



Season 3, Episode 11: “Overtime 101, Part Two”

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

[Lee Jacobs]: Hello, and welcome to episode two of Overtime 101, Barclay Damon’s *Labor & Employment Podcast*. My name is Lee Jacobs, a partner here at the firm, and I’m pleased to be with my co-host, friend, and as I continuously say, just overall great person, Rosemary. Good afternoon, Rosemary. How are we doing today?

[Rosemary Enright]: We’re doing great. You know, I’m in Studio B, everybody knows what that is. Buffalo, New York. And it is just magnificent here. I’m looking out the window at the blue skies. We’re going to be in the high 70s, low 80s over the weekend. Hope to get out and play a little pickleball.

[Lee]: You know, great ... continuing from our prior episode’s conversation, I’m looking forward to sitting in the sun this weekend.

[Rosemary]: Yes.

[Lee]: But before we jump into our fun facts and what we normally do, but let’s just set the stage of where we were and where we’re going. So this is part two of what is turning into a multipart series as to Overtime 101. So first things first, we have some questions for you, dear, gentle listeners. We have up on our poll from our on the Spotify poll from our prior podcast episode one of this series. Two questions for you. The first question, which of the following exemptions do you currently use? Executive, administrative, professional. And you can pick one, two, or all three or none of the above. We’re curious to hear which ones are actually in use by you, our listeners. And the second question is a free form open box. We know this stuff is complicated. We know there are a lot of nuances, so feel free to ask us any question that you have about this. And Rosemary and I will do our very best to get back to you as soon as we can with the answers to your questions. And in this episode, again, we talked about the prior episode. We laid the groundwork of what the new rules are. We talked about federalism and what the federal goals are, what the state goals are. And what we’re going to jump into today is some more nuance and some additional exemption categories. Do a damages calculation for you about why this really matters and why it could be a problem for employers, and then conclude with some of Rosemary and I’s thoughts about the future; best practices and what we see coming down the pipe. But before we do that, Rosemary, do you have any fun facts that you want to share with us?

[Rosemary]: Yeah, in fact, I’ll share that. And maybe we’re a little behind the times, but we finished watching the third season of “Hacks,” so I don’t know if you’ve if you watch that Lee, but it’s, it’s on Max right, HBO Max, and you know all I’m going to say is I am very proud of Ava. So it was terrific. So, you know, and you may be sitting there thinking, how is that a fun fact, Rosemary? Trust me with the work we do, to have that, to be able to take the time to watch the three seasons of “Hacks,” yeah, that’s a big deal for me. So, I mean.

[Lee]: I think “Hacks” is a great show, and it’s one of those shows that feels like old school HBO.

[Rosemary]: Oh, it does.

[Lee]: It feels like well done, and you just want to watch it and just you get obsessed with it. Yeah. Speaking of TV obsession, I may have gave a little hint when I said that “dear, gentle listeners.” Want to give the date of time of where we are. When you’re listening to this, last night was the premiere of part two of season three of “Bridgerton,” and stayed up last night bingeing the rest of the season. And it was quite good. Highly recommended for everyone to watch that. My boyfriend and I enjoyed almost every moment of it and highly recommended you watch “Bridgerton.”

[Rosemary]: You know, I was just going to say... I don’t and I just wonder if I should admit one of my other guilty pleasures is *People* magazine. You know, they say, if you have a problem, admit it. I admit it, just like I’m a Bills fan, you know? And happily, I’ve subscribed to *People* for forever as long as I can remember. And they’re always articles and reviews about “Bridgerton.” They love it. They rave about it. So I’ll have to look. It looks kind of like “The Gilded Age,” which I loved.

[Lee]: It’s a more stylized version, more sexy version as well. Yeah, it’s quite good. And I will say, whereas “Gilded Age”—enjoyed that as well. But I was crying good, happy, joyous tears. Multiple moments last night.

[Rosemary]: Wow.

[Lee]: It was good, Bridgerton, last night.

[Rosemary]: All right. All right. I’ll see.

[Lee]: And I’m hopeful our listeners here will cry some good, joyous tears from we’re about to talk about with Overtime 101. Let’s see. Let’s see as we’re into this. But I know, Rosemary, before we went live you had it some thoughts of wisdom, you know and in a conversation that you had. So please share with our listeners some thoughts before we dive into. Yeah.

[Rosemary]: Absolutely. Thankfully. Well, you know so as you know I’m everybody I’m in Buffalo, Lee’s in New York City. Our producer Kyla is here in Buffalo with me And so I... we ended the first part and I stepped out to do a lap, got my Fitbit on, and got to get my steps, get some water. And Kyla stopped me when I stepped out and she said to me, wow, Rosemary. She said, it’s really hard for employers. She said, I mean, it sounds like you’ve got to go individual by individual. And I looked at her and I said, that is exactly right, Kyla. And I said, Lee and I’ve got to share that with our listeners because that’s the insight. If you walk away with, well, we want you to walk away with all of it, but if you walk away with anything, it’s that you can’t just make this broad brushstroke. Oh, okay. Everybody in this department has an advanced degree, so they all are exempt and you can’t... it’s... you can’t do that. It is individualized. So each person, what are they doing there? What are they actually doing? What are their job duties? What are we paying them? Are we paying them the right threshold, you know, for the E, the A or the P. So it’s individualized. And you may sit there and think, my gosh, that’s so much work. I’ve got 200 employees. I’ve got 300 employees. Yes. But Lee’s going to do the damages calculation. And you know what? You’re going to want to take the time to go do that...

[Lee]: What the government will do. And I have sitting over there on the other side of my monitor, a... there’s very few words in the English language I can’t say, but one of them is “recapitulation,” this summary. It’s from the Department of Labor—for a client who went through an audit and the stack is about this thick because they have 200-plus employees. And guess what? The Department of Labor went by employee by employee to determine what each employee was owed because there was allegations of improper payment and amongst those things were improper classification. And so stay tuned and hopefully the tears of joy won’t turn into tears of sadness when we do it.

[Rosemary]: That’s right. Exactly. Exactly.

[Lee]: So jumping into this, Rosemary, so we talked about the E, the A and the P. The executive administration, administrative and professional exemption. But dear reader, dear listeners, there are more exemptions. Right? So the executive in the administrative, New York is very clear. It embraces the federal rules and it puts a higher standard and says pay even more. The professional exemption. New York acknowledges it embraces the federal rules, but says, eh, you can accept and pay what the federal says \$844 per week. But there are two other exemptions that I want to talk about here, Rosemary. The computer professional exemption and outside salesperson exemption, both of these statutes are, excuse me, the computer professional and the outside sales exemptions are recognized by New York, but again, as similar with the professional exemption, there is no requirement to pay different. So if someone—and before we go into the minutiae of these two, in order to pay someone to fall into the computer professional exemption, you have to pay them as of today, June 14, \$684 per week or \$17.10 per hour. And as of July 1, that's \$844 per week, or using my handy-dandy calculator, \$21.10 per hour. So we... if you pay them that, then we can look in to see what they do as a computer professional. But in reality, when I think about this in New York State, specifically here in New York City, to get a starting job at a fast-food restaurant is minimum wage is \$16 an hour and it's hard to get employment now here in the city in Manhattan, fast food. I've seen places at my local fast-food places, starting salaries of \$20 an hour, if not more. So I'm going to make the safe assumption. And that's going to be one of the questions that we're going to ask you, dear listeners, are you using the computer professional exemption? And if so, are you paying your people \$17.10 per hour, \$684 per week? Odds are I'm going to bet, no. But I'm curious to see what you all have to say. Rosemary, anything to add about the computer professional before I let you take away the outside sales exemption?

[Rosemary]: You know, no, I really don't. And having come from Oracle, you'd think I'd be like, oh, you know what? I'd carry on, but I really don't. I think you hit the nail on the head. And what I'd say to our dear listeners is again, you go out and, and we will include the links for you. But you know, you can look at what the duties are because remember there are the three tests. We pay them a salary. It's this... meets a certain threshold, and then they perform certain duties. You can look and see what the duties are, the duty requirements for that particular exemption. So but it's pretty much what you'd what you'd expect.

[Lee]: And I can't imagine someone not making enough in New York State or rather anywhere in the country if they fall into the computer professional exemption.

[Rosemary]: I agree.

[Lee]: If you have specific questions, reach out. We're here to help.

[Rosemary]: Yeah.

[Lee]: So, Rosemary, outside sales, what's this all about?

[Rosemary]: Yeah, outside sales. Well, the way you know, I love to get everybody to think about this is that way back in the day. Now I'm going to tell you, I don't want anybody out there thinking that I... like as a child answered the door and saw the person that goes door to door with the vacuum cleaners. But I know from watching "I Love Lucy" reruns, that there was a person that would go door to door selling the vacuum cleaner. If you all can remember that episode, I don't know if you remember, when the person comes in and Lucy, you know, they're plugging, they've got all the different attachment ends and they're cleaning it and they're throwing she's spilling things. And of course none of it works. And you know, the wheels come off, which is fabulous. But that's how you want to think about outside sales. Outside sales is an individual who is outside of the workplace doing all of your sales so they don't have a desk in your place of business. They're generally traveling all over or they're working from their home office dialing for dollars. So they are outside. And what's interesting is with your outside sales exemption, there is no salary threshold. There is no salary threshold because they're in sales. And so the assumption is they're making sales and they're being paid on

a commission basis. The only exception to that is you want to make sure they're making at least minimum wage. And again, as you know, to Lee's observation about your computer exemption and... what computer person is not making at least \$27 an hour in the city. Again, with your commission sales that they... the commissions that they're making, you're going to hit that number. But there actually is that, again, the salary threshold does not apply to outside sales. And the name is exactly as it sounds.

[Lee]: "Outside" is key. You are a car salesman that works inside at a car sales... at a car dealership does not apply to you.

[Rosemary]: That's right. That's right.

[Lee]: It literally states—and I'm reading from the Hospitality Wage Order again same in the miscellaneous wage order, same in the FLSA...It says the term "outside salesperson" in italics. In italics "outside" means an individual who's "customarily and predominantly engaged away from the premises of the employer and not in any fixed site and location for the purpose of making sales, delivering goods, obtaining contracts," etc., etc. If they're outside, they fall. If they're inside, then let's look to the E, the A, or the P perhaps. Mm hmm. Okay. So there's another concept here, the highly compensated employee. So a federalism here. The federal government as of today, June 14, 2024, says that if someone makes \$107,432 on an annual basis as a salary, meaning that needs to be regular and predictable, it can't be caught up in a bonus or something like that at the end of the year. They are per se, ineligible for overtime. They are automatically exempt. The Federal government is increasing that threshold number as of July 1, 2024 to \$132,964 as a salary basis. New York State doesn't clearly recognize this threshold. It's not one that it fully embraces or one that it says. And when I advise clients that if you are paying someone \$100,000 plus per year, well, let's have them fall into one of the other ones. Let's be a little bit more specific and let's not try to just have a catchall that we pay them enough so therefore they don't have to be paid because we know that the federal, the state government, the state DOL is always going to be a little bit more microscopic in looking into its reviews as compared to the federal government. So that's how I come across the highly compensated employee. And I've got a horror story for it that I'm going to give in a moment. But Rosemary, what's your take on the highly compensated employee aspect?

[Rosemary]: You know, I don't have anything to add to it, and especially because I want to hear the horror story. We love your horror stories. In fact, let me just say, dear listeners, that we actually had one of our listeners send us an email this week, right, Lee? And in that they indicated it was about the wage notices and they made a discovery and that they had not... this person had joined and was having all the new hires complete the wage notice but didn't realize that all the current employees did not have a wage notice. And because of one of Lee's now infamous, let's just say, Lee, horror stories, this HR person said, oh my gosh, and went back and got it all in order because they had heard the horror story and the debt. What they some of Lee's clients had ended up paying because they had failed on the wage notice. So do tell, do tell.

[Lee]: So this scenario here, this is a former client of mine years back before the pandemic, but there was a individual who was a professional dumpling maker in a very, very busy, famous restaurant in Chinatown here in New York City. All this individual would do is come in, in the morning, work 12, 16 hours a day and just be a dumpling-making machine. The business understood and recognized. It's a value to him. And they paid him \$100,000. That's \$2,000 or so per week, right? So a \$100,000. I've got my calculator here, \$100,000 divided by 52. That's \$1,923 per week. New York City, not... that's not a crazy amount to pay a back of house worker who is very good at their job. They did some reading on their own. They found the federal government's rule that said a highly compensated employee, they were making \$100,000 per year. Good. We don't have to pay them overtime. DOL shows up and says, okay, he's a highly compensated individual, but he is a dumpling-making machine. He is a manual laborer. Whether he's standing on his feet or he's sitting down, he is just working with his hands for 12 to 16 hours per day. Since New York does not clearly recognize the highly

compensated employee exemption, we are not going to apply it to him because he is a dumpling machine and we are going to... stay tuned for my damages calculation—convert this salary into an hourly wage and then apply minimum is... Rosemary, your face is my exact words! ...and convert him into an hourly employee. And now we have a back wages assessment for overtime.

[Rosemary]: And you heard what Lee said that he was doing 12 and 14 hours a day. So do the math. And I bet he was working more than five days a week, six.

[Lee]: Six days a week.

[Rosemary]: Do you remember the dollar amount, Lee?

[Lee]: For him, it was close to \$300,000 at the end just for him.

[Rosemary]: Wow. And then there's interest. Well, you're going to do all of that.

[Lee]: Yeah, but it is. It can be quite shocking. Yeah, we have. And the so again so these are the things here is that like I know that I focused on the prior episode and I called it the EAP executive, administrative, professional. Odds are if you're paying someone \$100,000 a year, please, please, please, please, here in New York State, let's have them fall into either the E, the A, or the P, please. So that way no one could ever come back and say they are a dumpling-making machine. Right. So New York wants you to use the E the A or the P, so let's use them, let's use them properly and be protected and be secured. That when the knock happens on the door, you don't have to worry about your house potentially falling apart.

[Rosemary]: Yeah.

[Lee]: Okay.

[Rosemary]: So love this story, love this story.

[Lee]: So, Rosemary, the next topic that we have on our list to talk about is frequency of pay. Yeah, what is this all about? And I think I may know and correct me if I'm wrong, this is where the difference between how I said two versus three elements to be exempt. And I just said you have to pay enough and do the duties and you set salary, pay enough, and duties and am I on to something there?

[Rosemary]: You know, I don't know. So I'll tell you what I'm thinking here, and then you tell me. All right. So, so what I'll say is that I think... So remember we said think there's two instances over the past month or so that Lee and I have. Well, actually, all of our attorneys have been getting questions about the new overtime rules. And, you know, we said we think it's probably the change in the threshold. All right. So there was the change back in January, which hopefully everybody was caught up with because Lee and I already talked about that. But the federal is, you know, is increasing, which we've been talking about. But the second, what actually changed in New York and this is what I think, as I said it maybe triggering this this question, is that with these... with the threshold increases in New York. All right, we're clear on those numbers. But there was this whole other discussion and you may have seen this... again, if you've got a payroll company or an HR company that sends you alerts or you may have gotten one of our alerts, because I think, Lee, I think you put an alert out on this, if memory serves. Yeah. And so individuals are paid in New York state, the New York labor law dictates the frequency of pay. And what I mean by that is how often you have to pay your workers or your employees. So manual workers, are dumpling machines. How did you say dumpling-making machine?

[Lee]: Yeah.

[Rosemary]: Now... the DMM. All right, so the DMM. All right so your manual workers have to be paid every single week in New York. All right. That's what the New York labor law dictates manual what workers are paid every week. And we could have a whole discussion just around what manual workers are. But think about it. I like the way Lee said it, this individual was standing on their feet all day and using their hands. All right. So individuals who are working in manufacturing plants, I got to tell you, I would take the position that your fast-food workers are manual workers.

[Lee]: The law, the Hospitality Wage Order has per se, if you are a hospitality employee, you are paid weekly.

[Rosemary]: There you go. So that's what I'm talking about. And so the definition of a manual worker and New York State is very broad, so you're on your feet. There is a physical element... I work with some banks. There are individuals who work in the bank, and I'm not talking an individual who necessarily does maintenance work. There are other individuals who work in the bank who are deemed manual workers and you might think, whoa, head exploding. Seriously, you have somebody... in a bank who's wearing, you know, nobody wear suits anymore... but is in business casual and there are manual worker. Yes. So again we could have a whole discussion. If you want more details, shoot us an email, send us a question. But manual workers are paid every single week. Now the E, the A, and the P, right. Others, clerical workers, office workers can be paid biweekly or semimonthly. All right. But there was this... and I think a lot of people weren't aware of this... there was a threshold. All right. That you had to meet so or an individual who you're paying what the dollar amount their salary threshold. So those numbers that we've been going through and in New York, in order for you to be entitled to, or for the employer to be permitted to, pay the E, the A, and the P and others the on this by weekly or semimonthly frequency as opposed to manual. That threshold increased this year. All right. And Lee can give you the numbers in a minute. I don't remember them off the top of my head, but what's confusing to people is that the salary threshold for pay frequency—how often you have to pay your employees—increased. And so you could have someone who falls under the let's say, let's go with the P, because the professional, as we know, is following federal, which is lower than New York State. All right. So if you were meeting the federal floor, all right. Which is substantially lower than what we pay in New York for the E and the A, you'd have to look and say, oh, all right, well, they made the exemption. I can pay them semimonthly. Well, New York State says, wait a second, you've got to make sure you meet this threshold to be able to pay them every other week or semimonthly. If you don't meet that threshold, you have to pay them weekly just like your manual workers.

[Lee]: Yep.

[Rosemary]: All right. And so and this is so important. I was just on the phone with a client and he was paying the people in his office. He was not paying them because they were office workers. He was paying them every other week, semimonthly, and had no idea about this. We had a whole conversation and he's now changed and it's an easy change. Just move to weekly and you may think, well, is it really that big of a deal? The answer is yes. Now, unfortunately, I don't have a horror story. Maybe Lee does around this, but there are law firms right now out there whose sole... that they exist solely to find these wage and hour violations. And one of them in particular right now is pay frequency. And that is because the threshold went up and if you're not paying your people properly and Lee, I'm sorry, I don't remember the fines off the top of my head. You may have them in front of you. I mean, it gets costly real fast and it's for every single employee. Lee, go ahead.

[Lee]: So that's right on point, Rosemary, a couple points to add to it is that so... going back to the bank scenario, even though the bank is filled with office workers that are sitting in their nice, relaxed, air-conditioned environments, sitting at their computers, you have that one manual employee, that one manual employee's supposed to be paid every week. Everyone else can be paid semiweekly or semimonthly or every other week. Hospitality industry per se. Everyone in hospitality is considered to be a manual worker. But what about my marketing manager who sits upstairs above the restaurant and in a cool air-conditioned place? That person you do not have to pay weekly. It's by the person. Again, one of the things that Kyla picked up for us, it does not matter what your business is, what department they work for, what their title is, it's what they do. So

what, what are the damages, Rosemary? The damage is if you do not pay your employees on time, right? So the first thing, you don't pay them on time. It is 100% liquidated damages. So if I have an employee that I'm supposed to pay \$1,000 every week and they make \$4,000 in a month, but I pay them twice per month, two of my \$1,000 payments week one and week three, for example, were late. So even though I paid everything that they were supposed to pay, I have suffered a \$2,000 penalty. So now with that \$4,000 payment turns into a \$6,000 payment and this will be applied upon every single employee against your workforce.

[Rosemary]: Yep.

[Lee]: And Rosemary is so on point with this that there are plaintiff's law firms that all they do is search for these things. They have employees that are moles that will go in and get hired and want to be hired inappropriately. So that they can then turn around and sue you. So please, please, please rely on us, rely upon your professionals. We are here to help you and navigate and the course and the way through it.

[Rosemary]: And I'm sorry to interrupt you. Just before we move on to that, I want to make a point. When you just said that this triggered for me, this same employer said to me, why didn't my payroll company tell me this? And the answer is, I'm not throwing payroll companies under the bus. But what I explained to him is they don't know your business. You're just sending them time records and saying, here, process my payroll. All right.

[Lee]: And to step back, you... this payroll company that's based in California and all of its staff is outsourced to the Asian Pacific region.

[Rosemary]: Yes.

[Lee]: They're not going to know New York rules.

[Rosemary]: No, exactly. That's exactly right. So, you know, "I didn't know" is not a defense by any stretch of the imagination. So I just wanted to throw that in there because, again, they have no idea. So, again, now throwing payroll companies under the bus just understand, it's your business. You need to understand it. So I'm sorry. Go ahead.

[Lee]: My question to you, when I when I threw the ball over at the beginning of this conversation was more it dovetailed into the highly compensated employee. So I've had some clients that have been facing an audit or they've after listening to a webinar or a podcast, go, oh crap, it's now November, my manager, I haven't been paying them, right. Okay, I can just give them a bonus now and catch them up and try to keep up and bring them up to \$62,000 a year and all is golden. Or another business has... is their plan. I'm going to pay them a minimum wage throughout the entirety of the year and then come the end of the year, I'm going to give them a solid bonus and that bonus is going to bring them up over the threshold and make them ineligible for overtime so that those are all known. Those are the that you need. The Supreme Court, the US Supreme Court said this year that you must pay... if you want to use the highly compensated employee exemption, you must pay them on a regular basis with the salary, and I believe it is a no more than 10% of that salary can aid in a bonus or caught up in different ways as we move on throughout the course of the year.

[Rosemary]: Yep, that's right. That's right, Lee. It's... I just went through this with another client. That's exactly right. It's up to 10%. And understand, we've also had them think, oh, is that like 10% every week? They've done all crazy calculation and no.

[Lee]: Again.

[Rosemary]: And.

[Lee]: Move away from the highly compensated employee fit them into executive, administrative or professional, then this isn't a problem.

[Rosemary]: Exactly.

[Lee]: Because the thresholds are again, much lower. And I just realized, too, if you are just listening to this episode for the first time, if you didn't listen to part one, here are the numbers, okay? What we're all talking about is, is that New York State, in order to avoid paying someone overtime, we must pay them and they fall into the E, the A or the P, the executive, administrative, the executive or administrative excuse me, exemption in New York City. Long Island, Westchester, \$1,200 per week, \$62,400 per year. Everywhere else in New York State, \$1,124.20 per week or \$58,458.40 per year. If you do not pay your employees those amounts then it does not matter whether they are E, A, P, whatever word you want to use.

[Rosemary]: Any letter doesn't matter.

[Lee]: They are eligible for overtime. The professional exemption New York State has not increased the floor that has come from the federal government and as of July 1, it will be \$844 per week.

[Rosemary]: So, Lee, so we've talked about all the different thresholds. So what is the new salary threshold for the pay frequency? Go ahead.

[Lee]: Sure. So to be exempt from paying these, to be exempt from the pay frequency rules, the threshold has increased from \$900 to \$1,300 dollars per week. Rosemary in ideal... Primarily in most of my interactions with this, I'm already paying my clients. My clients are already paying weekly, so this really isn't an issue for them. But as this come up with you where this threshold and give us examples of how it's hit the..how the tire hits the pavement.

[Rosemary]: Yep. Absolutely. Excuse me. So I've got a client and it is an office and they have manual workers and so they were paying everybody biweekly. But as we just said, manual workers need to be paid weekly and I don't know how it was brought up to me, but they made some reference and I said, wait a second, we started talking about pay frequency. And they said, well, Rosemary, what are we going to do? Do we do we now have to move everybody to weekly? Do we keep some weekly, some semimonthly or biweekly? And I said what... the easiest thing would be to move everybody to weekly. But they said, but we've got... it's a national company. They said this is going to be significant for us, Rosemary, and it doesn't make sense here and there. I said, all right, well, we have this one location, right? And it's in New York State. I said we can apply for an exception. And that's what we did, Lee. And so the Department of Labor will let you put together. There's a form that you fill out, you explain, you know, there's a bunch of questions that it asks about the size of your business, what you do, the number of people you employ, the number of manual workers, non-manual workers. And you explain the situation and they decide whether or not they'll grant an exception. And in this case, it was... I can't remember the number, Lee. It might have been five or six manual workers and there were, you know, 100 who were not. And the DOL granted the exception. It was very easy. You know, we put it together, we drafted we completed the form in a couple of days, submitted it. We had an answer. And two weeks from the DOL.

[Lee]: Wow. Yeah, that's great news. And I think... so. So the message to everyone here is if you're listening to this and you went, oh, no, I have those two employees that are my manual laborers in my office, give us a call. Shoot us an email. We will help you navigate your way to a potential hopeful, clear path to not have to overhaul your entire payment process. But if you've got like 50/50 or you've got a majority of your workforce that are manual workers and you're not paying them \$1,300 per week or not paying them weekly what they're supposed to be making, then you can be suffering. You could save, you could be looking at significant penalties, significant penalties. Yeah. Speaking of those penalties.

[Rosemary]: That's what I was going to say. Speaking of penalties, Lee.

[Lee]: Let's do this and I and I'm going to try something here. And as we as Rosemary said, we're going to pull back the curtain a little bit. I'm going to open up my calculator and share my calculator with the screen. For those of you that are watching this on either Spotify on the video version or even on YouTube or on our website. So I'm going to share my calculator, don't worry. And then if not, if you can't see the screen, I'm going to walk you through it. Okay? So everyone can see the math that I'm doing. Okay. So we're going to talk about one employee, but let's just assume this one employee represents multiple employees at different locations across multiple locations throughout the state of New York. So you multiply this, what we're about to do times X, whatever number of employees you could have. So this employee is a manager. This manager was making \$2,000 per week and their job description says they're going to be a manager. They are not...they are exempt from overtime and they agree to work 60 hours per week. Okay. So that means we're looking at this. They're working 40 regular hours and 20 overtime hours. Turns out—knock on the door, Department of Labor, plaintiff's lawsuit, whatever you want to do, we pierce through the veil of this job description and we see they're not really a manager. They're just a whatever. They're not managing two people. They don't fall under the requirements. So what do we do? Okay, so the first thing my clients will say to me, well, they're making \$2,000 per week so that means... and they agreed to work 60 hours per week. So that means their hourly rate is \$33 an hour. No, no, no. Their hourly rate is not this, because this is an illegal agreement that you got into with your an employee, how can you make it? What the DOL will say is, how can you make an agreement to pay someone less than what they are required to make because they don't fall under the qualifications of the various exemptions. So what the DOL, what a plaintiff's lawyer, what a court will condone will be the following: They will take that amount of being paid \$2,000 per week. And my computer here we go, \$2,000 per week and divide it by 40. And this person's hourly rate is now \$50 per hour. Their overtime rate is one and a half times that. So one and a half times that. Their overtime rate is \$75 an hour. And for this employee that we are paying well above the threshold here in New York City of \$1,200 dollars per week or \$1,124 in upstate New York, their overtime rate is \$75 an hour. They worked 20 hours of overtime per week, times 20. We have an underpayment of \$1,500 dollars per week. And this is one of your best employees, right? They work 50 hours per week. They were there the entire year. So we're going to times this by 50. We have an underpayment of \$75,000 just in straight wages on overtime. And then the DOL, a tenacious plaintiff's lawyer is going to go, yeah, this \$75,000. This was late payment, wasn't it? This was late. These frequency of pay, you should have paid me either once per week, twice per week. It was late. I'm going to double that. That turns into \$150,000. And then, of course, there's interest. And all of those numbers that get added to it.

[Rosemary]: Don't...and include the 100% liquidated damages, Lee.

[Lee]: Oh 100, oh excuse me. And then because you broke the law and Mr./Ms. Employer, and you should have known better, there is no... ignorance is not the excuse. We're going to double that \$300,000.

[Rosemary]: Now add your interest.

[Lee]: Now add my interest to that, which is, I believe, 9%.

[Rosemary]: Yes.

[Lee]: \$27,000. So we're at \$327,000. And then when we want to do other fines that we could potentially add to that. Right. So the listener that reached out to Rosemary and me about the Wage Theft Prevention Act has two pieces. It has the wage acknowledgment form and then it has a pay stub. The pay stub has to be right. Now we know this pay stub was wrong. This pay stub was wrong because this employee, we've been paying them wrong. That's a \$250 per pay period penalty, capping at \$5,000 per employee. So where we are at now here, \$300,000.

[Rosemary]: Now it was \$327.

[Lee]: Thousand plus 27 in interest plus \$5,000 in a potential fine, which will ultimately be doubled as well. We are looking at \$337,000 for this one employee.

[Rosemary]: For one.

[Lee]: For one year that we were paying well over the exemption to make them not an over exempt from overtime. And now if you've got five employees that do this or this employee worked for you for five years, you can see very easily how this becomes catastrophic and can be a death knell to any business. And unfortunately, dear listeners, I want to tell you that the DOL, a plaintiff's lawyer, will listen to you when they say, well, this is the way my father did it when I inherited this, or this is the way I learned how to do it, or my payroll company told me it was okay. There are no excuses; there just aren't. You have to get all of this right. And that's why all of this is so important. Anything to add to that, Rosemary? And I, you.

[Rosemary]: No! It's brilliant and I know it. I know it's scary. And there's and the unfortunate thing is because, well, Lee and I have talked about this before, because we're talking wages, there's no negotiation on wages. You know, some of these you can try to, you know, talk to the DOL about, oh, well, penalties or this or that. But when that's wages, they will not negotiate. The employees entitled to those dollars. And there's little to nothing we can do.

[Lee]: And even further to that even... let's say this manager got wrapped up in an audit because of a complaint by someone else. And this manager doesn't want the money. This manager actually in their interview with the DOL, says, I love working here. I love my boss. This is the best place I've ever been, etc., etc. I don't want the money. The DOL doesn't care. It doesn't care they are still going to get the money for them. This is a literal black and white, yes or no analysis. And the best thing is the only thing that any your lawyer, whomever can do is, Rosemary said, is perhaps maybe to get them to lower some of the penalties. Maybe, maybe. And that is going to be based upon your intentions. If you made an innocent mistake, perhaps, maybe it will be a 25% penalty. But if this is something that's been repeated over and over and over and you should have known better, it's all backed by fact and case by case specific, that penalty can be 50%, 100%. And in the worst-case scenarios where you are actually exploiting your workers, all of those numbers that Rosemary and I were just talking about, where we did liquidated damages and we just doubled it. You could triple it. You could triple those numbers in those bad scenarios. And to get even... not to scare you, but yes, to scare you, one of the changes that came into place this year with the Wage Theft Prevention Act when you don't pay your employees properly or on time and this is consistent and you are doing it intentionally, guess what? You could be held criminally liable. You could be arrested and face criminal sanctions because you are stealing from your employees. They have made wages that you are refusing to pay them. Hard stop. So yes, meant to scare, not to scare, but... do it right and we want to help you do it right. So please, please reach out to us. We're here to help you. So now, with all of this being said, all of this being said, I want everyone to take a deep breath because this may all be for naught. So assume you are doing and you are following New York's rules. The only real change from what we've talked about here today, based upon from when Rosemary and I were last with you on this topic, was that \$900 to \$1,300 change on what the pay frequency exemption, the... nothing else has changed about New York. So if you are following our instructions from before, you are good. There's nothing you need to worry about, hopefully. But these federal rules, which are scheduled to come into place on July 1, I would not be surprised. Very similar to sometime in President Obama's first administration when he tried to raise federal minimum wage. And these exemption levels. It is there again that some federal judge in Texas puts a stop to all of this. So we tell you all of this to be ready. Pay attention. But it may actually not come into effect.

[Rosemary]: But only, like you said, only the federal that the everything else we talked about specific to New York remains the same.

[Lee]: So if you're following New York rules and you've now listened to what Rosemary was talking about with the \$900 to \$1,300 increase on frequency of pays odds are you're golden regardless, regardless of what happens on the federal the federal level.

[Rosemary]: Right.

[Lee]: Any closing thoughts, Rosemary? Anything? Because I see that we have taken up more. As usual, you and I can just go on forever. Any closing thoughts?

[Rosemary]: It's true. No, I guess I don't... I mean, I think we've hit it all. I guess what I'd say is, you know, the last one I gave the PSA, service announcement. I'll give one. Wear sunscreen. Lee, wear sunscreen this weekend. But no, in all seriousness, you know, you see those numbers and they're scary. But you know what I have to say? Don't stick your head in the ground. Some people cry, you know, or when you play hide and seek with the child, they go like this and they think you can't see them, you know, by doing that. All right, it's not going to get better. So, if like my client who didn't realize that they weren't paying on the right frequency, I mean, we had the conversation last week, this week, they were paid weekly. They've had to they've just converted over that. Now they're in compliance. And he said to me, I can sleep easier now, Rosemary. So just don't... it's not going to get better and you know some might say well you know what, I'll throw the dice. I wouldn't throw the dice. I'm not a gambling person myself. And these things are so easy to fix. So easy to fix. So that's all I'd say, Lee.

[Lee]: I couldn't agree more. Not the only... thing I have found in my years of doing this, the only defense to any of these cases, if you've done something wrong, right, if you've done everything right, then prove it, right. Show the record, show the documents. There's nothing to worry about. Stand strong and fight the fight. But if you've done something wrong, the only way to win was to not done the wrong thing in the first place. So an ounce of prevention is worth everything here. So again, please, please, please let us help you. And to that thought process, stay tuned. We're going to continue this series of Overtime 101, and we're going to be talking about some other topics. And Rosemary, shout them out. If I don't if I don't hit them, whether it be do I pay overtime on a holiday? Do I pay overtime on a Saturday or Sunday? What if I worked 8 hours, 10 hours, 12 hours in a day, all these things and more.

[Rosemary]: What if I have a job and I get a different rate of pay for different things that I do throughout the day or throughout the week? How do I calculate overtime for that person? How well you know, what do I do with people who they're tipped and I get the tip credit? How do I calculate over time on that? All right, how do I calculate overtime? You say that everybody, you know, hourly people. I get that. But how do I do that if I have salaried, nonexempt people? How do you calculate overtime for that?

[Lee]: And what if there's holidays in the breaks. Some there's yes, Juneteenth which is next week do I pay How do I pay overtime on Juneteenth. Okay, next question. My office, my building, my business is closed for that day. Do those 8 hours that I'm going to pay for, they're my employees in that day count towards overtime for the week. Those and more.

[Rosemary]: So does sick time, my employee called off do they... is that....

[Lee]: Even more! So that leads to the question, dear listeners, in the poll that you're going to find in Spotify, please ask us your overtime questions. Ask us anything that you have about overtime, whether it's your deep, dark secrets. Promise we won't tell anyone who you are or anything to that nature, or even the most simple questions that you are free to ask or you think are too simple. Nothing is simple because we want to make sure you get it right.

[Rosemary]: Right.

[Lee]: So please stay with us as we continue the conversation and we look forward to the next one. Rosemary, thank you again. It's as always, it has been a pleasure and a true joy doing this. I look forward to our next one.

[Rosemary]: Ditto. Ditto, ditto. All right. Take care, bye.

[Lee]: Thanks everyone.

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