

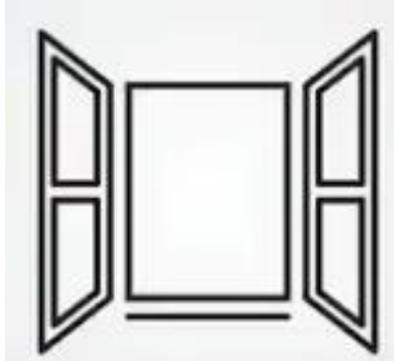
Paying Caregivers and Employees from a Trust: Staying Out of Hot Water

ITM 21st University Webinar

August 19, 2020

Presenters: Rachel Green, CEO; Cheryl Severson, COO

Real life stories to kick us off



TEAM provides an Employer of Record service to employ any household workers that are being paid out of a trust. TEAM steps in to handle all the employee administration, and more importantly, protects the trust and the bank from any employment-related risk.

Being an employer means exposure to many potential hazards



What we'll cover today:
10 things you can do to avoid pitfalls and liability exposure when you have direct employees of a trust

A few facts to get us started

Why does this matter?

1. When **regular payments** are made to a caregiver, companion, or other service provider from a trust, an employment relationship may exist.
2. Employment liability can **pierce the veil of a trust**. This opens the trust, the client, and you as fiduciary, to potential employment liability and administrative burden.
3. If you are making regular and ongoing disbursements to an individual who is providing **care or companionship services** to a beneficiary on a consistent basis (not employed through a home care agency), **that person is likely going to be an employee** and not an independent contractor.

1. Classify workers correctly

What matters:

DOL Six-Factor Test:

1. The nature and degree of **employer's control**;
2. The **permanency** of the worker's relationship;
3. The amount of the **worker's investment** in facilities, equipment;
4. The amount of **skill, initiative, judgment, or foresight** required;
5. The worker's **opportunities for profit or loss**; and
6. The extent of **integration of the worker's services** into the potential employer's business.

The economic realities of the relationship

1. Classify workers correctly

What does not matter:

- The worker's title of "Independent Contractor," even if agreed to by the worker
- The worker's desire to be classified as an independent contractor
- A signed written agreement calling the worker an independent contractor

Uber



amazon

Dynamex

A few items to consider:

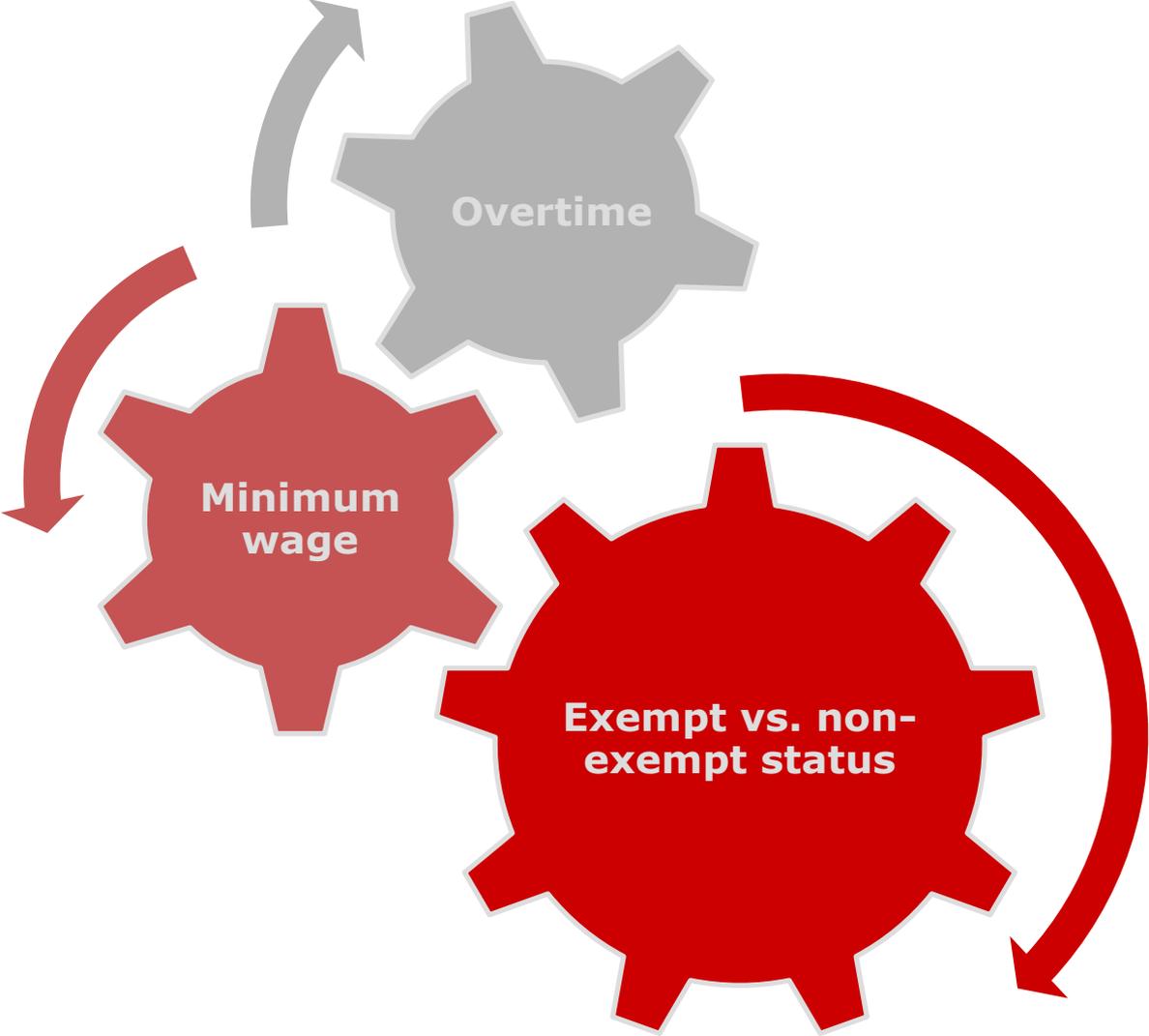
An employee...	An independent contractor...
Usually works for one employer .	Markets services to the general public and generally provides these services to multiple entities .
Works a set schedule determined by the employer.	Sets his/her own hours .
Works at the employer's place of business and uses the employer's tools and supplies .	Works out of his/her own home or place of business and uses his/her own tools and supplies .
Accomplishes tasks in the manner the employer has directed or requested .	Has the authority to decide how to accomplish tasks and has minimal input from others.
Is paid an hourly rate set by the employer and has no risk of financial loss as a direct result of the job.	Generally paid a fixed rate and incurs profit or loss based on managerial skills.
Has general education and experience, and receives training on how to perform job duties from employer.	Has acquired specialized skills and brings to the job specific experience and training.
Cannot hire others to perform job duties without permission from the employer.	Has discretion to subcontract out work to others.
Can resign or be terminated at any point.	Risks breach of contract if he/she quits before completing the project.
Is covered by a workers' compensation policy in the event of an injury.	Has procured his/her own liability insurance and is not covered by workers' compensation in the event of an injury.
Is likely eligible for unemployment benefits if laid off.	Is not eligible for unemployment benefits when the job ends.

When in doubt, consult an employment attorney

Polling Question #1

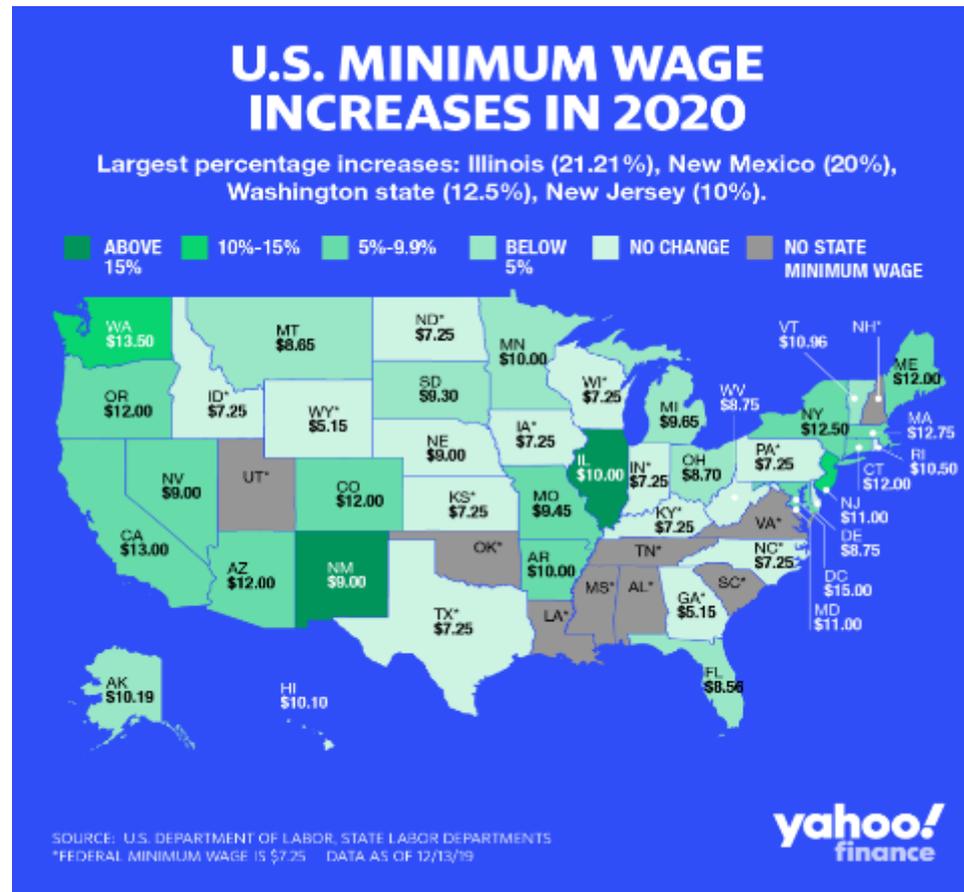
- A caregiver being compensated out of the trust can be classified as an independent contractor if they agree to it in writing.
 - A. True
 - B. False

2. Pay employees correctly:



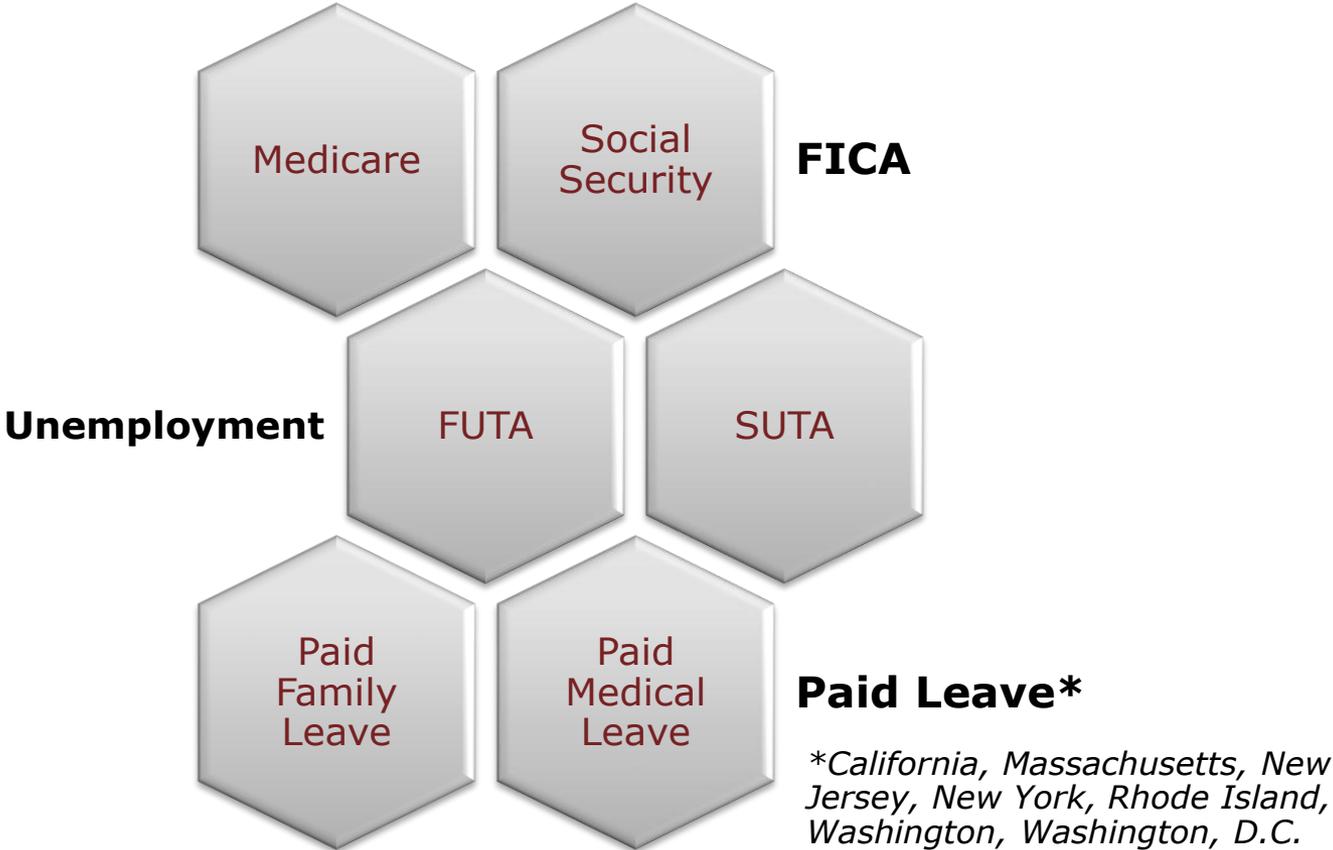
2. Pay employees correctly: minimum wage

States that raised minimum wage in 2020



- More than 50% of states require a higher minimum wage than federal minimum wage of \$7.25/hr
- Nearly 50 cities and counties require a higher minimum wage than what is required at the federal or state level

3. Pay required taxes



Noncompliance can result in back taxes, penalties, and audits

Polling Question #2

- If a caregiver agrees to be paid a salary, you do not need to collect time cards or track hours:
 - A. True
 - B. False

4. Obtain appropriate (or required) insurance

- ❖ **Workers' compensation** is the largest insurance-related consideration
- ❖ Caregiving is physically demanding and has a **high prevalence of injury**
- ❖ Workers' compensation insurance is **required by most states** and is the employer's financial responsibility
- ❖ **Homeowners policies** often exclude employees working in the home

In some states, failure to procure workers' compensation insurance is a criminal offense; noncompliance could result in significant financial penalties and even **jail time**

5. Keep good records

Both a best practice and required by law

Requirements under the Fair Labor Standards Act:

- Payroll records must be retained for three years
- Time cards must be retained for two years
- Other records retention requirements vary by state and by type of record
 - Selection and hiring documents
 - I-9 Forms
 - Benefits
 - Tax Records
 - Safety and Work Comp claims data

Good records are also needed to defend against potential wage and hour claims

6. Use good hiring practices



1) Run background checks

Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

▶ **START HERE:** Read instructions carefully before completing this form. The instructions must be read during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work authorized individuals documented as an employee may present to establish employment authorization and identity. The information on an individual because the documentation presented has a future expiration date may also constitute a violation of the anti-discrimination laws.

Section 1. Employee Information and Attestation (Employer must complete and return the first day of employment, but not before accepting a job offer.)

Last Name (Family Name)	First Name (Given Name)	Middle Initial
Address (Street Number and Name)		Appt. Number City or Town
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number	Employee's Email Address

2) Verify employment eligibility



3) Don't ask discriminatory interview questions

Interview Questions to Avoid:

Don't ask questions about...

- An applicant's disability or that would reveal a disability
- Genetic information
- Race, religion, or ethnicity
- Age
- Whether the applicant is pregnant or plans to become pregnant
- Anything that could lead to learning about any other protected class
 - Ex: Ancestry, Age (40 and above), Color, Disability, Genetic Information, Gender Identity and Gender Expression, Marital Status, Medical Condition or History, Military or Veteran Status, National Origin, Pregnancy, Race, Religion, Sex/Gender, Sexual Orientation

7. Perform safe and effective employee terminations

- Avoid discrimination and retaliation claims by being thoughtful about:

- 1. Timing of termination**

- 2. Reason for termination**

- 3. The manner in which the termination is carried out**



- State laws vary in terms of timing of the final paycheck and vacation payout. Any misses here can lead to wage and hour claims and penalties.
- Overlooking home and personal security for your clients can create a very vulnerable situation, which you could also be held liable for. Change locks, notify others, and update security passcodes.

Polling Question #3

- Which of these are you able to ask an applicant about during an interview, regardless of which state you're in?
 - A. Their ability to lift a certain weight
 - B. How much they earn at their current job
 - C. If they're pregnant or planning on becoming pregnant
 - D. If they have a disability

8. Proactively manage day-to-day employee relations

- Disciplinary actions and other employment decisions can lead to claims of **discrimination** or **retaliation**
- Untrained managers (e.g., your clients) can inadvertently create **hostile work environments**
- **Harassment** claims can occur against supervisors, co-workers, your client, and anyone else workers come into contact with during the course of work
- **Employees are savvier than ever in creating “claims” and knowing the buzz words; information is a few clicks away**



9. Stay abreast of changes to employment law

The burden is on you to stay informed and the rules are changing daily

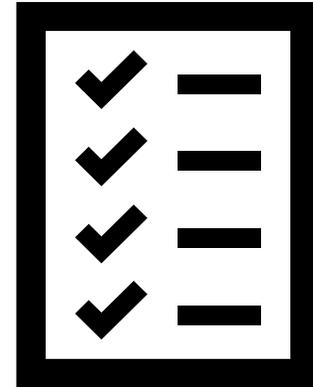
Trends to watch out for:

- Minimum Wage
- Mandated Employer Paid Sick and Safe Leave
- Paid Medical Leave and Paid Family Leave programs
- Paid Time Off for *Any Reason*
- Medical and Recreational Marijuana Use
- Fair Pay Acts



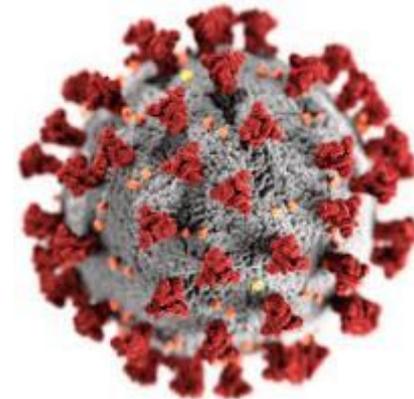
10. Put policies in writing

- Documenting policies can be a great way to ensure fairness and consistency
- Policy documents should be reviewed for updates at least annually
- A poorly worded policy can be worse than no policy
 - *"Employees who work unauthorized overtime will not be paid."*
 - *"Employees who work unauthorized overtime may face disciplinary action, up to and including termination of employment."*



Special Considerations with COVID-19

- Providing these household workers with updates on regulations and safety protocols to ensure a compliant work environment
- With certain states rolling in and out of lockdown measures, some of these employees might require Essential Employee documentation in case they are questioned on their way to and from work
- Consulting with your clients on potential furloughs or layoffs of their workers, and ensuring you're performing the necessary terminations in a compliant manner
- Assisting employees with unemployment claims when applicable



11. Don't be an employer

The simplest and cleanest way to avoid everything we've talked about today is to **avoid paying caregivers or other service providers directly** from the trust. You can do this by engaging a home health agency or 3rd party employer of record service.

**Just
say no.**

Remember:

Things can go well, even for a number of years ... until they don't. All it takes is a single incident to create a disgruntled or unhappy employee who will file that claim or lawsuit.



“An independent contractor who falls off your roof will be an employee by the time he hits the ground.”

- Terry Keating, TEAM Co-Founder

Feel free to contact us with any questions

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