ATTORNEYS & COUNSELORS AT LAW

## Mitigating Mistakes

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Repairing and Recovering From  
Common HR Miscues

Presented by  
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## Today's Presenters

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## What do you do When ... ?

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- You suspect an employee misclassification?
- An employee has been overpaid for several weeks?
- A federal investigator knocks on your door?
- You hear: “but I reported that to my manager weeks ago!”
- You’re the last to find out about a serial policy-violating manager?



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## Managing Misclassification Mistakes

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- The scenario:
  - Mary is classified as an exempt employee.
  - She has been salaried, exempt since 2005, when she was performing the duties of controller.
  - In 2011, the company hired a new CFO, who rearranged Mary’s duties and hired a new accounts payable manager.
  - Since then, Mary has had no direct reports.
  - Mary has been consistently classified as exempt and never paid OT, despite regularly working 50+ hours during the busy season.



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## Is the Classification Correct?

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- Executive exemption does not apply.
  - Requirements:
    - Paid on a salary basis
    - Primary duty is managing the enterprise, or a customarily recognized department or subdivision of the enterprise.
    - Customarily and regularly directs the work of at least two or more other full-time employees or their equivalent AND the employee must have the authority to hire or fire (or suggestions are given “particular weight.”)



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## What About the “Administrative Exemption?”

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- Requirements:
  - Paid a guaranteed salary
  - Performs office or non-manual work directly related to the management policies or general business operation of the employer/employer’s customers

*Continued*



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## What About the “Administrative Exemption?”

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- Must customarily and regularly exercise independent judgment and discretion
  - Regular and recurring responsibility to compare and evaluate courses of action, then act or make a decision after considering various possibilities
  - Must act free of direction or supervision in matters of consequence and significance



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## What if it's Too Close to Call?

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- Err on the side of non-exempt.
- Reclassification ... Raising a red flag?
  - Consider salaried, non-exempt.
  - Require “daily activity log” and monitoring of time for internal purposes.
  - Changes with administration, position of Department of Labor
  - Update job descriptions and job duties.



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## Addressing the Mistake

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- In some circumstances, it may make sense to admit mistake.
  - Address with employee.
  - Provide calculation for unpaid OT.
  - Provide payment for unpaid OT.
  - Remember: FLSA claims cannot be waived without court or DOL approval.

*Continued*



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## Addressing the Mistake

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- IRS has a “Voluntary Classification Settlement Program:”
  - Allows employers to change the classification for independent contractors to employees
  - Fines are reduced to 10% per employee tax liability that would have been paid if classified correctly.



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## BEWARE: Focus of Michigan AG

- April 22 – announced that there would be a “crack down on companies that cheat workers, rob millions from taxpayers”
- AG Dana Nessel unveiled measures to crackdown on misclassifications
- Established the “Payroll Fraud Enforcement Unit” within the AG’s Department
- MI lawmakers discussed additional anti-fraud legislation.
- Most common industries identified: construction, landscaping, janitorial services, childcare, beauty/personal services, retail, food service, car wash and home healthcare



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## We Paid Them WHAT?

- The scenario:
  - James, Mark and Lisa are operators who are paid \$14.50 per hour or \$580.00 per week.
  - Due to a payroll error, on March 1, their rates were changed to \$16.25 per hour and their checks on 3/15, 3/29, 4/12, and 4/26 were \$70 more than they should have been for a total overpayment of \$280 per each (\$1,120 total).



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## Overpayment Deductions

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- Do we need to get the employees' consent to deduct from future earnings?
  - Michigan Payment of Wages and Fringe Benefits Act allows for a deduction for a wage or fringe benefit overpayment without the written consent of an employee, provided specific requirements are met.



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## Without Written Consent

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- It's never okay if the employee's rate of pay is not greater than the minimum wage per hour
- If the overpayment was the result of a mathematical miscalculation, typographical error, clerical error or misprint in processing of payroll, then ...
  - You can continue to the next slide
  - If not, do not continue – deduction is not permitted without written consent!



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## Without Written Consent

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- Deduction can be made within six months of the overpayment *IF*:
  - Employee receives written notice of the deduction at least one pay period before it is made
  - Deduction amount is less than 15% of the employee's gross wage earnings
    - *In our scenario, you can't do it all at once.*
  - All other required/authorized deductions are made first.
  - Employee's hourly rate does not drop below minimum wage.



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## Knock, Knock: Give me All Your Records!

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- The scenario:
  - It is Friday at 3 p.m., and you're dreaming about a relaxing weekend.
  - An unexpected visitor arrives and introduces himself as "Thomas Dollard, Investigator. U.S. Department of Labor/Wage and Hour Division."
  - He then hands you a request for records to review, which looks something like ...



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## DOL Investigation

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The Wage and Hour Division (WHD) of the U.S. Department of Labor is responsible for administering and enforcing a number of federal labor laws, including the Fair Labor Standards Act (FLSA). This letter is to inform you of the agency's plan to determine your compliance with the FLSA. I would like to conduct a conference at your location on August 1, 2018 in the morning.

Authority for this investigation is contained in Section 11(a) of the FLSA. Section 11(a) states, "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter or which may aid in the enforcement of the provisions of this chapter."

In order to conduct the investigation with as little disruption to your business operations as possible, please have all documents providing the following information for the last two years, ending with your last completed payroll:



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## Request Records

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**Names, addresses, and telephone numbers of all business owners and company officers (e.g., President, Treasurer, Secretary, Board of Directors and other Corporate Officers) along with a company organizational chart if you have one;**

**Legal name of the company and all other names used by the company (e.g., "Doing Business As" names);**

**Records demonstrating your gross annual dollar volume of sales (tax records, profit and loss statements). Please provide these records for the past three (instead of two) years;**

**A list of all employees with their address, telephone numbers, hourly rate or salary, descriptive job title, shift, and whether you consider that employee exempt from overtime for all current and former employees (past two years);**



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## The Tricky Records...

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- Payroll and time records for the most recently completed payroll and sample payroll and time records for the last two quarters of 2017, each quarter of 2018, and the first two quarters of 2019 (one pay period from each)
- 1099 forms and contract documents with any independent contractors, subcontractors or day laborers
- Records of any other payments made to employees



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## General Process

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- #1 – Ask the DOL to return on another day.
  - Must give employers 72 hours to respond
  - Notify appropriate personnel (owner/President/CFO)
- #2 – Can the records be delivered via a different method than an on-site inspection?
- #3 – Retain counsel to verify credentials and issues and to be present during investigation.
- #4 – Prepare for initial conference and follow-up requests.



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## Can I Tell Him to Kick Rocks?

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- This is not advised.
- Typically, consenting to the investigation instead of requiring a subpoena is advantageous.
- Investigators who are flatly denied audit access will likely return with a subpoena granting access to the facility, all requested documents, and all requested employees on *their terms*.



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## Prep for Opening Conference

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- Compile/arrange copies of all data.
  - Do not give more than is requested.
  - Keep copies.
  - Recommend title pages with each request and explanation, if required.
  - Label: “Confidential and Proprietary”
- Have a separate conference room that is well lit, has access to internet/power.
- Try to minimize employee interruption/involvement.



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## Opening Conference

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- Explain DOL's authority.
  - Investigate and gather data RE: wages, hours and other employment practices.
  - Enter an employee's premises and inspect their records and workplace.
  - Question employees in their investigation RE: compliance.
- Explain purpose and investigation procedure.
  - Describe intended scope of investigation.

*Continued*



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## Opening Conference

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- Gather and review data.
  - *Do not generate documents.*
- Tour of the facility.
- Interview employees
  - Legal representative not entitled to be present for non-managerial employees
    - Counsel may prepare witnesses and explain their rights.
  - Viewed by DOL as most important investigatory tool



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## Closing Conference

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- If DOL intends to issue findings of back wages due, it must conduct a closing conference.
- Generally held at same location as opening conference
- Will communicate DOL's findings, explain post-audit rights
- Will not share the identity of any complainants or informants
- Don't agree/admit, promise or argue
- Request time to correct any legal or factual errors.



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## “Uninvestigated” Allegation

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- The scenario:
  - You find out, during an EEOC investigation, that Sherry complained about Jonathan's sexual harassment to her boss, Jerry, *weeks* ago.
  - The complaint was not elevated, and Sherry was subsequently terminated due to poor performance.
  - Sherry is not alleging retaliation, and Jerry, as a “manager,” was defined as the correct person to whom complaints of harassment should be directed.



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## Is it Too Late?

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- No!
- Immediately launch an investigation.
- Ascertain whether Sherry is represented by counsel and/or can provide information needed for investigation.
- Review “performance-based” reasoning for termination.



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## Admission of Liability?

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- You do not have to admit underlying sexual harassment.
- You may find ongoing issues that need to be remedied in the workplace.
  - Prompt, remedial action should result, even if Sherry does not return to workplace.
- Offer of reinstatement beneficial because it may bar future economic damages.



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## How far Down the Rabbit Hole ...?

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- The scenario:
  - During your investigation of Sherry’s claims, you find a number of issues involving several previously terminated employees also working with Jonathan and reporting concerns to Jerry.
  - The word “systemic” pops into your mind, and you have nightmares of a Title VII class action litigation.



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## Drawing the Line

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- Focus is on current employees and structure.
- Keep in mind the applicable statute of limitations (three years from last date of violation per Michigan law and Title VII).
- Assess worst-case scenario exposure.
- Don’t let fear of “creating a slippery slope” paralyze you from remedying harassment/retaliation and changing culture.



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## The Last to Know

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- The scenario:
  - Paul is a “difficult personality” in the workplace who has earned a front-row spot on his manager’s (Samantha) radar.
  - Samantha has reported several issues to HR involving Paul; none have risen to the level requiring discipline, until ...
  - Samantha reports Paul has had ongoing attendance issues, which are verified by a review of his time card report.

*Continued*



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## The Last to Know

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- After closer review, HR approves placing Paul on an attendance related Performance Improvement Plan (PIP).
- When presenting the PIP, Paul becomes extremely agitated and accuses Samantha of favoritism.
- According to Paul, Samantha’s “bowling buddies” are regularly allowed to leave work on Tuesday (bowling night) 15 minutes early and are habitually late on Wednesday mornings.



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## Reviewing Accusations Against Management

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- Before confronting Samantha, you should:
  - Review the time card records of the employees in the department.
  - Is there a pattern?
    - Where there is smoke ...
  - Consult with other “neutral” employees.
  - Look for other ways to substantiate/contradict the allegations.
    - Surveillance video, project reports, etc.



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## Address & Remedy

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- If Paul was right, you need to:
  - Review attendance discipline.
  - Consider implications on company-wide policies/decisions (for example, RIF selections based on attendance history, performance, etc.).
  - Discipline Samantha.
  - Set clear expectations moving forward.
  - Try to avoid “Monday Morning Quarterbacking” and retroactively imposing discipline (depends on severity).



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## Key Considerations

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- Typically need to *balance* business priorities with efforts to be 100% compliant with myriad of employment laws and regulations.
- Mistakes happen! Accept, acknowledge, remedy, move *forward*.
- Company initiatives/changes provide great opportunity to re-focus and fix long-standing problems and high-risk practices.



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## Questions?

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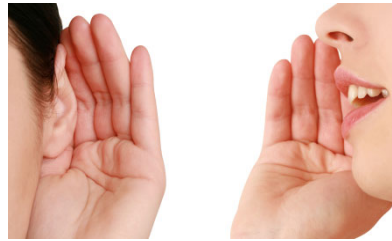


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## Post-Webinar Survey

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We want to hear from you!



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**Responding to Employee Leave Requests  
Under Michigan & Federal Law**



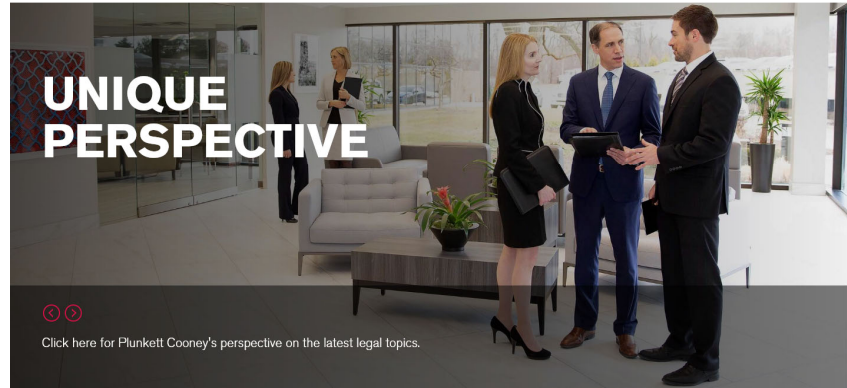
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# New Look!



Team Services Insights Firm Contact



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# Presentation File of Program



Team Services **Insights** Firm Contact

## Events

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### PRACTICE AREAS

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Human Resources Services  
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Let me Tell You What I Just Heard...

POSTED BY CLAUDEA D. ORR  
04/15/2019

Rumor-based sexual harassment claim draws attention in the form of nearly 50 amicus curiae briefs from across the country. This post explains why.

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If at First You Don't Succeed, Try... Try... Again



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# Thank You!



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