Five Biggest Business Bloopers... And How to Fix Them

Presented by Jodi Slavik
Blooper #1: Audit Schmaudit
(or... “I’ve done a self-audit, my I-9s are fine”)
“Audits of employer forms increased from 250 in fiscal year 2007 to more than 3,000 in 2012. From fiscal years 2009 to 2012, the total amount of fines grew to nearly $13 million from $1 million. The number of company managers arrested has increased to 238, according to data provided by ICE.”

Source: USA Today, 12/23/12
In reviewing forms previously subject to an internal audit, we find **errors** on 50 - 70%.
Fines

• Technical & substantive
• Chance to correct technical
• $110 per mistake or omission
• $1100 max fine per form ($1100 for a missing form)

Average of $11,000 in fines assessed per employer in 2011
Fixing the **Blooper**: Conducting a Self-Audit
Step One: Review Form

• Use new form as of 5/7/13
• New data fields
  – EEs foreign passport info, phone number & email
• 2 pg form, 6 pgs instruction, 65 pg Handbook for Employers

Handbook for Employers

Instructions for Completing Form I-9
(Employment Eligibility Verification Form)
Step Two: Do You Have All Forms?

- Print current roster and hires 3 yrs prior
  - If any hires not on current roster, apply 1 and 3 rule
  - Except workers hired before 11/6/86
  - Include owners if employees

- Destroy I-9s for those beyond 1 or 3 (unnecessary liability)

- If missing I-9, complete immediately
  - Don’t backdate
  - Include explanation
Step Three: Carefully Review Each Section

Common errors:

- Signature on wrong line
- Names or numbers not accurately transcribed
- Not checking info in Sec 1 against copies of docs in Sec 2
- Mistaken use of “other names”
- Not signed by EE
- Not filled out timely
- Wrong form per hire date
- Issuing agency recorded incorrectly
- ER attached docs without filling out Sec. 2
Case Example

Ketchikan Drywall Services, Inc. v. ICE, 9th Cir, Aug 2013

- ER had photocopied each EE’s documentation and attached it to the Form I-9, but had left Section 1 or 2 incomplete on several forms.

- ER argued substantial compliance

- Court agreed with ICE...$173,500 in penalties
Don’t Prepopulate!

DOJ: Increases chance of outdated or inaccurate info

- Could reject Sec. 2 docs...could lead to mis-match
- Could overlook EE with limited English proficiency

If you do so, fill out Preparer/Translator Certificate
Step Four: Correct Forms

- Correct and initial original
- Include brief explanation
- Complete new form if significant; don’t discard original
- Include cover letter
General Rule: Don’t Make the Auditor Ask
Step 5: Check Your Process

- Retention policy
  - On site, off site, electronic
  - Confirm access within 3 days
  - Retain docs for all or none...company-wide!

- One or more designated I-9 verifiers w/adequate training

- Tickle system for reauthorization
  - When work authorization expires – List A or C
  - NOT for List B docs, US Passport, or Perm Resident (I-551)...unless temp I-551 stamp
Blooper #2:

You’re

EXEMPT (well, maybe)
Exempt “White Collar” Employees

Executive
- $455/wk
- Manage division of business
- 2+ EEs; authority to hire/fire/suggestions given weight

Administrative
- $455/wk
- Office or non-manual work directly related to business ops
- Discretion and independent judgment on matters of significance
- Tax, finance, accounting, budgeting, HR, PR, gov’t relations, purchasing, QC

Learned/Creative Professional
- $455/wk
- Learned requires advanced knowledge in a field of science or learning normally acquired by prolonged coursework

Computer

Outside Sales

Highly Compensated ($100,000 w/ $455/wk in salary or fee)
Recent Classification Cases

**Fiore v. PPG**

- Territorial mgr promoting Olympic stain
- PPG couldn’t show good faith reason why apply administrative exemption = double damages.
- $12,203.10 in back pay; $600K in attorneys fees
- Make sure you notify worker of fluctuating workweek.  
  *(Div 1 2012)*

**Litchfield v. KPMG**

Audit associates may be exempt because using “advanced knowledge” and exercising discretion. *(Div 1 2012, Sup Ct denied review 2013)*
Maintaining salary basis

• Weekly salary if any hours worked

• Limited docking allowed:
  – One or more *full days* for personal reasons (not sickness or disability);
  – One or more *full days* due to sickness or disability if policy or practice pays salary;
  – To offset jury or witness fees, or for temporary military duty pay;
  – Penalties for major safety infractions;
  – Unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (not WA);
  – Initial or terminal week of employment if the employee does not work the full week; or
  – Unpaid leave taken by the employee under the federal Family and Medical Leave Act.

• Can do partial vacation or PTO...with caution
Fixing the **Blooper**:

**Check**
- Take temp: what’s % of exempt workforce?
- Audit, by individual, using classification checklist (FLSA Overtime Security Advisor or SHRM FLSA: Exemption Questionnaire)
- Record key details, including who, where, primary duties & percentage of time spent (captures inst. knowledge)

**Confirm**
- Majority of time spent doing what?

**Correct**
- Payroll audit for exposure--two years
- Reclassify...*carefully*
- Train supervisors...monitor employees
- Review *Vigilant Legal Guide, Salary Basis Test*
- Put safe harbor clause in handbook
Mini-**Blooper**: Assuming independent means independent under all laws.

Independent contractor v. **covered worker**

**RCW 51.18.080**: "Worker" means ... every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor...”.

**RCW 50.04.100**: "Employment” ... means personal service, of whatever nature... performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied.
Independent Contractor Cases

- If contractor provides “personal labor”, ERs must pay workers compensation (*Xenith Group*, WA Ct of Apps 2012)

- Economically dependent contractors are EEs under MWA...replaces “control” test (*Anfinson*, WA S Ct 2012)

- Economic reality test applied to contract janitors (*Becerra v. Expert Janitorial*, WA Ct Apps, Div I 9/16/13)
Fixing the Blooper:

1. Run your contractors through the tests


**L&I:** [http://www.lni.wa.gov/IPUB/101-063-000.pdf](http://www.lni.wa.gov/IPUB/101-063-000.pdf)
2. If unsure about IRS classification, *consider* SS-8.

3. If reclassifying under IRS: Voluntary Classification Settlement Program (VCSP)

4. If maintaining as indep K’ors, check contract language:
   - independence
   - own tools & employees
   - contract limits
   - periodic audit of business office, books, clients, UBI, business tax return

5. If reclassifying as covered workers....
Blooper #3:
Meals & Breaks in the Tech Era
Meals

• One meal period for every five hours worked
  – Between 2\textsuperscript{nd} – 5\textsuperscript{th} hour
  – 3 hrs over normal shift  = 2\textsuperscript{nd} lunch before or during overtime

• 30 minutes \textit{uninterrupted}, unpaid
  – If interrupted, pay and provide 30 minutes
  – Can require to stay on site but cannot require response to pager, cell phone, radio

• Waivers allowed

- Court said employers have a “mandatory obligation” to “provide” breaks and “ensure” compliance.
- Paying for meal periods not enough.
- Court ordered payment again for missed meals (but not double damages...phew!)
- Compare to *Brinker v. Supreme Ct (CA 2012)*
- Another WA App. Ct. said no additional pay when up to 10% of paid lunch used for work (*Iverson, 2003*)
• 10 minute rest for every four hours worked
  – Paid
  – Can be intermittent/interrupted, but not (10) one minute breaks
  – In mid-point, but no later than 3 hours (Wingert...2002 Sup. Ct.)
  – Can be on call, but allow them the remainder of break
  – May NOT waive
Employers must add missed rest breaks to “hours worked” and pay overtime.

Union contract provided 15 minute paid breaks. When nurses missed breaks, they were paid 15 + 15 straight-time minutes.

Court reversed 2x damages
Fixing the Meals & Breaks **Blooper:**

- Create a solid meal & break policy
- Time clocks?
- Educate staff, enforce & discipline
- Voluntary waivers
- Variance?
- Add language to time cards
- Train supervisors
  - Monitor desk time (waiver?)
  - Is work load in line with work hours?
  - Circulate and be aware
CAN YOU COME TO A MEETING RIGHT NOW?

NO, IT'S ALMOST LUNCH TIME.

IF I MISS LUNCH, MY DAY WILL BE 12 HOURS OF UNINTERRUPTED MISERY. I WILL ENVY THE DEAD.

THAT'S STUPID. THE DEAD DON'T EAT LUNCH EITHER.
Blooper #4:

NO DOCUMENTATION!!!
How to Get Supervisors to Document

• Train
  – Get buy-in
  – Make an element of group learning

• Set the example

• Give examples
  – Email folders, texts
  – Simple forms; sample booklet
  – Spiral notebooks

• Make an essential function
  – Include in performance reviews

• Incentivize
Blooper #5: You’re Too Nice!
Please help us help our friend

Paul, long-time employee and member of our management team is fighting a hard battle with cancer.

Donations to help Paul with medical bills can be made at any checkstand. Thank you for your thoughtfulness and generosity.

Your Love Team
Hi All!

Our service department has fallen behind on some of our projects and I wanted to keep you up to date on where we are on a few things:

- James was out for two weeks due to pneumonia, but he’s back now and almost completely recovered;
- As many of you already know, Tyler had a heart attack and will hopefully be back after June 6th (Maybe, he’s doing better!)
- I dislocated my shoulder and I’ve been out since May 27th

This has caused delays on our ongoing projects. The service department will update you in the future and we will have the following items corrected:

- There will always be a completion date (no TBD’s)
- We will include the plant and customer name on projects
- Updates will come every Tuesday in the morning, including which service department employees are out on leave
Elements of a Privacy Claim

✓ A legally protected privacy interest
✓ A reasonable expectation of privacy
✓ A serious invasion of the privacy interest

Fixing the Blooper:

– Give ample notice – handbook and signage
  • ID a legitimate competing interest (e.g. avoiding employee theft) and no reasonable alternative
– Talk to EE and contain breach
– Re-educate
– Contain gossip
Overshare v. Undershare
Overly Friendly Supervisor
Supervisors and Facebook...

• Do employees *really* want to friend him?
  – How do they say “no” without disturbing work relationship?

• Blurring work/life balance

• If they start talking about work, is this time the employee is “suffered or permitted to do work”?

• Supervisor aware of harassment creates liability

**TO DO:**

  – *Discourage* supervisors from friending employees
  – Include in harassment training
  – Remind them to manage work hours
Health Insurance Past FMLA

Can become de facto insurance provider

COBRA notice w/in 44 days or penalties up to $110/day (*Fama v. Design Assistance Corp D NJ, April 2012*)

**Fixing the Blooper:**
- Check insurance contract/talk to insurer
- Talk to attorney about timing/options
- Issue COBRA notice
- Make employee whole
Docking Paycheck

• Cannot deduct from final paycheck unless loss of equipment was dishonest or willful (and happened during final pay period).

• Can agree to deduct final paycheck for non-returned uniforms

• Cannot deduct for damage or loss during ongoing employment
Fixing the **Blooper:**

- Make whole
- Make it easy
- Handbook
- Small claims
Questions?
We’re in this together.

QUESTIONS?

- Jodi Slavik
- jodis@vigilant.org
- www.vigilant.org