



**No Whammies!  
Don't Press your Luck on  
Wage and Hour Issues**

# Host & Contestants



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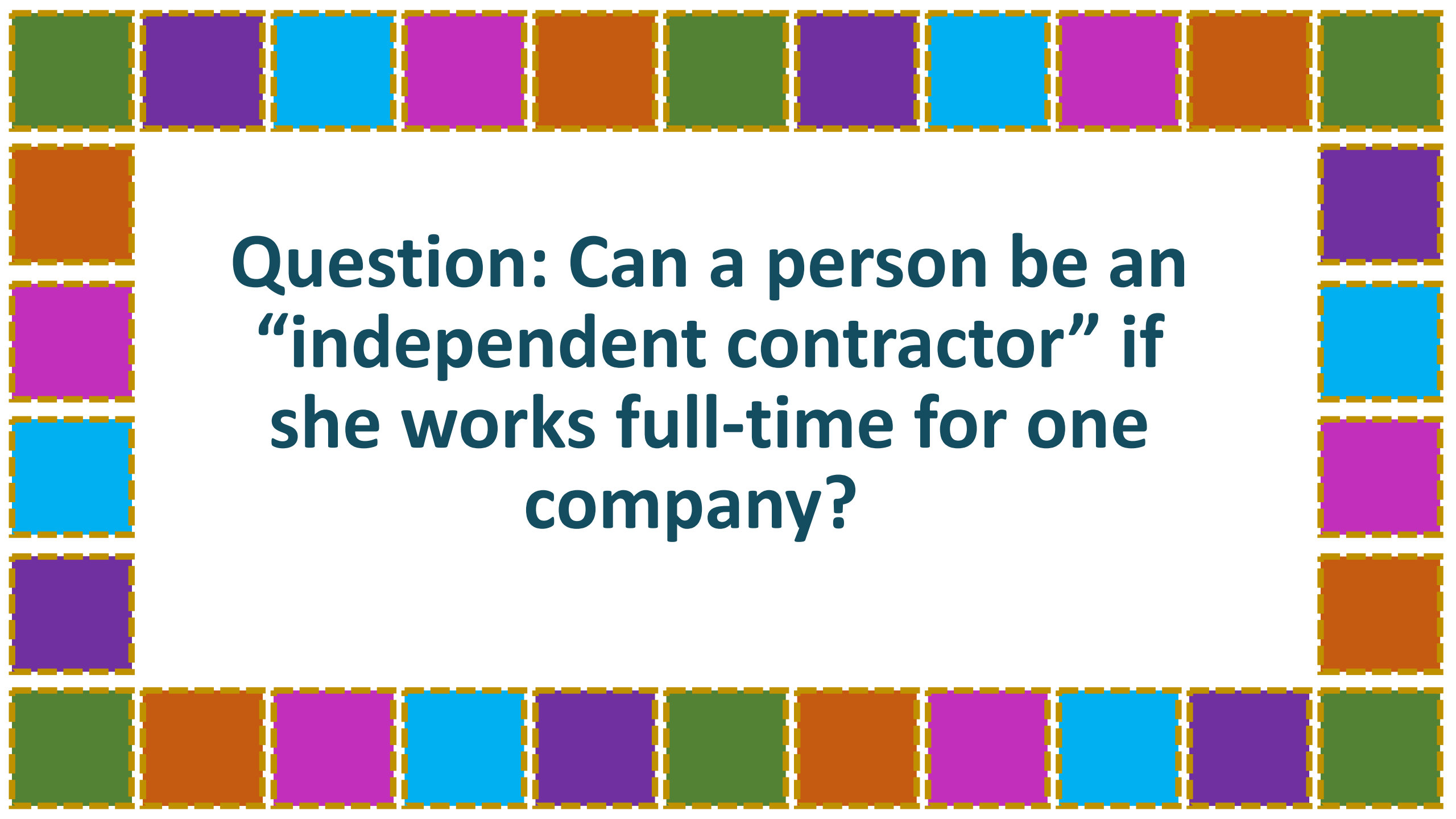
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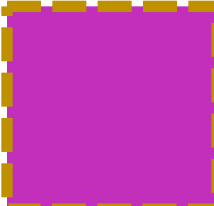
**Question: Can a person be an  
“independent contractor” if  
she works full-time for one  
company?**

# Employee vs. Independent Contractor

## Avoid a Whammy!

If a person is mischaracterized as an independent contractor and later determined by a state or federal agency to be an employee, then:

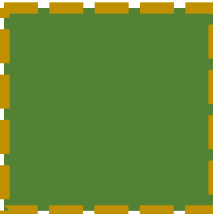
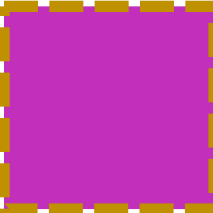
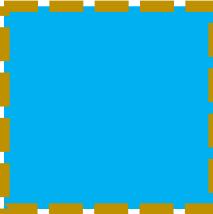
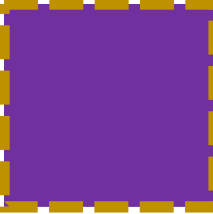
- (a) minimum wage and overtime were owed the entire time;
- (b) meal and break periods, benefits, and other legal requirements for employees are owed;
- (c) costs and agency penalties for mischaracterization can be large, thousands or tens of thousands \$\$\$
- (d) Costs and agency penalties go up exponentially if more than one person is involved on a class action basis, easily into millions \$\$\$

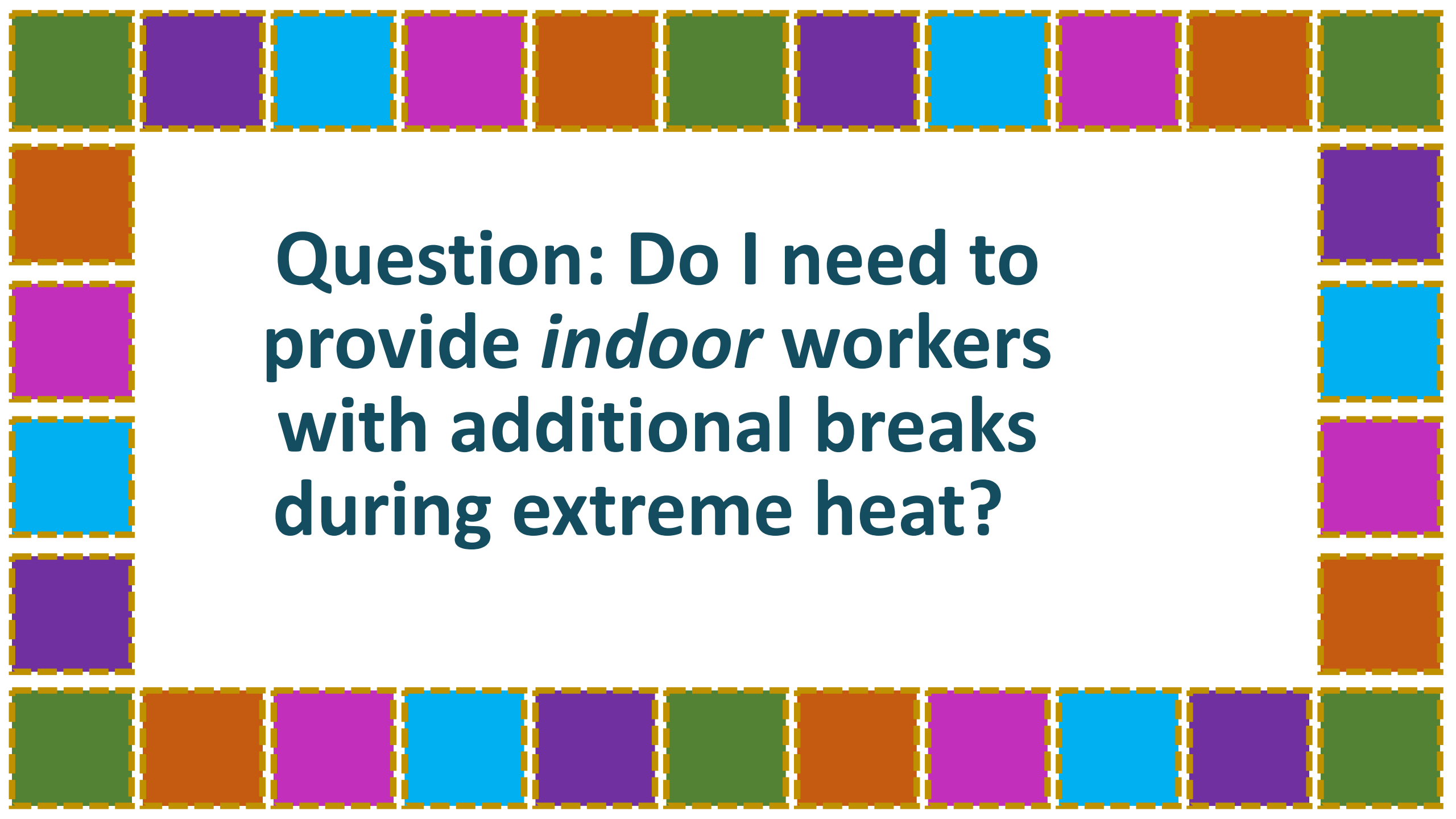


# Employee vs. Independent Contractor

The “*totality of the circumstances*” test, which the U.S. Department of Labor is expected to return to, focuses on six factors:

1. the worker’s “opportunity for profit or loss depending on managerial skill” of the work;
2. “investments by the worker and the employer” in the work;
3. the “degree of permanence of the work relationship”;
4. the “nature and degree of control” of the work by the employer, such as supervision of work, employer’s right to supervise or discipline the worker, or demands on worker time that do not allow working for others or when they choose;
5. the “extent to which the work performed is an integral part of the employer’s business”;  
and
6. whether a worker uses specialized skills brought to the job or depends on “training from the employer to perform the work.”

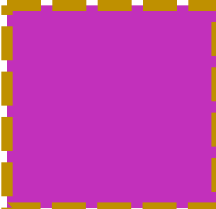
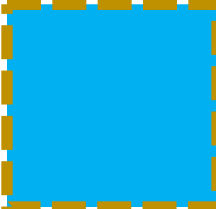
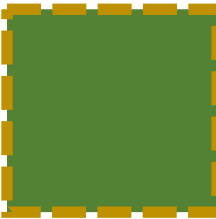


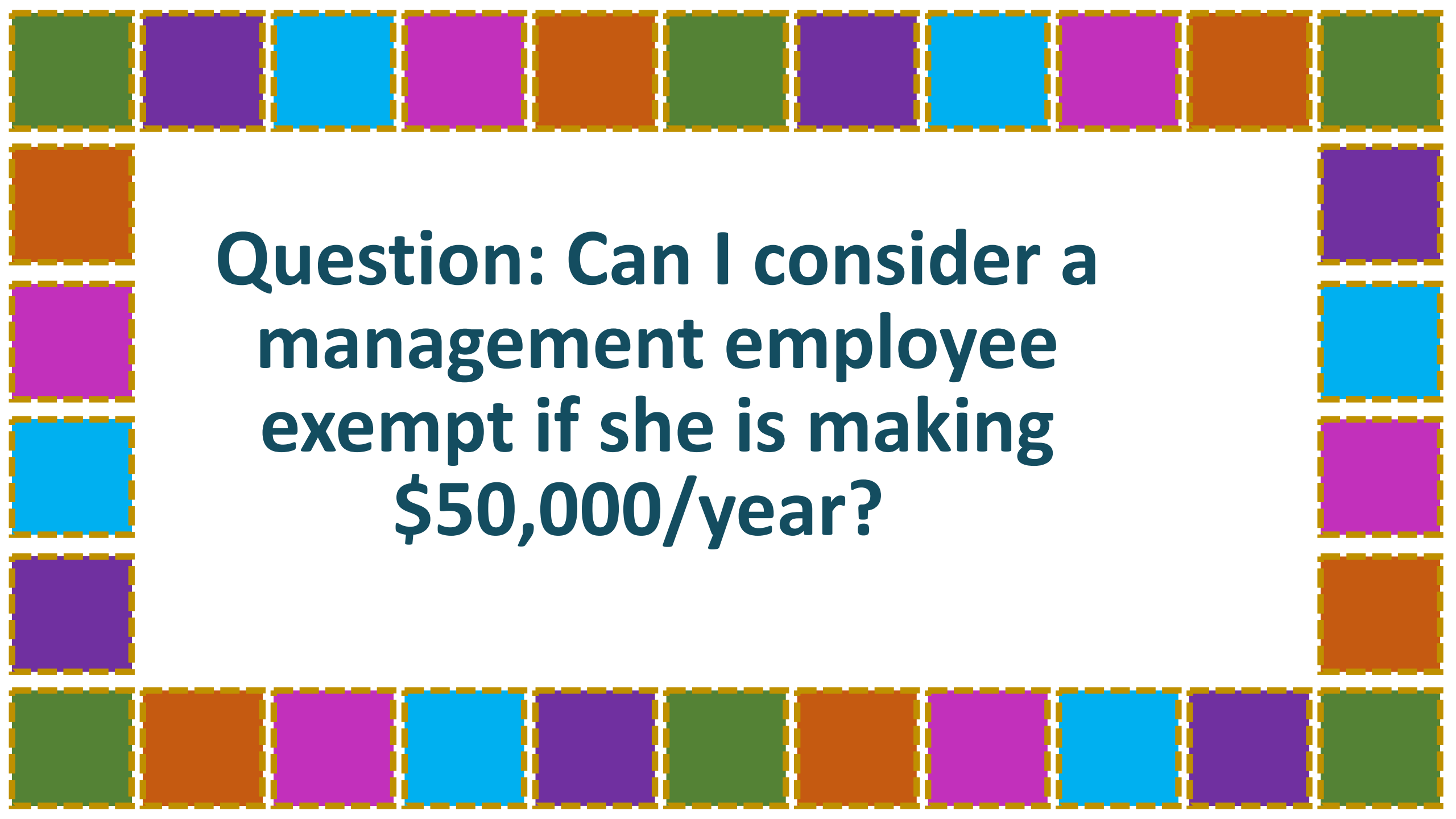


**Question: Do I need to provide *indoor* workers with additional breaks during extreme heat?**

# Meal Periods and Rest Breaks for Employees

- Each state has unique laws for meal periods and rest breaks depending on the number of hours an employee is working
  - Oregon requires meal periods if employee working 6+ hours
  - Washington and California require meal periods if employee working 5+ hours
- Each state has different requirements if employees are under age 18
- Union Collective Bargaining Agreements may or may not be allowed to alter these meal periods and rest breaks
- Some states are adding additional rest breaks for severe heat or smoke conditions – including for indoor workers in some states!
- Be careful with time clock rounding, because rounding up may trigger the appearance of a requirement to provide meal period or rest break!



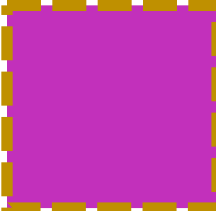
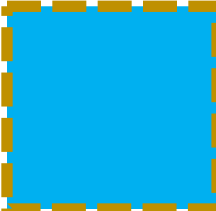
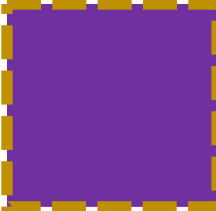
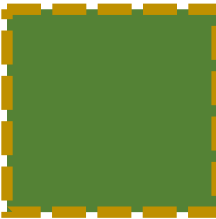



**Question: Can I consider a  
management employee  
exempt if she is making  
\$50,000/year?**



# Exempt vs. Non-Exempt Employees

- “Exempt” means an employee is not entitled to overtime pay, paid rest breaks and meal periods, accrued sick leave (Washington), and certain other federal and state mandated employee benefits
- “Exempt” can be a salaried or hourly employee, but usually salaried
- Most common “Exempt” status based on “white-collar job”
  - Must meet salary threshold at state level where applicable
  - Federal government also proposing increase to salary threshold
- Other “Exempt” status can be based on outside salesperson, educators, computer professionals, others
- Federal and state agencies cracking down on exempt status – avoid a Whammy and categorize accurately in your state!!!

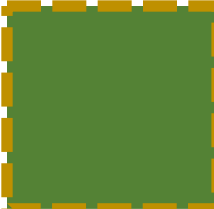
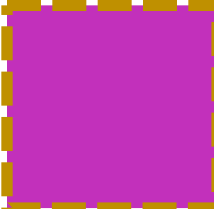
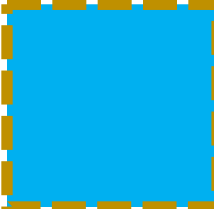
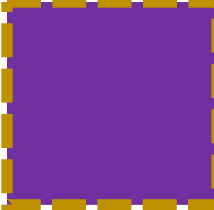


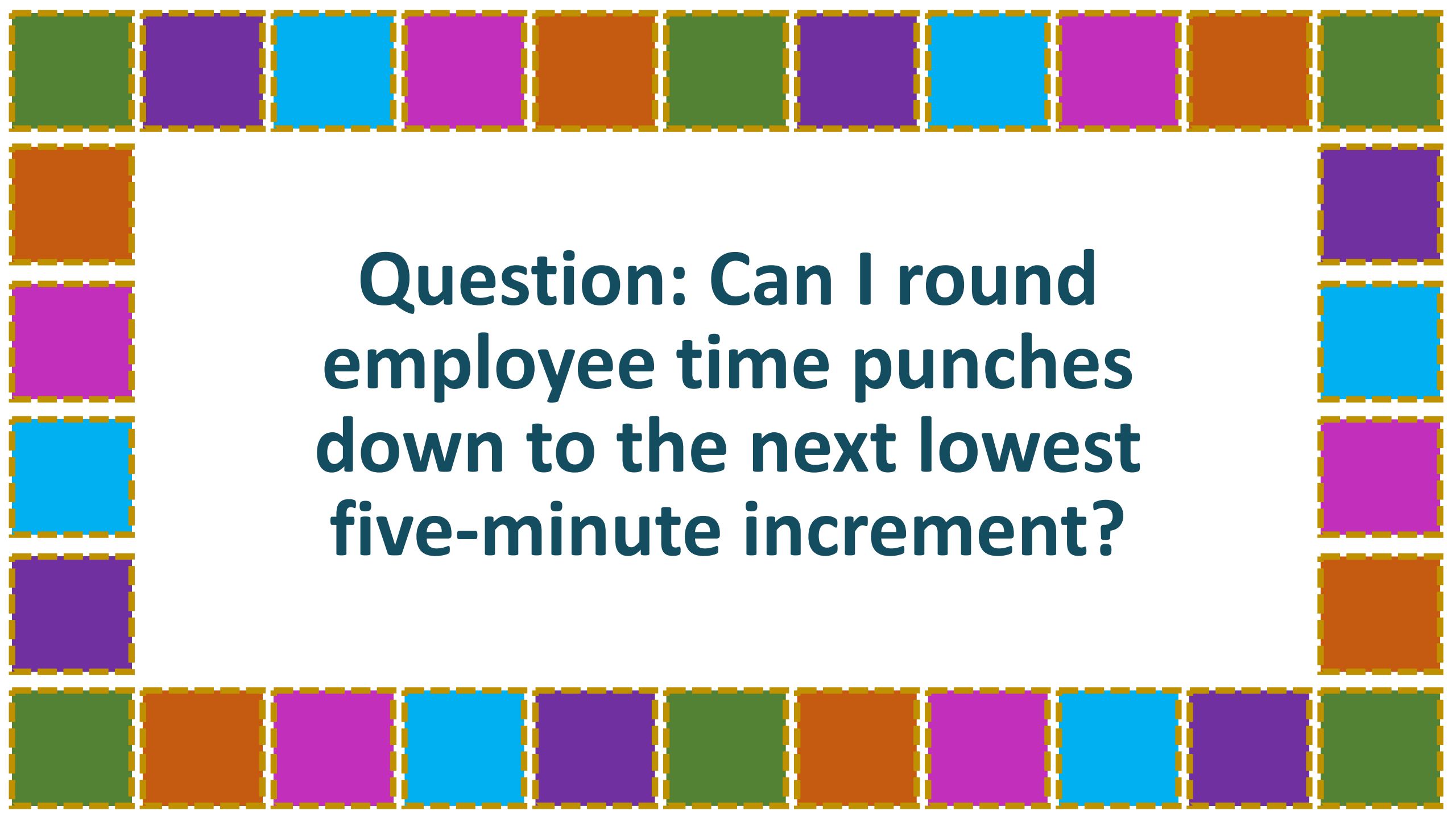


**Question: Do I need to pay employees to attend required pre-shift safety meetings?**

# Pre- and Post-Shift Activities and Wages

- Employers may be required to pay wages for some employee pre- and post-shift activities:
  - Time spent booting up a computer at a call center—compensable!
  - Time spent in mandatory security screening line—not compensable!
- Compensable activities under Fair Labor Standards Act are:
  - “integral and indispensable” part of employee’s principal activities for employer, or
  - Activities that are compensable by contract, custom, or practice
- **Avoid the Whammy**—large class action cases on these issues have cost employers millions \$\$\$

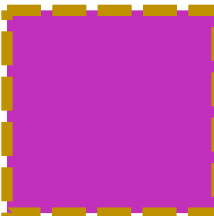
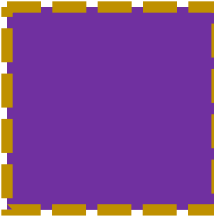





**Question: Can I round  
employee time punches  
down to the next lowest  
five-minute increment?**

# Time Rounding—Avoid a Big Class Action Whammy!

- U.S. Dep’t of Labor allows “rounding” to nearest quarter hour, but....
  - Oregon no longer allows rounding, based on 2022 court decision
  - Washington allows rounding but only if the average rounding benefits employees
  - California courts have not yet totally ruled out rounding, but it is expected to happen very soon, so no rounding will be allowed
- “Wage theft” is the new moniker for these situations
- Class actions across the region are attacking any time clock rounding unless it only rounds up to benefit the employee

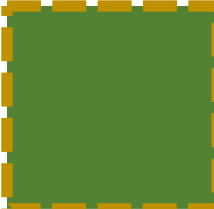
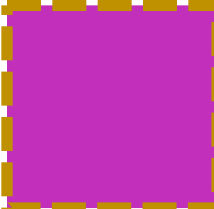
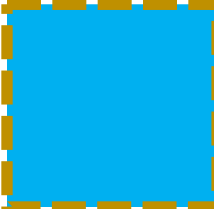
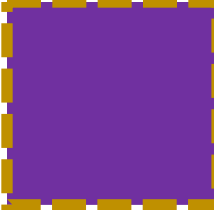




**Question: Can an employer compensate two employees performing similar work differently as long as the difference is based on a non-discriminatory reason?**

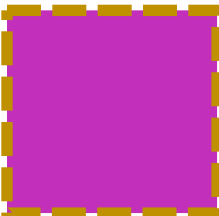
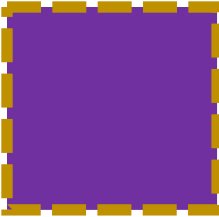
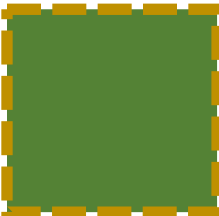
# Pay Equity Obligations—Avoid a Whammy!

- Pay attention to state laws adopted to address historical pay inequity among protected classes of employees (gender, race, etc.).
- Most state pay equity laws also protect employees' right to discuss salary and wages.
- Some states require employers to conduct pay equity analyses on a regular basis or employers have advantages to doing so.
- Employees in the same positions can generally be paid different amounts if employer can demonstrate truthful, legal justifications for pay differences (e.g., experience level, education level, special certifications).



# Pay Transparency

- Some states have adopted laws to require job postings to include pay scale and information on other benefits and compensation.
- According to SHRM, the percentage of job postings with pay information was 10% in 2019, 30% in 2022, and Indeed reports 50% in 2023
- Even if not required by law, pay transparency can be a competitive advantage for employers because applicant rates increase with pay transparency
- **Avoid a Whammy**—employers should review both old and new job postings to ensure compliance with pay equity and transparency laws and union wage scales.



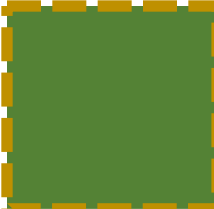
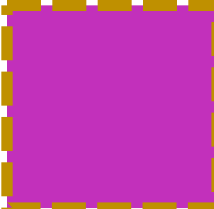
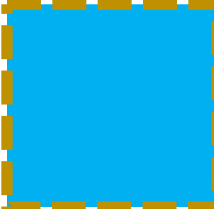
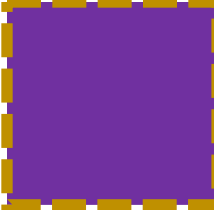


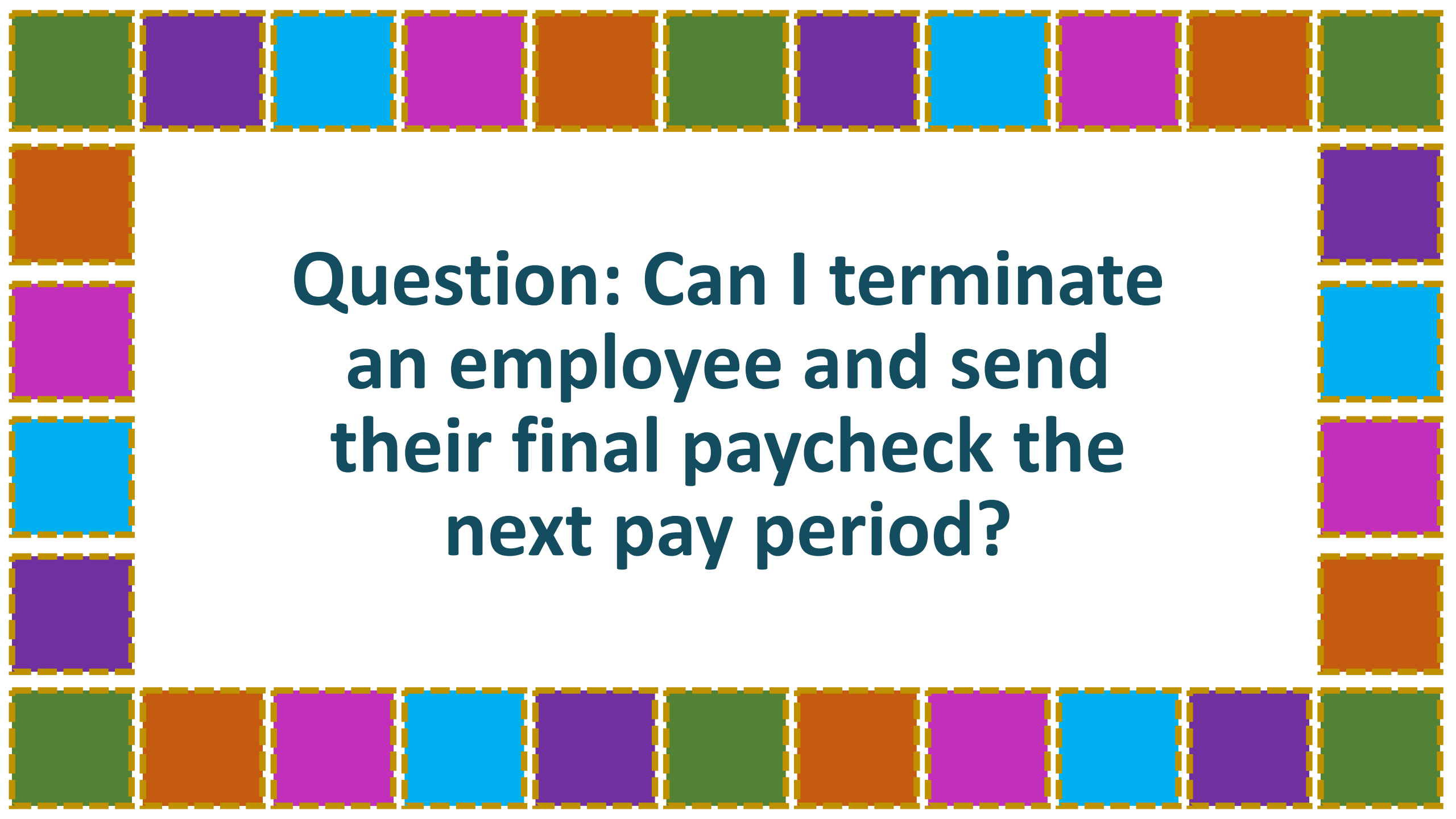


**Question: Can I make all  
my employees sign  
noncompete agreements?**

# Noncompete Agreements Under Fire!

- Employee noncompetition agreements have been under heavy scrutiny for several years in state laws:
  - California bans all employee noncompetition agreements (limited exceptions)
  - Oregon and Washington restrict employee noncompetition agreements
  - Alaska, Montana, Idaho don't broadly restrict, but courts will interpret narrowly
- U.S. National Labor Relations Board joining in, general counsel issues memorandum saying they violate National Labor Relations Act
- Federal Trade Commission also joining in, proposing rule to ban nationwide
- **Avoid a Whammy**—work with state laws to craft nonsolicitation and confidentiality/trade secret protections that still protect employers

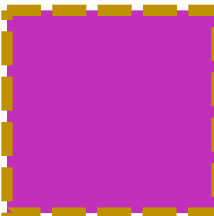
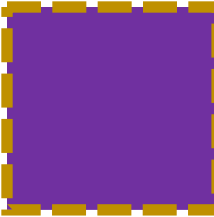





**Question: Can I terminate  
an employee and send  
their final paycheck the  
next pay period?**

# Paystubs and Final Paychecks—Avoid a Parting Whammy!

- Final paychecks are generally due the same day or next day, but all state laws differ!
- Paystubs are required to contain certain information, but the requirements differ by state, for example:
  - Washington requires employee occupation and sick leave law balances
  - Oregon requires the employer's address, phone, and business registry number
- State fines for paystub content violations are high—\$4,000 in California per employee!
- Payroll processors do not always include mandatory information—employer bears burden to ensure paystubs meet requirements!
- Final paychecks also have state limitations on deductions—even if an employee agreed to paycheck deduction, state law may prohibit it!





**Question: If you aren't  
sure how to apply an  
employment law, what  
should you do?  
Answer: Avoid a  
Whammy! Call us!**



**Thank you!**