

Wage and Hour Compliance Checklist

How to avoid class actions and prepare for a government audit



Will Rogers once said, “Everything is funny as long as it is happening to somebody else.” Employee wage and hour class actions and government audits are never funny. Just ask the president of a sheetrock company sentenced in 2012 to two years in jail, while also facing a potential fine of \$3.3 million for intentionally underpaying employee overtime and union pension and benefit contributions.

Employee lawsuits alleging non-compliance with wage and hour laws are up, and the Department of Labor (DOL) is planning more employer audits to see if you are complying with wage and hour regulations. One estimate is that 70 percent of employers audited are found to have violated regulations. Are you ready? Odds are you aren’t.

Take action now so you have good defenses against a wage and hour lawsuit and are prepared for a government audit. Here is a compliance checklist:

1. Check 1099s (current and past five years) for those paid as independent contractors and review their job duties to verify they were not employees.
2. Examine your job descriptions to make sure they accurately reflect the work done and justify applicable exemptions from overtime requirements.
3. Identify the circumstances, if any, where salaried employees were not paid a full week’s salary. Identify situations where non-exempt employees were required to be on the premises while off the clock, or where they may have been restricted in their activities while off the premises.
4. Review your time-keeping system so that non-exempt workers are being paid for all work performed—including pre- and post-shift work and during meal breaks. (You should not automatically deduct time for employee meals or breaks without verifying they are being taken.)
5. In Washington, you need to “round time” following the seven-minute rule. When employees are up to seven minutes late, they must be paid for the entire quarter hour; if they are eight to 14 minutes late, payment may begin at the nearest quarter hour. If they clock out seven minutes before the end of their shift, they must be paid to the end of that shift; if they clock out eight minutes prior to the end of their shift, their payment may stop at the nearest quarter hour.
6. Payroll records and written policies and procedures should be current and accurate.
7. Train staff members so they understand that exempt status is a matter of law and cannot be altered by agreement between employer and employee. Inform them that senior management requires compliance with wage and hour laws.
8. Encourage employees to resolve any wage questions directly with their employers, without fear of retaliation. Confirm written policies that set out procedures for employees to challenge improper deductions.
9. Write up employees who fail to comply with your punch-in, punch-out, and rest and lunch break rules.
10. You have the right to refuse to allow the DOL investigator on-site without a search warrant. Consenting to an investigation, rather than demanding a subpoena, is usually advantageous. Seek to clarify the scope of the investigation. Does the audit pertain to one or two categories of workers (i.e., office workers or factory workers)? If so, there should be no need to produce records for other groups. You may request 72 hours to comply with any investigative demand.
11. Mark the documents you give to the DOL as confidential and proprietary. Protect trade secret information and keep duplicates of documents of every record produced.
12. Meet with company witnesses to review matters covered by the audit. Escort the DOL investigator through inspections of the workplace.

These “best practices” can help prepare an employer for a potential wage and hour class action and government audit; however, employers are advised to consult with experienced legal counsel to ensure that they are in compliance with wage and hour regulations.

D. MICHAEL REILLY, a shareholder at Lane Powell and director of the firm’s Labor and Employment and Employee Benefits Practice Group, represents small and large employers in all facets of employment-related issues and litigation. He can be reached at reillym@lanepowell.com or 206.223.7051.