



NFIB
The Voice of Small Business.®

2017 Labor & Employment Law Update for Small Business

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National Federation of Independent Business



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Agenda

- **Wage and hour update** – federal law review and state minimum wage updates
- **Worker classification** - joint employment and independent contractor enforcement
- **Drugs, drugs and more drugs** – medical marijuana updates
- **Ban the Box and Other Hiring Laws** – complying with new state and municipal hiring restrictions
- **Questions?**

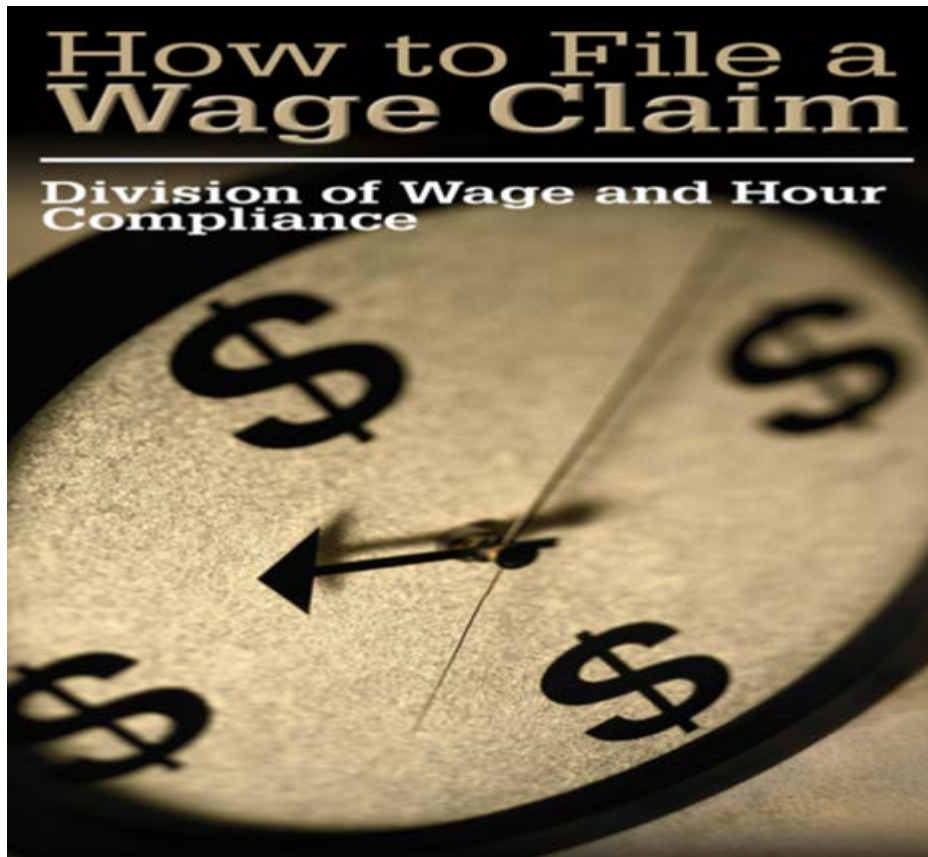
About NFIB

The National Federation of Independent Business is the leading small business association over 300,000 small and independent businesses nationwide. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its members in Washington D.C., and all 50 states.

Litigation Statistics

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





Wage and Hour Update

Time to Vote

Are you concerned about your business's compliance with wage and hour laws?

1. Yes
2. No
3. Unsure



State of the Nation

DOL estimates **70 percent** of employers
are out of compliance!

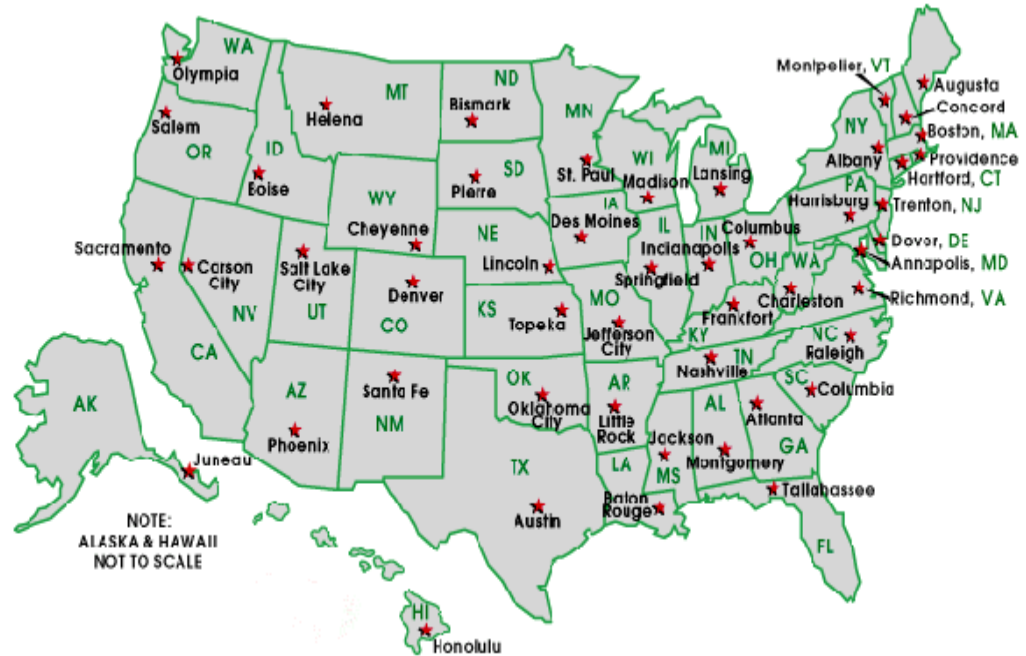


Wage and Hour Risks

- Wage & Hour claims represent over 90% of the employment class actions filed every year
- Federal wage & hour lawsuits filed nationally have increased more than 400% since 2000, with a record high in 2015 of 8,781

Overview of the FLSA

- Fair Labor Standards Act (FLSA) – federal wage and hour law
- Follow the law (federal, state or local) that provides highest rate of pay.



Overview of the FLSA

Non-exempt employees

- Paid for actual hours worked
- Must keep records of time worked, *e.g., timesheets or timecards*
- Must earn at least minimum wage for all hours worked
- Entitled to overtime for any hours worked over 40 in 7-day work week at rate of 1½ times regular rate of pay



Overview of the FLSA

Exempt employees

- Paid regardless of quantity or quality of work
- No limit on the number of hours an employee may work or be required to work
- No minimum wage requirement
- No overtime requirement



Overview of the FLSA

- Executive, Administrative, Professional – 3 part test:
 1. Salary Basis: Employee must be paid a predetermined and fixed minimum salary that is not subject to reduction because of quality or quantity of work performed.
 2. Salary Level: \$23,660/annual or \$455/week.
 3. Duties Test: employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations.

Overview of the FLSA

Highly Compensated – 3 part test:

1. Salary: The employee earns total annual compensation of \$100,000 or more, including \$455/week, paid on a salary basis;
2. Non-manual work: The employee's primary duty includes performing office or non-manual work; and
3. One exempt EAP duty: The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Key Provisions in New Overtime Rule

\$47,476

The previous threshold of \$23,660 per year/week/\$23,660 annually has increased to \$47,476 per year/week/\$47,476 annually.

DELAYED



\$104,000

The threshold for determining as an "exempt highly compensated employee" will raise from \$100,000 to \$134,000.

State Minimum Wage Update

- 19 states have new effective minimum wages as of January 1, 2017
- 2 additional states and Washington, DC will have new minimums in July

State Minimum Wage Update

Connecticut - \$10.10

Maine - \$ 9.00

Massachusetts - \$ 11.00

New Hampshire - \$ 7.25

Rhode Island - \$ 9.60

Vermont - \$10.00

<https://www.dol.gov/whd/minwage/america.htm>

Effective January 1, 2017

| State | Wage |
|-------------|---------|
| Alaska | \$9.80 |
| Arizona | \$10.00 |
| Arkansas | \$8.50 |
| California | \$10.50 |
| Colorado | \$9.30 |
| Connecticut | \$10.10 |

Effective January 1, 2017

| State | Wage |
|---------------|---------|
| Florida | \$8.10 |
| Hawaii | \$9.25 |
| Maine | \$9.00 |
| Massachusetts | \$11.00 |
| Michigan | \$8.90 |
| Missouri | \$7.70 |

Effective January 1, 2017

| State | Wage |
|--------------|---------------|
| Montana | \$8.15 |
| New Jersey | \$8.44 |
| Ohio* | \$8.15/\$7.25 |
| South Dakota | \$8.65 |
| Vermont | \$10.00 |
| Washington | \$11.00 |



Worker Misclassification & Joint Employer Liability



Independent Contractor

Independent contractors, by definition, are self-employed and because they are not employees, independent contractors are not covered by employment, labor, and related tax laws.



Employee

Employee is broadly defined

- Every person in the service of another
- Any contract of hire, written, or implied
- Includes undocumented workers, minors, trainees, part-time or temporary workers



Who Cares?

- **Internal Revenue Service (IRS)**
 - More difficult to collect income taxes from independent contractors
- **Health & Human Services (HHS)**
 - More difficult to collect payroll taxes from independent contractors
- **Department of Labor (DOL)**
 - Potential abuse of minimum wage and overtime laws
 - Potential abuse of anti-discrimination laws

Who Cares?

- **State Department of Taxation**
 - More difficult to collect income taxes from independent contractors
- **State Employment Commission**
 - Employers are not contributing to the UI fund
- **State Workers' Compensation Board**
 - Employers are not contributing to the WC fund
- **State Department of Labor**



Who Cares?



Employment Agencies . . . Problem Solved . . . Right?

- Employment agencies hire, fire and pay the workers.
- Employment agencies are responsible for withholding income and payroll taxes, paying the employer's portion of FICA, and possibly providing fringe benefits to the workers.
- The contracting company pays the agency with a vendor check.
- So what could go wrong?

Joint Employers

- A contracting company or franchisor may be considered a “joint employer” depending upon the amount of control it exercises over the worker during the term of the assignment.



Liability of Joint Employers

National Labor Relations Board

- Temporary employees from an agency may be included in a bargaining unit if they share a “community of interests.”
- Both employers may be held liable in an unfair labor practice.

Department of Labor

Wage & Hour Division

- Both employers are liable for minimum wage and overtime requirements.

Occupational Safety & Health Administration

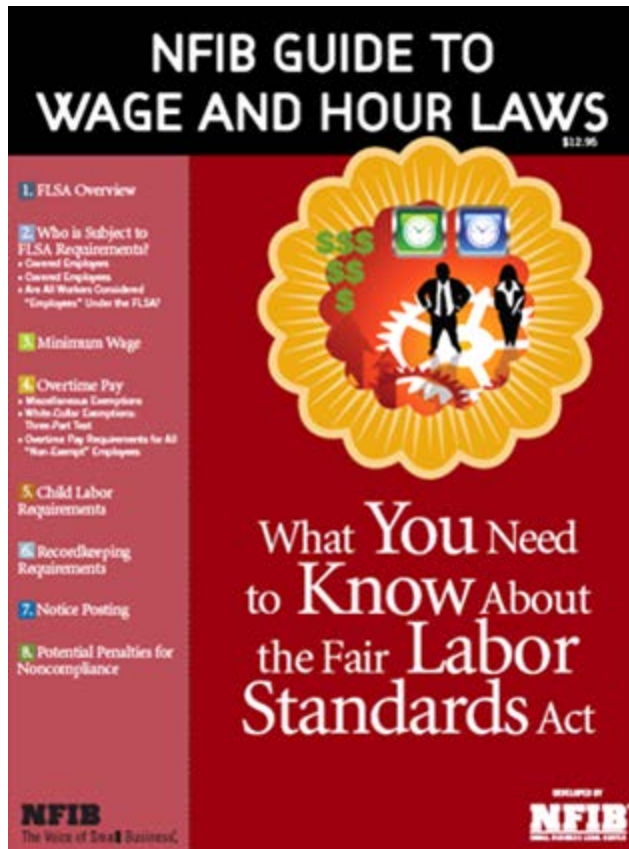
- Leasing employer will likely be liable for work-related injuries.

Catch & Correct Violations



- Two biggest risks:
 - Misclassifying employees
 - Not paying employees correctly for work time

Help is Available!



- **NFIB Small Business Guides**
 - Guide to Wage and Hour Laws
 - Model Employee Handbook for Small Business
 - Small Business Guide to Independent Contractors
 - Small Business Guide to Document Retention
- Available **FREE**
nfib.com/legal



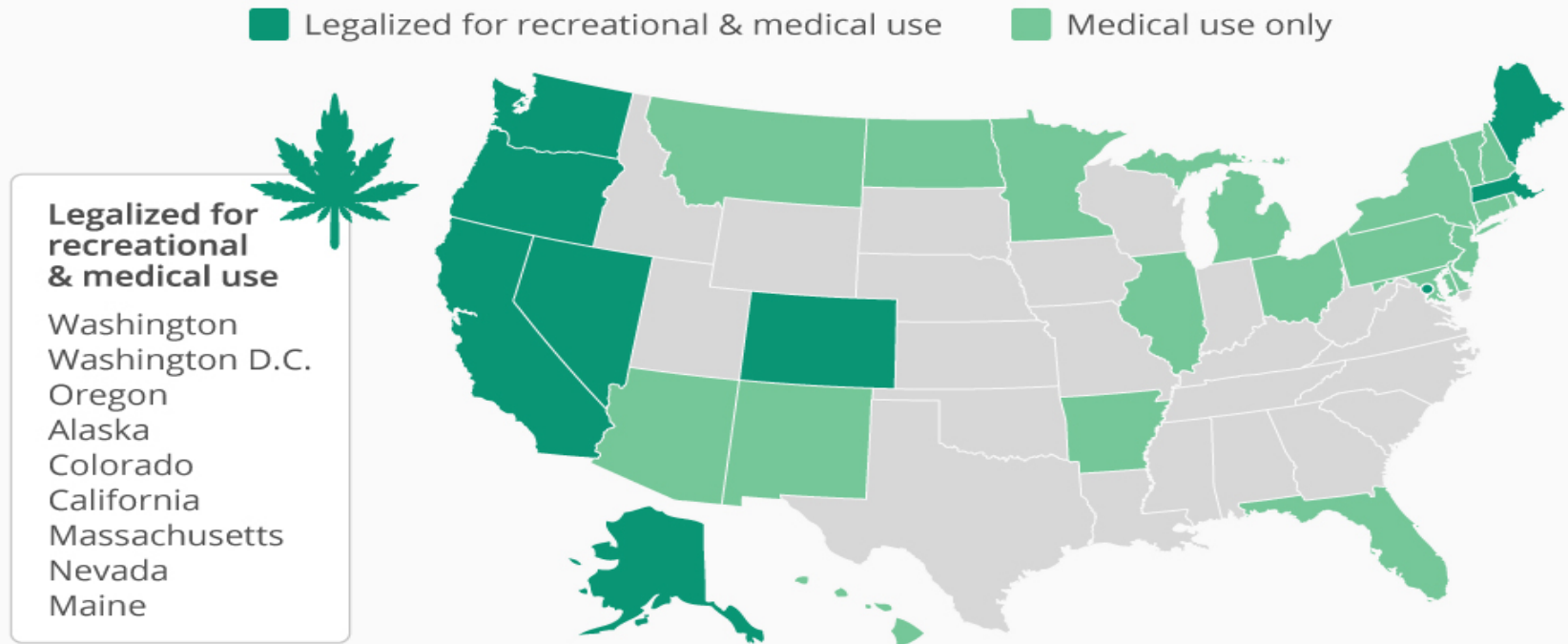
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The United States of Weed

The States Where It's Legal To Smoke Marijuana

Laws on recreational and medical marijuana use in the US*



* As of Nov 10, 2016 - laws in some states have not yet taken effect.
Some states not highlighted allow limited medical marijuana access

Source: NY Times

statista 

Marijuana and State Laws

- 29 states and the District of Columbia have legalized possession and use of marijuana for medical purposes
- 8 states and the District of Columbia have also legalized limited amounts of marijuana for recreational purposes



Can I regulate employees' use of marijuana?

- **YES! Employers in all 50 states and D.C. can RESTRICT use of marijuana by:**
 - Prohibiting marijuana possession and use at work; and
 - Prohibiting employees from reporting to work impaired or under the influence of marijuana

Can I prohibit off-duty and off-premise use of marijuana?

- **Probably, yes. But stay tuned.**
 - Does having a trace amount of THC in your body constitute use or possession at work?
 - When is an employee “impaired” or “under the influence” by THC?

Can I still maintain a drug-free workplace?

- Probably (*see next slide for Massachusetts*).
 - Marijuana is still illegal under federal law.
 - You could have a zero-tolerance policy for positive test results and the courts would probably uphold your right to terminate an employee for a positive test.



Can I still maintain a drug-free workplace?

- **Massachusetts – UPDATE!**
 - *Barbuto v. Advantage Sales*, July 17, 2017
 - Unless an employer can demonstrate undue hardship, any employee disciplined, fired, etc. for medical marijuana usage might have a handicap discrimination claim.
 - Check with attorney before taking any adverse action against applicant or employee in MA and update policies accordingly.



“Ban the Box” and other Hiring Laws

What is Ban the Box?

- Refers to criminal history question on job applications:
 - *Have you ever been convicted of a crime? YES NO*
- Question now banned in 24 states and more than 150 cities and counties
- Several large national companies follow practice

What Ban the Box means for Employers

- Not *required* to hire those with a criminal record
- Still can conduct legal background checks
- Delay criminal history inquiry until later in the hiring process:
 - Interview
 - Job offer

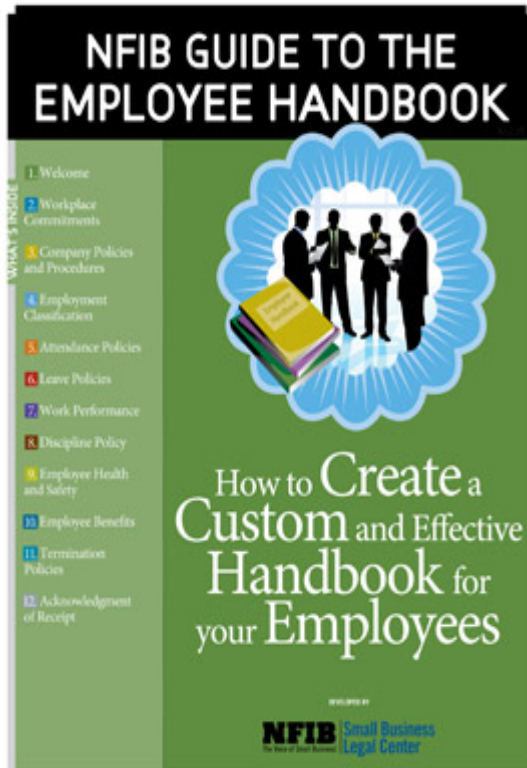
How to review a criminal background check

- Case by case basis (*individualized assessment*)
- Consider:
 1. Time since the conviction
 2. Nature of the offense
 3. Nature of the job
 4. Any criminal history restrictions
- Must be able to articulate why criminal record makes the applicant unfit for the job

Let Applicant Respond

- Allow applicant an opportunity to explain
- Consider that background check may be inaccurate
- Before rejecting applicant, give notice and copy of report
- Follow the Fair Credit Reporting Act and any state/local requirements

(FREE) Help is Available!



- **NFIB Small Business Guides**
 - Model Employee Handbook for Small Business
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Thank you...