



# SECTION 7 MEGA MEETING MARCH 12-13 2018 CHAMPAIGN IL

## Monday Mar 12 Location: Skateland Roller Skating & Laser Zone Laser Tag

6pm to ? Meet and greet members and vendors Light hors d'oeuvres Beer and Wine provided sponsored by : RC Sports

## Tuesday March 13 Location: Wyndham Suites & Convention Center

8:00a - 9:00a Coffee, Juice, and Donuts provided by Section 7  
 8:15a - 9:15a Section 7 business meeting and Election of Section 7 President  
 9:15a - 10:00a Round Table/Open Forum share New Ideas  
 10:00a - 10:30a Vendor Time - Break  
 10:30a - 11:30p Protect Yourself from an FLSA lawsuit - Charles Krueger, atty for employers  
 Learn about this type of federal lawsuit, what timekeeping and records you must have and what needs to be in an employees handbook. Q&A session too!

11:30a - 11:45a Break  
 11:45a - 12:30p Protect Your Online Reputation - Fetch Rev  
 12:00p - 1:00p Free Buffet Lunch and time with Vendors  
 sponsored by:  
 1:00p - 3:00p Protect your rental skate inventory by: KC Perkins  
 3:00p - 3:45p Vendor Time- Break  
 3:45p - 5:00p Q & A Session/Networking  
 5:00p Have a safe drive home!  
 Thanks RSA Sec. 7 Officers!



Skateland Roller Skating & Laser Zone Laser Tag.  
Address: 208 W. Curtis Road, Savoy, IL 61874  
Phone: 217-359-3335



Hawthorn Suites by Wyndham  
101 Trade Centre Drive, Champaign, IL 61820  
Phone: 217-398-3400

When making a reservation mention "Roller Skating Association Section 7" or use block code RSKATE. The room rates are:  
King \$94.99 Double \$99.99

## Understanding Wage & Hour Disputes

PRESENTED BY

CHARLES A. KRUGEL



Labor & Employment Law & Human Resources Counseling on Behalf of Business

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**MARCH 13, 2018**

**PRESENTATION HANDOUT**

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***DISCLAIMER: THIS CONTENT IS GENERAL & INSTRUCTIVE INFORMATION ONLY; IT'S NOT INTENDED AS LEGAL ADVICE. THIS INFORMATION ISN'T INTENDED TO CREATE & DOESN'T CREATE AN ATTORNEY-CLIENT RELATIONSHIP. READERS SHOULD NOT ACT UPON THIS INFORMATION WITHOUT FIRST CONSULTING WITH AN ATTORNEY (PREFERABLY ME!).***

## Summary of Classification Issues Including Salaried vs. Hourly & Contractor vs. Employee

Classification has become a very hot topic, in the aftermath of our 2008 economic collapse, & the recent focus on wage disparity.

Predatory attorneys, government regulators & worker associations seek anyone that they can represent against an employer. Government wants the revenue from unpaid payroll taxes. This is a really hot area of law.

Presently, the 2 key laws relating to classification, & overtime/hourly vs. salaried are:

1. Fair Labor Standards Act (FLSA). Federal law. This covers most employers in the U.S., with a few narrow exceptions.

It's difficult to summarize the exceptions as they have little in common. Employers must pay all non-exempt employees at least the federal minimum wage & overtime (1 ½ times hourly rate) for any hours worked in excess of 40 hours in a workweek. Narrow exclusions.

Penalties include lost wages, punitive damages & attorney's fees & costs. Criminal prosecution is possible along with penalty up to \$10k for willful violations. Can go back up to 3 years.

Penalties may also include liquidated damages which is generally an automatic double payment of backpay.

2. Illinois Minimum Wage Law. Covers workers 18 & older; 4 or more employees, excluding family members.

Payment of back wages, legal costs, attorneys' fees. Other penalties including punitive damages (up to 20% of back wages) may apply.

Relies on many of the same definitions & reasoning as the FLSA.

In Illinois, there are 5 regulatory agencies that deal with classification issues: (1) IRS; (2) US Dept. of Labor; (3) IL Dept. of Labor; (4) IL Dept. of Employment Security; & (5) IL Dept. of Revenue. The key & best definitions are from the IRS.

### Overtime — Exempt vs. Nonexempt Classifications

Overtime at a minimum of 1 1/2 times the regular rate of pay is required after 40 hours of work in a workweek.

**Don't arbitrarily classify. This will probably lead to illegal classification.**

Exclusions exist for businesses earning less than \$500k in annual revenue or hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally, or physically disabled or gifted; preschools, elementary & secondary schools & institutions of higher education; & federal, state, & local government agencies. Other similar exceptions exist too.

The following are examples of employees exempt from both the minimum wage & overtime pay requirements:

- Executive, administrative, & professional employees (including teachers & academic administrative personnel in elementary & secondary schools), outside sales employees, & some computer professionals;
- Employees of some seasonal businesses;
- Employees earning more than \$455/week gross.
- Employees of certain small newspapers & switchboard operators of small telephone companies;
- Employees in newspaper delivery; &
- Casual babysitters & persons employed as companions to the elderly or infirm.

The following are examples of workers exempt from overtime pay requirements only:

- Certain commissioned employees of retail or service businesses;
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons, clerks & mechanics employed by nonmanufacturing establishments primarily engaged in selling these items to ultimate purchasers (consumers, businesses);

- Announcers, news editors, & chief engineers of certain nonmetropolitan broadcasting stations;
- Domestic service workers who reside in their employers' residences; &
- Employees of motion picture theaters.
- Certain employees may be partially exempt from the overtime pay requirements. These include:
- Employees engaged in certain operations on agricultural commodities & employees of certain bulk petroleum distributors;
- Employees of hospitals & residential care establishments that have agreements with the

employees that they will work 14 day periods in lieu of 7 day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight in a day or 80 in the 14 day work period, whichever is the greater number of overtime hours); &

- Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job specific.

For additional information see: [www.dol.gov](http://www.dol.gov).

***Consider this: Start with a relevant job description to minimize issues***

### Independent Contractor (1099) vs. Employee (W2)

Advantage of the independent contractor classification:

- Avoid processing & paying federal & state withholding taxes. Avoid unemployment & workers compensation costs.

Disadvantage:

- If improperly classified (*intent is irrelevant*), then penalty may include payment of taxes by employer & 5%–25% penalty for each month.

How to Distinguish Between the Two:

- Degree of control & independence is one key.
- Independent contractors have a great deal of control over their working conditions, environment, & freedom to work for anyone.
  - Such control might include control over work schedule, when & how

paid, work for other businesses, location of work, maintain separate/distinct identity.

- Commission pay might not matter.
- They use own their work methods; not trained by the principal; outside principal's scope of expertise.
- They use own tools, materials, etc.
- Closed ended contract/agreement with a start & finish date.
- Employees have little-to-no control over the above-mentioned factors.
  - Employees are subject to using the employer's materials, tools, processes, property, etc.
  - Employees generally work within scope of principal's core services.

See the [irs.gov](http://irs.gov) or [dol.gov](http://dol.gov) for additional information.

## Preventing Disputes

- Pay employees on-time & accurately.
- Clearly explain your payroll practices. Transparency matters.
- If you have shared tip or gratuity pools, make sure you clearly explain how it's divided up.
- If you discover errors, immediately correct them & explain them in writing to affected employees.

## Litigating Wage & Hour Disputes

Odds are if you have to litigate one of these cases you'll be confronted with the prospect of litigating either before a state department of labor or in federal or state court.

Furthermore, you'll be confronted with the prospect of litigating against 1 or a few employees, or even a class of employees potentially in the hundreds (depending on how many people you employ). This includes part-time & seasonal employees.

Whether or not you end up with litigating against a few employees or a hundred depends on:

- How many different departments or divisions you have;
- How people in different departments/divisions are compensated & classified & why you compensate or classify them as you do.

Here's what litigation typically entails:

- You'll need to disclose *ALL* of your payroll records for at least the past 3 years &

- If employees complain to you about payroll, errors, whatever, don't ignore them. Investigate & respond in writing immediately.
- Don't let issues languish or fester.
- It's much cheaper to resolve issues immediately & internally than it is to litigate them in court or before regulatory agencies.

- possibly up to 10 years. It depends on the jurisdiction where you're litigating.
  - Disclosure includes all timecards, payroll records, paycheck info., etc., etc.
- You'll need to disclose all of your employee handbooks, memos, payroll process info., job descriptions, & any records of employee payroll disputes.
- You & others you employ may need to sit for depositions, which may take hours to prepare for & complete.

If the litigation process sounds scary & like some sort of space-alien probe, you're not far-off target.

Litigation is an expensive, tiring & painful process. You may even need to engage accountants & lawyers to compile & interpret information, & to represent you.

Keep in mind, relative to any employment-related matter, the best deterrent to lawsuits & complaints is to get things right the 1<sup>st</sup> time. Moreover, it's always much more expensive to defend yourself in court, or before a regulatory agency, than it is to resolve issues or disputes internally.

## **Employment Policies & Handbooks—To Use or Not To Use**

In general, there's no mandate that a business must have written policies or manuals. However, many public sector contracts & insurance carriers require, or strongly urge, policyholders & contractors to have documented policies & procedures.

Also, businesses looking for a sale or merger, or that have grown to the point where ad hoc policies & procedures are too inefficient & inconsistent, may use documented policies or handbooks to help evaluate & improve the value of their workforce, during the due diligence process. Obviously, profit is the ultimate determinant of value in the private sector.

There are many canned resources available to help businesses document & plan HR policies. Some are credible. However, the problem associated with many of these products is that they don't address a company's actual needs, & they may not be current. For example, many generic publications only address sexual harassment, & not other forms of harassment.

After deciding whether to have documented policies, another key question is what policies to use. Factors such as the business' regulatory environment, past practice/history, industry & region (i.e., context) generally control.

Furthermore, a business has to determine what form these policies should take, e.g., a written memo, a multi-page document or a bound manual. The decision comes down to company size & complexity & the purpose of the policies (i.e., context).

The larger & more complex the company, the greater the need for written employment policies addressing a large number or range of issues; i.e., a bigger document. The smaller & less complex a business is then it might have fewer issues to address, & it may not even have to put its policies in writing.

However, a small company that's in a highly regulated or complex industry may have to address a number of employment issues via written policies; e.g., safety, record retention/destruction & compliance reporting. In short, the complexity of a company & its industry is just as good an indicator of what form employment policies should take than the size of its workforce.

The purpose of the policies is another important indicator of what policies to use. For example, if a 20-year old business has never had a workplace

violence issue, then it probably doesn't need to address this issue. Or at most, it might not need to comprehensively address this issue because past performance is a credible indicator of future events. However, a relatively new business that is undergoing rapid growth & hiring from a population that's prone to violence, might need to be more proactive & address workplace violence at the outset.

Essentially, a company shouldn't seek to address issues it hasn't encountered, unless it could reasonably expect to encounter these issues in the future, or it's otherwise required by a rule or law to address them.

When discussing what kinds of policies to implement, I emphasize that it's impossible to cover every issue or circumstance that arise. Moreover, it's impossible to put everything in writing. Therefore, common sense & some sort of disclaimer is necessary; e.g., this isn't intended to be a comprehensive guide.

Nevertheless, some businesses, especially small businesses, believe that it's better to put nothing in writing. This way they won't give contentious employees & their attorneys ideas about lawsuits & complaints. Well I understand that logic, but I don't necessarily agree. The reason I don't agree is due to unemployment compensation.

Financially speaking, unemployment compensation (UC) disproportionately hurts smaller businesses than it does larger businesses. Because of the time spent on contesting claims & completing reports, UC tends to eat up a greater percentage of a small business' operating expenses. Furthermore, UC claims administrators tend to only deny benefits when the employer provides them with documented proof of employee ineligibility; e.g., misconduct, quitting work or absenteeism. Moreover, UC claims processors usually seek documented proof of violations via written employment policies. They expect the employment policies to be in writing. It's another aspect of government bureaucracy & oftentimes this bureaucracy is really burdensome for small businesses.

Consequently, from a cost versus benefit perspective, if a business is paying a lot in UC, written policies & lower UC expenses may further serve to make a business more attractive to a buyer or partner.

## **Checklist of Factors to Consider**

1. Do you need written policies? Why or why not?
2. Should you do it yourself or have someone else do it for you?
3. What should you include?
4. Do you need an index or table of contents?
5. Should you have it reviewed by an outside party?
6. Do you publish this on your website? Only to employees or to all?

## **Comments About the Do-It-Yourself Approach to Policies & Handbooks**

This isn't a bad route to go assuming you know what you want & what to look for. The basic concept is to ask colleagues or search the internet for already prepared resources, policies & handbooks. There's a seemingly infinite number of free & high quality resources available. How do you know which to use or not?

A lot of this is common sense:

- Don't use a policy or handbook that has multiple or egregious spelling, grammar or formatting errors. That's one indicator of poor quality.
- Just because something says its "best practice" doesn't mean it is. The fact is, there is no official designation for "best practice." It's a term of art or for marketing.
- Don't just take something verbatim. Edit it to suit your specific needs, culture & branding.
- Policies & handbooks should mirror your branding & culture. Not doing this increases the likelihood of misunderstandings, miscommunication & mistakes. Research within your industry & region.
- If you cobble together multiple documents, sentences, etc., then make sure you edit so that punctuation, grammar & formatting are consistent.
- If you use a 3<sup>rd</sup> party to create your policies, handbooks, etc., do your due diligence on them. Don't spend the \$ until you know what you're getting.

## **List of Possible Policies**

- Scope, purpose, introduction
- Changes in policies, updates
- Employment at will; right-to-work or similar statements
- Equal employment opportunity, affirmative action, anti-discrimination & harassment
- Immigration compliance
- Hiring or selection process
- Employment references
- Employee files—access, review, copies
- Part-time & fulltime; hourly & salaried
- Work schedules; calendar
- Overtime
- Holidays
- Vacation
- Sick time
- Other paid time off
- Benefits—mandatory or optional insurance, employee assistance program, etc.
- On-call staff availability
- Credit, criminal or other background checks
- Employment medical exams—physical or mental, hearing, vision, drugs, etc.
- Payroll, compensation, tip sharing, bonuses

- 'Licensing or certificate requirements—yours, theirs, whomever
- Orientation, probationary period, training
- Education—continuing ed paid, unpaid
- Use of temps or independent contractors
- Nepotism, personal relationships, favoritism
- Unions or labor associations
- Separation from employment—for cause, layoffs
- Rehire or recall
- Noncompetition, nonsolicitation, nondisclosure
- Media or public relations
- Communications policy—who, what, when, why, where, how.
- Trademarks, copyrights & proprietary or protected information
- Promotions, demotions
- Discipline
- Resignations, quit, abandonment
- Performance appraisal
- Accommodations—disability, military, breast feeding, maternity, etc.
- Entrances & exits
- Parking, commuting, ride sharing, \$ allowances
- Expenses
- Requesting Time Off
- Complaints, grievances, disputes, open door
- Bereavement; death
- Jury duty
- Voting
- Contact Information—yours, theirs
- Weather
- Closings
- Official announcements, communications
- Document retention, storage, destruction
- Behavior, conduct
- Investigations
- Emergencies—fire, police, plumbing, construction
- Concealed carry, weapons
- Drugs, substance abuse, Intoxication or under the influence
- Reporting requirements to company officials, regulatory agencies, auditors, accountants, etc.
- Benefits
- COBRA
- Affordable Care Act
- Parties
- Events
- Conferences
- Food
- Beverages
- Breaks
- Smoking
- Workplace surveillance, monitoring
- Technology
- Cell phones
- Phone calls
- Use of equipment
- Severance
- Employment agreements
- Exit interviews
- Employee relations
- Acknowledgement of receipt, Understanding, responsibilities
- Employee postings, bulletin boards, companywide communications



## **Practice & Background Summary); www.charlesakrugel.com**

As a management side labor & employment attorney & human resources (HR) counselor, I have more than 24 years of experience in the field & have been running my own practice for 17-plus years; [www.charlesakrugel.com](http://www.charlesakrugel.com).

My clients are small to medium sized companies in a variety of industries. Besides providing traditional labor & employment law services, I represent companies desiring to institute preventive & proactive HR functions. These functions include policies & procedures, which help to efficiently & discreetly resolve issues in-house & prevent lawsuits & complaints; they also help to reduce costs & act as catalysts for increasing productivity & profits.



1/3 of my practice is focused on preventive & proactive HR; another third is centered on contracts & negotiations; while the final third is focused on litigation.

Regarding results, I have negotiated more than 100 labor & employment agreements & contracts, including noncompete & severance/separation agreements, collective bargaining & related labor agreements. Also, I have argued more than 11 arbitrations, 13 mediations & 39 agency cases/complaints & have resolved 100-plus labor grievances & similar in-house complaints & completed over 100 in-house investigations.

My career choice is the result of a long running fascination with workplace behavior, management styles, & how & why people pursue particular vocations. While in college, I advanced my interest by majoring in psychology. After college, I pursued graduate study in industrial/organizational (I/O) psychology with the thought of being an I/O consultant. During my first year of graduate school, I realized that the practice of I/O psychology was too "touchy feely" for me. Consequently, I decided that once I earned my masters degree in I/O psychology, I would attend law school.

I earned my law degree (Juris Doctorate) from Ohio Northern University. My MA degree in I/O psychology is from the University of North Carolina at Charlotte. My BS degree in psychology is from Bradley University. During law & graduate schools, I was a graduate student representative for each

school's university senate. During college, I was a rush chairman & executive board member for my social fraternity.

Regarding civic & association involvement, I'm on the following boards of directors:

- Member of the Board of Directors, & Vice President, for The Lakeside Community Committee, a 45 year old child & family advocacy, housing & adoption agency;
- Member of the Board of Directors for Youth Outreach Services, a 50+ year-old teen advocacy, housing & direct service organization in Chicago;
- Member, Board of Directors for the Kelly Hall YMCA in West Humboldt Park, part of the YMCAs of Metro Chicago; &
- Member Board of Directors for Latinos Progresando, a 28-year-old immigration advocacy & legal services agency.
- Member & Vice Chair, Board of Directors for Oak-Leyden Developmental Services, a 60-plus year-old housing, education & training center for developmentally disabled children & adults.

I was awarded 2013 Outstanding Volunteer Attorney Award from the Chicago Lawyers' Committee's, & in 2014 completed a 5-year run on the Chicago Bar Foundation's Young Professionals Board where I still serve on their Advocacy Committee.

Finally, some personal background information. I'm a native Chicagoan. Born & raised in West Rogers Park. I graduated from Rogers Public School. For high school, I graduated from Niles North in Skokie. It was during childhood that I was indoctrinated into the ways of business, self-employment & entrepreneurship. My father owned & ran his own chain of pharmacies in Chicago for 35 years. My grandfather was an immigrant businessman who owned his own grocery stores in Chicago. Family taught me the value of hard work & how to compete & succeed in business.