



## Season 3, Episode 13: “Overtime 201, Part 2”

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

**[Lee Jacobs]:** Welcome to Overtime 201, part two. My name is Lee Jacobs, and I’m joined with my esteemed colleague, Rosemary. Good afternoon.

**[Rosemary]:** Hey, Lee. How are you doing?

**[Lee]:** Good. Excited to continue our conversation. We hope all of you took a lap around your block or whatever it may be, around the office, grabbed a cup of coffee as we continue our further discussions of high-level overtime topics. So, Rosemary, jumping right back into it, you were talking about an audit that one of your clients is currently facing. And one of the issues that you raised was the overtime true-up nightmare that we talked about. But were there any other nuances or interesting things that are beyond just 40 hours per week? The simple, the simple math, simple knowledge.

**[Rosemary]:** Yeah. You know, actually there is Lee. And what’s interesting is the issue I’m going to talk about came up last week with another client. So two in the same week so it was interesting. So this client has you know they it happens to be a restaurant, and it is family owned. They have two other restaurants in the area, Lee. And you know, there’s miles and miles apart, but it’s common ownership. So it’s common ownership. The employees can work between the different restaurants. They you know, they order the, you know, the... all of the supplies, the eggs, the flour, the milk, all of that. And it’s distributed out to the different restaurants. But each restaurant has its own name. It’s a different name. And it has a different tax ID.

**[Lee]:** Different payroll, different... like the checks are different.

**[Rosemary]:** Yeah, absolutely. But it is common ownership and as I said, the employees go between the locations and, you know, I’m going to steal something from you, Lee. They all go to the same holiday party, you know, and so... and it was a purely innocent mistake. But the individuals so I’ll say myself, I’m working at one of the restaurants in the morning for 4 or 5 hours. Then I go to another... the other restaurant and help out there for a few hours. And then the next day I’m at another restaurant I work 10 hours. Well lo and behold, you know, by the end of the week, in total, when I would total up all those hours, I might have worked 50 or 55 hours, but it was spread over all these different locations or these different businesses.

**[Lee]:** And different paychecks. I got three different paychecks.

**[Rosemary]:** That’s exactly right. So in the one, I got paid for 20 hours. And over here I got paid for 25 hours. And for this over here, I got paid another 30. So, no overtime pay.

**[Lee]:** That’s a problem.

**[Rosemary]:** That’s a big problem. That’s exactly right, Lee. It’s a big problem because that is what we call joint employment, right? It’s a joint employer. So it’s common ownership. Right. They... direct these individuals. And so if I’m working in any one of those restaurants, the hours are all go... How would we say

it, Lee, together you total them. All right. They are not even though it is a separate business because it's at a different location with a different name and a different tax ID. They're joint employers and the employees are going between. And so. So and the reality is I am, in fact, owed overtime because I worked more than 40 hours in a work week. Doesn't matter that it was in these different locations.

**[Lee]:** And here I think... spot on is this is the intent, right? It sadly doesn't matter that the business worked, did it this way not knowing to avoid overtime. Right. So it doesn't matter that there was no intent. Right. I'm certain that your client, if they knew, they would have paid overtime. But it's just probably it's the way it's always been done and there's never been a problem until now. And unfortunately it's been discovered. I can't remember when, but Rosemary, you and I have these conversations all the time. I can't remember the specific topics, but when you ask me what my thoughts are before I even look up the actual rule or the law, I get to my gut feeling and think about: can someone exploit this? Right? So take the joint employer narrative and have someone with bad intent. Well, if someone wanted to avoid paying overtime. If I had one business, I can just have multiple payroll entities within that same business and I can assign you to 20, 20, 20, 20 and you never get to overtime. And I'm doing it intentionally. Clearly, that shouldn't be allowed in the law. I wouldn't condone that. And so you take it further to this concept where you have different disparate businesses. And this isn't just hospitality, folks. This is all businesses. Imagine you have a family business that owns... that's on a block. You've got a nail salon, one place, a hair salon down the street, and then across the way there's a beauty supply store and you have... they're all sharing hospitality, sharing equipment, sharing supplies, go to the same holiday party. It's a problem and people don't know about this. And the another way that people are trying to subvert this that I've seen with my clients here in the city is what they'll do is that they will hire back-of-house workers or janitorial staff, people who are going to be working overtime for extended periods of time. They'll partner with like a temp agency or a cleaning agency. And while that employee may be an employee of the cleaning agency when they're doing cleaning in the morning or night, they're actually an employee of the business during the day. But when they're actually there cleaning, it's still the business, not the temp agency that's telling them how and when and where to do their work. And their actual work is for the benefit of the business, not the temp agency. There's been some cases down here in the city that says this is a problem because... think about it. Of course it is. I'm just trying to offload this to another secondary business that I don't have any control over because I'm paying the temp agency that's paying you. So we look to the intent of what's going on here and some of this stuff as well.

**[Rosemary]:** So you're right, Lee, and you know, you look at it and you think about it. I mean, literally their understanding was these are different businesses.

**[Lee]:** Exactly.

**[Rosemary]:** I base all of that, you know. And so how did you know? So the intent. Exactly. The other thing, Lee, is, you know, for those of you who were listening to the, you know, 201, part one we were talking about, remember, don't rely on your payroll company. Here's another great example. Right. So they all use the same payroll company, but they can see all the information. They didn't say, Oh, hey, wait a second. You know, you could be running into a joint employer issue here. You may have an overtime issue again, they literally are going to look at the timecard, put it in the system, cut the check.

**[Lee]:** Yeah, bad data in, bad data out.

**[Rosemary]:** That's exactly right. So—and I can't tell you how many of my clients say, why did my payroll company not tell me... And I'm not on the payroll company's under the bus. It's not their job. That's not what they do... I think that's great, Lee: bad data in bad data out. That's the way it is. And so that's why it is so important for you to understand, dear listeners, what you need to be, how this needs to be managed, right, and how all of this works. Because you can't a defense is not, well, my payroll company didn't tell me. So that's just not going to that's not going to fly.

**[Lee]:** And then, and don't think then you can probably then turn around and sue your payroll company for the mistakes because odds are in that agreement you signed with the payroll company, it literally says "bad data and data out" in so many legal words.

**[Rosemary]:** So many legal words. That's right. That's exactly right. Yeah. So then it came up and, you know, the other thing that came up, Lee, was this whole thing around because it's a restaurant, they were taking the tip credit and so and then they were and then of course they were had to work overtime. Are these individuals worked overtime. And so the way that the overtime rate of pay, which we just went through, you know, several examples of how you calculate was not calculated properly and what they what the... and this is a U.S. Department of Labor, Lee, and what the U.S. Department of Labor investigators said was this is the most common mistake in the hospitality industry. So an industry that is taking the tip credit. So, Lee, this is really your area. So take a minute or two or three and talk everybody through the right way to do it. If you've got if you're taking the tip credit for your employees.

**[Lee]:** Sure. Absolutely. So for our non-hospitality people, here's your permission to go grab another cup of coffee if you want. But I highly suggest stay with us because the credits that we're talking about here still apply. You know, the way you do the math, even though we're talking about the tip credit, the same way is calculated. So I'm going to share my screen here and I'm going to put up the LS 54. Okay. So the LS 54. The LS 54 is a notice for hourly rate employees. Looking in the middle column here. Line number three, I have blank per hour. This is at least minimum wage, \$15 or more. Line four has allowances taken. So let's presume we're doing \$15 per hour as written in number three. I check the box for tips because I'm taking the tip credit, and I can take up to a \$5 per hour tip credit. Now, for those of you that don't know, the tip credit allows an employer to pay their employees below minimum wage so long as they are making up that tip credit deduction of \$5 per hour in the tips by the end, before the shift is over. So I have so many of my clients that just say, yeah, in upstate New York, I can pay you \$10 an hour in downstate New York, it's \$11.35 or so and change. But no, that's not true, because what that winds up happening is someone goes, I'm paying you \$10 an hour, so I'm just going to write 10 here in box number three. My tip credit of being five, because it's a credit. So I'm doing the math of 10 plus 5. And that's really the overtime. And then I jumped down to seven, which is my giving my our overtime pay rate. And I'm just going to do 10 times one and a half and come to \$15 an hour. No, unfortunately that's wrong. What it is, is: you are paying your employees \$15 an hour with a \$5 tip credit for an effective rate of \$10 an hour. And I've been drilling this into my clients for years. You have to stop saying "we pay you \$10 an hour." No, unfortunately, it's a full line, \$15 an hour with a \$5 credit for an effective rate of \$10 an hour, because the way you do your overtime math here now is \$15 an hour times one and a half comes to \$22.50. With that, with a tip credit of \$5 an hour for an effective rate of \$17.50 per hour. So the difference there was \$15 an hour by doing it the wrong way, taking a off credit at the beginning versus \$17.50 an hour, \$2.50 per hour. You have someone who works, say, 20 hours per week and overtime, \$50 per week for weeks, a month, \$200 a month times 12 years, 12 months in a year, \$2,400 a year. In a lookback period of six years in an audit. So that's \$15,000 or so per employee that that can be doubled. And if you're doing this with nefarious purposes, maybe even tripled with interest, not good. Not right.

**[Rosemary]:** Exactly. Well, and as I said, that's why I wanted to pose the question to you, because as you said it is the number one mistake that everybody makes. They base it out, like you said, off that \$10.

**[Lee]:** And so then and for some, there are some positions within the hospitality industry or any industry that where you can tip. Well, I can't in imagine in others, others where there would be tips. But any other industry where you can take a meal credit or a lodging credit, something to that extent, the same thing applies. It's you, the full hourly rates times one and a half minus the tip credit. So you've got a... the best sommelier in the world who is being paid \$100 an hour for their shifts right? There... with eight which we so give take the tip credit so they're \$100 with the minus five minus five for an effective rate of \$95. Their overtime rate is based on the hundred, not the \$95. It's always the full hourly rate. And I could wax poetically for hours and hours, Rosemary, but I don't want to bore the non-hospitality people about when you can take the tip credit or not but just very briefly there are so many rules that you must be in strict compliance about the tipping.

The tip one is you ask that the right documentation your employees need to know about it. This form needs to be correct. Your tip pool needs to be true. You can't have non-tip eligible people in your pool. So that means managers, back-of-house workers, etc. that are sharing in tips. If you are sharing tips. And you must have documentation that shows tips in and tips out. So I've received X amount of tips on behalf of my employees and then I distributed them to my employees in this method, this manner. You don't do any of those things, you lose the ability to take the tip credit. So I've had I had a client, Rosemary, in the hospitality industry that faced a DOL audit where it was started off for unpaid spread of hours, uncovering through the unread spread of hours, they looked at the tip credit. They found that there were managers in the tip pool and then there therefore, for every single one of their hourly employees over the entire six-year period, they needed to refund the tip credit of \$five... for over the years, it's changed—for every hour worked, plus the amounts of tips that were illegally distributed to the managers. And the Department of Labor won't take the money out of the manager's pockets. They're going to take it, make the business pay it again. So these employees who were already paid well over minimum wage because they were tipped well, now got a windfall because of this simple spread of hour error where they weren't paying spread of hours, they now needed to pay \$5 an hour for every shift that every employee worked, as well as refunding the tips that should have gone to those people. Tricky stuff. Tipping is tricky. Let us help you. Please, please and again. Don't presume your payroll companies know this. Don't presume they know this.

**[Rosemary]:** Yeah. And it's scary stuff, Lee. You know when you when you hear all these numbers and these horror stories you know but it's reality. Everything we share with you has that actually happened? Right. You know, so. All right. So Lee, let's see. So we've talked about how to calculate it. We've got a salary nonexempt. What else? What other questions do we have?

**[Lee]:** Sure. So one that I get is and this is this is industry agnostic. Presume you've got a warehouse, some type of construction facility, a landscaping company, something to that extent. And you've got someone who has two jobs. Let's go with the last company, someone that's got two jobs, they like to be in the field literally on some days. Right. And so they're paid one hourly rate when they're doing that work. But they are also the landscaping company's web designer, because they are really good with the computer as well. And when they're the web designer, they're paid a different hourly rate. Rosemary, does this pose a problem when you've got two different hourly rates and you're working for one company or even two different companies where you've a joint employers, right? Two rates, two different businesses, right. Boom, head explodes.

**[Rosemary]:** Exactly. Exactly. As I say, it's not a problem. You just need to know how to do it. And by the way, I want to comment that this person is clearly a renaissance person, that they work in the field and they're are a website designer. Exactly. So it's interesting. So I try to keep it as simple as possible, but there are three different ways to deal with this. Right? And again, I just went through this with another client with the DOL on it. You know, that's where a lot of this comes out. So the first and the easiest I don't know, Lee, if you've had this occur, but the individual is making, you know, one rate of pay, the other rate of pay. And, you know, they're obviously one is higher than the other. The DOL's position is if you just always pay them the higher rate of pay. You know, no harm, no foul. You don't have so... and I'm sure you've had that.

**[Lee]:** Yep. Essentially I... 100%. If the employee wins. Yes. The DOL isn't going to care.

**[Rosemary]:** That's right. If ...and that's literally what this particular investigator said. If you want to pay them more, have at it. You know, so if you're paying in the higher rate of pay, no worry about it. The other... The second way is rate in effect, which I always find to be a little hard, Lee. I don't know if you find that to be difficult, but basically what that means is, as the name implies, whatever rate is in effect or so whatever they're working. So they're in that sense they, they're sitting doing the website design and they cross over into that overtime threshold. So it's over 40 hours, the rate and effect when they hit that over time. So 40.5, 41, 42 that is the rate upon which you're going to base their overtime. And I just think that's hard. Don't you lead to it.

**[Lee]:** And it's wrong. Not only is it so...well first, if that rate in effect is the higher of the two for good, the employee, the employee wins. But if that's the lower of the two, that's a problem. Because what was we're going to talk about and I'm going to put up another one of these wage acknowledgment forms in a moment, because you have to find the... before you even do that. You know, for viewers, if you're watching this on YouTube, you'll see me doing the Monty Burns thing, right? Imagine.

**[Rosemary]:** Austin Powers no, you're....

**[Lee]:** Like, get evil here. Imagine an employer that says, all right, I know I'm going to have these overtime workers and I'm the landscaping company. I'm going to be nefarious, right? I know that...so I know I'm paying them more as the web designer. So I'm in my workweek. I'm going to have them work 30 hours as the web designer at the beginning of the week. And then when they're making \$20 less per hour, then I'm going to put them out in the field. Mhm! Now, my rate in effect is much lower. My overtime rate's going to be lower. That's... can't be right. Right. The Department of Labor will go the employee's clearly losing here in this scenario. So the answer is your, listeners, and I'm putting up on the screen the LS 55 and the LS 55 literally gives us the information, shows us the answer. So you can see on the is 55 it has,... and I'm in the middle column line number three it has how much per hour the employee is making for and literally state "web designer," "lawn care," whatever it is for their different roles. Again in column four, if we're taking any tips or any other types of credits or allowances and I'm jumping down to line number seven, overtime pay rate for each type of work or shift. So here, if you want to, if you for example, if you just going to make this administrative easier for yourself, and you just want to pay the higher rate, you just have the higher rate and say it's going to be the higher rate. And so if it's that my higher rate is \$20 an hour, so \$20 times one and a half is 30. So I just write \$30 an hour. Department of Labor is going to say, you win. But the reality here is if you truly want to pay the real overtime, the term of art is something called a blended overtime rate. And the way that you do that is by creating a weighted average. And the weighted average is created by totaling the regular pay divided by the total hours worked in the week. The overtime rate may vary from work, from week to week, depending on how many hours you worked at each rate of pay. The overtime rate may vary from week to week. I literally read right from the form. So what you do is you add up all the hours worked, you divide by the amounts necessary and you come up with a blended overtime rate. Your payroll provider should help you with this. This is not something that they may not...Some payroll providers know this automatically and automatically do the math for you. Others don't and will just default to the rate then in effect. And as we just talked about, that can be a problem. So you've got to be careful and you've got to watch this. There's this there's spreadsheets you can Google and find that will help you do this, where you plug in the number of hours and each rates and it tells you what the amounts to be paid. And the other thing to think about this is that you've got to make sure your pay stubs are clear here as well. Your pay stubs, presuming this is one business with one payroll entity, should have each line of... 10 hours web designer, 40 hours lawn care. And so that way we can assert the records are there year after year after year. And this same issue here is for joint employers. You've got payroll entities over different businesses with different rates. The same thing is going to apply that you should either choose and embrace the highest rate, or work on a true amount and figure out the blended overtime rate. And that's going to change every single week your employees work. So the question here is that I have to my clients, or that I pose to them is you either got to make sure your payroll company knows this down cold, or your internal processing knows this down cold, or just don't do it.

**[Rosemary]:** Yeah, exactly.

**[Lee]:** Just don't do it.

**[Rosemary]:** That's right. That's exactly right. Yeah. Well, and we've been working with a payroll company and... for two weeks now to help them, teach them how to do this. And they are so struggling. So that's your point, Lee. It's like, well, we may just have to do it in-house and use the information because like you said, if you get this wrong, it's a problem.

**[Lee]:** And I think that speaking over the things that we've talked about in both of these sessions of Overtime 201, with the true up nightmare with the bonuses. So if you're going to give a contingent bonus, don't let your employees work overtime. Then the problem doesn't exist. Right. Right. Or if your employees work overtime, don't give them the contingent bonus and then the problem doesn't exist.

**[Rosemary]:** Right. Exactly. Exactly.

**[Lee]:** It's... unless you've got the internal framework or the external support, you will... we're human beings, someone is going to make a mistake here and these mistakes are going to be so, so costly for you. So costly.

**[Rosemary]:** But luckily for you, what generally will happen is, is your employee, you know, has been kind enough to keep track of all the hours they worked and how they should have been paid so that when they then come forward and say, oh, look...and you don't have any documents, you know, that that would that would confirm I'll do it in the positive, Lee, that would confirm that. Well then you can just pay what the employee says. Right. And that's what the DOL does. And so and, and yes, I'm being very facetious and sarcastic there, but it is unfortunate that I've had that happen to several clients. Were the employee said, well, here's this notebook and I've been recording everything in it and they turn it over and the client doesn't have, you know, back to what we talked about in the first episode of 201. And we said, you know, on the wage statement, it just says, "regular earnings" and in fact, it isn't regular earnings. Right. Part of that is sick pay or holiday pay or PTO or something. But all of a sudden you've got an issue, right...

**[Lee]:** You and you may be saying to yourself, who keeps a diary? Who actually writes, Rosemary, I beg to differ.

**[Rosemary]:** Do you really?

**[Lee]:** Not. I well, not now. But when I was an hourly employee, my mother told me before I started working. So she goes, just this is back in the day when you had, like high school planners, right? Like I read in the paper every day, I would write down the number of hours that I work per week, and I would just keep it in my diary contemporaneously because my mother, I don't want to use the wrong word here...wasn't fairly paid or appropriately paid when she was an hourly worker.

**[Rosemary]:** Okay.

**[Lee]:** So it all... it takes one just takes one employee. I have a client that's being sued here in New York City in federal court. They... the... he paid all of his employees well, quite well over minimum wage, but he paid them on a weekly amount. And he has no proof of the number of hours per week that the employee's work schedules, no timecards, no anything.

**[Rosemary]:** Wow.

**[Lee]:** Nothing. Because that's the way it's always been done. And it just takes one employee to complain. And unfortunately, as you know this, Rosemary, the law is very clear. If you don't have the records, the employee's version of events will control if it makes common sense.

**[Rosemary]:** So from the diary, Lee. That's right, yeah. Have an employee come forward. Here you go.

**[Lee]:** So the employees are going to say, yeah, they knew. We know the employee only worked 50 hours per week, but let's say now they've got a nefarious plaintiff's attorney whispering in their ear. That plaintiff's attorney is going to say, well, you worked 60 hours per week, and if the business is open and there's enough hours to show under a commonsense assessment that you work 60 hours per week, odds are the Department of Labor and/or a jury or a judge is going to accept the 60 hours because you... business owner, were required

to keep those records. And I know listeners, you've heard me say this before because it was a real-life example. It does not matter the reasons why you don't have the records, whether it is because that's the way it's always done, whether your dog ate the homework or you lost them in a flood during Hurricane Sandy and you have a video of the records being washed out to sea. It does not matter.

**[Rosemary]:** Correct. Correct.

**[Lee]:** I don't know if ...that's on a point to scare the viewer, our listeners at the end of the episode, but we could go on. We're at about 30 minutes here. I think this is a good time for us to take a.... to say goodbye for now on this topic. Rosemary, what do you think?

**[Rosemary]:** I agree. But what I will say is, if you have a question... shoot us an email and we are happy to discuss it on our ...on the next podcast. If you if there's something that you think we missed, or you weren't clear on something, please reach out to us.

**[Lee]:** And... the building on that, Rosemary, I think please like us on if you're viewing on, on Spotify, any of your podcast listeners, YouTube etc. etc. like or subscribe please help our please let us know that you're out there. Comment. Send us questions and because we want this to be as interactive as possible. And so to that extent, here are the questions for our Spotify Apple listeners. One. Were you aware of the true up nightmare? Yes or no? Question two, and I think this is literally one now. And if not, you were unaware of the true up nightmare. Is this now a real nightmare for you? Yes or no. Question three. Do you want us to focus more on the joint employer issue? Do you still have some more questions about joint employment relationships? Yes. No. And then question 4, what would you like to hear about next. And here's three, five choices for you. A. Navigating the complexities of employee benefits. B. Legal considerations for remote workers and digital nomads. C. Best practices for creating compliant employment contracts. D. Strategies for managing workplace diversity and inclusion, and E. The impact of emerging technologies like artificial intelligence on labor laws. Let's help... you tell us what you want to hear from us next and if anything different. Comment, email. We're here to help. And here, listen, Rosemary, what do you got?

**[Rosemary]:** So, Lee, I was just going to ask, do they get to like... do they get to rank them? Do they get to say like, one, two, three, four, five? Or do they just do they check every one that they want?

**[Lee]:** I believe there's going to be checkboxes so you can check on the ones that you want. It will be a multiple-choice for you.

**[Rosemary]:** Perfect. Okay, good. Great. And please do let us know. We're happy to talk about anything and everything, but I think you know that because you've been listening to us.

**[Lee]:** And continue the conversation. So many of you have reached out and given us... asked questions. You know, we're here. We're here to help and we love... we love these. And we look forward to speaking to you next time. Thanks, everyone.

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