



Season 3, Episode 12: “Overtime 201, Part 1”

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

[Lee Jacobs]: Hello, and welcome to Barclay Damon’s Labor & Employment Podcast’s newest episode, “Overtime 201.” I’m Lee Jacobs, and I’m welcomed here to be here with my esteemed colleague, Rosemary. Good afternoon. How are you doing?

[Rosemary Enright]: I’m doing great, Lee. How are you doing today?

[Lee]: I’m doing pretty good. And I’m glad that we’re together again to continue the conversation, a more elevated conversation on overtime. As... if you’re a loyal listener of ours. You know, we just finished a two-part series on the basics of overtime, overtime in New York State and discussing salary exemptions, and things to that nature. But Rosemary and I thought that we should continue the conversation with some higher-level concepts, and we’re going to do that by asking each other some questions. Some of them we don’t know each other’s questions. So you might hear some “shock and awe,” but and you also might hear how the sausage is made. Hear how lawyers go through the process, ask some other questions. And we feel that by peeling the curtain back a little bit, it might be interesting. So that’ll be one of the questions that we’ll ask you at the end to give you some feedback, if you like, to this concept. But as you as usual, before we jump into it, Rosemary, fun facts. Do you want to go first or should I? What do you think this when we did pre-discuss. You tell me because I don’t know yours, but you know mine so I don’t know if...

[Rosemary]: You go first, you go first.

[Lee]: Okay so hopefully we talked in the last episode about how Rosemary and I both like to sit in the sun. Hopefully if you’re viewing us, you can see I have hopefully what is showing is a nice tan. I just came back from Bali. My boyfriend and I took my mother for her 70th birthday and it was a complete surprise. We didn’t tell her where she was going. About four months ago we told her, just pack a bag with beach clothes and be ready to go. And she was a trooper, never left the country. And we went, had an amazing time. But the fun fact and I think the funny fact of this is that since she didn’t know where she was going, she couldn’t prep for it. But on the way back, the way leaving from Bali, she got to watch “Eat, Pray, Love.” And for those of you that don’t know, that’s a movie with Julia Roberts where she goes to Italy to eat, India to pray, and then Bali to love. I look over to my mother about an hour and a half into the flight. She’s in total tears going, why didn’t you let me watch this before I went to Bali? But that’s my fun fact for the day.

[Rosemary]: That’s great. I did not know. I knew what “Eat, Pray, Love” was about. But... I didn’t. I didn’t realize that the “love” part was in Bali. So that’s awesome. That’s awesome. Well, so I had said to Lee since he was talking about Bali, I would just share the fun fact that years ago... it was forever ago, Lee, that I went to Bali. So I think is probably many of you now. I was with Oracle Corporation for 16 years and it was a club, so an achievement club. And so, you know, a lot of large companies will do these achievement clubs and, and the highest level that particular year was that you could go to Bali. And so that’s how I ended up in Bali and we went in early and extended. So, you know, we were there for a pretty good amount of time. So I guess the fun fact is I got to Bali on Oracle’s dime, thank you, Larry Ellison! And the other thing is, and people may not think this is a fun thing, but I think you and I talked about it...when we went there. Well, you know, we had said we

want to get out and like, you know, see the culture, you know, leave the resort property, which I'm sure you did also. And one of the things... they're very spiritual in Bali. And so when there is... when someone passes, they... the funeral procession goes through the village where that person lived. And so the person is put on a... I don't know what the word would be, but because they're not in a casket, I can't remember. But it's like this...

[Lee]: Like a raised platform.

[Rosemary]: Yes. And they carry them through the streets, and they throw flowers. And I mean, it is it is deeply, deeply moving because they are truly celebrating that person and their life. And so we actually went to one of those and we were lucky enough, which I know it sounds like a crazy word to use, but, you know, someone had lost, a family had lost a loved one and that and they're more than happy to have others walk out there to join in the celebration.

[Lee]: So so it is it is as close to paradise as possible. And the Balinese people are the one of the most welcoming and warm people that I've ever encountered in the world. And a fun fact of Bali. And then I think we should move on. So this isn't the Bali podcast. Bali's known as the Island of the Gods. We've learned on it on this on a tour. We went on that even though Indonesia is a Muslim country, the island of Bali is majority Hindu and they... and that's why the island is filled with temples and statues almost everywhere of various Hindu gods. It is a...paradise for those that are lucky enough to get there. And I'm very grateful, obviously, that I was able to do this. But it was a wonderful, wonderful experience. And I'm sure, Rosemary, it sounds like your experience was equally amazing as well.

[Rosemary]: It was. It was. So but now to the more mundane, Lee.

[Lee]: Yes. And overtime. Right. So, you know, so just to set the conversation, get us to where we were before. So presumptively in New York State, when you work more than 40 hours in one workweek. Now, notice that I said the work, work more than 40 hours in one workweek. You were due overtime. And overtime is one and a half times your regular hourly rate. Now, where the last episode discussed how you are exempt from overtime. Now you become exempt from overtime, meaning you don't have to pay an employee 40... for working more than 40 hours in a week, so long as they meet the following three requirements: we pay them a salary. That salary is enough. That's \$1,200 in New York City, Long Island, and Westchester, \$1,200 per week, or \$1,112.50. I think everywhere else per week. And you fall into one of the exemption categories. And in New York there is the EAP. If you remember Executive/administrative, that's the \$1,200 or \$1,250 or professional, which is still with the federal threshold, which is about \$700 or so per week. But so that's the basics, right? So we talked about when you must pay overtime and when you must not pay overtime. So today's conversation is about those extra credit, those higher-level overtime questions.

[Rosemary]: And actually Lee, before you do that, I'm going to jump in. I think everybody knows and I always just jump in with it. And what more when we're chatting about this. So you heard Lee say "work," emphasis on work. We'll talk about that in a second. But two other things I want to point out. You notice he said work week. All right. So Lee, is the workweek just like Monday to Friday? I mean, what does what do they mean when they say workweek?

[Lee]: So it's whatever it does is not necessarily the calendar week. It's whatever you use your business sets as your workweek. And it must be the same workweek for all employees. So you can't put, you know, certain classes or certain individuals having, you know, Tuesday to Wednesday for some, others Sunday to Saturday, whatever it may be. But some businesses may have a good reason for deviating from a calendar week because you find that most of your employees do their work over like a three-day period, like 10 hours in a three-day period. So break your workweek in the middle, right? So if they... 10 hours on a Tuesday, Wednesday, Thursday, have your workweek break from on Tuesday, Wednesday. So that way you can cut and or move those 10 hours to another week so you can be logistical and strategical, if that's even a word.

[Rosemary]: I don't think that's a word, Lee.

[Lee]: Deploy "strategery" to make sure to make sure to get the benefit of still paying your employees properly. And it's okay to do that because you're giving them notice, right. And you've got to give them notice in your handbook, on posters, on forms of what your workweek is.

[Rosemary]: Yeah, exactly. So I just wanted to make that point because I think it's important. I think some people think, oh, it's Monday to Friday or, you know, it's got to run Sunday to Saturday. As you said, it's whatever you define it as. The other thing is when Lee just said, you know, your regular hourly rate, the only thing I would say there, Lee, and tell me if you would agree with this, I might put an even finer point on it and say your regular rate of pay. Yeah. Based on what you and I are going to talk about in this, you know, in this episode.

[Lee]: Yep. I think I think that's exactly right, because you will see that, you know...so obviously hourly workers, I think it's built into our consciousness that you work overtime, you work more than 40, you get overtime at your regular hourly rate is derives your overtime rate. So that so if minimum wage in New York City, \$16 and now in Westchester, forgive me, I'm not neglecting Long Island or Westchester, but I'm just going to use New York City from now on in during the conversation. And every upstate, everywhere else being \$15 an hour. So in New York City, your overtime rate is \$24 an hour. One and a half times; upstate is \$22.50. 15 times one and a half. Coming to \$22.50. But there's the class of employees that we pay a salary to, right? That if you may not fall into one of those exemption categories that we talked about. And that's, Rosemary, you hit the nail on the head. That's where you... thank you for the correction to me. It's your regular rate of pay. And based upon some of the questions that we're going to throw back, I'm going to put up on the screen some wage acknowledgment forms and we'll make them available for download on the website as well. That will help guide our discussion and hopefully give you the word. If listening isn't enough, you can actually see in words these concepts that we're talking about.

[Rosemary]: For the visual learners, as we say. Right?

[Lee]: Exactly.

[Rosemary]: The different types of learners, the audio, the visual and the kinesthetic. So trying to hit on all of them.

[Lee]: So absolutely. So, Rosemary, do you want to so do you want I feel like we're playing password. Do you want to give the clue or take the clue? This one I do. I defer to you. How would you want to go?

[Rosemary]: I'll take the clue this time. All right. Hopefully. Hopefully. I know the answer. I'm ready. Go ahead.

[Lee]: All right. So, Rosemary, so that first one up to you. So we've discussed where if you're a salaried employee and you're exempt from overtime, you don't have to pay overtime. So what about those nonexempt salaried employees? Do we have to pay them overtime? And if so, how do we figure it out?

[Rosemary]: Yep. And as you know, Lee, as you and I discussed, and just a reminder to all of our listeners, remember, it's... people will sometimes say, oh, someone is salaried, I don't have to pay them overtime. No, it's: are they not exempt or are they exempt. Because as Lee and I discussed in that previous episode, you can have salaried, nonexempt. And that's what Lee's talking about here. What do you do with a salaried nonexempt employee? And it's you know, it's kind of straightforward, but I'm going to give you two answers to that, Lee. The first is you have someone that regularly works 40 hours. All right? So they're a nonexempt they're classified as nonexempt. They regularly work 40 hours, but we pay them a salary. And I have quite a few employers who do that. And somebody may say, why do they do that? Part of it is, quite frankly, it's an ego

thing for their employees, right? They want to say I'm a salaried employee. So we've got a salaried nonexempt who regularly works 40 hours. In a week if they work or if they're going to work 41 or 42 or 43, as these one-offs, the way we calculate their hourly rate of pay, because again, we calculate overtime, as Lee and I have discussed at, it's one and a half times your regular rate of pay. So we're going to take the 40 hours because that's normally what they work and we're going to divide it by their salary and whatever that number is, that is the hourly rate. And we're going to apply that then... that we come up with. We then come up with our one and a half of that. So if they're making \$10 an hour, they never would because that's not the minimum wage. But I'm really bad with math, Lee, as you know. So if it turns out when we do that math of dividing 40 hours by the salary that we pay them, it's \$10 an hour, their overtime rate is going to be \$15. So that one's really easy. Now, we may have an individual who we bring them in and we say, all right, actually, we're expecting you to work 50 hours a week. So again, in that instance, we're going to divide the 50, the 50 hours by the salary, come up with the same number. So, you know, Lee, everybody's sitting there thinking, well, that's pretty straightforward, Rosemary. But in case... so you don't have to rewind, Lee, is there a form or anything that our listeners can look at? And actually, more importantly, actually the better question. That was a really bad set up. To our listeners, I apologize. Terrible set up for Lee. The better way to think about this is you have a salaried nonexempt employee what wage notice do I give them Lee, that's really what the question is...

[Lee]: Sure. So you have a salary, a salaried exempt employee, a nonexempt employee. Excuse me. So we would so I'm going to share my screen here. Now if you remember for those of that our loyal listeners and apologies, but for our first-time listeners, there is something called the Wage Theft Prevention Act in New York State and the as part of the Wage Theft Prevention Act, you are required to give to your employees within a short time of then being hired a wage acknowledgment form. And there are different forms for different types of employees in the state of New York. The first form that I have up on the screen is an LS-59 form. Notice that it says right at the very top, this is a notice for exempt employees. This is the form that goes to your exempt employees that don't... that are exempt from being paid overtime. So, Rosemary, excellent question. Which form do I give? We've got two potential forms that can be given to our employees that make a salary and are exempt. So the first one is the LS 56 and the LS56 says at the top notice for employees paid a weekly rate or salary for a fixed number of hours, 40 or fewer in a week. So this is your employees that are... work hourly and they generally work less than 40 hours per week. And here, if this is someone that as Rosemary said they want to be paid a salary because it is a thing of pride for them. And note it says on this form that this does not apply to hospitality workers. It cannot be anyone in the hospitality industry. This form does not apply. And essentially hospitality, these next two forms do not apply to you, so go take a cup of coffee. You can take a break if you're in the hospitality industry here, because if you use these forms, you're going to get into trouble. So think of some employee that you what's a good example, Rosemary, of an employee that would be paid a salary basis that's working 40 hours fewer in a week.

[Rosemary]: You know I actually I work with a lot of health care. All right. And so the individuals like the... some of the counselors and that they all work. Yeah, they actually work 37.5 hours every single week religiously. That's it.

[Lee]: So and then they get paid a flat, a flat amount for the week.

[Rosemary]: They get paid. Exactly.

[Lee]: So here... let's... I'm going to do math here because it just makes it easier for me a simple number. So let's say they're getting paid \$2,000 a week as a counselor and they're 37.5 hours per week. The reason why—and Rosemary was made a point that I got to be very salient here to everyone, you have to still make sure we're hitting minimum wage, that if so, that's why I'm using \$2,000. Right. So if minimum wage in everywhere but New York City is \$15 an hour and there are 37.50 per hour, this salary per week must be at least \$562.50 per hour to be paying minimum wage for the week. But let's say we agree to pay them \$20 an hour and it's 37.50 per week. What? Rosemary had a hit, a point that is crucial here because some people, an employee

and an employer may think because they're paying someone a salary, then it doesn't matter because I'm paying them a salary; I don't need to follow minimum wage. We have to make sure whatever we're paying someone like, for example, if this is \$1,000 per week and we are, the form wants us to specify the number of hours for which this weekly rate will be paid. Right? It's 40 hours okay, 40 divided by \$1,000 comes to \$25 an hour. We're in minimum wage. We're clear. But if it's \$500 per week and they're working, they're working 40 hours, 38 hours per week. Right. With 38 times 15 is less than \$500. So we're going to be violating minimum wage rules. So we have to make sure here we're doing—whether this is a weekly rate, a month, semimonthly rate or whatever it may be that's the number of weekly hours when we divide the math out from here that we are still paying at least the minimum wage. So what... we see so for this employee who generally works less than 40 or fewer, we get through fewer hours per week. We would then, to calculate their overtime rate of pay is we would take whatever we pay them for during the course of the week, divide by 40 and the divide that and then times that number by one and a half. So if someone's paid \$1,000 per week, we divide that by 40. And I'm going to... and I've got my calculator here up on the screen, I'm not sure if y'all can see it, but the math is pretty simple. So it's \$1,000 divided by 40, comes to \$25 an hour is my ...would be my regular hourly rate. And then I times that by one and a half to come to my overtime rate, which is \$37.50. So any hours for this employee who generally works 40 or fewer in a week would be then paid at \$37.50 that week. Pretty simple, pretty easy for these employees that generally work 40 or fewer in one week. But for employees that work more than 40 hours per week.

[Rosemary]: Like, my 50 example.

[Lee]: Exactly now so this is someone who's working more than 50 and it varies week per week. So here I have up on this screen, it is the LS 57. The LS 57 is a notice in place for employee employees paid a salary for varying hours, day rate, piece rate, flat rate or other non-hourly pay. I note here that in my practice, Rosemary, I tell my employee, my clients that if you've got someone that you want to pay a weekly salary and they're working more than 50 hours per week and they're not exempt from overtime, just pay them hourly, because what I'm about to talk about here is a nightmare in the process of how do you have to figure. Just pay them hourly. It just is nuts. So let's say you've got someone that you agree that you're going to pay. It has to again, be at least minimum wage for the week. For whatever it should be. So for your employee, Rosemary, 50 hours per week, how much would how much are they being paid per week? Let's do the math.

[Rosemary]: Oh. Oh, So you want me to just pick a number?

[Lee]: Yeah, pick a number. Give me some numbers.

[Rosemary]: Let's do \$1,800.

[Lee]: So \$1,800 per week. And they're. And that's for 50 hours per week. Right. So here what we need to do following the form... it says on the form in.... So it would be \$1,800 per week.

[Rosemary]: Mmhm.

[Lee]: In most cases the overtime rate will be one and a half times the regular rate of pay for the week. The regular rate of pay is the total weekly pay divided by the hours worked in the week. So it's not in the planned week, the hoped-for week, the "what's in the job description" week. It is the actual week. So that means your overtime rate is going to change week by week. So let me just share my screen here and hopefully I can actually bring up the calculator because to show the nightmare that this can be... window and calculator do... entire screen, here we go. So I have up on my screen here a calculator and side by side to that the LS 57. So we have \$1,800 per week someone is being paid and they work... first let's see if it passes the minimum wage test. So we're going to divide by 40, \$45 an hour. We're in the clear. Good. Okay. So \$1,800 dollars an hour divided by 50 hours per week for that work week is \$36 an hour. So you are... having to agree. So you're paying

your employee, for the first 40 hours, \$1,800. And now for the next 10 hours, \$36 an hour, an additional \$360 per workweek. So in reality, because you want to pay your employee a salary for whatever reason rather than a weekly hour, you're paying them more. You're now actually going to be paying them \$2,160 per week. A lot of money. And... but if they work 55 hours in a workweek or let's say they're working 70 hours in a work, okay. So 70 hours in a workweek, we do again, \$1,800, was that the number, Rosemary, \$1,800 divided by 70. So that's \$25 an hour is their regular rate. Now, their overtime rate is one and a half times. So the benefit is \$38.57. So the benefit of this, right, is the more the more overtime someone works, the less the less their overtime rate could be. But you are agreeing to pay them more immediately from the get-go and your systems are now have to be set up to track these numbers because their overtime rate is going to change week by week by week.

[Rosemary]: So I'm sorry to interrupt, Lee, but I was just to say, I think to me that's the biggest hassle is that every single week you've got to calculate this.

[Lee]: So that's why for this employee that's \$1,800 and they're working 50 hours a week. Embrace it. Give them an hourly wage form. They're \$36 an hour and their overtime rate is. And then you know what their overtime rate is always is \$54 an hour. And then that, advise my clients when you're now faced with this, is that okay? Now your problem here is that you've got employees working overtime. Perhaps maybe you should hire another employee if this overtime rate is too high because the administrative burden is too much. And as we've talked about, if you make a mistake here, there's that whole cascading waterfall of damages that you could face, that your paystubs are wrong, your wage acknowledgments are wrong, administrative fines doubling... as liquidated damages, administrative attorney's fees, interest, etc., etc. Just convert to the hourly rate. That's how I see it.

[Rosemary]: Yeah, I agree. I agree with you. And so and Lee, we were just talking about, you know, calculating their rate of pay. So two questions. The first one is, is just to make sure everybody knows where to find these forms. Where do they find the two forms you just show them?

[Lee]: So first, you can either find them on our website, we'll put them up on our website, and below is the links here into the for the podcast. But you can also find them from the New York State Department of Labor website, literally you just Google LS57, LS56, 55, 54 or just even "wage acknowledgment form" and they will show up as the first numbers that pop up on the state's website. Fun fact about the wage acknowledgment forms. They are made available in the top, I think 13 spoken languages in the state of New York. So you must give the form to your employee in the language that they speak. So if you have a Spanish speaker and you know they don't speak English and you give them the English form and it's the most beautiful, perfect, best, well-filled out form in the world, it does not matter because it needs to be given to them in Spanish. But if the form... if you have an employee who does not speak a language that the state does not provide, then you can give them that form in English. But if the form is there from the language they speak, you must give them to that form in the language they speak.

[Rosemary]: Great. And then they. So now I'm going to give you a question.

[Lee]: Sure.

[Rosemary]: And it's related obviously, to what we were just talking about. So we were just calculating the overtime rate based on their salary. All right. And then their hours worked on it. So let's not worry about salaried nonexempt anymore. We've just got a nonexempt employee. We pay this nonexempt employee hourly and they during the week I'm just going to use a real-world example. I work with a client who owns a restaurant and they post on the on the time cards, you know, where people sign in, Lee. They've got at the bottom a list of the less desirable jobs. So cleaning the fryer. Let's say cleaning the restrooms or something like that. And so a person who does that job, will then initial that I did that job and depending on, you know,

what the job is, they will get a bonus. So, you know, cleaning out the fryer is \$35, cleaning the restroom is \$75. Okay. So they get this bonus. Does that factor in at all to the overtime rate?

[Lee]: It does. Excellent question, Rosemary. This is something that for... so first hospitality people welcome back please join the conversation—this applies to everybody, both hospitality and hospitality and don't worry non-hospitality will tell you when you can go grab your coffee break in a moment. This is a transitional question into the two topics, but this is something called the overtime "true up nightmare." It's literally a term of art. You Google it. The overtime true up nightmare. So there are two types of bonuses: contingent and discretionary is ones that you give to everyone or no one for no reason or any reason at all. Your employees don't have to do anything to attain this type of bonus.

[Rosemary]: And they don't expect it.

[Lee]: Exactly. Whereas a contingent bonus here is literally up on a board. It says, if you do this job, I will pay you this amount. Contingent. I do the work I now expect to get paid. So this overtime trip nightmare became a true nightmare for I saw for a lot of my clients during the pandemic when they were offering bonuses to employees to when they start working that that in order to get someone to work for them to come back into the workforce, they were giving them a \$2,000 sign-on bonus. But that sign-on bonus was spread out over months of time. So you needed to continue. Exactly. Exactly. You needed to continue working in order to obtain that bonus over time. So now it moves. And if I just got it from just showing up on day one, the full amount, it would be discretionary, and I would just get it immediately. But now, because I had to continue working, it was contingent. So if you're employees receive a contingent bonus and they do not work any overtime, mazel tov, they get the bonus, they work overtime, that bonus now inflates their hourly rate. So let's say, for example, you had someone who was working minimum wage, upstate New York, \$15 an hour and their overtime rate was \$22.50. They worked 50 hours for the week. I'm going to pull up my calculator here and hopefully this screen will share. Here we go. Share, screen, window, calculator. So we have an employee who works 40 hours a week, minimum wage. So that's \$15 an hour. And during this week they worked ten additional hours of work. So that so let's do the math here. 40 times \$15, that would be no, that's 400 times 15. Apologies there. 40 times \$15. So that's \$600 of regular pay for the first 40 hours of work. Their overtime pay would be for they work 10 hours of overtime times \$22.50, which is the overtime rate. So now they're up to \$825 for the week. That's what we've paid them for the week. But now in your scenario, Rosemary, we had someone who got what, \$50 for cleaning the dishes, let's say. Yeah. So we've now paid them \$650 of regular pay for the week, \$650 divided by 40. Their new hourly rate is \$16.25. They've increased. We don't need to now pay them more for the hourly rate because they still are being paid minimum wage for what their regular amount was. We're doing this process to get the new overtime rate, so we times that times one and a half to come to \$24.3750, or \$24.38. So their overtime rate increased by minus \$22.50, increase by a \$1.88. So they worked ten additional hours that week. We owe them an additional \$18.75 for that week because they worked overtime and because we gave them this contingent bonus. ...Now I... please, Rosemary.

[Rosemary]: I was just going to say again to summarize and Lee, just correctly, if I summarize it incorrectly, but basically, listeners, what you're going to do is this is what they get paid, this is what they earn. I'm going to add this amount to it. The bonus, the \$50 divided by the hours worked and you got your overtime, the rate of pay for that week. I exactly. And then based on that, you do your overtime. It's just that simple. So... but it's important for you to know you have to include it and you may think, oh, it's \$1.87 big deal. But as Lee and I always say that was one person.

[Lee]: One person, one week.

[Rosemary]: That's right. One person, one week. All right. So it could be everybody. And I posed this question to Lee, because this client who I'm discussing is right now is subject to a DOL audit, just random. And this was discovered. So but as he said, one person, one week but then it's going to bleed down into everything else.

Right. That we've talked about. So I just... I had to bring that up. And so similarly, Lee, let me ask so now we just said we have to add the contingent bonuses. And alright so somebody takes a day off and has 8 hours of vacation. I they've got 8 hours of vacation and then they work 30, they actually work 33 hours. So now on their paycheck, it's going to say or their pay stub that they're being paid for 41 hours because they had 8 hours of vacation and they work 33 there. Now, overtime. How do I calculate that, Lee?

[Lee]: Well, I'm going to sidestep your question for a moment and say that say to our listeners, do not rely on your payroll company, make sure that they are doing this right because here in this scenario, right, Rosemary, the answer is they do not they're not owed overtime for that week because the very first thing I said is "worked hours in the workweek." So your pay stub. Right. Should have a line item for vacation, PTO, whatever it is that shows 8 hours and then regular hours, 33 hours, and then that's it. If you just have it as a line item that says regular hours 41, that's going to... and you don't pay them over time for that period because we know that's the way it's supposed to be. Everyone is happy today, but they may not be happy six years from now when you're the subject of a Department of Labor audit or a private lawsuit because you don't have proof of your records as to what actually happened during that period. So it's crucially important to make sure your records properly reflect vacation, sick time because you do not have to pay overtime on those hours.

[Rosemary]: Yep. And so as Lee said, so it's going to be your PTO, it's also your holiday pay because a lot of employers pay holiday pay. And what do we say? We said sick, PTO, holiday pay...

[Lee]: Any of you. And every year any of your other leaves that you have voting leave, bone marrow, leave that any of those leaves, unpaid leaves, don't go into this also.

[Rosemary]: That's right. Because it's all worked hours. That's hours actually worked. And Lee, your point was brilliant to make that, you know, if the pay stub is wrong, it just says regular hours, like you said, five or six years from now when you can't reconstruct it, you don't have anything to support it. Now all of a sudden look at, hey, you owe these people overtime and then there's liquidated damages and interest and everything else that goes on top of it. So make sure your payroll company is doing it right. Make sure it's on the, you know, wage, the pay stubs correctly. The other thing is I always encourage my clients and their handbooks, Lee, to put language in there specifically that says that holiday, sick all of those they do not factor into the overtime calculations. So it is in all the different sections and then the overtime section I would make sure that it says this is based on hours actually worked.

[Lee]: Absolutely. And another... just and to go back to that overtime true up nightmare, don't trust your payroll companies to know about that also as well. A it... while this is a national concept that affects everybody under the Fair Labor Standards Act, your payroll companies may not be sophisticated enough to know this because no one's told them that this bonus was contingent versus discretionary. And also, mind you, if you pay someone that bonus, let's just say, for example, you know, I changed the fact pattern a little bit from rather than being \$50 per dishwasher or cleaning service that they provide, you just pay them an additional \$1,000 at the end of the month for doing the dishes. Right. That's because that's what they get. You would take the bonus and what that bonus period is now divided by four each week. And then you would add \$250 to each week. So you take the bonus divided amount across the time that that it's been proven, that it's been proofed for. And then you add that to each weekly period. Again, your payroll providers may not know this, so please, please double-check with them and of course, check with us. We're here to help you navigate these issues because they are tricky and intricate and hidden, and they could come back to bite you in a very significant way.

[Rosemary]: Well, and you know, Lee, I mean, that's... you're spot on. I mean, we've got this DOL audit going on right now. They have a payroll company, payroll company had no idea. So these employees were just getting the \$50 of the 25 of their \$35. You know, it was just listed on there as a bonus. And it was not calculated. It was not added in to the rate of pay for calculating overtime. So that is I mean, that is a real-life story happening literally right now. And when you've had to correct that...

[Lee]: I think, Rosemary, we probably been going for about 30 minutes or so. I think perhaps we should, you know, do a break here. As usual, we have our good intentions to do... get this all done in one, but we just can't because we just have so much that we want to impart to everyone. So I think we will turn this into a two-parter. We'll take a break here for now. But I think some questions to ask to the audience and please, we... those of you that have been giving us feedback, we love it. Please, like, subscribe if you're listening to us on YouTube, direct message us through YouTube, post, if you're watching us through LinkedIn, please like and comment on their direct messages. Shoot us an email. We're here to help. And if you're listening to us on Spotify, here are your poll questions. Question one: Have you ever heard of the overtime true up nightmare before? Yes or no?

[Rosemary]: And you now going to lose sleep over it because you're like, oh no?!

[Lee]: And so that's the hidden question too. That's implied in the yes, yes or excuse me, in the no. And then question two is: do you actually have employees that are paid a salary that are nonexempt from overtime? Yes or no? We're actually curious to hear if that is something you fall into, because it's like we said, is that really a good idea and perhaps engage with us so you can tell us why you think it's a good idea and why it helps your business model. One of the things one of my mentors told me when I first started practicing law that the practice of law is "open book." We're not doing heart surgery, having to cut wires on a bomb. We are here to make everyone better. So if you've got a good reason as to why you are paying, your nonexempt employees to salary. Tell us so we can help others model after you and do the good stuff. Any closing thoughts before we say goodbye for now, Rosemary?

[Rosemary]: No, I guess what I'd say is everybody go and get a cup of coffee now. Do a lap, get your hourly steps in and we'll talk to you soon.

[Lee]: We'll talk to everyone soon. Thanks again.

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