# Wage and Hour Checklist

Wage issues are some of the most frequent, expensive, and challenging employer compliance problems. Compliant wage practices and classifications are your first and best defense. In order to best withstand a Department of Labor Wage and Hour Division investigation or audit, business owners and HR professionals must understand wage concepts such as the minimum wage and overtime and should be aware of all relevant state and federal wage and hour rules.

## Warning about Internal Audits

It can be beneficial to conduct an audit of an organization’s wage and hour practices. Conducting an internal wage and hour investigation or audit can be critical to your compliance efforts. However, the findings from your investigation can, and will likely, become part of regulatory or legal proceedings against the employer. In legal proceedings, documents relating to a case that must be preserved and potentially shared are called “discoverable”.

If the employer does not address the problems it found in the audit, it can increase the employer’s liability. In other words, the audit would be evidence *against* the employer because then the mistakes were equivalent to willful violations (assuming no corrective action was taken). Fines and penalties from willful violations tend to be much more serious and can impart personal liability for those involved. To minimize the risk of audit findings being used against the employer, have an employment attorney conduct the audit or conduct the audit according to their oversight. When an audit is conducted by an attorney or at their direction, the results are protected by attorney client confidentiality and are considered privileged.

## Six Quick Tips

1. Make sure all non-exempt employees receive at least the relevant minimum wage for all hours worked.
2. Familiarize yourself with the overtime exemption criteria and remember that simply because an employee is paid on a salaried basis does not automatically disqualify the employee from entitlement to overtime compensation.
3. Secure and maintain signed timesheets from all non-exempt employees verifying their hours worked. Retain such timesheets for at least three (3) years or longer under relevant state laws.
4. Avoid prorating/reducing an exempt employee’s salary based on the quantity or quality of work performed, unless such a deduction is specifically permitted by law.
5. Familiarize yourself with the meal, break and lactation break laws that pertain to the states in which you employ personnel.
6. Ensure that employees are properly classified as either W-2 employees or 1099 independent contractors in accordance with the IRS and EEOC guidelines.

## Wage and Hour Questions to Ask

The checklist below outlines several wage issues about which you should understand or concepts to ask about. These do not cover every possible wage and hour violation but give a general idea of what to look out for. Remember employees may be subject to multiple wage and hour regulations on the municipal, state and federal level. The wage regulation most beneficial to the employee must be followed. For example, if you have employees in or who visit California for business, there are strict rules for many of the below subjects in addition to federal regulations. If you have practices that violate any of the below subjects, they should to be corrected or discussed with your employment counsel. Be aware that this list is thorough, but is by no means all encompassing.

[ ]  Employer Coverage

* Is the organization engaged in interstate commerce or otherwise covered under the Fair Labor Standard Act or “FLSA”? (FYI: nearly all organizations are covered.)

[ ]  Workweek, payday, payment of wages and pay period

* Do employees complete a current version of the form W-4 and any relevant state withholding forms?
* What is the seven day workweek for the purposes of overtime calculation?
* What is 24 hour period that defines a workday if daily overtime applies in your state?
* What is the payroll cycle, pay days, how frequently are wages paid and do they comply with relevant states wage payment laws?
* Is a mandated requirement of “direct deposit” of wages permitted in your state if used?

[ ]  Employee Classifications

* Has the organization properly classified employees and non-employees such as independent contractors?
* Have independent contractor statuses been analyzed using tax and employment tests such as the IRS Criteria, economic realities tests or other relevant state regulations?
* Are there clear boundaries between employees, independent contractors, interns and volunteers? (FYI: this is rare and typically only allowed in certain situations at non-profits.)

[ ]  Overtime and the Minimum Wage

* Verify that all non-exempt employees are earning at least the minimum wage at either the state, municipal, or federal level, whichever is highest.
* Are non-exempt employees paid an overtime rate of time and one-half their regular rate of pay for all hours worked over 40 hours in the workweek or in other situations dictated by state law?
* Ensure that the overtime rate is being calculated correctly based on the “regular” rate of pay.
* Does the overtime rate include applicable amounts such as non-discretionary bonuses?

[ ]  Non-Exempt and Exempt Employees

* Are all employees classified as non-exempt or exempt from wage and hour laws according to states or federal criteria?
* Do the job duties and actual work of exempt employees meet the relevant tests to be considered exempt from overtime?
* Are applicable exempt employees paid on a bona-fide salary basis test according to the Department of Labor or relevant state agency regulations?
* Are exempt employees paid at least the minimum salary of $455 per week or higher according to state law?
* Do all deductions from salary fit into the limited criteria of allowable deductions under the salary basis test?

[ ]  Salary Basis Safe Harbor

* Does the organization have a clearly communicated policy prohibiting improper salary deductions?
* Does the organization have a complaint mechanism to reimburse employees for any improper deductions?

[ ]  Wage Deductions

* Has the organization analyzed all wage deductions to ensure they comply with relevant laws?
* Are non-standard deductions to paychecks such as uniform expenses, expenses for tools, etc. authorized in writing by employees and are in conformance with your state’s wage and hour regulations?
* Has the organization ensured that appropriate deductions do not take employee wages below the minimum wage?

 [ ]  Rest and Meal Periods

* Verify whether there are any state requirements for mandatory meal and rest breaks.
* Does the company offer paid or unpaid meal periods according to relevant state law or its policies or contracts?
* Does the company offer short paid rest periods if required under state law?
* Does the organization offer reasonable time for lactation breaks and a private non-bathroom location for employees to express breast milk?
* If so, verify that non-exempt staff is adhering to any rest and meal requirements.

[ ]  Off the Clock Work

* Does the organization pay non-exempt employees for all hours worked?
* Does the organization have a clear policy on off the clock work?
* Do you train non-exempt staff and supervisory personnel on the requirements to accurately complete time reporting records such as time sheets?

 [ ]  Travel Time Pay

* Does the organization pay for employee travel time when applicable according to wage and hour regulations?
* Are FLSA guidelines followed for non-exempt employees traveling overnight on company business?

[ ]  Expense Reimbursement

* If employees drive their own cars for work, is mileage tracked and are employees paid according to the current annually updated IRS mileage reimbursement rate?
* Are employees reimbursed for costs incurred in the scope of employment when required?

[ ]  Payday Frequency

* Are employees paid wages on a regular consistent time period and on time?
* Does the company’s wage payment cycle comply?
* Does the company have direct deposit form for all employees who elect direct deposit?

[ ]  Wage Related Posters and Notifications

* Are the federal minimum wage poster and relevant state wage posters posted in all worksites?
* Do employees receive wage notifications at hire if required under state law?

[ ]  Minor Employees

* Are minors prohibited from working in occupations hazardous their health according to the FLSA?
* Does the organization understand the FLSA and relevant state minor employment regulations specific to the age of its minor employees?
* Does the organization have state specific minor employment certificates if applicable?

[ ]  Reporting Time Pay

* Does the organization pay state specific reporting time pay rules that may apply?

[ ]  Record Keeping

* Are all FLSA wage records such as timesheets retained for at least three years or longer according to state or other relevant federal laws?
* Are employee payroll and wage records physically secured?
* Does the organization have a records retention policy and complete proper destruction?

 [ ]  Employee Wage Rights

* Does the organization prohibit retaliation against employees who have raised a wage complaint or assisted with a wage investigation?
* Have polices that prohibit wage, working conditions and employee benefits been removed from the employee handbook and do managers understand why?

[ ]  Final Pay

* Are all wages for a departing employee paid on or before the employee’s next regular scheduled payday or sooner according to state law?
* Do final wages include accrued commissions, accrued vacation or other amounts that may be required to be paid under employer policies, contracts or according to state law?

## Dealing with an Investigation

The Department of Labor and various state agencies that enforce wage and hour regulations have the authority to conduct workplace inspections regarding wage and hour issues.

The important thing to remember is that these inspections can be complex in their scope and that legal counsel should be involved as soon as possible even if they will not be present for the meetings. Usually these investigations have a very specific scope. These investigations are not usually conducted randomly but are a result of an employee complaint. As a result these investigations can vary.

Wage and hour complaints are confidential. The name of the worker and the nature of the complaint are typically not shared with the employer. Whether or not a complaint exists may not be disclosed. Employees who have filed complaints or provided information during an investigation are protected under the law. Employers cannot discriminate or terminate employees for having made a complaint or assisted with an investigation. Employees who have been retaliated against may sue, seeking reinstatement to their jobs and payment of wages lost in addition to other damages.

## Investigation Steps

1. Employers can be represented by their attorneys at any point in an investigation process.
2. Ask the Department of Labor to schedule the meeting or investigation at a mutually convenient time. Begin by contacting your employment attorney for legal advice and help getting your documents prepared.
3. If your attorney has guidance that differs from anything below, we recommend that you follow the legal advice of your employment counsel.
4. Let employees know your commitment to wage and hour law compliance and that there will be absolutely no retaliation of any kind against employees who may have brought a concern or those who assist in an investigation into wage issues.
5. When the investigator has advised the employer of his/her findings, the employer or representative may present additional facts for consideration if violations were disclosed.
6. Hold a training and communicate policy changes to employees if applicable.
7. After the investigation is concluded, review the issue and other wage practices to ensure future compliance.

## Wage and Hour Issue Employer Costs

## Employer’s attorney’s fees and court costs, employee’s attorney’s fees and court costs, back wages, liquidated damages, court injunctions, civil financial penalties, increased penalties for repeat and/or willful violations, criminal penalties, including fines and imprisonment.

## In addition, some regulatory agencies will share information. So if an employment department or tax agency is resolving an issue relating to a misclassified independent contractor, it is possible the Department of Labor may begin their own investigation as well. However, as stated before, most investigations are the result of employee complaints.

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