

Ten Ways to Stay Out of Court

August 8-9, 2018

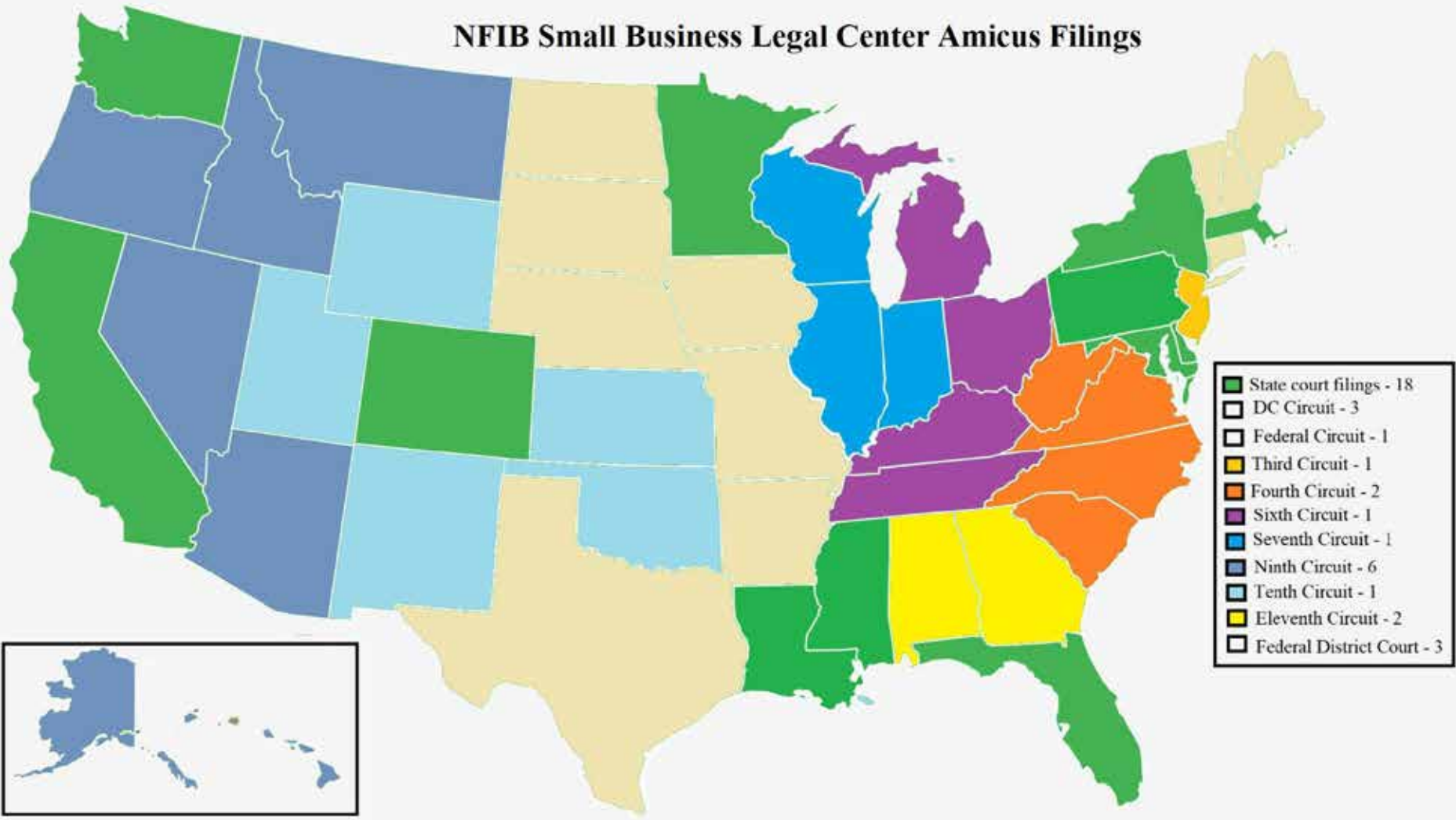


NFIB Small Business Legal Center

- We are the voice for small business in the courts and the legal resource for small business owners nationwide.
- While the information provided in this presentation is intended to be accurate, it should not be considered legal advice. The Legal Center cannot be held responsible for any errors or omissions.



NFIB Small Business Legal Center Amicus Filings



California Statistics



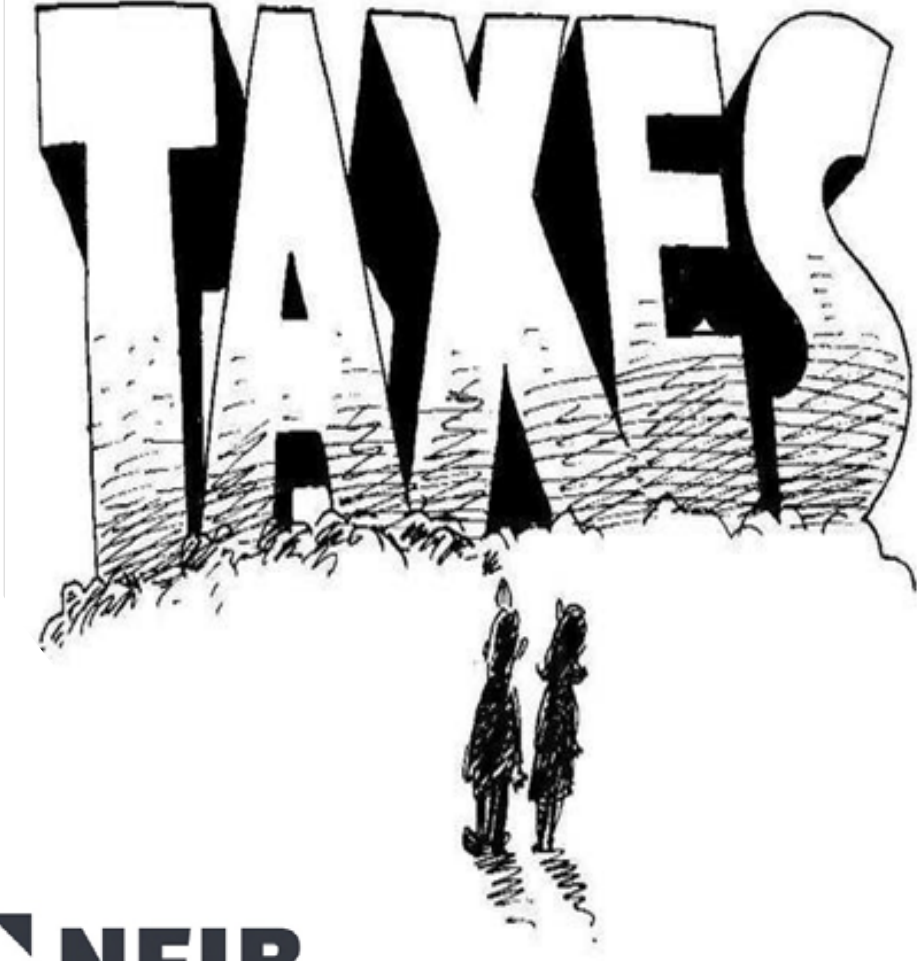
- California is often ranked as America's No. 1 "Judicial Hell Hole."
- 7.5 millions lawsuits in 2014.
- California accounts for 40% of all Title III ADA lawsuits.
- Potential for lawsuits expand with each new bill passed.

Rule #1: Incorporate



- Asset protection and tax benefits.
- Have your attorney or accountant review your corporate records once a year.

Rule #2: Stay Alert



- Keep good records!
- Carefully record transactions you make with your business.
- Deposit all business receipts in a separate account.
- Proactively talk with CPA or tax attorney about tax planning.

Rule #3: Maintain Adequate Insurance



- Read the fine print!
- Comparison shop—specialty broker might help.
- Don't be cheap—increase liability coverage, consider umbrella, business interruption, disability, and employment practices liability insurance.

Rule #4: Hire Smart



- Make good hiring decisions.
- Require job applications from all candidates.
- Check references.

Rule #4: Hire Smart

- Prepare a list of standard questions!
- Only ask appropriate questions that shed light on the applicant's capacity to perform functions and duties of the job.



Rule #4: Hire Smart

- Do not ask questions that could reveal whether the person belongs to a protected group (questions about sexual orientation, religion, race, etc).
- Do not ask questions about the employee's medical history.



Rule #4: Hire Smart

- Do not ask about wage/salary history.
- Do not ask about gender or request gender documentation.
- Do not ask about criminal history on application or in an interview.



Rule #4: Hire Smart

Do Not Ask:

- What is your current hourly wage or salary?
- Do you have any medical conditions that would interfere with your ability to perform this job?
- Have you ever been treated for drug abuse?
- Are you taking any prescription drugs?
- Have you ever been a member of a union?
- Do you have small children?



Rule #4: Hire Smart – Background Checks

- California's Ban the Box law prohibits employers from asking about criminal history until after extending a tentative offer.



Rule #4: Hire Smart – Background Checks

- Do not automatically revoke your offer.
- You need a legitimate business justification based on an individualized assessment.
- You must be able to demonstrate that the criminal conviction has bearing on the applicant's capacity to execute specific job duties.



Rule #4: Hire Smart – Background Checks

- Must provide written notice of intent to rescind an offer.
- Must include a copy of the disqualifying conviction or criminal history report.
- Notice must inform applicant they have 5 days to challenge accuracy, or submit evidence of rehabilitation and or mitigating facts.
- Delay final decision by 5 more days if applicant says they intend to submit further documents.

Rule #4: Hire Smart – Background Checks

- Adopt a uniform policy for running background checks.
- Get applicant's permission in writing.
- Clearly identify the information you will be checking.



Rule #4: Hire Smart – Immigration

- California Warning:
 - Do not ask for any form of documentation beyond what is required by federal law.
 - Do not question the authenticity of documents that appear genuine on their face.
 - Do not reexamine legal status of an existing employee after completing I-9.



Rule #4: Hire Smart – Immigration

- If you find incorrect information, correct and initial or have employee fill out a new form and attach to the old form.
- If information is missing, fill in the information and initial and date that section. **(Do Not Backdate!)**
- Store all I-9s together.



Rule #5: Manage Fairly & Wisely

- Prohibit discrimination and harassment.
- ALL employees should be aware of antidiscrimination laws.
- Be aware of what goes on outside of your workplace.
- Train all supervisors on good personnel practices.
- Can be sued for “hostile” environment even if you are not personally involved.

Rule #5: Manage Fairly & Wisely

- Companies with 50+ employees must provide harassment training for supervisors every second year.
- Must specifically cover sexual harassment, including discrimination on the basis of gender identity or failure to comply to gender norms.



Rule #5: Manage Fairly & Wisely

- Employers must respect an employee's request to be referred to by a chosen name, or pronoun.
- Employers must allow employees use of "facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth."
- Employers must also be able to demonstrate a genuine business necessity to enforce workplace policies on physical appearance, grooming or dress standards that may be inconsistent with employees' chosen gender identity or expression.



TRANSGENDER RIGHTS IN THE WORKPLACE



WHAT DOES "TRANSGENDER" MEAN?

Transgender is a term used to describe people whose gender identity differs from the sex they were assigned at birth. Gender expression is defined by the law to mean a "person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." People who identify as transgender are protected by the provisions of California's Fair Employment & Housing Act prohibiting discrimination based on sex, gender, gender identity, and gender expression.

THERE ARE TWO KINDS OF GENDER TRANSITION

- 1 *"Social transition"* involves a process of socially aligning one's gender with the internal sense of self (e.g. changes in name and pronoun, bathroom facility usage, participation in activities like sports teams).
- 2 *"Physical transition"* refers to medical treatments an individual may undergo to physically align their body with internal sense of self (e.g. hormone therapies or surgical procedures).

A transgender person does not need to complete any particular step in a gender transition in order to be protected

means, for instance, that a transgender woman may not be held to any different standard of dress or grooming than any other woman in the workplace. And, in general, an employer may not impose any dress or grooming standard that is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity.

What are the obligations of employers when it comes to bathrooms, showers, and locker rooms? All employees have a right to safe and appropriate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity, regardless of the employee's assigned sex at birth. In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. Use of a unisex single stall restroom should always be a matter of choice. No employee should be forced to use one either as a matter of policy or due to continuing harassment in a gender-appropriate facility. Under state law, all single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency must be identified as all-gender toilet facilities.

FILING A COMPLAINT

If you believe you are a victim of discrimination you may, within one year of the discrimination, file a complaint of discrimination by contacting DFEH.

If you have a disability that prevents you from submitting a

Rule #5: Manage Fairly & Wisely

- Performance Issues and Company Policies.
- Set out expectations for new employees.
- Tackle poor performance early.
- Document corrective action.
- Enforce company policies consistently.
- Avoid any inference of retaliation, discrimination or other improper motive.



Rule #6: Catch & Correct Wage & Hour Violations

- Escalating two-tiered minimum wage.
 - Companies with 26+ employees pay \$11.00.
 - Smaller companies pay \$10.50 through 2018.
- Must have bona fide business justifications for pay discrepancies between employees—other than past wage or salary history.
- Requires overtime compensation either for (a) time worked over 40 hours in a 7-day work week; or (b) in excess of 8 hours in a day.



Rule #6: Catch & Correct Wage & Hour Violations

- Minimum wage will rise to \$15.00 by 2023.
 - 2019 - \$12.00 for 26+ / \$11.00 for 1-25;
 - 2020 - \$13.00 for 26+ / \$12.00 for 1-25;
 - 2021 - \$14.00 for 26+ / \$13.00 for 1-25;
 - 2022 - \$15.00 for 26+ / \$14.00 for 1-25;
 - 2023 - \$15.00 for 26+ / \$15.00 for 1-25.
- Rate adjusted by changes to Consumer Price Index after 2023.
- **L.A. County** – July 1, 2018: \$13.25 / \$12.00



Rule #6: Catch & Correct Wage & Hour Violations

Nonexempt Employees

- Must keep records of time worked.
 - E.g., timecards or timesheets.
- Must earn at least minimum wage for all hours worked.
- Entitled to overtime for any hours worked over 40 in a 7-day work week, or after 8 hours in any given day.

Rule #6: Catch & Correct Wage & Hour Violations

Exempt Employees

- Must be paid \$455 per week (\$23,660 per year).
- **California Rule:** Must be paid at least twice minimum wage, assuming a 40 hour workweek.
 - $(\$10.50 \times 40) \times 2 = \840 per week or \$43,800 per year.
 - $(\$15.00 \times 40) \times 2 = \$1,200$ or \$62,571.48 per year.
- Finally, to be salaried an employee must perform executive, administrative, professional, or computer-related or outside sales work.



Rule #7: Be Careful With Independent Contractors

- *Dynamex Operations West, Inc. v. Superior Court*
- A – Free from Control of the sort exercised over employees.
- B – Must perform work distinct from employees in the “usual course of business.”
- C – Worker has “take[n] the usual steps to establish and promote his independent business...”



Rule #7: Be Careful With Independent Contractors

- **A – Free from Control of the sort exercised over employees.**
- Do not treat contractors like employees.
- Independent contractors should be free to carry out projects on their own time and use their own judgement.
- How much control are you exerting over the worker?



Rule #7: Be Careful With Independent Contractors

- **B – Must perform work distinct from employees in the “usual course of business.”**
- Courts will be closely scrutinize on-going relationships.
- Independent contractors should not be integral to your business model.
- Would he or she be viewed by others as working in your business?



Rule #7: Be Careful With Independent Contractors

- **B – Must perform work distinct from employees in the “usual course of business.”**
- Retail store hiring a plumber to fix a leak:
- Coffee shop hiring an electrician to install an electrical line:
- Clothing manufacturer hiring a work-at-home seamstress:
- Baker hiring a cake decorator to work on custom cakes:



Rule #7: Be Careful With Independent Contractors

- **C – Worker has “take[n] the usual steps to establish and promote his independent business...”**
- Require documentation to establish that the consultant is truly an independent contractor, such as business cards, licenses, incorporation, advertising materials, and certificate of insurance.
- Are they using their own tools?



Rule #7: Be Careful With Independent Contractors

- **C – Worker has “take[n] the usual steps to establish and promote his independent business...”**
- Independent contractors should be free to decline work and to provide their services to other businesses.
- Do they have other clients?



Rule #8: Know Special Local and State Rules

California Paid Sick Leave

§ Provide either upfront allocation of 24 hours, or allow employees to accrue 1 hour paid sick leave for every 30 worked.

§ With up-front allocation, unused hours expire;

§ Accrued hours roll-over from year to year;

§ Exempt employees are presumed to work 40 hours per week.

§ Employee can take leave to take care of self or family member or to assist victims.

§ Employee cannot punish employer for taking paid sick leave.

§ Keep a balance on pay-stubs.

Rule #8: Know Special Local and State Rules

California Paid Sick Leave

- § Employees are eligible after they have worked in California for 30 days; however, employers can require new hires to work 90 days.
- § Employers can require reasonable advance notice.
- § Employers can cap use of accrued hours at 24, and can cap total accrual at 48 hours.



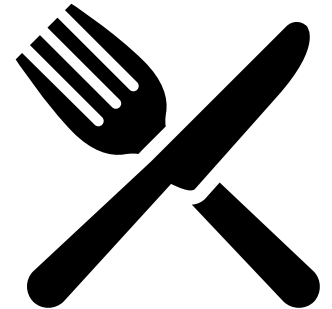
Rule #8: Know Special Local and State Rules

Meal Breaks

§ Employers must provide a meal period once within the first five hours worked.

§ Employees are entitled to an unpaid 30 minute meal break during which they are relieved of all duties and permitted to leave.

§ If nature of work requires employee to be “on call” the employee must (a) agree to taking an ‘on duty’ lunch in writing and (b) be paid.



Rule #8: Know Special Local and State Rules

Rest Breaks

§ Employees must provide a paid ten minute break in the middle of each four hour shift, or every major fraction thereof.

§ E.g., Two breaks for a six hour shift.

§ While employers are not required to “police” employees to ensure that they are not working during breaks, employers must actively encourage employees to take their breaks.

§ It may be prudent to set out expectations that employees will take their breaks in writing in an employee handbook.

§ One way to demonstrate compliance is to require employees to record their meal and rest breaks.



Rule #9: Don't be a Sitting Duck!

§ The **Americans with Disabilities Act (ADA)** imposes an affirmative burden to make places of public accommodation accessible to disabled persons.

§ ADA guidelines for all post-1992 construction.

§ Must remove barriers for older facilities where "readily achievable."

§ Settlement won't cure the problem.

§ Hire a certified access specialist to identify and cure problems.



Rule #9: Don't be a Sitting Duck!

§ Under **Proposition 65**, businesses must provide warning when exposing public to any of 850 listed chemicals.

§ Most businesses post to avoid threat of lawsuits with a general warning that a chemical is present:

“This product/area contains chemicals known to the State of California to cause cancer and birth defects, or other reproductive harm.”



Rule #9: Don't be a Sitting Duck!

- § New warnings for consumer products *must* say the product “can expose you to” a listed Proposition 65 chemical.
- § Must include “WARNING” in all-caps.
- § Must list at least one chemical that prompted the warning.
- § Must provide this web address for consumers seeking additional information: www.P65Warnings.ca.gov
- § Must include a triangular warning symbol in most cases.



Rule #9: Don't be a Sitting Duck!

§ New regulations require internet warnings on product display page: [WARNING](#).

§ Consumer should not have to search text for the warning.

§ New regulations require warnings in multiple languages:

§ For products with labels in other languages;

§ For facilities that provide signage in other languages.



Rule #9: Don't be a Sitting Duck!

§ OEHHA's shortened "on-product" warning:

§ Must be at least 6-point type size; but no smaller than largest consumer print.



WARNING: Cancer and Reproductive Harm -
www.P65Warnings.ca.gov.

Rule #10: Get it in Writing (& keep it)!

Institute a document retention policy.

§ Keep tax-related records for at least eight years.

§ Document employment actions.

§ Retain employee records (under lock and key!) for term of employment plus five years.

§ Keep OSHA logs for five years.

Help is Available!

NFIB Small Business Guides

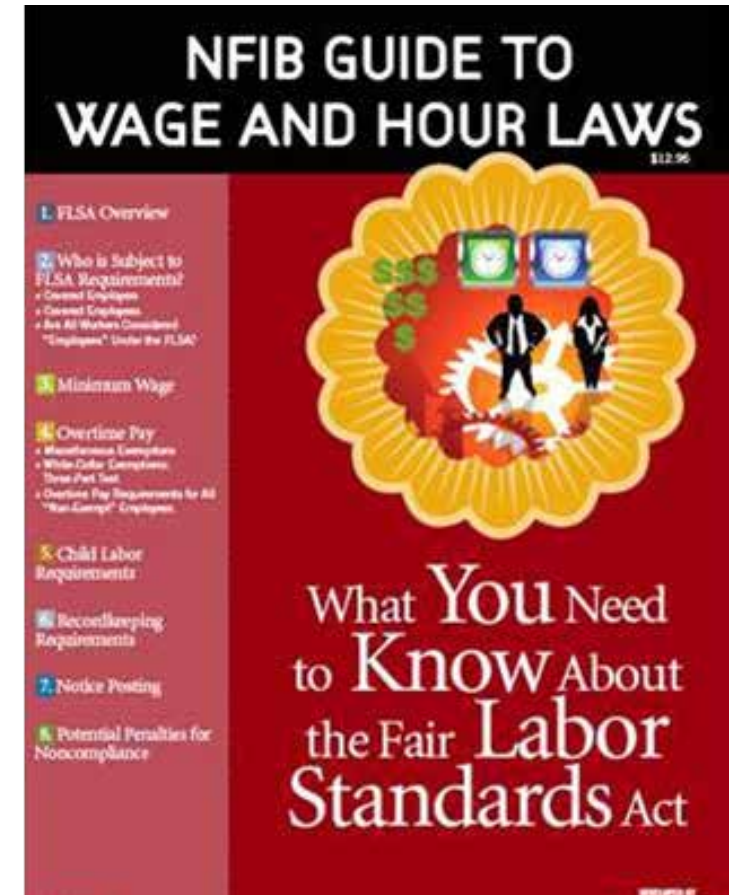
§ Guide to Wage and Hour Laws

§ Model Employee Handbook for Small Business

§ Small Business Guide to Document Retention

§ Guide to Independent Contractors

§ Guide to OSHA inspections.



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