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Keeping Small Business Out of Court:

Five Ways Small Business Owners
Can Avoid Lawsuits

Elizabeth Milito, Senior Executive Counsel

Litigation Statistics



U.S. tort system costs over \$260 billion in per year – a staggering \$880 per person!

70 percent of 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.

Rule #1 Maintain Adequate Insurance



- Read the fine print – guaranteed replacement cost or actual cash value?
- Comparison shop – specialty broker can help assess your industry's unique needs.
- Don't be cheap – increase liability coverage, consider umbrella and business interruption.

Rule #2 Document, Document, Document

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- Institute a document retention policy.
- A good document retention policy will promote efficiency, save valuable computer and physical storage space, and protect your company in the event of litigation.

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Rule #2 Document, Document, Document

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Keep good records!

- ✓ Keep tax-related records for at least eight years.
- ✓ Retain employee records (under lock and key!) for term of employment plus five years.
- ✓ OSHA logs should be retained for five years.

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Rule #3

Catch and Correct Wage and Hour Violations

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Who is Subject to Fair Labor Standards Act?

As a practical matter almost *all businesses and employees in the United States are subject to the FLSA* – the federal law governing overtime and minimum wage. Independent contractors are not covered.

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Rule #3

Wage and Hour Violations

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Most common FLSA mistakes include the following:

1. Misclassification of employees as exempt or as independent contractors
2. Failure to pay otherwise exempt employees on a salary basis
3. "Off-the-clock" and regular rate cases
4. Donning and doffing activities
5. Unpaid on-duty meal periods
6. Denied reimbursements
7. Miscalculated commissions and bonuses
8. Tip pooling

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Rule #3

Wage and Hour Violations



Overtime Pay

- All covered employees who are non-exempt from the FLSA overtime pay requirements must be paid at one and a half times the regular rate of pay for all hours worked beyond 40 hours per workweek.
- Designating an employee as 'salaried' instead of 'hourly' does not automatically qualify the employee as 'exempt' for overtime pay requirements.

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Rule #3

Wage and Hour Violations



Travel Time

- Time spent commuting from home to work is generally not considered compensable work time.
- Time spent away from home on business is considered work time if it cuts across the employee's workday.
- Time spent in travel as a passenger on an airplane, train, boat, bus or automobile is not compensable.

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Rule #3

Wage and Hour Violations



Remember –

You can't agree to break the law!

- An employee may not waive his/her right to overtime pay. (An employer generally may, however, discipline an employee who works unauthorized overtime!)
- No comp time in lieu of overtime.
- All hours actually worked over 40 hours in a workweek – no matter the particular day or hour – are subject to overtime pay.

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Rule #4 Be Careful with Independent Contractors



- AND - breaking the law will NOT save you money (in the long run).
 - Conduct regular reviews of independent contractor classifications.
 - Consider how much control your business has over the contractor.

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Rule #4 Be Careful with Independent Contractors

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Massachusetts PRESUMES employee-employer relationship exists unless:

1. Individual free from control; and
2. Service is outside the usual course of business of the employer; and
3. Contractor has independent business.

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Rule #4 Be Careful with Independent Contractors

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Is Will an employee or independent contractor?

Fence4U controls many aspects of the relationship

- ✓ Where and when Will works
- ✓ Required to wear Fence4U's uniform
- ✓ Fence4U provides all customers
- ✓ Danny regularly checks Will's work

Will is likely an employee.

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Rule #4 Be Careful with Independent Contractors



Bonus Question: How much overtime does Danny owe Will?

Assume Will is non-exempt and worked
60 hours per week.

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Rule #5 Watch Out for Those Workers' Comp Claims



- Stop accidents before they happen:
 - ✓ Hire wisely.
 - ✓ Be proactive in training.
 - ✓ Commit to a RTW program.
 - ✓ Maintain a Drug Free Workplace.

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Rule #5

Watch Out for Those Workers' Comp Claims

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- Get injured workers back to work:
 - ✓ Remind injured employees that you're committed to RTW.
 - ✓ Send job description to physician.
 - ✓ Create temporary light-duty assignments.

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Rule #5

Watch Out for Those Workers' Comp Claims

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- Avoid Fraud – watch out for:
 1. Disgruntled employee;
 2. Employee on leave is hard to reach;
 3. New employee;
 4. No witnesses to accident; and
 5. Varying accounts of accident.

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Rule #5

Watch Out for Those Workers' Comp Claims

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Farewell to Britney?

Implement and enforce "Attendance and Punctuality Policy" and "Job Abandonment Policy".

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Conclusion

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- Lawsuits hurt small-business owners, new business formation, and job creation.
- Assess your risks to help minimize your liability exposure.

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We want to hear from you!!

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