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# Everything COVID-19 for HR Professionals

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# Anthony M. Stites

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Attorney Anthony Stites represents business entities in all facets of their employment matters. On a daily basis, he works with human resource personnel and in-house counsel to prevent or solve problems in the employment arena. Anthony has presented hundreds of supervisor training sessions throughout the U.S. He has extensive experience in strike activity and trial experience defending employers in all areas of employment matters.

Anthony is an AV<sup>®</sup> Preeminent<sup>™</sup> rated attorney based on Martindale-Hubbell's peer review ratings, has been selected for inclusion in *Super Lawyers in America*<sup>®</sup> ten times and has been selected for inclusion since 2016 in the *Best Lawyers*<sup>®</sup> in America publication. *Best Lawyers in America*<sup>®</sup> recognized him "Lawyer of the Year," Fort Wayne in 2017 and 2018 in the area of Employment Law - Management and in 2020 in the area of Litigation- Labor and Employment. He has presented over 250 speeches and/or seminars locally and nationwide. He is a member of the Allen County (Indiana) and Ohio Bar associations, as well as the Indiana State Bar Association.



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H. Joseph Cohen works with clients in the areas of labor and employment matters and litigation including insurance defense. Concentrating on health care providers, his practice works with hospitals, physician offices, dentists, and doctors on their employment law needs. He has extensive experience in defending all types of employment claims, including those based on race, sex, national origin, religion, and sexual harassment. His experience also includes handling insurance defense claims.

An AV Preeminent™ rated attorney by Martindale-Hubbell, he is active in the community, where he serves on the Board of Directors for the United Way of Allen County, the Mad Anthony's Children's Hope House and Easter Seals/ARC where he serves as board chair. He was appointed in February 2019 to the Indiana University - Fort Wayne School of Nursing External Advisory Board. He has presented more than 100 lectures/seminars to statewide and local audiences on various labor and employment topics.



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Rachel Steinhofer represents clients in the employment arena, defending employers against claims involving Title VII, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Indiana Wage Payment Statute, the Indiana Wage Claims Statute, and the Indiana Workers' Compensation Act. In addition, Rachel interacts with administrative agencies, including the Equal Employment Opportunity Commission (EEOC), on behalf of clients.

Rachel has volunteered at the Neighborhood Christian Legal Clinic and serves on the board of directors for Mental Health America of Northeast Indiana. She is the secretary and past-president of the board of directors for McMillen Health. She has given presentations on multiple legal topics, including the "Workplace Survival Guide" and "Finding Free Legal Research Sites and Free Case Law," and she was a contributor to a publication about medical malpractice claims. Since 2015, she has been selected a "Rising Star" by the *Indiana Super Lawyers*® publication.

# What is “Regular Rate” under FLSA?

- The FLSA was enacted in 1938 to remedy “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers...”
- Section 7(a) of the FLSA generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their **regular rate of pay** for time worked in excess of 40 hours per workweek.
- But the FLSA did not originally define “regular rate.”
- Later that year, the WHD issued an interpretive bulletin defining regular rate as “the rate at which the employee is actually employed and paid and not...a fictitious rate which the employer adopts solely for bookkeeping purposes.
- TODAY, the “regular rate” includes **all remuneration for employment**, subject to exclusions outlined in Section (e) of the FLSA.
  - the FLSA does not restrict the forms of “remuneration” that an employer may pay—which may include an hourly rate, salary, commission, piece rate, a combination thereof, or any other method—as long as the regular rate is equal to at least the applicable minimum wage and non-exempt employees are paid any overtime owed at one and one-half times the regular rate.

# What Can The Employer Exclude from the Regular Rate of Pay?

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”;
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples; and
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

# Why Is This Important for COVID-19 Purposes?

Under the Emergency Family and Medical Leave Expansion Act, an employer is required to pay an employee not less than 2/3rds of the employee's **regular rate of pay** after the first 10 days of leave.

- The 2/3rds pay must be for the same number of hours that the employee would be otherwise normally scheduled to work.
- BUT paid leave shall not exceed \$200/day.



# Pandemic-Related Harassment Due to National Origin, Race or Other Protected Characteristics

- Remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against co-workers based on race, national origin, color, sex, religion, age (40 or over), physical or mental disability, or genetic information.
- Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

# Harassment in a Teleworking Setting

- Harassment may occur using electronic communications, whether the employees are in the workplace, teleworking or on leave.
- The employer should take the same actions it would take if the employee was in the workplace.
- Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.