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Wage and Hour Self-Audits Checklist

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This checklist identifies the main risk categories for wage and hour self-audits. To avoid potentially significant liability for wage and hour violations, employers should consider wage and hour self-audits to identify and close compliance gaps.

For practice notes on conducting wage and hour self-audits, see [Conducting an Audit on Exempt/Non-Exempt Employee Classifications, Auditing Independent Contractor Classifications and Practices and Reclassifying Employees and Independent Contractors, Pay Equity Audits and Best Practices](#), and [Guidelines for Evaluating Employee Wage and Hour Training Programs](#).

For guidance on additional federal Fair Labor Standards Act wage and hour issues, see the [Wage and Hour Practice Notes Page](#). For information on a wide variety of wage and hour issues in all 50 states and the District of Columbia, see [Wage and Hour State Practice Notes Chart](#).

In conducting a wage and hour self-audit, you should consider the following issues:

Preserve the Attorney-Client Privilege/Work Product

Audits often involve the production of documents that would normally be discoverable in a federal or state Department of Labor investigation or wage and hour litigation. Consequently, you should take steps to establish and preserve the attorney-client privilege and work product, to the extent possible, from the outset of the audit. For details on how to preserve the attorney-client privilege and work product protection, see [Preserving the Attorney-Client Privilege and Work Product Protection During Investigations](#).

Evaluate Employer's Wage and Hour Policies and Procedures

Ensure that the employer's policies and procedures comply with applicable federal and state law and that the employer uniformly implements them.

Ensure Employer Corrected Previously Identified Shortfalls

Confirm that the employer corrected compliance gaps identified in prior audits.

Confirm Accuracy of Employee Classifications

In assessing whether the employer has correctly classified employees as exempt or non-exempt for overtime purposes, consider the following:

- **Duties.** Do exempt employees meet all requirements of the executive, administrative, professional, outside sales, computer employee, or highly compensated employee exemption? In evaluating the classification of employees, you should:
 - Review job descriptions and actual duties to ensure that the job descriptions reflect the work being performed by employees.
 - Examine job descriptions to ensure they are accurate, up to date, and justify the applicable exemption –and–

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- o Evaluate each exemption on a case-by-case basis and avoid decisions based solely on job descriptions and/or titles.
- **Compensation amount.** Confirm that exempt employees earn at least \$455 per week on a “salary basis” to ensure that the federal exempt salary basis and threshold is satisfied. Salary basis means an employee regularly receives a set amount of compensation each pay period regardless of the quality or quantity of the employee’s work, although certain types of deductions are permissible (see the section below entitled “Deductions.”). Note the following:
 - o This requirement does not apply to outside sales employees, teachers, and employees practicing law or medicine. Note that not all states (e.g., California) have adopted each of these exceptions to the salary basis rule.
 - o Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour. Confirm that state law does not require a higher rate. In California, for example, computer professional employees must be paid a salary of at least \$90,790.07 annually (\$7,565.85 monthly) or an hourly wage of at least \$43.58 for every hour worked. see [Wage and Hour State Practice Notes Chart](#).
 - o Exempt highly compensated employees must be paid at least \$100,000 annually. Note that not all states (e.g., California) recognize the highly compensated employee exemption.

On November 22, 2016, a federal district court judge in the Eastern District of Texas issued a nationwide preliminary injunction barring enforcement of the DOL’s overtime expansion rule that would have, among other things, raised the salary threshold to \$913 per week (\$47,476 yearly) on December 1, 2016. Thus, the DOL’s overtime expansion rule did not take effect on December 1, 2016, as scheduled. See *Nevada v. United States DOL*, 2016 U.S. Dist. LEXIS 162048, at *33 (E.D. Tex. Nov. 22, 2016). On August 31, 2017, the same federal district court judge in the Eastern District of Texas struck down the DOL’s overtime expansion rule. See *Nevada v. United States DOL*, 2017 U.S. Dist. LEXIS 140522, at *28 (E.D. Tex. Aug. 31, 2017).

- o Confirm that the salary paid to employees classified as exempt satisfy the salary threshold of certain states that maintain thresholds greater than the federal \$455 weekly salary threshold requirement.

For more guidance on exemption requirements, see the [Wage and Hour—FLSA Requirements and Exemptions Practice Notes Page](#).

- **Deductions.** Ensure exempt employees regularly receive a predetermined amount of compensation for every workweek in which they perform any work regardless of the hours, quality, or quantity of work. Confirm that the employer only makes the following proper deductions:
 - o For absences of one or more full days not for sickness/disability.
 - o For absences of one or more full days for sickness/disability if made according to a bona fide plan, policy, or practice of providing compensation for salary loss.
 - o Offsets for amounts employees receive as jury or witness fees/military pay.
 - o Penalties for infractions of major safety rules.
 - o For disciplinary suspensions of one or more full days.
 - o Days not worked in the first/last week of employment –and–
 - o For leave under the Family and Medical Leave Act.

See 29 C.F.R. § 541.602. See also [Docking Pay and the Salary Basis Requirement](#).

- **Safe harbor policy.** Confirm the employer has a safe-harbor policy and procedures to address improper salary deductions. If an employer has made improper deductions from salaries, it will not jeopardize employee exemptions so long as the employer clearly communicates a policy that prohibits improper deductions and provides a complaint mechanism; reimburses employees for improper deductions; makes a good-faith commitment to comply in the future; and does not willfully continue to make improper deductions. See [Safe Harbor Policy for Exempt Employees](#).

Evaluate Independent Contractor Classifications

The worker is more likely to be deemed an employee if:

- The worker’s services form an integral part of the employer’s business.
- The relationship has a longer term or more permanent character.

- The worker did not invest much in facilities and equipment.
- The company exercises control over how, when, and where the worker performs the work;
- The worker does not have any opportunity for profit and loss beyond the hourly compensation or salary received by the worker.
- The worker is prohibited by the employer from providing services to another company –and–
- The worker does not use initiative, judgment, or foresight to compete for business in the open market.

See [Independent Contractor Tests and Risks of Worker Misclassification](#).

Review Employer Internship Programs

In January 2018, the DOL announced its withdrawal from using the previous six-factor text for unpaid internship programs that had been used under the Obama administration. The new test, which has been adopted by the Second, Sixth, Ninth, and Eleventh Circuits, is known as the “primary beneficiary” test.

- **Primary beneficiary test.** The “primary beneficiary” test is flexible, and no single factor is determinative. Accordingly, whether an intern or student is an employee under federal law necessarily depends on the unique circumstances of each case. The test considers the following seven non-exhaustive factors to weigh and balance:
 - o The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee and vice versa.
 - o The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
 - o The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
 - o The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
 - o The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
 - o The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern –and–
 - o The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job after the internship.

For more information on internship agreements, see [Internship Agreements: Major Drafting and Legal Issues](#).

Evaluate How the Employer Calculates and Pays Wages

You should consider the following issues:

- **Minimum wage and overtime.** Determine if the employer pays non-exempt employees minimum wage and overtime according to applicable federal and/or state law. In particular:
 - o Confirm that the employer includes all applicable payments in calculating the regular rate and overtime pay (e.g., non-discretionary bonuses, shift differentials, and other payments) and/or lawfully excludes additional payments from such calculations.
 - o Confirm that deductions for the benefit or convenience of the employer (e.g., uniforms) do not reduce an employee’s rate of pay below minimum wage.
 - o Consider whether special requirements for overtime pay apply (e.g., for hospital workers, non-exempt salaried employees, piecework, multiple jobs, and job/day rates).

See the [Wage and Hour—FLSA Requirements and Exemptions Practice Notes Page](#) and [Wage and Hour State Practice Notes Chart](#).

- **Compensatory time.** Determine whether the employer provides compensatory time to non-exempt employees in lieu of overtime. Note the following:
 - o Only public employers (i.e., a state, a political subdivision of a state, or an interstate governmental agency) may lawfully provide compensatory time in lieu of overtime pay.
 - o Private sector employers must pay overtime when employees work more than forty hours in a week. However, there may be a limited exception for validly implemented “time-off plans,” which provide time off in the same pay period at the time-and-one-half rate.
- **Deductions.** Evaluate the propriety of the deductions that the employer makes. In particular:
 - o Confirm that the state in which the employer operates permits deductions from employees’ wages. (For example, California prohibits employers from deducting from wages unless done so under certain circumstances set forth in Cal. Labor Code § 224.)
 - o If the state does permit wage deductions and permits them for the benefit or convenience of the employer (e.g., uniforms), confirm that such deductions do not reduce an employee’s rate of pay below minimum wage.
 - o Ensure the employer is not making impermissible deductions from exempt employees’ salary basis pay. (See the section above entitled “Compensation amount.”)

See [Making Deductions and Garnishments](#) and [Wage and Hour State Practice Notes Chart](#).

Determine Whether All Hours Worked Are Recorded and Paid

Your analysis should encompass the following:

- **Timekeeping system.** Ensure the employer’s timekeeping system allows for the accurate recording and calculation of hours worked.
- **Compensable time.** Confirm that non-exempt employees record all hours worked including, for example, pre- and post-shift work; compensable training, travel and meeting time; reporting time; work performed at home; on-call time; waiting time (if engaged by the employer to wait); and any time worked during an employee’s otherwise non-compensable meal and break times. Confirm that the employer pays the employees for such time.
- **Rounding.** Determine whether the employer complies with applicable rounding rules. Federal law permits employers to round employee time to the nearest quarter hour. That is, employers may round down – and not count as hours worked – one to seven minutes of work. Employers must round up – and count as a quarter hour of work time – eight to fourteen minutes of work. Rounding is permissible where it is used in such a manner that it will not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked.
- **Meals and breaks.** Confirm that non-exempt employees accurately record non-compensable meal and break times and that they do not perform work at such times. Under federal law, breaks of thirty minutes or more need not be compensable. Employers, however, must pay employees for breaks of twenty minutes or less and include such time in overtime calculations.
- **Off-the-clock policies/procedures.** Determine if the employer has policies and procedures in place that prohibit and prevent off-the-clock work. Determine whether there is a procedure for reporting off-the-clock work.

See the [Wage and Hour—Compensation Practice Notes Page](#) and [Wage and Hour State Practice Notes Chart](#).

Review the Employer’s Provisions for Nursing Mothers

You should consider the following issues concerning breastfeeding mothers:

- **Location and time for breaks.** Be sure the employer provides non-exempt nursing mothers reasonable breaks and a place to express milk (other than a bathroom). Federal law does not require breaks for exempt employees.
- **Exemption from requirements.** If the employer does not provide breaks or private location for nursing mothers to express milk, determine whether it is exempt from such requirements because it has fewer than fifty employees and can establish undue hardship. Note that state law, however, may also impose lactation break requirements.

- **Similar treatment of employees.** Generally, breaks to express milk are not compensable under federal law. However, if an employer provides compensated breaks, the employer must compensate an employee who uses break time to express milk in the same way that it compensates other employees for break time.
- **Relieved from work.** Determine whether nursing mothers are completely relieved from work when taking breaks to express milk. If not, the employer must compensate the time as work time.

See 29 U.S.C. § 207(r). For more information on federal lactation break requirements, see [Understanding Meal Period and Rest Break Requirements — Lactation / Nursing Accommodation / Breastfeeding Breaks](#) and [Lactation/Breastfeeding Policy](#). For state law lactation break requirements, see [Wage and Hour State Practice Notes Chart](#).

Confirm Compliance with Child Labor Restrictions

The employer must comply with the following federal restrictions for non-agricultural jobs:

- **Minors age 18 or older.** No restrictions on jobs or hours.
- **Minors age 16 and 17.** May perform any job not declared hazardous by the Secretary of Labor, and are not subject to restrictions on hours.
- **Minors age 14 and 15.** May generally work outside school hours in various nonmanufacturing, non-mining, nonhazardous jobs listed by the Secretary Labor in regulations published at 29 C.F.R. Part 570 under the following conditions:
 - o No more than three hours on a school day, eighteen hours in a school week, eight hours on a non-school day, or forty hours in a non-school week.
 - o They may not begin work before 7 a.m. or work after 7 p.m., except from June 1 through Labor Day, when evening hours are extended until 9 p.m.
 - o Permissible work for 14- and 15-year olds is limited to those jobs in the retail, food service, and gasoline service establishments specifically listed in the Secretary of Labor’s regulations –and–
 - o Those enrolled in an approved Work Experience and Career Exploration Program (WECEP) may work up to twenty-three hours in school weeks and three hours on school days (including during school hours).

See [Navigating the FLSA’s Child Labor Restrictions](#).

Evaluate the Employer’s Recordkeeping Practices

Is the employer maintaining at least the following records?

- Personal information (employee’s name, home address, occupation, sex, and birth date if under 19 years of age)
- Hour and day when workweek begins
- Total hours worked (each workday and each workweek)
- Total daily/weekly straight-time earnings
- Regular hourly pay rate for week when overtime is worked
- Total overtime pay for the workweek
- Deductions from or additions to wages
- Total wages paid each pay period
- Date of payment and pay period covered
- Specific information for homeworkers, employees working under uncommon pay arrangements, employees to whom lodging or other facilities are furnished, and employees receiving remedial education

See [Understanding Records Maintenance and Retention Requirements Under the FLSA](#).

Determine Whether Industry-Specific Requirements Apply

Does the employer comply with all wage and hour requirements applicable to its industry (e.g., agriculture, automobile dealers, restaurants, construction, garment, government contractors)?

Review the Employer's DOL Posters and Notices

Has the employer satisfied all applicable posting and notice requirements, including industry-specific requirements? Many states and cities also require employers to post certain notices advising employees of their wage and hour rights, in addition to providing employees with written notices upon hire and when the employer changes certain terms and conditions of employment (e.g., pay rate, pay day, pay period). Confirm that all such posting and notice requirements are met. See [Complying with Federal Wage and Hour Poster and Notice Requirements](#). For state wage and hour poster requirements, see [Wage and Hour State Practice Notes Chart](#).

Determine State Wage and Hour Requirements Applicable to the Employer

Federal and state law may significantly differ in many areas and employers must generally comply with the provisions most protective to employees. You should:

- Determine whether and to what extent the employer complies with applicable state wage and hour requirements –and–
- Ensure the employer's wage and hour policies/procedures reflect applicable state law requirement.

See [Wage and Hour State Practice Notes Chart](#).

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