

# PAY NOW OR PAY LATER: HOW TO RESPOND TO A WAGE AND HOUR AUDIT AND AVOID VIOLATIONS

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## I. THE WAGE AND HOUR AUDIT PROCESS.

### A. Why Me?

1. The Department of Labor enforces over 180 separate federal statutes, including the Family and Medical Leave Act (“FMLA”) and the Occupational Safety and Health Act (“OSHA”).
2. This presentation covers audits of an employer’s obligations under the Fair Labor Standards Act (“FLSA”), a New Deal era statute passed in response to the Great Depression.
  - a. The Wage and Hour Division may also audit FMLA, some immigration laws, employee benefit plans and regulations concerning the garnishment of wages.
  - b. Most common audits over:
    - i. Minimum wage
    - ii. Overtime
    - iii. Employee classification
      - (A) Is the employee “exempt” from the wage and hour laws because of the type of work the employee performs?
      - (B) Regulations on this issue are in a constant state of flux.
    - iv. Child labor laws
    - v. Unpaid work
      - (A) Donning and doffing
      - (B) Post-shift security screens
    - vi. Recordkeeping
3. What triggers a Wage and Hour audit?
  - a. Employee complaints
    - i. These are confidential

- ii. The DOL does not even have to confirm that an employee complaint was filed
  - b. Policy/targeted industry or locations
  - c. Random selection
- B. How Do I Know?
  - 1. You will get a letter in the mail or by email. ***Not required*** but it is typically done so that records will be available.
  - 2. Typically provide for short notice, often less than a week.
  - 3. This notice provides for on-sight “visit” that includes review of records and employee interviews.
- C. What Do I Do?
  - 1. Contact your attorney.
  - 2. Designate a point person. This is to control what information is provided to the DOL.
  - 3. Do not make or destroy evidence.
  - 4. Do not retaliate against any employee you think may have filed a complaint.
  - 5. Cooperate. It is an adversarial process, but it does not have to be contentious.
  - 6. Keep notes of every interaction, every document produced, etc.
- D. What Will Happen?
  - 1. Opening conference or meeting to discuss what the auditor intends to do.
  - 2. Auditor will review records and interview employees.
  - 3. The process is not supposed to disturb your business operations.
    - a. Find a place for the auditor to review records and interview employees.
  - 4. Employee interviews are to verify the information in the records, including hours worked and the job duties for those employees whom you claim are exempt.
    - a. You may not participate in employee interviews, but may be interviewed.
    - b. May have an attorney for managerial employees, but not other employees.

5. The auditor may ask for additional records. If the auditor believes there was willful non-compliance, the auditor may ask for three years of records.
6. When the investigation is completed, the auditor will call a meeting to reveal the results of the audit and provide a written report.
  - a. May assess fines, back wages, etc.
  - b. May make recommendations on improved processes
  - c. You may agree with the findings and negotiate a settlement
  - d. You may appeal and litigate in court

II. COMMON WAGE AND HOUR VIOLATIONS AND PENALTIES OWED

- A. More investigators and investigations, but less money recovered
- B. Current DOL appears to be targeting specific industries and regions
- C. What are potential penalties:
  1. Backpay
  2. Liquidated damages equal to the backpay
  3. Attorneys' fees and costs
  4. Fines

III. HOW TO CONDUCT AN INTERNAL AUDIT AND RESOLVE VIOLATIONS PROACTIVELY

- A. Employee classification
  1. Law is constantly changing on this issue
  2. "Default" is that employees are *not* exempt
  3. Annual or semi-annual review of job descriptions and actual work performed by employees in "grey area" and independent contractors
- B. Review overtime and rate of pay calculations
  1. This is important if you have employees who work in different jobs where rate of pay is different.
  2. Non-discretionary bonuses must be included.

3. This is a calculation issue, but you have to make sure you are using all of the correct information.
- C. Review recordkeeping
1. Make sure time records are accurate and employees are signing in and out at appropriate times.
  2. Review time off and leave policies to make sure they are compliant and being followed.