



WEB EXCLUSIVE - Do Good Audits Exist? Minimizing Damages In FLSA Cases

Insights

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Tax season is in the rearview mirror, and you can only hope that the IRS will not take a second look at what you filed. Perhaps the only thing worse than completing your tax returns is finding out that you're being audited. Common responses to undergoing an audit may involve gnashing of teeth, pulling of hair, and other forms of self-inflicted minor violence.

But not all audits are bad. (Well, maybe all *tax* audits are bad.) Under the federal Fair Labor Standards Act (FLSA), conducting an *internal* audit of your company's pay practices may save your company money in the unfortunate event that a court finds an FLSA violation.

FLSA Compliance Can Be Challenging

The FLSA, of course, is the federal law that establishes wage and hour requirements like minimum wage and paying overtime. The FLSA's overtime requirement in particular provides a challenge to employers. The basic rule is fairly straightforward: most employees must be paid at a rate of one-and-a-half times their "regular rate" for hours worked over 40 hours in a workweek. But what appears simple at first can, in fact, make compliance challenging.

For example, one of the more complex aspects of the FLSA is determining the dividing line between which employees are or aren't entitled to overtime pay. In FLSA-speak, this line is between non-exempt employees (those entitled to overtime) and exempt (those not entitled). While the FLSA contains various exemptions, the exemptions most commonly relied upon are the executive, administrative, and professional exemptions.

A good example of the challenges faced by employers when classifying workers is determining the employee's "primary duty." Under U.S. Department of Labor regulations, "primary duty" is vaguely defined as "the principal, main major, or most important duty that the employee performs."

Employers must consider several factors—such as the amount of time spent performing exempt tasks, the employee's freedom from supervision, and the employee's wages compared to nonexempt employees—to determine whether the employee's "primary" duty supports an exemption. The result is a complicated, highly fact-specific analysis.

What Is An FLSA "Audit"?

Self-initiated wage and hour reviews, or "audits," can take several forms. Generally, audits will entail a review of documentation related to the positions under review, such as job descriptions, pay

records, and pay plans. At times, companies administer these self-audits on their own, or they could enlist the assistance of trained employment lawyers to conduct the review. Audits may involve conducting interviews of human resources personnel and higher-level management. At the conclusion of the audit conducted by legal counsel, your company will typically receive a legally privileged written assessment of the audit's findings.

Should My Company Conduct an Audit?

An audit may lessen your company's exposure to liability under the FLSA. On the front end, conducting an audit—whether it reviews one position, all classifications, or the timekeeping and related pay practices of a company—will help identify violations and gray areas so that a company can engage in a meaningful analysis and make informed decisions. On the back end, an audit may show good faith to a court that your company attempted to comply with the FLSA even if the pay practice ultimately is found to have violated the law.

Specifically, employees who successfully bring FLSA actions often are entitled to liquidated damages equaling their actual damages. If a company can show it acted in good faith, possibly by relying upon the advice of legal counsel after a wage and hour review is conducted, it may be able to avoid some or all liquidated damages.

Accordingly, you should consider many factors before deciding to move forward with a wage and hour review. For example, you may want to consider the following:

- Do you have uncertainty regarding whether your company has properly classified some of its employees or whether your company's pay practices comply with the FLSA?
- Do you believe that your company has a higher-than-normal legal risk of a group of employees bringing an FLSA collective action to challenge their classification status or the pay practices of your company?
- Can your company afford the risk? Keep in mind that where a group of employees band together in a collective action, damages can quickly climb to millions of dollars.

The Bottom Line

Of course, conducting a wage and hour audit, even one with the assistance of knowledgeable legal counsel, cannot undo the past. But it can put you in a better position going forward. Not only may it eliminate liability going forward in most scenarios where you make changes, but it could reduce liability should the audited practice ultimately be deemed improper because your company acted in good faith in seeking to comply with the FLSA.

While a wage and hour audit is not necessary or appropriate in every circumstance, making a good faith effort to comply after the review has been conducted may save you greatly if the issue is later contested. That is, you may find that not all audits are bad, and some can actually even be beneficial to your business.

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