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Wage & Hour Self-Audit Checklist

The Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing the Fair Labor Standards Act (FLSA). In the last few years, the WHD has hired and trained hundreds of additional investigators to carry out its enforcement efforts and has increased the number of "directed investigations," which target certain businesses even though there has been no complaint filed. Given the WHD's heightened focus on FLSA compliance, it is a best practice for employers to review their pay practices for adherence to the law. The following is a checklist to help you review your practices in four key areas of the FLSA.

Overtime:

Under the FLSA, non-exempt employees must be paid overtime whenever they work more than 40 hours in a workweek. The overtime rate is 1.5 times the employee's "regular rate of pay." **Note:** Some states have additional overtime requirements, including a daily overtime rate. Check your state law to ensure compliance.

Self-Audit Check:

- **Are you paying overtime to non-exempt employees whenever they work more than 40 hours in a workweek?** If a non-exempt employee has worked more than 40 hours in a workweek, he or she must be paid overtime, regardless of whether the overtime was authorized. An employee's hours may not be averaged over two workweeks to determine whether overtime is due. In addition, an employee may not waive his or her right to overtime.
- **Does your timekeeping system accurately record all hours worked?** Employers are free to choose any timekeeping system they wish, provided it accurately and completely keeps track of all hours worked. It is a best practice to track time to the minute worked and have employees sign off on their time records for each pay period.
- **Do you have controls in place to prevent "off-the-clock work?"** Employees may not be asked, required, or permitted to work "off-the-clock." It is a best practice to have a written policy that requires employees to record all time spent working and to specifically prohibit working when the employee is not punched in. In addition, it is a best practice to require employees to punch out for meal periods, expressly prohibit

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employees from working during this time, and to encourage employees to eat their lunch away from their work station. If non-exempt employees do perform work outside of their normal schedule, it is critical to have a means for the employees to promptly record and document such time.

- **Are you including rest breaks in hours worked?** Rest breaks are considered hours worked and therefore must be paid and included when determining overtime. The WHD defines a rest break as any period lasting 20 minutes or less that the employee is allowed to spend away from work. In addition, certain other activities may also be considered "hours worked" and therefore compensable under the FLSA (e.g., time spent in training, time spent "donning and doffing" work gear and certain time spent traveling). It's important to ensure all compensable time is considered when determining whether overtime is due.
- **Are you determining an employee's "regular rate of pay" in accordance with the law?** An employee's regular rate of pay is calculated by dividing the total pay for employment (except for certain statutory exclusions) in any workweek by the total number of hours actually worked. In determining an employee's regular rate of pay, the following must be included:
 - Salary or hourly rate of pay;
 - Reasonable cost of employer-provided room and board;
 - Tips;
 - Commissions;
 - Piece rate;
 - Nondiscretionary bonuses (bonuses promised to employees before the work begins);
 - On-call pay;
 - Cash payments under a cafeteria plan; *and*
 - Shift differentials.
- **Are you calculating and paying overtime in accordance with the law?** Under the FLSA, employers are prohibited from paying overtime as a fixed sum for varying amounts of overtime, even if the amount of money paid is equal to or greater than the sum owed on a per-hour basis. In other words, employers must actually calculate and pay overtime each time it is worked. Additionally, private employers may not offer "comp time"--paid time off instead of cash payment--for working overtime hours. Further, an employee's overtime pay may not be reduced for any reason, such as for deductions for loss, cash shortages, etc.

Exemptions:

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The FLSA includes exemptions from overtime requirements for certain administrative, professional, executive, highly compensated, outside sales, and computer professional employees. To qualify for one of these exemptions, very strict salary and duties tests must be satisfied.

Self-Audit Check:

- **Does the employee meet all requirements for exemption?** Each exemption has its own salary and duties test. If the employee's salary or primary duty fails to meet the exemption's tests, the employee must be classified as non-exempt. It is important to note that the employee's actual job duties are the pivotal factor when making this determination and not the employee's job title. The Department of Labor (DOL) has published a number of fact sheets to assist employers in making this determination. When in doubt, it is a best practice to classify the employee as non-exempt.
- **Is a majority of the employee's work "exempt-level"?** Employees who spend more than 50 percent of their time performing exempt-level work, as defined by the duties test of the exemption, will generally satisfy an exemption's primary duty requirements. **Note:** Time alone isn't the sole factor; employers should carefully review the applicable exemption test when making this determination.
- **Do you have accurate job descriptions?** Accurate job descriptions can be helpful when determining whether an employee is exempt or non-exempt. It is important to review and update job descriptions on a regular basis.
- **Are you complying with the exemption's salary-basis requirements?** Employers must generally pay exempt employees on a salary basis. This means exempt employees must receive their full, predetermined salary each pay period regardless of the number of hours worked or the quality of the work. There are only a few limited exceptions to this requirement:
 - When an employee is absent for one or more full days for personal reasons other than sickness or disability;
 - To offset jury or witness fees, or for temporary military duty pay;
 - For penalties imposed in good faith for infractions of safety rules of *major* significance;
 - For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct infractions;
 - In the employee's first or last week of employment if the employee does not work the full week; or
 - For unpaid leave taken by the employee under the Family and Medical Leave Act.

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Deductions from exempt employees' salary for any other reason are **not** permitted by the FLSA.

Employee vs. Independent Contractor Classification:

The FLSA does not apply to bona fide independent contractors. Thus, independent contractors are not entitled to the minimum wage or overtime. However, it is important to remember that a worker is presumed to be an employee unless he or she meets specific, narrow criteria for independent contractor status.

The WHD has made the misclassification of employees as independent contractors a priority in its enforcement efforts. The WHD uses an "economic reality" test for the purposes of determining whether the individual is considered an employee, and therefore, covered by the FLSA. Under this test, an employee is someone who, as a matter of economic reality, is dependent upon the business to which he or she renders service. Consider working with legal counsel when making this classification.

Self-Audit Check:

- **Have you applied the WHD's "economic reality" test to every individual classified as an independent contractor?** Any individual who fails to meet this test must be considered an employee under the FLSA. When in doubt, the employer should classify the individual as an employee and pay him or her in accordance with the FLSA. **Note:** In addition to the WHD's test, the IRS, Equal Employment Opportunity Commission, and many states have their own employee vs. independent contractor tests for determining whether an individual is subject to certain tax requirements, is protected under non-discrimination laws, or is eligible for workers' compensation.
- **Have you documented the factors used to determine an individual's status?** It is a best practice to document each factor used when applying independent contractor tests.
- **Do you review classifications regularly?** Because relationships can change over time, it is vital to review classifications regularly.

Recordkeeping:

The FLSA requires employers to retain certain payroll and time records on each employee.

- **Are you retaining time cards and time sheets for at least two years?** The FLSA requires that employers retain time cards, work schedules, and other records on which wage calculations are based for at least two years.

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- **Are you retaining payroll records for at least three years?** The FLSA also requires employers to retain payroll records for at least three years, including:
 - Total hours worked each work day and each workweek;
 - The total daily or weekly straight-time earnings;
 - The total overtime pay for the workweek;
 - Deductions from, or additions to, wages;
 - Total wages paid each pay period; and
 - Date of payment and the pay period covered by the payment.

Note: Payroll records required for tax purposes should be retained for at least four years.

Compliance Recommendations:

The FLSA's requirements are extensive and go beyond what is summarized above. It is a best practice to review policies and practices and conduct comprehensive self-audits regularly to assess compliance with the FLSA. In addition, employers should remember that their state may have more stringent requirements than the FLSA's. Employers can find information on state wage & hour requirements in the Compliance Database section of HR411, including state by state comparison charts on: *Minimum Wage, Overtime, Breaks/Rest Periods, Wage Payment, and Employee Records.*