THE LITTLER REPORT

Total Wage and Hour Compliance:

An Initiative to End the Wage and Hour Class Action War

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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INTRODUCTION AND INITIATIVE SUMMARY

"There is a place in Reno, Nevada, that practically mints money. It's not one of the many casinos in town. Nor is it one of the legal brothels that operate in the area. It is a law firm, located in a wing of a private home nestled in the foothills of the Sierra Nevadas . . . . [A]ttorney Mark R. Thierman pursues a practice that in recent years has won his clients hundreds of millions of dollars from some of the biggest names in Corporate America—and produced tens of millions for himself . . . . Thierman sues companies for violating 'wage and hour rules'. . . . [T]his litigation has exploded nationwide. . . . [and] undetonated legal mines remain buried in countless companies . . . ."[1]

The above words introduced *Business Week's* cover story on wage wars that are now raging in workplaces from Florida to California and everywhere in between. Wage and hour class action lawsuits have grown from an infrequent curiosity to a nationwide industry and epidemic. While it is easy to vilify plaintiffs' attorneys such as Mark Thierman and the hundreds more who seek to be part of the wage and hour gold rush, the underlying challenge is less about opportunistic attorneys and more about the incompatibility of 19th century laws with the needs and demands of 21st century employers.

Upon graduating from Harvard, Mark Thierman learned wage and hour law as an associate attorney at Littler, defending employers. The law he learned thirty years ago was already decades old. Brick and mortar factories with bell schedules have gradually been replaced by digital workplaces, often with job descriptions that would have been considered science fiction in the 1930s. Nonetheless, wage and hour laws have survived through generations with little change. Whether the cause is neglect or a lack of political courage, legislative reform at both the federal and state levels is and has been totally inadequate. By the time Mark Thierman transformed himself into one of the nation's most successful and best-known plaintiff wage and hour attorneys, Littler was a distant memory, but the learned lessons of wage and hour law remained current and vibrant.

The wage and hour compliance landmines did not materialize only in this decade. For years, practices and policies drifted and adjusted to changing work environments. Left largely unnoticed in the 1970s and 1980s, wage and hour compliance became viewed as a routine matter impacting individuals. If a claim was brought before an administrative agency, the amount in controversy was rarely noticeable in annual audit reports. In the 1990s this started to change. In 1994, Littler added a class action chapter to its National Employer® book and warned that within a decade, most of the Fortune 500 would have one or more such lawsuits. The magnitude of these "bet the company" cases was, if anything, understated.

How Many Wage and Hour Class Actions Are Being Filed?

The number of wage and hour class actions filed in the federal courts more than doubled from 2001 to 2006,[2] and the pace is not slowing. Examining employment law class actions filed nationwide from October 1, 2007, to March 28, 2008, Littler found 1655 (1147 in federal court; 508 in state court), including 544 in California (137 in federal court; 407 in state court). These numbers are a minimum, as state court reporting systems are only gradually moving online and becoming more comprehensive. Nationwide, over 75% of the class actions filed were wage and hour related (1257 out of 1655), and in California, over 57% percent were wage and hour related (311 out of 544 can be identified as wage and hour related; insufficient data is available regarding more than 120 others, which also may have involved wage and hour claims). Based on this information, California leads the nation in employment class actions filed (544 from October 1, 2007 to March 28, 2008), but Florida, with a population of roughly half of California's population, is in first place on a per capita basis (533 filed in Florida during the same time period).

What is the Size of the Settlements?

Such lawsuits expose employers to "bet the company" jury verdicts and threaten the ability of many companies to continue doing business. In today's class-action-rich litigation environment, wage and hour missteps have led to a veritable parade of horribles including adverse publicity and direct loss in share value. As a result, to avoid financial ruin, many companies are compelled to pay significant amounts to settle these lawsuits.

The year 2007 alone saw the following multi-million dollar wage and hour class action settlements involving well known and highly respected employers within the specified industries:

- $87 million – package delivery industry
- $65 million – computer industry
- $53.3 million – supermarket industry
- $38 million – office supply industry
- $14 million – financial services industry
- $14 million – beverage bottling and distribution industry
- $12.6 million – telecommunications industry

What Wage and Hour Issues are Being Litigated?

In addition to the expanding number and size of class actions, the wage and hour issues also are multiplying. While unpaid overtime cases remain the largest single claim, missed meal and rest break cases are proliferating. Off-the-clock allegations, unpaid donning and doffing work time claims, and unpaid travel time are also becoming commonplace. Focusing primarily on state law requirements, creative and well-funded plaintiffs' counsel are now examining every possible micro-violation of the wage and hour statutes. Expense reimbursement claims, inaccurate wage statements, and the use of out-of-state banks are increasingly more common causes of actions in California.

Absent a strategy to counter this trend, the phenomenon of the wage and hour class action will continue to grow in volume, complexity and variety, and will continue to cost employers hundreds of millions of dollars in settlements, damage awards, statutory penalties, litigation expenses, business costs and lost productivity.

Is There a Silver Bullet?

Employers need to awaken to this crisis and attack it from every direction. Legislative reform, revised regulations, new case law, and advanced litigation and settlement strategies are all a part of finding a solution. However, at the center of this "war" comes an ear-shattering call for common sense and a recognition that the best immediate solution is within the employer's control. This is a "war" that is lost every time it is fought. No matter how successful the judgment or settlement, the loss of management time and the cost of attorneys' fees and discovery battles injure an organization's bottom line. Perhaps more importantly, this type of litigation weakens employer trust and polarizes the people that must work together in an ever more competitive global world. Most employers are committed to doing the right thing and complying with legal requirements. This core value and common sense reality demands a new age of total wage and hour compliance.

In recognition of the strong need for a compliance solution, a task force of Littler attorneys has for over eighteen months been building a "Total Wage and Hour Compliance Initiative." Arthur Miller, formerly with Harvard Law School and now a distinguished Professor at New York University, authored the words now enshrined in Rule 23 of the Federal Rules of Civil Procedure, creating the procedural vehicle of class actions. At a 2007 Littler Class Action Symposium in Chicago, Professor Miller was confronted with the reality that the class action vehicle had created a wage and hour nightmare for employers. Not unsympathetic, Professor Miller observed that class actions migrate from industry to industry and topic to topic. He then observed that as the number of class actions within an area of law increases, the result is a reallocation of resources to compliance efforts, ironically bringing about a decline in those kinds of cases. Accepting the truth of this statement, Littler has committed itself to providing the forward-thinking organization the resources and 21st century learning technologies that can vastly accelerate this compliance effort. Compared to the cost of what is avoided and the positive message presented to employees, the "Total Compliance Initiative" is a very high return investment in an organization's future.

Why Is a "Total" Wage and Hour Compliance Initiative Necessary?

Before outlining the elements of this Initiative, it is important to understand its mission. The goal is not merely to "win" or do better in the wage and hour wars, in that this presumes a continuation of litigation. The objective is to reach and maintain a level of compliance that greatly reduces the likelihood of litigation. The only way to actually "win" the wage war is to "end" the war. With thousands of plaintiffs' attorneys now invested in examining every aspect of the payroll process and legal requirements, maximum scrutiny of the workplace should be expected. Every employee who is terminated, demoted, or experiences an unpleasant workplace event is encouraged by Internet and television advertising to seek the advice of counsel. In an initial interview by prospective counsel,

within a few minutes the plaintiff attorney's questioning often turns to pay practices and wage and hour issues. Inspired by Mark Thierman and the prospect of turning a small individual claim into a multi-million dollar wage and hour class action, the organization's wage and hour compliance goes under the microscope. If the goal is to "end" the wage wars, a "total" wage and hour compliance initiative is mandatory.

What is the Total Wage and Hour Compliance Initiative?

In answering this question, it is necessary to explain what is not covered by the Initiative and this Report. Legislative reform, updates on new case law, and breathtaking new litigation strategies are not part of this Initiative. All of these important issues and resources are addressed elsewhere. The focus here is on the development of a systematic process that promises to move the level of wage and hour compliance as close to "total" as is reasonably possible with a sensible allocation of scarce corporate resources.

Key Component #1: Conduct a Wage and Hour Assessment of Existing Policies, Procedures, and Practices.

The first of seven Key Components starts with existing employers that have continuing operations. Before recommendations can be made and applied, it is absolutely necessary to assess current compliance. New employers, of course, do not have a history and can bypass this step. Indeed, starting with a clean slate would greatly simplify the Initiative but is not realistic for most employers. Apart from being necessary, the assessment of existing policies, procedures, and practices is one of the most delicate undertakings in the entire Initiative. How should the audit be designed? Should an effort be made to keep the audit protected by the attorney-client privilege? Who are the decisionmakers to be involved? What are the topics of the audit review? How should the audit be structured and conducted? Is there available technology that can assist in the audit process?

Key Component #2: Protect the Company Through the Establishment of Revised State-of-the-Art Wage and Hour Policies and Procedures.

For new and existing employers, it is necessary to design a custom set of policies and procedures that promises to provide a platform for "total" compliance. Policies and procedures can be legally correct but weak in their ability to be consistently followed with defensive documentation. This is the stage in the Initiative when the compliance strategy and plan are formed.

Key Component #3: Protect the Company Through an Individualized Plan for Implementing Operational Changes.

This Component is clearly part of Component #2, but because it is so important and difficult, it justifies separate treatment. In a perfect world where legal compliance is defined by bright lines, it would be simple for good organizations to see errors and make needed corrections. This is clearly not the world of wage and hour law. The above assessment will almost certainly lead to many desired changes. Changing to a new practice does not mean, however, that current practices are clearly a violation of law. Instead, it is common that the practice is defensible, but open to challenge. Unfortunately, plaintiffs' counsel and some courts have, in the past, been too ready to point to such changes in practice as evidence of wrongdoing. This creates the challenge of making changes while not creating admissions or evidence that will actually encourage the very litigation that one is seeking to prevent. In this Component, the need for a highly individualized approach is explained and the many different options outlined and explored. Included are some state-of-the-art programs through the Department of Labor and state administrative agencies designed to allow employers to achieve full compliance without being subject to the same penalties and costs that would accompany litigation.

Key Component #4: Implement an Effective Wage and Hour Complaint and Reporting System.

This Component is simple in its mission and application and absolutely revolutionary in what it seeks to accomplish. In many other parts of employment law, the concept of self-enforcement is well established. If someone is suffering unlawful harassment, it is expected that the company will have a complaint system, investigatory process, and, if needed, a corrective action capability. If employees are informed about these systems and fail to use them, damages can be reduced and in some cases liability can be eliminated. This Component applies these fundamental elements of employment law to wage and hour compliance for at least two powerful reasons. First, current law and legal trends suggest that courts will recognize complaint reporting systems as part of an affirmative good faith defense or as applicable to the avoidable consequences defense. Second, such systems actually work, allowing improved enforcement of policies and faster corrections when mistakes are made.

Key Component #5: Create a Cutting-Edge Wage and Hour Training Program for Human Resources, Supervisors and Employees.

Repeatedly, one of the failings of compliance systems is a lack of understanding and execution by managers and employees. A company can have the best policies and systems, but if they are not fully understood and uniformly implemented, any effective defense will be lost. This Component closely links with our later examination of new technology. While live instruction is highly recommended for HR professionals and managers on many employment law topics, legally engineered electronic learning is highly recommended for both supervisors and employees regarding wage and hour compliance. In almost every legal challenge, the question is raised regarding the company's training and whether noncompliance was actually the implied policy. E-learning programs that show and teach real compliance can defeat such a claim in a cost-effective manner. Moreover, e-learning solutions offer a cost-effective way of providing uniform and verified training to every employee and supervisor. See Appendix A for a display of Littler-engineered training that is provided by Employment Law Learning Technologies (ELT). This is a first-of-its-kind creation, designed to be a major component of ending the wage wars. More in-depth, live instruction should be provided to anyone who is in the position to be answering detailed questions about and interpreting or enforcing the organization's policy, such as human resources personnel and certain levels of management. The EEOC recommends that those investigating harassment complaints should be "well trained." Those investigating wage and hour complaints should receive the same level of training.

Key Component #6: Minimize Future Wage and Hour Exposure Through Technological Innovation.

Technology is the necessary component in making wage and hour compliance cost effective and immediately provable. Innovation and technology are applied to the audit process and 21st century training systems. Ironically, it is technology that provides the best vehicle for applying old wage and hour laws to the current workplace. In this Component, the focus is on the new systems that record time and guide lawful compliance. New ways of entering data using GPS or magnetic sensors allow automatic recordkeeping. Meanwhile, great caution is urged. As new systems are implemented and added, they need to be monitored to ensure that they perform as expected. This leads to the next Component: compliance verification.

Key Component #7: Conduct Periodic Reviews and/or Audits of the Company's Wage and Hour Compliance Status.

While this Component is logically listed last, its importance cannot be overstated. A growing legal requirement of employers is evidence that they not only implement lawful compliance systems, but that they verify that the compliance systems are working. For new employers, this will be the first audit to be considered, and many of the elements of Component #1 should be reviewed (including attorney-client privilege considerations). The checklist used in Component #1 is applicable here; however, making changes is simplified. In this situation, the policy is established and the question is whether conduct is mirroring requirements. It is expected that if noncompliance is discovered, corrections will be made. While this might constitute some evidence of a particular violation, it is also evidence that the system is working and that the violations are individual, which can serve as solid evidence that no basis exists for certification of a class.

KEY COMPONENT #1: CONDUCT A WAGE AND HOUR ASSESSMENT OF EXISTING POLICIES, PROCEDURES, AND PRACTICES

The starting point for a Total Wage and Hour Compliance Initiative is to determine current policies, procedures and practices. This process has two primary components. First is a review or assessment of the established written policies and procedures of the organization. Second is an examination or audit of the organization's actual practices, classifications, and existing compliance efforts. While Littler has developed technologically enhanced audit tools to assist this process and discovered some classic patterns, the "assessment" is not romantic. It is a systematic process that requires careful attention to detail. However, as one probes deeper, a remarkable discovery emerges. On the surface what appears to be a bright line application of statutes and regulations actually becomes an assessment of grey areas of law and practices that have been commonplace for decades but lack litigated guidelines on what is legally acceptable. In this assessment process, one of the weaknesses that will be detected is the use of a practice that has yet to be legally tested, while another compliance solution is well established.

Review or Assessment of Written Policies and Procedures

This review is conducted to ensure that minimum legal standards are reflected in the employer's policies and procedures; however, many employers with "legally compliant policies and procedures" nonetheless are subject to claims and litigation. This compliance gap results from inadequate implementation or competing business goals that detract from well-conceived compliance initiatives. Accordingly, this assessment must also examine the adequacy of the policies and procedures to support and assist the employer in being able to "prove" employment law compliance. Set forth below is a sample list of key questions that should be addressed as policies and procedures are reviewed.

- Are regular pay days established?
- Are employees paid with the frequency required by applicable state law?
- Is an authorized instrument of wage payment used?
- Are employees provided with a pay stub or earnings statement with each wage payment, which complies with state law?
- Are employees properly classified as exempt or nonexempt?
- Are nonexempt employees properly compensated for all overtime worked?
- Is off-the-clock work prohibited and prevented?
- Are meal and rest period requirements complied with and documented?
- Is all compensable "work time" tracked and compensated?
- Is vacation accrual, use and payout tracked and compensated?
- Has authorization been obtained for deductions from employee paychecks, and are the deductions appropriate?
- When are commissions earned and paid, how are they calculated, and are they included in the regular rate for overtime purposes?
- When are bonuses earned and paid, how are they calculated, and are they included in the regular rate for overtime purposes?
- Are terminated employees paid their final wages in accordance with applicable state law?

Audit of Actual Practices and Compliance

This is a far more involved and difficult process than the desk review referenced above. For some employers, a decision will be made that new policies and procedures are needed and that little value will be gained from a historical audit (other than potentially collecting evidence of possible wage and hour violations in a readily accessible form). For other employers, it will be almost impossible to justify the business costs of making changes without some assessment as to how current policies are being implemented. Moreover, two employers in the same industry with similar written policies and procedures can have different cultures and very different practices. An audit or assessment of how current policies are implemented may be needed to determine whether further safeguards and documentation processes need to be implemented.

Planning and Designing the Audit[3]

Given the high exposure, publicity (and thus increased employee and union awareness) and exorbitant costs associated with class actions, employers should proactively audit their wage and hour classifications and pay practices and policies, and make changes if necessary within business constraints.[4]

Identify decisionmakers

At the outset, the decision needs to be made as to who will be involved in the audit and each person's role. For example, should counsel be included to ensure protection by attorney-client and/or attorney work-product privileges?

The auditor must have a thorough understanding of the laws and legal requirements in all jurisdictions where the employer has employees, in order to be able to determine whether the employer has complied with all state and federal requirements and to spot any areas of concern. For example, federal and state laws regarding overtime exemptions differ depending on the jurisdiction and job classification.

Preserve the attorney-client privilege

Through the application of the attorney-client privilege it may be possible to protect information obtained during an audit from being discoverable. The attorney-client privilege protects communications made (and kept) in confidence to an attorney

by a client for the purpose of seeking or obtaining legal advice. Its purpose is to promote openness and to encourage clients to be completely truthful so that the attorney can provide competent legal advice.

Once the company invokes the privilege, nonlawyer corporate managers within the company should report to the company's legal department or to outside counsel and take instruction from counsel or counsel's agents (*i.e.*, investigators, paralegals, etc.).

It is useful to recite, from time to time, that the matter under consideration is proceeding pursuant to the need for legal advice. For example, auditors could begin or end written reports requesting counsel to advise what appropriate legal options exist in light of the developing facts. Similarly, counsel should direct nonlawyer corporate auditors to gather appropriate facts to allow counsel to give appropriate legal advice to the company.

Reports prepared by attorneys should discuss the relevant legal principles and the employer's conduct in light of those principles. If possible, these reports should be presented orally, due to the risks of later discoverability of reports presented in other formats.

The communication must be kept confidential by both the company and the attorney(s). Disclosure thus should be limited to only those who have a true "need to know." Documents to and from counsel should be conspicuously labeled as "Privileged and Confidential: Attorney-Client Privileged Communication," and the company should limit distribution of copies and access to documents. Provided that the company's document retention policy so permits, documents used to prepare audits should be destroyed (unless there is pending litigation or there exists a legal requirement to retain the documents). If the company uses questionnaires or surveys, the employer should inform those completing such documents, in writing, that they are confidential, and the company will use them for the purpose of seeking legal advice.

Employers should consider instructing managers and supervisors not to create written material without first discussing it with the designated lead counsel. An employer also should instruct all participants in the internal audit not to hold meetings or discuss the audit with anyone without notifying the designated lead counsel.[5]

Witness interviews can be a critical component of an effective internal audit. Employers must take care to maintain applicable privileges, handle all witness interviews so as to ensure the candor and credibility of the witness, and avoid the impression that company counsel is representing the employee-witness. The employer should give all witnesses interviewed an *Upjohn* admonition.[6]

For practical recommendations for preserving the privilege(s) and confidentiality, see Appendix B.

Other potential privileges

Attorney work-product doctrine: This doctrine protects from discovery the documents, reports, communications, memoranda, mental impressions, opinions, or legal conclusions counsel prepares in anticipation of litigation or for trial.

Self-critical analysis privilege: Despite the solid common sense at its core, the "self-critical analysis" privilege has had difficulty gaining wide acceptance. The "privilege has led a checkered existence in the federal courts."[7] This is due in part to the fact that the self-critical analysis privilege is judicially created and does not have a clear statutory basis.

Remedial measures/negotiated settlement: Under Rule 407 of the Federal Rules of Evidence, "when, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove . . . negligence . . . or culpable conduct." Typically, courts apply the Rule to product design defects or warnings cases. However, a parallel can be drawn to remedial measures taken by a company with regard to its employment or other policies. A company may be able to argue that evidence of such measures cannot be used to draw adverse inferences about the company's past practices, or knowledge of alleged violations.[8]

Identify topics for audit review

Employee exemption status: All employers should carefully examine their job descriptions, the actual job duties of employees, and compensation arrangements to ensure that all employees are properly classified as exempt or nonexempt from the payment of overtime. California employers should note that California law is generally more restrictive as to the applicability of overtime exemptions. For example, under California law, an employer must satisfy a "quantitative" test regarding how much time an employee actually spends performing "exempt" versus "nonexempt" tasks.

In contrast, federal law (Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*) requires only that an exempt employee's "primary duty" be the performance of exempt work. The major overtime exemptions include those listed below.

- Manager or Executive exemption (caution: the "working manager" and Assistant Manager)
- Administrative exemption
- Professional exemption
- Outside sales exemption
- "Inside" (or "commission," or "retail") sales exemption[9]
- Computer professional exemption[10]

Pay practices: Employers' pay practices vary greatly. Some employers have seemingly simple and straightforward methods of pay, while others are more complicated. Even so, many employers fail to thoroughly review their pay practices. Even those practices that appear, at first blush, to be basic and easy to calculate, should be reviewed because they may be more complex than they seem. Particular pay practices that should be reviewed include the method of calculation of regular rate, commission plans, bonuses, payment from out-of-state banks, vacation "forfeiture" policies, compliance with wage statement requirements,[11] and reimbursement of business expenses.

Timekeeping/recordkeeping policies and practices and ensuring payment for all compensable time: Off-the-clock work is an enormous source of potential liability. In order to obtain class certification of such a claim, a plaintiff must demonstrate that the employer had a standard policy or practice of requiring such work. A written policy that addresses this issue can go a long way towards defeating such a claim. See Key Component #2 below for a checklist of issues to be addressed in a timekeeping/recordkeeping policy.

Meal and rest period compliance: Many state wage and hour laws require employers to provide their employees with meal and/or rest breaks. These laws specify the circumstances under which such breaks must be compensated. In some cases, state laws impose different requirements than the FLSA. California is one such state, and the issue of meal and rest breaks has become a very fertile area for litigation. A written meal and rest period policy that complies with applicable law is an essential element of any defense to a class action that asserts employees were denied the breaks to which they were legally entitled.

Independent contractor versus employee classifications: It is important for companies to review contracts and engagement agreements with temporary and other contract workers to ensure the proper classification of temporary or contract workers.

Develop an Audit Process

It is important to develop procedures and processes to be followed by the audit team. The following is a checklist of areas to review.

1. **Review necessary documents**
   - Review job descriptions
   - Review policies
   - Review timekeeping materials
2. **Identify participants**
   - High-level corporate officers
   - Human resources employees
   - Employee managers/department heads
   - In-house or outside counsel
3. **Determine scope of audit and tools to be used**
   - **Identify employee groups to be audited.** Groups can be identified based on a number of categories, such as employee complaints, change in law regarding exempt status, or change in technology that may impact employee job duties.[12]
   - **Identify locations to be audited.** Consider starting the audit in job locations in states with high levels of risk (e.g., the departments/employee groups that are the most vulnerable to off-the-clock work, meal and rest period violations, or misclassification).
   - **Determine which records to review.** These may include personnel files, performance evaluations, time-clock records, security records, schedules, and pay stubs.
   - **Determine who to interview.** Managers may not have the most accurate information on employee practices relating to timekeeping, taking breaks, and percentage of time in exempt duties. Interviewing/surveying employees will generate more accurate information, although it may result in drawing unwanted attention to how employees are paid.

Consider Using Open Compliance and Ethics Group (OCEG) Legal Standards and Guidelines

An audit implies that legal standards and guidelines exist against which current policies and practices can be measured. Until very recently, this compilation of federal, state, and local laws and regulations was very hard to assemble. Moreover, little existed that would define a "recommended practice" that might not be legally required. In 2007, this changed with the public launch of Wage and Hour Standards and Guidelines developed by the Open Compliance and Ethics Group (OCEG). OCEG is a not-for-profit corporation dedicated to establishing guidelines for legal compliance in the workplace. OCEG, which is composed of major accounting firms, financial firms, major businesses, government representatives and academic institutions, maintains twelve overlapping legal domains, one of which is Employment and Labor Law. Littler chairs that domain and maintains much of its content, which includes federal and state-specific requirements on wage and hour and other employment laws as well as guidelines and recommended practices (OCEG Core Practices). All of the information is online and can be customized for the particular industry and employer.[13] A checklist can be developed and downloaded as an Excel spreadsheet. An excerpt of the OCEG materials on federal and state wage and hour law is attached as Appendix C.

Conduct Audit

The following steps should be followed when an audit is being conducted.

1. Prepare schedule and set deadlines and budget for audit. During this step, several questions will need to be carefully considered and decisions will need to be made about how the audit will proceed. For example, a decision will need to be made as to whether the audit should be conducted by the company's audit team, a human resources group, or alternatively by an outside investigation team or legal counsel. The decisionmakers will also need to determine whether written questionnaires or verbal surveys will be used, and whether information will be collected from managers only, or from both managers and employees. Preparations should also be made to ensure that all information collected will be stored in a central repository.

2. Prepare and administer questionnaires/surveys. While preparing questionnaires or surveys, language should be included to ensure the protection of attorney-client and/or attorney work-product privilege.[14] Additionally, it is important to include language ensuring the confidentiality of the audit. In spite of safeguards to maintain confidentiality/privileges, an audit should be conducted with the assumption that all data will be discoverable.

3. Analysis of data by management and counsel. Counsel and management may work together to analyze the data once the audit has been completed. The decisionmakers will need to determine the format in which results will be analyzed and reviewed. This decision must be made with an eye towards the possibility of using the data as a defense in litigation. It may be worth considering a nonprivileged version of an audit to use as a potential defense to "willfulness" and liquidated damages claims in litigation.

At this stage, steps should also be considered that may help preserve the privileges that attach to an internal audit.

Finally, careful attention should be given to a detailed and thorough analysis of the audit results so as to determine whether the findings reveal a need for changes to employee classifications, policies, or procedures.

4. Schedule ongoing compliance audits. See Key Component #7 on page 27 for further discussion of scheduling and conducting ongoing compliance audits.

Consider Using a Technological Innovation by Littler

Utilizing state-of-the-art technology and software, Littler has developed Audit QB (Audit Quarterback), a dynamic web-based employment audit program that our attorneys use to conduct audits effectively and efficiently. Audit QB is further discussed in Key Component #6 below. For an example of an excerpt of an audit questionnaire available through Audit QB, see Appendix D, which is an excerpt from a questionnaire currently used by Littler attorneys in conducting wage and hour audits. The complete questionnaire forms the backbone of Audit QB, Littler's web-based audit system, which is available through Littler and can be customized and updated for particular states, industries, and tasks. It is advisable that the questionnaire will be used as part of an attorney-client privileged process.

KEY COMPONENT #2: PROTECT THE COMPANY THROUGH THE ESTABLISHMENT OF REVISED STATE-OF-THE-ART WAGE AND HOUR POLICIES AND PROCEDURES

In Key Component #1, an assessment took place of the policies, procedures, and practices that cover wage and hour

processes in the workplace. Now it is necessary to consider replacing and amending policies and procedures with state-of-the-art solutions. Of course, for new businesses, this is an excellent opportunity to start with first-class policies and procedures. However, for most of the rest of the employer community, it is necessary to build on a long history of policies and procedures. As part of Key Component #2, consideration is focused on what constitutes a comprehensive set of state-of-the-art wage and hour compliance policies and procedures.[15] In Key Component #3, infra, the complex issue of how to make changes is separately addressed.

By adopting, reviewing, and updating such policies and procedures on a regular basis, an employer can:

- Provide a consistent company-wide standard for addressing wage and hour compliance issues.
- Eliminate common wage and hour myths and misconceptions on the part of employees and supervisors.
- Ensure that wage and hour compliance problems are the exception rather than the norm.
- Demonstrate a company's "culture of compliance" and good faith to agency investigators charged with enforcing federal and state wage and hour requirements.
- Prevent class action lawsuits premised on the theory that an employer has engaged in a company-wide "pattern and practice" of wage and hour violations.

Key Considerations in Drafting Wage and Hour Policies

In drafting wage and hour policies, it is important to establish a few touchstones. First, the policies must be compliant with state and federal wage and hour law. As many wage and hour issues are a matter of state law, remaining compliant can be a significant challenge for a multi-state employer. Employers with multi-state operations may want to consider adopting some policies that satisfy the lowest common denominator - in other words, adopting policies that give all the employees the benefit of the protection offered by whichever state (among those where the company has a presence) has the law that is most advantageous to employees. Doing so may ultimately prove easier than maintaining different versions of policies for employees who reside in different states. On the other hand, vast cost differences may justify developing state-specific systems. If this option is followed, it is essential that the employer is fully committed to doing what is necessary to keep the separate policies and practices current and fully implemented.

Second, an employer should only enact policies that the company and its managers will be able to follow. For example, a meal period policy should not state that an extra hour of pay will automatically be issued for a missed meal period if, in fact, the company's payroll system is not capable of implementing such a remedy. Indeed, many payroll systems purport to have this capability but are under-designed, such that all individual circumstances justifying the extra hour of pay are not anticipated and other circumstances exist where automatic pay is unnecessarily added. Systems break down, get turned off, need upgrades, and can be subject to human intervention. All of these considerations need to be factored into making choices about what will actually work for the organization.

Finally, state-of-the-art policies are of limited utility if company managers and/or human resources personnel are either unaware of them or unsure how to implement them. Once the proper policies have been adopted, it is essential to provide training to management, human resources, payroll and anyone else who may have responsibility for administering the policies, on how to comply with the policies and where to go if questions arise about the policies.

Essential Policies

While there is a nearly unlimited number of possible topics for employment policies, some are more important than others in terms of preventing wage and hour class actions. The following is a list of those policies that are particularly important to have, along with key terms that should be included within such policies.[16]

Time and Manner of Wage Payment

The laws of many states regulate the time and manner in which wages must be paid to employees. An employer that has a practice which not conform with such requirements is a prime candidate for a class action lawsuit — as evidenced by the recent spate of lawsuits against California employers that have paychecks are issued by out-of-state banks in violation of California Labor Code section 212(a)(1). Key components of such a policy include the following.

Establish regular pay days that provide for the payment of wages with the frequency required by applicable state law. For example, many states require that nonexempt employees be paid at least twice a month. A few states require nonexempt employees to be paid bi-weekly or even once a week. In addition, several states require employers to compensate their employees within a specified number of days after the end of the pay period — with the maximum time period allowed to lapse between the end of the pay period and the corresponding pay day currently ranging from six to thirty days.

Use an authorized instrument of wage payment. Some states permit mandatory direct deposit where certain conditions are met. Some states permit employers to pay wages via a debit card provided certain conditions are met. Using either of these methods in a state that does not authorize such a method can lead to liability.[17]

Provide employees with a pay stub or earnings statement with each wage payment that complies with state law. This is an example of a practice in which the lowest common denominator approach discussed above may be appropriate.

Classification of Employees as Exempt

Misclassifying employees as exempt is one of the costliest errors an employer can make, because the misclassified employee is entitled to be paid for any overtime he may have worked during the past two to four years (depending upon the state in which the employee is employed), along with (in some states) missed meal periods. This can also give rise to significant penalties. Minimizing the likelihood of such liability consists, in general terms, of two components: (1) ensuring that employees are properly classified, and (2) ensuring that exempt employees are treated in a manner that is consistent with their exempt status. The following are the specific points that should be included in any policy addressing these components.

Proper classification. Assessment of an employee's exempt status must be based upon the job duties the employee is actually performing — not on an idealized or outdated job description. Consider including an audit mechanism to ensure that exempt employees are, in fact, performing the duties the company expected they would be performing at the time the position was classified as exempt.

Criteria for what qualifies as an exempt position varies from state to state, and state law is not always consistent with the FLSA. Accordingly, the policy should include a process for ensuring that each employee qualifies as exempt under both federal law and the law of the state in which he or she works.

Maintaining exemption. Exempt employees must be paid on a salary basis, which means that they must receive a predetermined amount of compensation each pay period that is not reduced due to variations in the quality or quantity of their work. As a result, there are limited bases for taking deductions from an exempt employee's salary. The policy should specify those limited criteria.

For employers that maintain a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, the FLSA contains a safe harbor provision for violations of the salary basis requirement for exempt employees. A detailed discussion of the steps required to take advantage of the safe harbor provision is set forth below in Component #3. A sample safe harbor policy is set forth in Appendix F.

Consider creating a third classification (the nonexempt manager). Increasingly, policy decisions are being made to classify manager and assistant manager positions as nonexempt to avoid the potential of a misclassification claim. This may be short sighted given the expansion of lawsuits directed at nonexempt employees alleging off-the-clock work, missed or misused meal periods, and unavailable rest periods (under applicable state law). However, assuming good compliance policies and procedures exist for the nonexempt classification, this concern can be overcome. The real problem that emerges is employee backlash, resulting when employees think that the company has demoted them and devalued their contribution to the organization. The classic example of this phenomenon involves paralegals. At least in law firms, most paralegals are nonexempt. However, one of the greatest complaints is the lack of professional respect and treatment. This is so intensely felt that many of the paralegal associations decline to take a position on whether their members should be classified as exempt or nonexempt. Clearly there are economic advantages to the nonexempt classification.

How does a progressive organization elect to safely classify certain individuals as nonexempt, but at the same time address the need for status and respect? One creative answer is the creation of a third category of employee, the nonexempt manager or professional. Legally, nothing exists except exempt or nonexempt, but by policy this third category can be created.

It involves meeting all the requirements of a nonexempt classification, but the benefits and treatment are comparable to exempt employees. The vacation allowance, 401k, stock options, medical plan, etc. are applied as if the employee was exempt, but the wage and hour policies are those of a nonexempt employee. Great caution is needed in structuring this classification because sometimes certain exempt benefits are dependent on exempt status. However, these elements can be identified and usually modified to meet nonexempt minimums.

Littler envisions that when serious wage and hour reform is undertaken by states and the federal government, the actual creation of this third classification may occur. The world has long ago given up strict blue collar and white collar distinctions in favor of many colors and bends.

Payment for All Overtime Worked

Simply classifying employees correctly is not sufficient to avoid liability. An employer must also ensure that nonexempt employees are properly compensated for all overtime worked. An overtime policy under the FLSA should include the following components:

- The policy should establish a workweek consisting of a regularly recurring period of 168 hours.
- The policy should call for the payment of overtime at the rate of 1.5 times an employee's regular rate of pay for all hours worked in excess of 40 in a workweek and should state that overtime will also be paid in accordance with the law of the state in which the employee works.
- Management preapproval of any overtime worked should be required. Unauthorized overtime must be paid, but the policy should provide that anyone who works overtime without authorization will be disciplined.
- The policy should specify that employees cannot waive their right to overtime pay.
- California allows the use of "make-up time" by employees who want to make up work they missed due to a personal obligation, without forcing their employer to incur liability for daily overtime. The employer decides whether to allow the use of this procedure. An employer that allows the use of make up time should include, in its overtime policy, a detailed explanation of how the process works. Key points to include are as follows:
  - An employee may request to make up work time that has been or will in the future be lost due to a personal obligation of the employee. The request must be made in writing and signed by the employee.
  - Lost time must be made up in the same workweek.
  - The use of make-up time cannot result in the employee working more than eleven hours in a single day or 40 hours in a workweek.

Timekeeping Policy

Off-the-clock work is an enormous source of potential liability. In order to obtain class certification of such a claim, a plaintiff must demonstrate that the employer had a standard policy or practice of requiring such work. A written policy that addresses the issue can go a long way towards defeating such a claim. Key components of such a policy include the following:

- Strictly prohibit off-the-clock work.
- Specify that managers cannot request or require off-the-clock work or suggest that it is acceptable.
- Require managers to report all suspected off-the-clock work to human resources or senior management so it can be investigated and corrected.
- Require employees to accurately record all work hours and submit their completed, signed time records in a timely manner.
- Require managers to review their employees' time records for accuracy and to immediately correct any record that is wrong or missing information.
- Prohibit employees from recording information on time records of other employees.
- Prohibit managers from improperly editing employee time records to reduce actual working time, offer comp time or defer reporting working time to another non-overtime week.
- Include a mechanism for employees to report payroll errors or concerns.

Meal and Rest Periods

The FLSA does not require employers to provide employees with meal or rest breaks. If such breaks are provided, however, the Act regulates the circumstances under which they must be

counted as "hours worked." For example, under the FLSA, meal periods must be counted as "hours worked" unless: (1) they are at least thirty minutes long; (2) the employee is relieved of all duties; and (3) the employee is free to leave his or her workstation.

In contrast, many state wage and hour laws require employers to provide their employees with meal and/or rest breaks. These laws specify the circumstances under which such breaks must be compensated. In some cases, state law imposes different requirements than the FLSA. California is one such state, and the issue of meal and rest breaks has become a very fertile area for litigation. Having a written meal and rest period policy that complies with applicable law is an essential element of any defense to a class action that asserts employees were denied the breaks to which they were legally entitled. A meal and rest period policy should include the following elements:

- State whether, when and for how long the meal and/or rest breaks will be provided. Ensure these terms comply with the requirements of applicable state law.
- Describe the procedure to be followed in the event that a meal and/or rest period is interrupted by work.
- Ensure that employees are provided with any compensation that might be required for time spent in a noncompliant meal and/or rest period.
- Require employees to record the beginning and ending times of their meal breaks.
- Instruct employees to contact their supervisor if they have questions regarding meal or rest periods.

Vacation

Neither the FLSA nor most state laws require paid vacation. As a result, many employers dismiss vacation policies as a source of potential liability. However, a poorly drafted vacation policy can be a larger source of liability than it may initially appear, largely because many states treat vacation pay as wages. In those states, a vacation policy that does not properly account for vacation can result in an employee not being paid all wages due at the time of termination which, in turn, can lead to substantial penalties. Thus, it is important for an employer to have a vacation policy that includes the following elements:

- Identify which employees are eligible for vacation benefits and when they begin to accrue vacation.
- Indicate the rate of vacation accrual and whether there is any cap on the amount of vacation an employee can accrue.
- Disallow the forfeiture of accrued vacation because it was not used by a particular date ("use it or lose it policy") where such forfeiture is prohibited by state law.
- Where required by state law, ensure that upon termination, employees are paid accrued but unused vacation.

Commissions

Although commissions are generally a matter of individual contract, a legally flawed policy that is applied to all salespersons can give rise to liability on a class basis. While the formula for calculating commissions will, of course, be specific to each employer, every employer's commission policy should specifically address the following topics:

- **When commissions are earned.** This is key because in many states, once a commission is earned it cannot be forfeited. Thus, an employer must give careful thought to precisely what conditions need to be satisfied before the salesperson "earns" his or her commission.
- **How commissions are calculated and when they will be paid.**
- **Payment of commissions on termination.** This should not be left up to chance, nor should an employer attempt to simply apply the other provisions of the commission plan to the post-termination setting. Rather, a commission policy or plan should specifically identify the circumstances under which an employee will be paid commissions on and after his or her final day of employment.
- **Appropriate wage and hour treatment of commissions.** This need not be addressed in the policy itself, but it is important to note that any employer that pays commissions to nonexempt employees must ensure they are treating those payments correctly under the applicable wage and hour laws. Specifically, the commissions must be included in the calculation of the employee's regular rate of pay. Furthermore, deferred commission payments to nonexempt employees must be apportioned back over the work weeks in which they were earned, and the regular rate must be recalculated for those weeks, and additional overtime paid.

Payment of Final Wages

The laws of many states establish strict timelines for paying employees their final wages. A multi-state employer that enacts a one-size-fits-all policy will, in all likelihood, be violating the laws of numerous states. Instead, an employer must institute policies and procedures to ensure that employees who are either terminated or who quit are paid their final wages in accordance with applicable state law. As many states also regulate the amount and type of deductions that may be taken from a final paycheck, the policy should address that issue as well.

Open Door Policy

By encouraging employees to resolve their complaints internally, an Open Door Policy can help reduce the likelihood that an employer will become a defendant in a class action. Any such policy should specify the avenue for employees to lodge complaints, provide for multiple avenues of redress, and expressly state that payroll-related concerns are covered by the policy.

Whistleblower/Nonretaliation Policy

An employer that encourages employees to bring wage and hour concerns forward for internal resolution must also ensure that anyone who does come forward is not subjected to retaliation. Therefore, the whistleblower/nonretaliation policy should specify that lodging a complaint about not being paid for all hours worked and/or about not being paid in accordance with applicable law qualifies as protected conduct. The policy should also state that anyone engaging in retaliation will be subject to discipline up to and including immediate termination.

OCEG

Any employer that is serious about creating and maintaining cutting-edge wage and hour policies should consider joining OCEG, discussed above in Key Component #1. The labor and employment law domain includes specific recommendations about the content that should be included in policies and procedures on those topics.

KEY COMPONENT #3: PROTECT THE COMPANY THROUGH AN INDIVIDUALIZED PLAN FOR IMPLEMENTING OPERATIONAL CHANGES

Perhaps the most difficult question in the entire wage and hour compliance process is how and when to fix or improve identified deficiencies. In classic tort law, corrections can be made and such improvements are usually not admissible as admissions. In wage and hour law the self-correction privilege is not well established. While one would hope that legislatures and judges would move in this direction, this is very much in doubt. With this context recognized, wage and hour policy, procedure, and practice corrections and/or improvements need to be very carefully considered based on a multiplicity of individual considerations, some of which are addressed below. Companies should consider fully discussing and weighing all available options with legal counsel.

Key Components #1 and #2 have resulted in an assessment of current practices and an identification of desirable "state-of-the-art" policy and procedure improvements. Normally, this stage of the process will have resulted in one or both of the following outcomes:

- The identification of one or more definitive problem areas whose solution will require further review by the employer, often in consultation with counsel; or
- The identification of one or more areas of risk where the employer's practice has an available good faith defense, but nevertheless may be open to challenge in the current litigation environment.

Often, the appropriate follow-up or response to the identification of a definitive problem area is obvious. In short, the employer should implement solutions aimed at fixing the problems. Re-auditing may be necessary to ascertain whether the solutions implemented have succeeded. If the solutions are not successful, the employer should go back to the proverbial "drawing board" and devise alternative methods for fixing the problems. Contrary to the assertions of plaintiffs' attorneys, most employers want to do the right thing and comply with applicable wage and hour laws. When shown a clear violation, corrective action is taken.

In stark contrast to this, the appropriate follow-up or response to the identification of a risk area is rarely, if ever, obvious. The reason for this is that the appropriate response will almost always depend on the extent and severity of the risk identified, the strength of the employer's defenses, the type and size of employer involved, the industry in which the employer does business, the employee group involved, the employer's tolerance for risk, and the list goes on. In California, for example, any employer conduct designed to confront a compliance challenge on a group basis

may be viewed down the road as evidence that supports a judge's decision to certify a class action.[18] That said, the number of variables involved in deciding how best to confront an identified risk area does not lend itself to a comprehensive treatment of the issue. There are, however, some basic approaches that will often be considered and may form the core of an employer's follow-up or response strategy.

Do Nothing

Inaction in the face of an identified risk area is rarely a good idea. There are, however, perhaps two very limited scenarios under which doing nothing may be a viable option. The first is a scenario under which the identified risk is so small, it is outweighed by the natural employee curiosity and perhaps discontent generated by any change in policy, practice or procedure. The second is a scenario under which litigation is imminent and the potential impact on class certification of group-wide, corrective action outweighs the benefits of that action in the short-term.

Secure Compliance Going Forward and Improve Documentation

Of the approaches discussed here, this may, in one form or another, be the one most often chosen by employers to address an identified risk area. Under this approach, an employer makes no effort to compensate employees for any past, potential compliance errors. Instead, the employer focuses its efforts on securing and documenting compliance going forward by implementing new, state-of-the art policies, practices, and procedures. The basic benefits of this approach are:

- The identified risk is fully mitigated going forward and capped;
- The identified risk is reduced by the running of the statute of limitations;
- A well-documented record of compliance going forward is created; and
- Where the employer has a history of making changes to operations, employee curiosity is not triggered.

Some of the drawbacks of this approach are:

- No protection is provided against litigation aimed at recovery of existing potential exposure;
- Interest may accrue on existing potential exposure;
- The changes made may be used as evidence to support class certification, or some implied admission of wrongdoing on the part of the employer; and
- Where the employer does not have a history of tweaking operations, it may trigger employee curiosity and motivate one or more employees to consult with counsel.

In light of these drawbacks, it is clear that an employer applying this approach must have at least some tolerance for risk. And while it is true that some of the incumbent risks of this approach may be mitigated,[19] its application is more often than not dictated by the employer's determination that whatever risks flow from this approach are outweighed by the continued running of the statute of limitations, and the likelihood that it will be able to obtain an employer-favorable settlement in any later-filed wage and hour lawsuit.

When undertaking such prospective change, it is advantageous for the change to occur in combination with a collection of other changes. For example, a new job description, certain new and expanded benefits, and a reclassification of affected positions from exempt to nonexempt may be very defensible changes that are acceptable to employees.

Payment of Back Wages Directly to Employees

Nothing in the law prevents an employer from paying back wages directly to its employees. To the contrary, state laws require the payment of all wages an employer concedes are due an employee.[20] There are at least two obvious benefits to be derived from the direct payment of back wages to employees:

- Compliance with the legal requirement to pay conceded wages; and
- The development of an open employer/employee relation-ship where miscommunications or mistakes are dealt with internally and without the involvement of third parties.

Despite these benefits, this approach is not commonly adopted by employers facing an identified risk area impacting more than a relatively small number of employees over a relatively short period of time. The primary reason is that this approach, while open and legally compliant, provides very little protection to the employer against future litigation or potential exposure to attorneys' fees, liquidated damages, interest and penalties. In fact, about the best an employer could hope for from this approach in

a subsequent wage and hour lawsuit is an offset or credit against the back wages allegedly due for the amounts already paid to the impacted employees.

Agency-Supervised Payment of Back Wages

The FLSA authorizes the U.S. Department of Labor (DOL) to supervise any voluntary payment of unpaid wages owed to an employee by an employer and release of claims.[21] The California Labor Code grants the same authority to the state Division of Labor Standards Enforcement (DLSE).[22] Some of the benefits available from an agency-supervised payment of back wages include:

- The waiver of further rights to recover back wages by the employees participating in the supervised payment plan;
- The possibility of arranging a payment plan over time;
- The possibility of a significant reduction of potential attorneys' fees, liquidated damages, interest, and penalty exposure; and
- The avoidance of litigation.

Some of the drawbacks to this approach include the following:

- The agency is likely to demand payment of the total amount of potential back wages due, despite the existence of one or more good faith defenses;
- Agency proceedings are generally a matter of public record;
- The agency may require an acknowledgment of liability or mandatory and monitored compliance efforts going forward; and
- The introduction of litigious or disgruntled employees to the agency process.

In some circumstances the drawbacks of this approach will outweigh the available benefits. This is particularly true where the reduction of potential attorneys' fees, liquidated damages, interest, and penalty exposure available through the agency approach do not outweigh the impact of the employer's good faith defenses on the likely settlement value of the employees' collective wage claims. Stated differently, the agency approach is perhaps most attractive when attorneys' fees, liquidated damages, interest, and penalties make up the bulk of the employer's potential exposure emanating from the risk area.

Recently, the California Labor Commissioner has shown leadership in this area with several private compliance settlements. One major advantage of this approach has been avoiding the legal fees associated with litigation and gaining some relief from potential penalties. Normally such private compliance settlements involve full restitution to the impacted employees.

Private Settlement with Employees

Unlike the agency-sponsored approach, a private settlement with employees would not be a matter of public record and would not likely require any mandatory or monitored ongoing compliance measures. Despite these apparent benefits, due to the appreciable risk that a private employee settlement may not be enforceable, a private settlement is not the preferred approach in every situation.

The law is clear that an employer may not compromise or settle a wage claim where the employee is concededly owed the wages at issue.[23] Thus, as a preliminary matter, this approach may only be viable where there is a demonstrable, bona fide dispute over whether the wages are, in fact, due the employee.[24] However, the analysis does not stop there.[25] As a result, in addition to the required bona fide dispute, the overall viability of this approach also depends upon whether or not the potential compliance problem arises under the FLSA, and the jurisdiction in which the employer resides.

Creative and Less Common Corrective Procedures

Making operational changes as part of a risk reduction program is and should be an individualized decision based on a vast combination of considerations. It is not possible for the Littler Task Force to list all of the options and combinations. However, a few of the more unusual approaches that have been used may be instructive and inspire additional solutions.

- An employer with a collective bargaining agreement incorporated several wage and hour changes into the negotiation of a new agreement. These changes greatly reduced risk and were viewed as ordinary developments coming out of the negotiations process.
- Another company settling a wage and hour class action included the new classification and changes into the settlement and had them approved by the court. In this manner, they created judicial approval of the subject of what might have become a second lawsuit.

- An industry association developed a set of policy recommendations that reduced wage and hour practice risks and presented them to members as best practices. Several member companies then adopted the policies as the Association's recommended and best practices.
- Many employers have developed ADR and arbitration agreements that seek to channel wage and hour disputes into an arbitration forum. Recently, the California Supreme Court held that preventing wage and hour class actions by a private arbitration agreement was unconscionable; however, federal law has been very supportive of these efforts and may preempt state law. (*See* Chapter 10 of The National Employer® 2008-2009).
- An employer with a very uncommon pay practice sought declaratory relief to confirm that the practice was legally compliant. This did not so much involve a change of policies and procedures as reduce risk by obtaining a favorable judgment.

The above list is representative of an almost endless set of options for individual operational change. Additional suggestions can be obtained by reviewing the "additional practices" listed in OCEG's Compensation Supplement of the Employment and Labor Law Domain.

KEY COMPONENT #4: IMPLEMENT AN EFFECTIVE WAGE AND HOUR COMPLAINT AND REPORTING SYSTEM

The rise of class action litigation based on alleged violations of federal and state wage and hour laws demonstrates that complaints regarding even the most mundane workplace issues can result in costly litigation to employers of all sizes. Although workplace complaints involving ethical ("whistleblowing") or harassment issues have received greater public focus and attention, payroll and wage practice complaints can have five to ten times the impact on company operations and finances. Even technical wage violations can result in regulatory investigations or litigation that can extend to all employees in a particular classification or status.

The above described importance of wage and hour claims leads to one of the most unasked questions in employment law. Why don't legislatures, administrative enforcement agencies, judges, and employers emphasize the need to have an effective internal wage and hour complaint procedure at least comparable to what is "required" for whistleblowing and harassment allegations? This question has profound implications and may even suggest the future direction of wage and hour law. Most employers want to do the right thing by meeting legal requirements. Contrary to a common allegation of plaintiffs' counsel, employer decisionmakers often are not aware when their wage and hour policies and procedures are not followed or intentionally violated. When notice of noncompliance is received, corrections are usually made. Compliance and self correction have enormous positive values for society, the employer, and the individual. This is the reconnection that has led to the "affirmative defense" under Title VII and a defense against damages, such as the "avoidable consequences doctrine" in California.[26]

In recognition of the compliance principles taken from harassment and whistleblower case law, the Littler Task Force places a high value on maintaining and enforcing internal procedures that encourage reporting and discovery of wage violations. As explained more fully below, such procedures inherently have value in preventing litigation, and they promise new defenses and mitigation arguments if litigation cannot be fully avoided.

Some of the kinds of complaints that can lead to litigation if not handled effectively include the following:

- An employee complains about off-the-clock work, but the employee's supervisor fails to adequately investigate, or fails to reimburse all affected employees.
- An employee classified as exempt wants to know why she does not receive overtime.
- An exempt employee complains of deductions from pay for intermittent leave and/or partial day absences for personal reasons.

To ensure proper wage and pay practices and to avoid litigation and/or reduce its financial impact, 21st century employers should maintain and enforce effective payroll and wage practice complaint procedures, which include proper training of managers and rank and file employees, alternative avenues for complaints, and a procedure for correcting violations.

The Legal Implications of an Effective Complaint Reporting Process

Several legal issues highlight the necessity for an effective complaint procedure. Such procedures can enable an employer

to avoid or reduce liability by having mechanisms in place to remedy violations as they are brought to the company's attention. Conversely, the failure to respond appropriately to complaints may result in increased liability for employers.

Safe Harbor Provision for the Salary Basis Test

One area of significance for employers is the preservation of exempt classifications under federal and state law. Under federal law, employers can use an effective complaint procedure to take advantage of a "safe harbor" that allows the employer to maintain the exempt status of employees, even where the salary requirement of the exemption has not been strictly maintained.

The FLSA exemptions from overtime require that exempt employees meet certain tests regarding their job duties and most must also be paid on a "salary basis" at not less than $455 per week. Under regulations promulgated by the DOL, improper deductions from an employee's salary (e.g., for absences of less than one day for certain disciplinary reasons, because the employer was closed due to inclement weather, partial week deductions for jury duty leave, a deduction for a two-day absence due to a minor illness when the employer does not have a bona fide sick leave plan, a policy or practice of providing wage replacement benefits, or a deduction for a partial day absence to attend a parent-teacher conference) can invalidate the exemption.[27] However, if an employer has a clearly communicated policy prohibiting improper deductions which meets certain specific requirements, the employer will not lose the exemption unless it willfully violates the policy by continuing to make improper deductions after receiving employee complaints.[28]

Such an internal policy must have three components:

(1) The policy must clearly specify that the employer prohibits certain salary/pay deductions, and must also include an internal complaint procedure.

(2) The policy must provide for reimbursement to employees for any improper pay deductions.

(3) The employer must make a good faith commitment to comply with its policy in the future.[29]

To obtain the protections of the safe harbor, employers should take care to ensure that any complaint policy meets the requirements of the FLSA regulation, and that complaints are handled properly.

The Potential Application of the Avoidable Consequences Doctrine

Under the avoidable consequences doctrine, a person injured by another's wrongful conduct cannot be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.[30] Under federal and state workplace harassment laws, the avoidable consequences doctrine has been combined with statutory principles to preclude or limit an employer's liability for harassment in certain circumstances where the employee failed to take advantage of a complaint procedure.[31] The California Supreme Court has explained that "[r]ecovery will not be allowed for damages that a party should have foreseen and could have avoided by reasonable effort without undue risks, expense, or humiliation."[32]

Adoption and use of an effective complaint procedure, when paired with appropriate policies and procedures, may enable an employer to assert the avoidable consequences doctrine as a defense to certain wage claims where employees failed to take advantage of a well-publicized and effective complaint procedure. Specifically, employees who fail to complain of an alleged practice unreasonably fail to avoid the damages that flow from that practice. As such, employee damages for such violations should be cut off from the time that the employee should have known to complain. This defense seems particularly well-suited for actions involving meal and rest periods, time clock violations, and other claims that require individualized inquiry to determine whether and to what extent a violation occurred. Courts can have an enormously positive impact on wage and hour compliance by applying the avoidable consequences doctrine when it can be shown that the involved employees knew (or should have known) about the possible violation and failed to seek relief through available internal complaint systems. While this defense is only now being advanced in litigation and courts have not yet ruled on it, employers should consider acting now. Compliance measures implemented today will not be tested under current law, but rather the law as it exists when and if litigation occurs. If this takes two or three years, it is likely that many jurisdictions will have decided on the application of the avoidable consequences doctrine by that time. Accordingly, the Littler Task Force urges strong consideration of an enhanced internal complaint, training, investigation, and compliance system today, both to avoid litigation and take advantage of anticipated future defenses.

Possible Pitfalls of Failure to Maintain Effective Complaint Procedures

Just as employers can use and apply effective complaint procedures to avoid liability for wage violations, failure to follow effective complaint procedures may also subject employers to greater damages. In addition to the lost opportunity to discover and correct improper practices, failure to learn of or respond to complaints can also give rise to heightened damages under the FLSA. This is the flip side of the advantages described above regarding various affirmative defenses and the avoidable consequences doctrine.

Not having an effective avenue for resolving employee complaints could result in the application of the longer three-year statute of limitations under the FLSA for "willful conduct," instead of the two-year limitations period for nonwillful violations.[33] To show willfulness, a plaintiff must show that the employer knew of the alleged violation or showed reckless disregard as to whether its conduct was prohibited by the statute.[34] It may well be argued that if an employee complains of an alleged violation, the employer may be deemed to "know" of the violation. In *Pollis v. New School for Social Research*, an employer's failure to rectify a pay violation after an employee complained resulted in a finding of willful conduct and an extension of the limitations period.[35] Similarly, a failure to respond to complaints may prevent an employer from asserting that a violation was made in "good faith," with a reasonable belief that its pay practices complied with the FLSA, which could otherwise relieve the employer from liability for liquidated (double) damages.[36]

In certain circumstances, an employer may argue that the lack of employee complaints demonstrates lack of employer knowledge about the unlawfulness of the wage practice at issue. In *Jerzak v. South Bend*, a federal district court found an employee's failure to complain about wage practices to be relevant to the court's conclusion that the employer's conduct was not willful.[37] In *Wolfslayer v. IKON Office Solutions, Inc.*, the district court found that the company's violation of the FLSA was not willful because the company maintained numerous and thorough compliance and audit policies to ensure that it did not violate the FLSA.[38]

Human Resources, Managers and Supervisors Must Follow an Effective Complaint Mechanism for Payroll Questions and Complaints

In conjunction with other types of training commonly provided to supervisors, including management training, harassment training, safety training, and equal employment opportunity training, employers should ensure that human resources, managers, and supervisors are trained on payroll issues and exemptions. As noted, a supervisor's failure to identify a mistake in partial day or week deductions from overtime could result in the treatment of otherwise qualifying employees as nonexempt under the FLSA. Once supervisors become aware of a potential violation, they are likely to consult with senior managers or human resources, and these higher level employees must have an understanding of the law and policy. Investigation training should also be provided to those who examine wage and hour complaints.

Furthermore, many plaintiffs' attorneys will seek extensive information on whether supervisors and/or managers know why their class-member subordinates' job duties qualify for exempt status (particularly under the administrative exemption), and try to use any lack of understanding as evidence that the employees were misclassified in bad faith. Knowledge and understanding of key wage and hour issues should be part of the performance evaluation of every manager and supervisor.

To avoid the pitfalls of unlawful pay policies or improper applications of lawful policies, employers should adopt effective complaint mechanisms for payroll questions and complaints. Such mechanisms should include the following components:

- Wage and hour complaints should be treated with similar levels of sophistication and importance as complaints involving ethics, harassment, and other high-level areas of risk. Indeed, given the potential liability many wage and hour violations pose, a strong argument can be made that complaints of this nature should be considered among the most serious complaints and promptly and thoroughly investigated and resolved.
- Complaint procedures should be well publicized, and should allow employees to complain to any number of managers or supervisors, rather than just allowing one avenue of complaint (*i.e.*, following the "chain of command"). The complaint procedures should be publicized in handbook policies, codes of conduct, and ethics policies.
- Employees should be required to acknowledge the policy through a signed or other provable record.

- Company policy should ensure that supervisors are trained to respond immediately to complaints about pay practices. Human resources and compensation personnel should also be trained on the proper response to complaints of this nature.
- Company policy should ensure that managers are trained on payroll requirements, wage and hour practices and laws, exemption definitions, and state law variations.
- If a practice is found to be out of compliance, an employer must resolve the issue immediately.

To ensure and verify that complaint procedures are known to employees, employers should obtain documentation that formally acknowledges the employees' understanding of complaint procedures. Printed policies that employees sign during orientation, and signed attendance sheets from employee training and orientation programs, are commonly accepted methods of securing a record of an employee's knowledge of complaint procedures. Given the current risk of litigation and the desire to scrupulously avoid wage and hour mistakes, many companies are turning to more sophisticated procedures, such as electronic verification of policy receipts and interactive computer-based training that includes an electronic record of training completion. See Key Component #5, below, for more information.

If the complaint procedures uncover a widespread practice that presents a concern, the company should undertake the analysis set forth above in Key Component #3. A key element of a successful complaint policy and procedure is its effectiveness at leading to correction of noncompliant pay practices.

Benefits of Having an Effective Complaint Mechanism

The policy review and audit procedures addressed above will assist employers in creating new policies and procedures to avoid claims. Effective implementation of such policies, including adequate investigation and resolution procedures that are followed throughout the organization, are essential for litigation avoidance and for effective wage and hour policies. Effective complaint mechanisms should ensure that most complaints are resolved internally before other third parties, such as the DOL or plaintiffs' counsel, become involved. By investigating and resolving complaints, companies can often prevent single claims from spinning into collective complaints. Investigating complaints can help companies identify and correct broader areas of risk and can identify weaknesses in recordkeeping that can be corrected.

KEY COMPONENT #5: CREATE A CUTTING-EDGE WAGE AND HOUR TRAINING PROGRAM FOR HUMAN RESOURCES, MANAGERS AND EMPLOYEES

Great wage and hour policies and internal complaint procedures will fail if human resources, managers and employees lack an understanding of their roles and obligations. Reviewing hundreds of wage and hour cases, the Littler Task Force concludes that more than half of them would never have occurred or would be far more defensible if it could be established that human resources, manager and employee training took place. Wage and hour training for employees and managers is a critical part of a prevention program, helping to prevent litigation from occurring at all and, where litigation does occur, substantially reducing damages by providing evidence that any wage and hour violation was not willful. This is because employees and managers who understand the basic rules are less likely to violate wage and hour laws inadvertently. Indeed, many cases involving massive liability could have been avoided with simple educational efforts.

Likewise, wage and hour training can be compelling evidence of good faith efforts to comply with the law. If and when mistakes occur, the employer that has provided its workforce with comprehensive wage and hour training will be well positioned to establish a good faith defense, and dramatically reduce damage awards or the settlement value of a case.

Conducting the needed training is most important. It is also necessary to consider the method of delivery and content of the training. Excellent live instruction is engaging and often preferred, especially for those who are responsible for answering detailed questions from employees or investigating complaints. To cover all lower level supervisors and employees, however, such training can be expensive and time-consuming to deploy, particularly for larger or geographically diverse organizations. By contrast, online training can be immediately available, reaching a large geographically dispersed workforce more efficiently. However, this is not the major advantage of online instruction for workforces with large employee populations. Wage and hour training has a high probability of being challenged for proof that it was received and evidence that every session covered the needed lessons. If done correctly, online training offers seamless tracking and archiving of data for each employee who participates in

training and acknowledges the organization's policies. Web-based training may enable an employer to prove that every employee received uniform and consistent instruction on key training topics. It also enables an employer to show a finder of fact, through a demonstration, the precise training that was delivered to the company's employees. Moreover, very technical lessons can be preprogrammed by experts and customized to the employer's industry, workforce, local regulations, and state and federal law.

In the past, some employers had very good training programs which were usually delivered in person. Indeed, Littler's Legal Learning Group has long included wage and hour training as part of its basic training for human resources and managers. See Appendix G for Littler's training options. Traditionally, the few wage and hour courses offered online were crude, too general, and not designed with an anticipation of future legal challenges. In response, the Littler Task Force engineered training content to address the most commonly encountered compliance and litigation challenges. Working with Employment Law Learning Technologies (ELT), a Littler-created company, to provide high quality online compliance training, this customized content was imbedded into a 20 minute story-based learning experience for employees, and a 45 minute simulation for managers. Dozens of variables have been programmed into the training so that it can be calibrated for the workforce, industry, and applicable state and federal requirements. The result is a unique training solution that actually teaches needed wage and hour lessons while simultaneously becoming electronically accessible evidence of compliance. More information about the ELT Wage and Hour programs is available in Appendix A.

Innovation should also extend to training individuals who will investigate wage and hour issues. Planning and strategic decisions involved in wage and hour investigations are substantially different than those presented by a discrimination or harassment complaint. For example, when and how to invoke the attorney client privilege, the scope of the investigation, the types of documents to look for, and how to engage in the interview process all differ dramatically in the context of a wage and hour investigation when compared to a harassment investigation. Even experienced investigators should receive additional instruction before conducting a wage and hour investigation. For investigation training to be effective, it should be as "hands on" as possible, rather than merely providing investigators with a list of learning points. Littler's Legal Learning Group has developed a program that simulates an actual investigation, in which participants must plan the investigation, interview witnesses, and reach a conclusion. See Appendix I for a sample course description.

Finally, communication protocols from upper management can build wage and hour awareness and emphasize that senior management supports ensuring employees are properly compensated for all hours worked. Training and follow-up communications deprive plaintiffs' counsel of the chance to make the argument that employers are meticulous when it comes to being paid for their products and services but imprecise and often sloppy in paying employees for their work.

Common Class-Based Claims Related to Inadequate or Inappropriate Training

While wage and hour lawsuits can obviously take many forms, there are some factual scenarios that arise time and again in wage and hour class actions. Many of these scenarios can be avoided if appropriate training is provided to managers and employees. The following is a brief discussion of the types of issues that training is particularly well-suited to address.

Allegation: The Plaintiff Was Instructed by His or Her Supervisor to Work Off-the-Clock

Plaintiffs often claim that they were instructed by a supervisor to work off-the-clock. *Falcon v. Starbucks Corp.*[39] is an example of a recent case in which the plaintiffs were able to obtain certification of a collective action for off-the-clock work even though their employer had an official written policy of prohibiting off-the-clock work. The "time worked is time paid" policy was stated clearly in the company's Partner Resources Manual, which also required partners to report any violation of the prohibition against off-the-clock work and stated that managers who violated the policy would be subject to corrective action "up to and including termination of employment." Partners who failed to report off-the-clock work were also officially subject to corrective action. The plaintiffs, a group of Assistant Store Managers (ASMs) were trained on the "time worked is time paid" policy, were required to record their work by punching in and out for shifts and breaks, and were officially allowed to note any unrecorded work in a "punch communication log." Store managers were to make corrections from the log into the payroll system. The company also provided all partners with a toll-free "Standards of Business Conduct Helpline" that allowed partners to "ask questions or

report concerns," and assured partners that the company "does not tolerate retaliation." In other words, it appears that the company had proper procedures in place.

However, the court's decision does not give any indication of whether — or to what extent — store managers were trained on the "time worked is time paid" policy, which was implemented shortly after the ASMs were converted to nonexempt employees. In opposition to the defendant's motion to decertify the collective action, the plaintiffs alleged that despite the official "time worked is time paid" policy, managers enforced an unwritten policy of encouraging or allowing ASMs to work off-the-clock in order to control overtime costs. Many of the declarations submitted by ASMs stated that the written policy was not enforced, that the store managers discouraged overtime yet indicated that the work still needed to be done, and that the ASMs had more work to do than they could possibly complete in eight hours a day. The plaintiffs also submitted evidence that bonuses for store managers depended, in part, on the number of labor hours the managers utilized. In short, the plaintiffs claimed that despite the written policy prohibiting such work, store managers either explicitly encouraged ASMs to perform off-the-clock work or were aware that ASMs were performing such work and implicitly approved the practice by ignoring it.

As this case shows, a supervisor's instruction to work off-the-clock need not be explicit to be problematic. A manager who is aware that his company has a policy that prohibits off-the-clock work probably knows that instructing an employee to work off-the-clock is improper. However, he may not realize that discouraging an employee from recording overtime while simultaneously telling the employee to keep working until all the work is done can be viewed as tantamount to instructing an employee to work off-the-clock. Appropriate training can help make this clear and help the company avoid legal problems.

Allegation: A Supervisor Altered Time Records to Reduce Reported Working Time

Getting employees to record all their work time is only half of the battle. Many class actions stem from the assertion that once the plaintiffs recorded all their time, their managers thereafter revised the plaintiffs' time cards to reduce the amount of work time reported. This is known as "time shaving." The plaintiffs in *Fasanelli v. Heartland Brewery, Inc.*,[40] were hourly employees who worked at the defendant's six restaurants. Among other claims, they alleged that "[d]efendants altered employees time cards so as not to reflect all of their time worked." Interestingly, the defendants admitted that the managers of at least two of the restaurant locations used a "punch-adjust" system to review whether an employee "clocked-in early (and performs no work), or clocked-out late (or not at all) after finishing his or her duties." In other words, the defendants conceded that on occasion, plaintiffs' time cards were altered. That evidence, along with the fact that the defendants maintained a common time-keeping practice based on an electronic click-in/out system, was sufficient to convince the court to conditionally certify the class under the FLSA.

Not surprisingly given its procedural posture, the decision in Fasanelli is silent on the issue of whether — and to what extent — the managers were trained on the proper execution of the "punch-adjust" system. Adjusting an employee's timecard to reflect actual time worked is entirely lawful. However, an employer engaging in such a practice should train its managers and implement procedural safeguards to ensure that such adjustments are only made in appropriate cases and that any changes made are agreed to by the employee involved.

Allegation: A Supervisor Knew an Employee Was Working Off-the-Clock but Took No Steps to Stop the Off-the-Clock Work

Supervisors need to understand that there is no such thing as voluntary off-the-clock work. An employee simply may not waive his right to be paid for every hour worked. Supervisors who do not understand this can cause significant liability for their employers. As but one example, one company settled with the DOL a multi-million dollar claim involving overtime owed to customer service representatives who worked off-the-clock. According to the complaint filed by the DOL, customer service representatives began "working" before the start of scheduled shifts and often stopped after the close of their shifts, but did not record the time and were not paid for it. Most of the alleged incidents occurred at call centers located across the country, yet the management at the centers allegedly turned a blind eye to the extra (uncompensated) work that was being performed.

Allegation: The Plaintiff Did Not Know Where to Direct Complaints About Unpaid Work

Plaintiffs in wage and hour class actions often assert that they thought their supervisor was acting improperly but were unsure to whom they should complain. Perceiving no other avenue of

redress, the employee/plaintiff turns to an outside agency or an attorney for assistance. This sequence of events deprives the employer of a chance to remedy the alleged violation before a lawsuit is filed. It is important that employees be trained to understand both how seriously the company takes allegations of wage and hour violations, and what internal remedies are available for individuals who feel their rights have been violated.

Allegation: The Plaintiff Never Took Meal Breaks and Rest Periods

In the past few years, plaintiffs' attorneys have been filing meal and rest period cases in droves. The common thread among these cases is the allegation that a class of employees was not allowed to take the meal and rest breaks to which the law entitles them. There are several cases pending in California and other states. In December 2005, an Oakland, California jury awarded $172 million (including $115 million in punitive damages) to a class of 116,000 hourly Wal-Mart workers who claimed they were not provided appropriate meal breaks.[41] Employers are well advised to provide training on the legal requirements that employees take meal periods and rest breaks.

Allegation: The Plaintiff Was Not Aware of Company Policies Regarding Working Time, Meal and Rest Periods, and Off-the-Clock Work

Well-written policies are of limited or no utility if employees are utterly unaware of their existence. Employers are more likely to train their managers on wage and hour matters than rank-and-file employees, because it is the managers who administer the company policies. However, employees need to be educated about their rights so that they can help the company police its workforce. Employees who were accurately informed about their rights in the workplace, were encouraged to report any violations, were given multiple avenues to report such violations and were assured that no retaliation would be permitted, would have virtually no excuse for failing to comply with their employer's wage and hour policies.

Allegation: A Supervisor Instructed the Plaintiff to Arrive to Work Fifteen Minutes Early, in Order to Be Ready and Able to Begin Work at the Scheduled Time

Supervisors must be trained to understand that if an employee comes into work a few minutes early to get a head start on his administrative duties, the supervisor must ensure that the employee is paid for that time. That principle is illustrated in the case of *Sherrill v. Sutherland Global Services*.[42] In that case, the plaintiffs were telemarketers who claimed that the defendant company encouraged its call center agents to arrive early to work in order to review and complete paperwork, sign on to the computer and review e-mail communications. As a result, employees often arrived fifteen to thirty minutes before the start of their shifts. The plaintiffs alleged that the defendant's management "was aware that agents were performing work prior to the start of their scheduled shifts, but instructed them not to sign onto the Kronos system until at or near the scheduled start time." Based upon these allegations, the court in *Sherrill* conditionally certified a class so they could pursue their off-the-clock claims under the FLSA.

Allegation: The Supervisor Mistakenly Believed the Employer Was Not Required to Compensate Plaintiff for Missed Meal and Rest Periods, As the Plaintiff was Instructed to Take Required Breaks But Chose Not to Take Them

California law requires that when a nonexempt employee is not provided with the meal and/or rest breaks to which he is entitled under the law, he must receive an extra hour of pay for each transgression.[43] The law in California is clear that an employer need only provide an employee with the opportunity to take a rest break. If the employee voluntarily chooses not to take that rest period, she is not entitled to the extra hour of pay. Many supervisors are under the impression that the same is true of meal breaks — *i.e.*, so long as the employee had the opportunity to take one, no additional payment is due if the employee chooses to skip that break. However, that issue has not yet been resolved by a published state court decision. To the contrary, counsel for plaintiffs argue (in some cases with success) that simply making a meal break available is insufficient; rather, the employer is required to actually ensure that the employee takes the meal break. Until this issue is resolved by the courts, employers would be well served to train their supervisors that payment for a missed meal period should be made whenever a meal period fails to satisfy the statutory criteria (*i.e.*, it is less than thirty minutes, the employee gets interrupted, it is not taken at the correct time of day, the employee is not free to leave the premises, etc.)

Solutions

As noted, many of the problems described above could be avoided by training new employees, managers and human resource and employee-facing payroll personnel about the

employer's key wage and hour policies and procedures using a web-based application. See Appendix A.

Training Topics

In particular, training should be provided on the following topics to nonexempt employees and anyone who is responsible for managing them:

- What constitutes working time.
- Prohibition against off-the-clock work.
- Importance of accurate timekeeping and employee and manager responsibilities to ensure accurate reporting.
- How to raise payroll questions or complaints.
- What to do if you are instructed to work off-the-clock.
- Certification of reported working time, including meal and rest periods.
- Certification of key duties by exempt employees.
- Procedures for reporting working time away from the employer's facility.
- Proper procedures for investigating and responding to payroll concerns or complaints.
- Proper editing of time records by supervisors.
- Duty free meal and rest period requirements.

Training should be an ongoing process. Once initial training is completed, an employer should provide refresher training to update managers, employees and human resource and payroll personnel regarding any changes to the law and company policy on these issues.

Another method of publicizing the company's key wage and hour policies and procedures is publishing brief articles in employee newsletters. To be effective, publications should address wage and hour issues and present appropriate solutions. Along the same lines, an employer might choose to send an annual letter from a senior business leader to the company's employees, reminding them of the company's key HR and payroll practices.

An employer should also consider developing an employee communications campaign to emphasize the company's culture of wage and hour compliance. Screensavers, badge stickers, time-clock policies and e-mail reminders can be used as tools to keep policies front and center in the minds of employees.

KEY COMPONENT #6: MINIMIZE FUTURE WAGE AND HOUR EXPOSURE THROUGH TECHNOLOGICAL INNOVATION

In a Total Wage and Hour Compliance Initiative, the potential violations are so numerous and individual-specific that conventional means of documentation and testing are often impractical, cumbersome, and economically prohibitive. If one examines the history of timekeeping records, the same story is replayed. To be competitive, businesses today are using automated timekeeping and payroll systems. This is especially true for employers with more than a few hundred employees.

Littler predicts that ultimately, electronic records will create such transparency regarding work histories and pay practices, that they will either provide the best evidence to defeat a wage and hour claim or class action, or they will be the plaintiffs' best ally in proving noncompliance. While these two outcomes seem to be in conflict, they are not. This is because total wage and hour compliance means that an employer can prove such compliance or be immediately aware of noncompliance, allowing immediate corrective action. Increasingly, automated systems designed with an understanding of the legal requirements will continuously perform increasingly more sophisticated self audits. This is known as "auto-compliance" technology. Even current systems, despite their fallibility, often include self-audit features such as automatic meal penalty payments for a missed 30 minute duty-free lunch in California. Several systems are under development that promise sufficient programming and cross-checking to become useful to an employer committed to "total wage and hour compliance."

In the battle for total wage and hour compliance, three fronts will benefit most from technology. First is the audit described in Key Components #1 and #7. Second, state-of-the-art uniform training described in Key Component #5. Third, sophisticated time management systems that capture and to some extent regulate workplace activities.

Technology-Based Audits of Wage and Hour Classifications and Practices

A technology-based audit offers several advantages over traditional pen-and-paper audits. Utilizing state-of-the-art technology and software, Littler has developed Audit QB (Audit Quarterback), a dynamic web-based employment audit

program that our attorneys use to conduct audits effectively and efficiently.[44] Advantages of technology-based audits, such as Audit QB, include the following:

- **Questionnaires and data can be stored in one central location.** Traditional audits often result in reams of paper with handwritten notes and cumbersome excel spreadsheets, but with a technology-based audit, which incorporates storage and organization in a central repository, that can be avoided. Audit projects can be managed, and relevant events can be scheduled in an ordered and controlled manner.
- **Store relevant documents.** In addition to storing data and questionnaires, a technology-based audit should incorporate an easy-to-use uploading feature, which allows for the storage of Word, PDF, Excel, or other documents directly in the database, where they can remain in one convenient location for repeated access. Examples of documents that may be uploaded include job descriptions, policies and procedures, or even performance reviews. An option for designating stored documents as privileged, with restricted access, will help an employer take advantage of the various privileges that may be available when conducting an audit.
- **Generate reports for data analysis.** Sophisticated technology-based audits may allow for the creation of customized reports to analyze data across any number of categories. For example, in an exemption classification audit using Audit QB, the responses of complete groups of interviewees within a job category can be compared, or responses can be compared one-to-one. These kinds of reports can be especially useful in determining whether particular issues addressed in the audit might warrant further investigation.
- **Improve the ease of periodic compliance checks and auditing.** With a technology-based audit, the process of conducting regular follow-ups on topical areas becomes smooth and efficient, because the questions to be asked have already been prepared and stored in a centralized location, and new responses to questions can be compared with prior responses. This enables an audit to become more dynamic than static, and gives an employer a more accurate picture of compliance over time.

Technology-Enabled Presentation and Documentation of Uniform Wage and Hour Training

The second front of the battle for wage and hour compliance that will benefit from technology is training conducted online, or what is commonly called e-learning. This technology and its advantages have been described above in Key Component # 5. Such systems have the ability to document that a company's wage and hour policies have been received and to confirm the employee or manager's role in compliance. At the completion of an online training session, each employee should be asked to acknowledge that he or she has received and understands the training, and knows where to direct any concerns or complaints regarding his or her employment. Managers can make a similar commitment, including an agreement to carry out their management duties consistent with the policies described in the training. By using an online format to ask these questions, an employer will have records of an employee's acknowledgments, which can be critical evidence when faced with litigation or allegations by an employee that he did not know where to direct his complaints. Similarly, managers will have committed to proper enforcement of wage and hour policies and provided confirmation that they are performing managerial duties (as opposed to nonmanagerial tasks). Any manager believing that he or she is either performing or being asked to perform significant nonmanagerial tasks should agree to immediately report this situation. For additional information on available e-learning programs, on using training as part of a total compliance effort and on building a good faith defense and to limit damages in litigation, see Appendices A, G, H, and I.

Technology-Based Time-Management, Payroll and Compliance Systems

Finally, time, task, and payroll systems are certain to benefit from the integration of existing and new technologies with an employer's state-of-the-art wage and hour policies and procedures. In fact, as technology "touch points" or employee/technology interfaces continue to infiltrate the workplace and become more readily affordable and accessible, it is only a matter of time before such systems fully replace the paper timesheet or manual punch clock as the standard of care required to evidence comprehensive compliance.

For example, an employee entering the building may be required to "badge-in." This electronic record could be linked to the time of clocking in for an hourly employee. If the employee

enters the building more than 15 minutes before clocking in or remains more than 15 minutes after clocking out, the system could require an explanation. If the employee had e-mail access, the system could send an e-mail requiring a confirmation that no work was done during that time (explanations of what constitutes work would be available online and covered in the e-learning course). If the assurance is not provided or the employee reports that work was performed, then the situation is escalated to a supervisor who must sign off on the resolution.

Taking the example one step further, a fully integrated compliance system might then automatically lock a nonexempt employee's computer or otherwise disable the employee's company-provided technological tools, such as a Blackberry or inventory scanner, for a specified period of time when the employee clocks out for a meal period, during the time the employee is scheduled to take a meal period, or should the employee work more than five hours without clocking out for a meal period (in California). In the latter scenario, the system may also simultaneously notify the employee's manager of the irregularity or require manager approval to log the employee back onto the computer or tool to assure follow-up. The same system may repeat at the end of the employee's scheduled work shift. This type of sophistication is essential, since the law is still evolving, especially regarding the timing and waivers associated with meal periods and rest breaks.

Technology can also be used to obtain real-time employee certifications verifying that employees have reviewed their time records and that the entries, including any adjustments by managers, are correct. The certification process can also be used to identify any errors. In other words, when the employee is asked to certify the accuracy of time records and a manager makes edits, the employee would be required to immediately notify the employer of any errors in the certification record. If errors are identified, the system could auto-generate a report to management, compensation or human resources and trigger a further investigation.

These are but a few examples of what a fully integrated, technology-driven, compliance system might look like. As a practical matter, dozens of these types of "touch points" and integration capabilities already exist today in the workplace. They just have not been widely used yet to fight the wage and hour compliance war. Again, it is only a matter of time. The barriers to entry for such a system continue to fall with every technological advancement and simplification made in this regard. And even if they do not fall precipitously, the benefits of securing well-documented compliance going forward are very likely to outweigh the costs of obtaining it for most employers of any appreciable size.

Caution: Carefully Verify the Promise and Effectiveness of Technology-Based Solutions

While the role of technology is central to ending the wage and hour wars, one enormous qualification must be emphasized. It is the nature of technology development to over-promise its availability and success. Marketing departments of software companies often have well-developed campaigns even before products are on the market. Moreover, what is supposed to be feasible in a first generation product may not be achieved until the second or even third generation of the product is released. Littler recommends that at least three qualifying procedures be applied to technology-driven solutions: (1) use only systems and technology already developed; (2) require your own legal due diligence regarding the legal standards, guidelines, and practices imbedded in the technology; and (3) periodically test the systems to ensure that what was once in compliance with your policies and legal requirements, remains operational and compliant.

KEY COMPONENT #7: CONDUCT PERIODIC REVIEWS AND/OR AUDITS OF THE COMPANY'S WAGE AND HOUR COMPLIANCE STATUS

The best laid compliance plans can fall into disuse through turnover in key personnel, perceived administrative inconvenience and competing business demands. Periodic compliance reviews and audit protocols are the best defense to waning compliance with wage and hour policies and procedures.

Fortunately, many companies now have existing audit resources that can be employed to monitor wage and hour compliance. This is particularly true since the passage of the Sarbanes-Oxley Act, as many companies have now adopted strict audit protocols to monitor their business practices. With some slight modification, the resources employed by companies to ensure compliance with Sarbanes-Oxley can be slightly modified and employed as a component in wage and hour compliance initiatives. For example, many multi-establishment employers have field auditors whose primary role is to review field business practices and report to a centralized monitoring group on their

findings. Quite often, these auditors use standardized audit templates and checklists to ensure consistent monitoring. These type of templates and checklists can be revised to encompass wage and hour topics, including minimum recordkeeping, mandatory postings and timekeeping practices.

Field human resources and payroll personnel can also be utilized to spot check wage and hour compliance and report their findings to a centralized contact. As in the more conventional audit setting, the use of a standardized questionnaire or template can ensure consistent review and enforcement of the company's wage and hour policies and procedures.

The following is a roadmap for establishing a wage and hour compliance audit program. As discussed in Key Component #1, in determining subject areas to be periodically audited and conducting reviews, an employer should considering joining OCEG, which will allow it to take advantage of the vast catalogued resources available to that organization's members.

Implement Audit Protocols to Ensure Compliance

1. Ensure required federal and state law posters are in place.
2. Ensure recordkeeping protocols are in place to retain payroll records required by federal and state law.
3. Spot check time records to determine if they are complete and consistent with payroll register entries.
4. If the company uses automated recordkeeping, examine supervisory time record edits in terms of actual edits and frequency of edits to determine if editing that is performed is appropriate.
5. Confirm that required time records are being maintained in a secure location.
6. Observe preshift and postshift activities by employees to determine if any off-the-clock work is occurring.
7. Spot check the application of rounding rules to confirm they are being used appropriately.
8. Determine whether any nonexempt employees have the ability to work remotely using laptops, PDAs or other technology and confirm that any work performed remotely is captured by time-keeping systems.
9. If nonexempt employees are working remotely, spot check computer log-in records or other electronic "touches" to determine if activities reflected in these records match the employees' time records.

Train Audit and HR Staff

Provide internal audit and HR staff with training regarding common wage and hour violations and issue-spotting techniques. Consider updating audit checklists to test compliance with certain policies and procedures.

Include Compliance in Management Performance Evaluation Metrics

Reward managers for supporting a culture of compliance and discipline managers who violate known requirements.

One benefit of a wage and hour compliance program is that a strong audit and enforcement model can support an employer's good faith defense. In addition, an audit and enforcement program can assist an employer in identifying and correcting possible compliance issues on a pre-litigation basis.

CONCLUSION: WHAT EXPECTATIONS OR PREDICTIONS ARE ASSOCIATED WITH THE LAUNCHING OF THE TOTAL WAGE AND HOUR COMPLIANCE INITIATIVE?

The Total Wage and Hour Compliance Initiative has been undertaken to help empower employers to "end" the wage and hour wars. The content within this Report will assist employers in commencing a "total wage and hour compliance" program, but more resources will be needed, along with an independent legal review. For some employers, the Initiative will be a means of augmenting an ongoing program of compliance. Littler is committed to providing continuously updated information and tools that will facilitate this important undertaking.

Meanwhile, one of the benefits of representing over 30,000 employers is the ability to see and identify trends even before they are reported in the media. In conjunction with this Initiative, Littler offers three predictions about the future of wage and hour class action litigation.

#1: Wage and hour class actions will cause a change in employer priorities and increase allocation of resources assigned to handle prevention. The dollar exposure to corporate America has now risen to a level that registers with almost every chief compliance office, risk assessment professional, or due diligence process. Noncompliance reduces the value of the

enterprise and can actually destroy its marketability. On a scale from 1 (highest) to 5 (lowest), many companies now place wage and hour compliance at level 2 (high). Within as little as eighteen months, we anticipate that wage and hour compliance will rise to level 1 (highest). Ironically, instituting most of the recommendations in this Total Compliance Initiative will most likely cost less than 10% of what would be necessary to defend against just one wage and hour class action.

#2: Wage and hour class actions will evolve such that as much as fifty percent of the cost of the litigation will involve e-discovery and spoliation issues. In less than two years, it is expected that increasingly sophisticated plaintiffs' counsel will be forced to argue more about lost e-mails, inaccessible text-messaging, and electronic time records with gaps, as opposed to the merits of their cases. This prediction is based on better defenses and compliance from employers and the rapid growth of electronic evidence. Courts are just now setting high standards regarding the preservation and production of such evidence.[45]

#3: The total wage and hour compliance initiative and other initiatives modeled after it will reach over eighty percent of companies with more than 500 employees the end of 2010, resulting in noticeable declines in the filing of wage and hour class actions by no later than 2012. Time predictions are challenging, and the preceding merely represents our task force's best estimate. Nonetheless, this should help many organizations in establishing their priorities. The promise from this and similar initiatives is that within four years the wage wars will become fewer and the end of the "wars" will be in sight. Many companies that act now can expect their wage "wars" to end within three to four years. This is the normal timeframe for major cultural changes and also parallels the statute of limitation in many states.

APPENDIX A

ELT's Wage & Hour E-Learning Program

ELT's Wage & Hour e-learning program educates a company's workforce about the basics of the law, as well as the company's policies. The program also helps to establish invaluable affirmative defenses in the event of litigation. ELT's e-learning program translates critical messages into real-life stories that employees will understand and remember. The Wage & Hour program brings the law and company policies to life, without using legal jargon and confusing terminology.

The course draws learners into cutting-edge, story-based simulations where they interact with characters, and help to solve common wage and hour problems. The separate employee and manager courses include the following:

Interactive Simulations for Employees

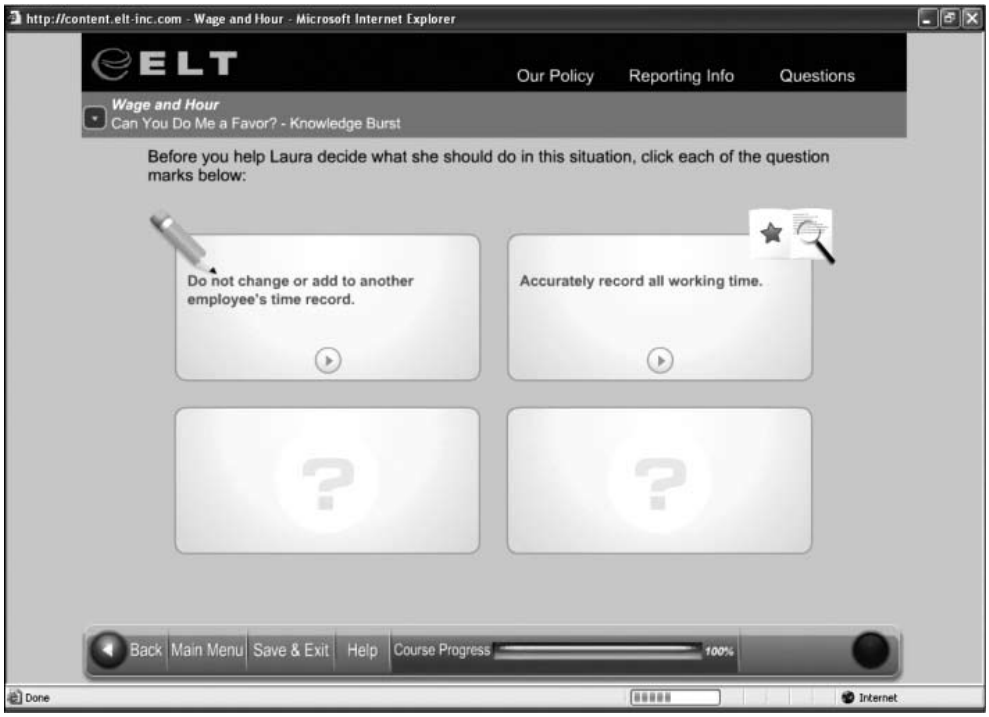
- Cover essential wage and hour lessons including:
  - – Overtime
  - – Hours worked
  - – Off-the-clock work
  - – Fixing errors
  - – Reporting
  - – Time card falsification
- Expose learners to critical policies about time keeping and hours worked.
- Make clear which practices are prohibited.
- Can be configured to address industry and state law requirements.

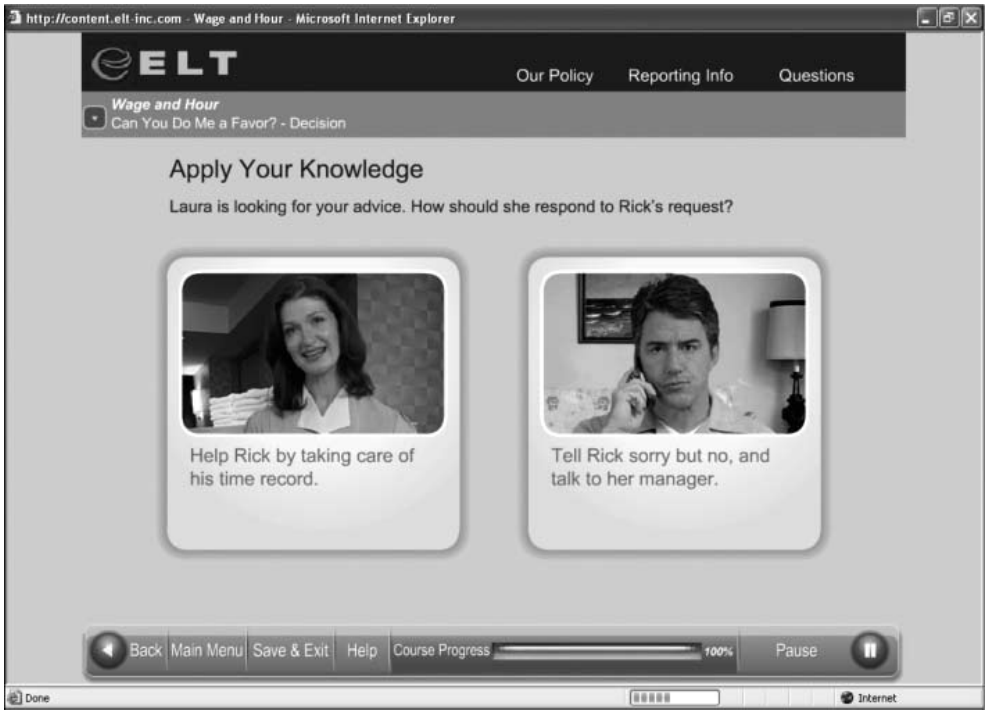
Interactive Simulations for Managers

- Cover essential wage and hour lessons including:
  - – Hours worked
  - – Overtime
  - – Errors and reporting
    - - Special manager responsibilities
    - - Off-the-clock work
    - - Record keeping
    - - Handling employee complaints and errors
    - - Meals and breaks
- Help managers understand the impact of their conduct.
- Expose managers to critical employer policies.
- Help managers understand how and when to seek help.
- Can be configured to address industry and state law requirements.

Sample Images from ELT's Wage and Hour E-Learning Program

Sample Images from ELT's Wage and Hour E-Learning Program (*continued*)





APPENDIX B

Practical Recommendations for Preserving the Attorney-Client Privilege

In light of developing case law, the following are some practical recommendations for employers, to help safeguard against the discoverability of documentation and communications produced as part of a self-audit:

(a) Assume that all documentation associated with an internal audit will eventually be discoverable.

(b) Create written documentation seeking advice of counsel and cite to possible litigation risks and/or clarify that the company is seeking legal advice.

(c) Conduct as much of the audit verbally as possible. For example, if instructing human resources representatives regarding what to investigate, do so verbally.

(d) Review must be at the direction and control of counsel. Consider hiring an outside expert to conduct the investigation, with counsel directing the investigation.

(e) Ensure counsel is involved as early as possible.

(f) Use outside counsel if possible. Outside counsel appears more objective to third parties and there is less risk of a court finding that counsel was wearing his or her "business" hat while conducting the investigation.

(g) Instruct all employees to cooperate with counsel and to communicate in strict confidence. Remind employees that the company, and not its employees, is the attorney's client; therefore, although conversations between employees and counsel are privileged, the company ultimately decides whether to waive the privilege, and in the case of a conflict of interest, the privilege belongs to the company.[46]

(h) Consider conducting a limited sample audit, *i.e.*, audit a small group of employees in a particular unit. Consider creating an initial sample audit that is privileged, and following it with a more extensive audit that may (or may not) be discoverable. The initial audit can be used to help identify the scope of the issues in the subsequent, more comprehensive, audit.

(i) Control documents produced during and following the audit. Maintain the confidentiality of any documents, clearly marking them as confidential and subject to the attorney-client and attorney work-product privileges.

(j) Take care in how and when the company implements any changes as a result of the internal audit. Try to do so in small groups of employees, or after a new legal development.

(k) Make sure management is committed to remedying any problems that are discovered

(l) If the company discovers problems, remedy them immediately and document the remedial action.

(m) By following the above guidelines and engaging in careful planning to preserve appropriate privileges, employers can conduct necessary self-audits while minimizing the risk that the audit results will be discoverable in later litigation.[47]

Legal Parameters of the Attorney-Client Privilege:

- The Attorney-Client Privilege and the Work-Product Doctrine, 53 (Edna Selan Epstein, ed., ABA 4th ed. Supp. 2004): "Companies conducting such audits would be well advised to attempt to structure the audit as a fact gathering with the purpose of giving legal advice. It is not certain that such structuring will be sufficient to erect a wall of privilege. Yet without it, it is fairly certain that the privilege will not apply."
- *Seibu Corp. v. KPMG L.L.P.*, 2002 U.S. Dist. LEXIS 906, at *9-10 (N.D. Tex. 2002): The "critical inquiry is whether . . . any particular communication in connection with [the] investigation *facilitated the rendition of legal advice to the client*." (Emphasis added.)
- *Cynthia Diane Deel v. Bank of Am.*, 227 F.R.D. 456, 459 (W.D. Va. 2005): Internal audit "prompted in part by the national proliferation in Fair Labor Standards Act litigation against businesses in general as well as the Bank in particular." The Attorney-client privilege did not protect completed employee questionnaires in an FLSA misclassification action. "The defendant's fatal flaw, however, was that it did not clarify to the employees completing the questionnaire that it needed the information to obtain legal advice." Additionally, the court found that the company told its employees that business leaders (as opposed to in-house or outside counsel) would review the information gleaned from the questionnaires. Finally, the notice to employees about the questionnaire was silent regarding the level of discretion it expected of the employees. The court therefore concluded that the company did not maintain the level of confidentiality required for assertion of the attorney-client privilege. The plaintiffs thus obtained discovery of the questionnaires completed by employees.

Attorney Work-Product Privilege:

The privilege accorded to "work product" is to some extent broader than the absolute attorney-client privilege discussed above. Although the "work product" may be, and often is, that of an attorney, the concept of "work product" is not confined to information or materials gathered or assembled by a lawyer. Further, a communication may be immune from discovery as work product even though a "client" of an attorney did not make or receive the communication. One major hurdle in protecting information and documents as attorney work-product is the "in anticipation of litigation" requirement. To meet this requirement, the threat of litigation must be real and imminent.[48] Note that investigations by regulatory agencies may present "more than a mere possibility of future litigation, and provide reasonable grounds for anticipating litigation."[49]

Self-critical Analysis Privilege:

Some courts have rejected the self-critical analysis privilege outright.[50] Other courts, while acknowledging the existence of the privilege in theory, have found numerous reasons not to apply it.[51] Moreover, to the extent courts do recognize the privilege, they generally will only protect from disclosure evaluative materials, and not objective facts or data such as statistics.[52]

Part of Negotiated Settlement:

Typically, courts apply the rule to product design defects or warnings cases. However, a parallel can be drawn to remedial measures taken by a company with regard to its employment or other policies. A company may be able to argue that evidence of such measures cannot be used to draw adverse inferences about the company's past practices, or knowledge of alleged violations. [53]

APPENDIX C

Excerpt from OCEG Materials on Compensation Law[54]

PR Prevent, Protect & Prepare

Ideally, noncompliance is prevented and proactively controlled. Management should take steps to not only minimize the possibility of noncompliance taking place, but also minimize the potential impact of a risk that materializes. Controls should be implemented to prevent noncompliance and to provide indications when suspicious activity takes place. Management should also prepare the organization to appropriately respond to risks when they materialize, including crises and emergencies.

PR1 General Controls, Policies & Procedures

An organization should establish a mix of preventative and corrective controls, policies and procedures to address risks and other program objectives. Management should indicate specific accountability and criteria for successful operation of the controls. These controls should be implemented, managed and monitored.

There are two primary types of controls:

- Preventive Controls deter or prevent undesirable events from occurring and should be designed to discourage errors or irregularities. These are proactive controls that help to prevent a loss.
- Detective Controls detect undesirable events which have occurred and should be designed to identify an error irregularity after it has occurred. These controls do not typically prevent a loss from occurring.

There are several other types of controls that management may define or employ:

- Directive Controls cause or encourage a desirable event or behavior to occur and typically include written policies, procedures, training, job descriptions, compensation plans, performance evaluations and the like.
- Corrective Controls correct undesirable events after they occur. These controls are designed to return the system to a trustworthy state after a loss has occurred.
- Compensating Controls are internal controls that are intended to reduce the risk of an existing or potential control weakness when duties cannot be appropriately segregated.

Principles:

- Mix of preventative, detective and corrective controls
- Monitored and updated for continued relevance
- Understandable
- Multi-dimensional

ECMP PR1.1 Establish Wage Payment Policies/Procedures

Establish policies and procedures to ensure compliance with federal and state wage payment requirements.

Management should establish policies and procedures to ensure compliance with federal and state wage payment requirements.

The FLSA regulates the payment of minimum wages and overtime compensation. The Act has been interpreted as requiring employers to compensate their employees on regularly designated pay days, although the Act does not otherwise regulate the frequency in which wages must be paid. The FLSA requires that wages be paid in cash or by negotiable instrument, with the one exception being that the reasonable cost or fair value of board, lodging or other facilities may be credited towards minimum wage.

Unlike the FLSA, the wage payment statutes in many states regulate how often employees must be paid (weekly, bi-weekly, semi-monthly or monthly), as well as the maximum time period that may elapse between the end of the pay period and the designated pay day. Many state laws also identify what instruments of wage payment may be used to compensate employees (e.g., cash, check, direct deposit, or pay cards) and dictate whether employees must receive a statement of earnings and/or deductions with each wage payment.

Legal Requirements

L01 Ensure employees are paid on a timely basis.

> FLSA: Employees must be paid on a regular pay day.

> Many states limit the number of days that may elapse between the end of the pay period and the designated pay day.

- FLSAREGS:§790.21 Time to Bring Employee Suits
- BIGGS Biggs v. Wilson
- OCEG Practice Aid: Compensation Wage Frequency

L02 Designate regular pay days, as required by applicable law.

> FLSA: Employees must be paid on a regular payday.

> At least monthly: AK, CO, DE, ID, IA, KS, LA (semi-monthly in some industries), MN, MT, NC, ND, OR, SD, TX, WA, WI

> At least semi-monthly: AZ, AR, CA, DC, GA, HI, IL, IN, KY, ME, MD, MI, MO, NV, NJ, NM, NY (most employees), OH, OK, PA (parties may agree otherwise), TN, UT, VA (hourly employees), VT (if notice is given to employees)

> At least bi weekly: MA, WV

> At least weekly: CT, NH (bi-weekly in limited circumstances), NY (manual and railroad workers), RI (unless paid a salary)

> Requirements apply in specific industries only: AL, MS, WY

> No requirement: FL, NE, SC

Note: Special rules apply to exempt employees in some states, and some states allow the payment of overtime to be delayed until the next pay period.

- FLSAREGS:§790.21 Time to Bring Employee Suits
- BIGGS Biggs v. Wilson
- OCEG Practice Aid: Compensation Wage Frequency

L03 Ensure employees are paid using an authorized instrument of wage payment.

> FLSA: Wages must be paid in "cash or negotiable instruments" payable at par, except that wages may include the reasonable cost

or fair value of board, lodging, and other facilities.

> Mandatory direct deposit permitted if certain conditions are met: IA, KY, LA, ME, MA, NC, ND, OH, SC, SD, TN, TX, UT, WA

> State law does not address, but mandatory direct deposit probably permissible: AL, MS, MO, NE

> Voluntary direct deposit permitted: FLSA and all states

> Payment using a pay card permitted by statute or regulation if certain conditions are met: CO, DE, KS, ME, MD, MI, MN, NV, NH, ND, OK (permits electronic payment), OR, VA

> Payment on a pay card probably permitted, based on enforcement position posted on the state's wage and hour agency's website: CA, HI, NC, TX, WA

- FLSAREGS:Part 531 Wage Payments
- OCEG Practice Aid: Compensation Direct Deposit

L04 Ensure that nonexempt employees are compensated for all "hours worked:"

> meal and rest breaks (see ECMP PR1.6)

> travel time (see ECMP PR1.7)

> waiting time (see ECMP PR1.8)

> sleep time (see ECMP PR1.9)

> training time (see ECMP PR1.10)

> starting and ending activities (see ECMP PR1.11)

- FLSAREGS:§778.100 Maximum nonovertime hours

L05 Ensure that male and female employees are paid equal wages for substantially equal jobs.

> Differentiation is permitted with respect to seniority and merit systems, systems that measure pay by quality or quantity of production, and factors other than gender.

- EPA Equal Pay Act of 1963
- EEOC Guidance Equal Pay and Compensation Discrimination

L06 Ensure employees are provided with a pay stub or earnings statement with each wage payment, where required by state law.

> No requirement under the FLSA

> Required in the following states: AK, CA, CO, CT, DE, DC, HI, ID, IL, IA, KY, ME, MD, MA, MI, MN, MO, MT, NV, NM, NY, ND, OK, OR, PA, RI, SC, TX, VT, WA, WI, WY

> Required only when deductions are made: NH, NJ, NC, UT, WV

> Required upon request of employee: KS, VA

> Required when wages are directly deposited: AZ

> Required for employers not subject to the FLSA: IN

> Not required in the following states: AL, AR, FL, GA, LA, MS, NE, OH (except for minors) SD, TN

L07 Ensure that employees receive "show up pay" if they report to work but are sent home due to lack of work, where required by state law.

> FLSA: Not required

> Required in: CA, CT, DC, MA, NH, NJ, NY, OR (minors only), RI

> Not required in the remaining states

Note: If employees must wait before they are sent home, they must be paid for the time spent waiting.

L08 Ensure that, if implementation or revision of the entity's wage payment policies and procedures constitutes a change in the terms and conditions of employment during the term of a collective bargaining agreement, either:

> the employer bargains with the union, or

> the union has clearly and unmistakably waived the right to bargain on the subject.

- NLRA National Labor Relations Act

Core Practices

101 Establish a methodology for identifying legal requirements regarding the payments of wages, including required frequency of wage payments and authorized instruments of wage payment.

102 Identify the person(s) responsible for identifying legal requirements regarding the payment of wages, including required frequency of wage payments and authorized instruments of wage payment.

103 Establish policies and/or procedures regarding pay days. Consider addressing:

> Payment when a payday falls on a holiday or weekend.

> Payment when an employee is absent from the place of employment on the designated payday.

> Payment of deceased employees.

104 Establish methodology for ensuring wage payment policies and procedures are consistent with any collective bargaining agreement.

Note: Collective bargaining agreements must conform to FLSA requirements, but may provide additional benefits.

Additional Practices

201 Consider consulting vendors regarding the available methods of electronic wage payment, and compare the various programs offered.

202 Consider delivering wage statements electronically, within the parameters of applicable state law.

ECMP PR1.6 Establish Meal and Rest Break Policies/Procedures

Establish policies and procedures addressing meal and rest periods.

Management should establish policies and procedures to ensure compliance with federal and state rules addressing meal and rest periods.

The FLSA does not require employers to provide their employees with meal or rest breaks. If such breaks are provided, however, the Act regulates the circumstances under which they must be counted as "hours worked." For example, under the FLSA, meal periods must be counted as "hours worked"

unless: 1) They are at least 30 minutes long, 2) The employee is relieved of all duties, and 3) The employee is free to leave his or her workstation.

Unlike the FLSA, many state wage and hour laws require employers to provide their employees with lunch and/or rest breaks. Again, these laws specify the circumstances under which such breaks must be compensated. In some instances, these circumstances differ from the federal requirements.

Finally, a growing number of states are beginning to require and/or encourage employers to provide nursing mothers with lactation breaks. Where possible, lactation breaks should be taken to coincide with the employee's regular rest breaks.

Legal Requirements

L01 Ensure that meal periods are counted as "hours worked" unless all of the following apply:

> They are 30 minutes or longer,

> The employee is relieved of all duties, and

> The employee is free to leave his or her work station.

Special rules apply to fire protection and law enforcement personnel.

Note: Some states (e.g., CA, MA) require that meal periods be compensated unless the employee is free to leave the work premises.

- FLSAREGS:§785.18 Rest and Meal Periods

L02 Ensure that meal periods are provided as required by state law:

> 30 minute break required if work shift exceeds 5 hours: CA, CO, NH, ND, WA

> 30 minute break required if work shift exceeds 6 hours: ME, MA, NY (special rules apply to factory workers), OR, TN

> 30 minute break required if work shift exceeds 7 1/2 hours: CT, DE

> 30 minute break required within an 8 hour shift, 20 minute break required within a 6 hour shift: RI

> 30 minute break required if work shift exceeds 8 hours: MN, NV

> 20 minute break required if work shift exceeds 6 hours: WV

> 20 minute break required if work shift exceeds 7 1/2 hours: IL (special rules apply to hotel workers in Cook County)

> Meal period required in certain industries only (e.g., workshops, mechanical establishments): NE

> Meal periods required, but length not specified: KY, VT

> Meal period recommended but not required: WI

> No meal break requirement for adults: Remaining states

Note: Some states regulate when, during the work shift, the meal period must be taken.

Note: Some states regulate the circumstances under which meal periods may be waived, if they can be waived at all.

Note: Many states have special rules for minors.

- OCEG Practice Aid: Compensation Meal & Rest Breaks

L03 Ensure that employees record the beginning and ending time of their meal breaks, where required by law.

> Not required by FLSA.

> Required in some states, such as California, New Hampshire and Wisconsin.

- OCEG Practice Aid: Compensation Meal & Rest Breaks

L04 Ensure that paid rest periods are provided as required by law.

> Not required by the FLSA.

> The following states require a 10 minute break for every 4 hours or major portion thereof of work: CA, CO, KY, NV, OR, WA (may not work more than 3 hours without a 10 minute rest period)

> The following states require employers to provide employees with adequate time to use toilet facilities: MN, VT

> The remaining states do not require break periods.

- OCEG Practice Aid: Compensation Meal & Rest Breaks

L05 Ensure that brief break periods of 20 minutes or less are counted as hours worked.

> Under certain circumstances, breaks initiated by the employer that last more than 20 minutes may be considered "hours worked."

- FLSAREGS:§785.18 Rest and Meal Periods

L06 Ensure that lactation breaks are provided as required by law.

> FLSA does not require.

> Required in the absence of undue hardship: CA, CT, DC, HI, IL, IN (effective 7/1/08), MN, MS, NM, NY, OK, OR, RI, TN

> Encouraged in: GA, TX, VA, WA

> State law does not require lactation breaks, but does provide that a woman has the right to breastfeed in any location where she is authorized to be: AL, AK, AR, AZ, CO, DE, FL, GA, KS, KY, LA, ME, MD, MA, MO, MT, NV, NH, NJ, NC, OH, PA, SC, UT, VT, WY.

> Not required in the remaining states.

- OCEG Practice Aid: Compensation Meal & Rest Breaks

L07 Ensure that, if implementation or revision of the entity's meal and rest periods policies and procedures constitutes a change in the terms and conditions of employment during the term of a collective bargaining agreement, either:

> the employer bargains with the union or

> the union has clearly and unmistakably waived the right to bargain on the subject.

- NLRA National Labor Relations Act

Core Practices

101 Establish a methodology for identifying legal requirements regarding meal and rest breaks.

102 Identify person(s) responsible for identifying legal requirements regarding meal and rest periods.

103 Establish policies and/or procedures regarding meal and rest breaks.

> Consider addressing the circumstances under which on duty meal periods are permitted, taking into consideration state law restrictions, if any.

> Consider addressing the circumstances under which meal periods may be waived, if permitted by applicable state law.

104 Establish methodology for ensuring policies and procedures regarding meal and rest periods are consistent with any applicable collective bargaining agreement.

Note: Collective bargaining agreements must conform to FLSA requirements, but may provide additional benefits.

APPENDIX D[55]

Sample Excerpt of Littler's Wage and Hour Practices Questionnaire

I. STATE YOUR NAME AS THE PERSON COMPLETING THIS QUESTIONNAIRE:

_____

II. HOURS WORKED - NON-EXEMPT EMPLOYEES

A. Do non-exempt employees receive any breaks? ☐ Yes ☐ No

If *yes*, for each state in which the company has employees, ask the following questions:

1. Which positions receive breaks?

   _____

2. How many breaks are received in a work day?

   _____

3. What is the length of each break period?

   _____

4. Is there any writing that communicates the frequency and time permitted for breaks? ☐ Yes ☐ No

   If *yes*, please attach.

   If *no*, how is the break information communicated to employees?

   _____

5. Are the breaks paid breaks? ☐ Yes ☐ No
6. If an employee extends his or her break for an unauthorized period of time, is the unauthorized time paid? ☐ Yes ☐ No

   If *no*, is the employee disciplined for the unauthorized break? ☐ Yes ☐ No

B. Do non-exempt employees receive any meal periods? ☐ Yes ☐ No

If *yes*, for each state where the company has employees, ask the following questions:

1. Does the length of the meal period vary by position? ☐ Yes ☐ No
   (a) If *no*, ask these questions:
      (1) What is the duration of the meal period?

      _____

      (2) Are employees allowed to leave the premises or work site during their meal period? ☐ Yes ☐ No
      (3) Are employees completely relieved from their duties during their meal period? ☐ Yes ☐ No
      (4) Is the meal period unpaid? ☐ Yes ☐ No
      (5) Do employees clock out or record the time taken for their meal period? ☐ Yes ☐ No
      (6) If an employee's meal period is interrupted, is the employee paid for the meal period? ☐ Yes ☐ No
      (7) Is there any writing/policy regarding meal periods that is communicated to employees? ☐ Yes ☐ No

         If *yes*, please attach.

         If *no*, how is the meal period policy or practice communicated to employees?

         _____

   (b) If *yes*, which positions receive meal periods?

      _____

For each non-exempt position that receives a meal period, ask the following:

(1) What is the duration of the meal period?

_____

(2) Are employees allowed to leave the premises or work site during their meal period? ☐ Yes ☐ No

(3) Are employees completely relieved from their duties during their meal period? ☐ Yes ☐ No

(4) Is the meal period unpaid? ☐ Yes ☐ No

(5) Do employees clock out or record the time taken for their meal period? ☐ Yes ☐ No

(6) If an employee's meal period is interrupted, is the employee paid for the meal period? ☐ Yes ☐ No

(7) Is there any writing/policy regarding meal periods that is communicated to employees? ☐ Yes ☐ No

If *yes*, please attach.

If *no*, how is the meal period policy or practice communicated to employees?

_____

C. Do any non-exempt employees have automatic deductions made for meal periods? ☐ Yes ☐ No

If *yes*, ask the following questions:

1. Which positions?

_____

2. What is the length of time automatically deducted?

_____

3. Is there a procedure in place for an employee to report a missed meal period? ☐ Yes ☐ No

(a) If *yes*, is there any writing regarding this procedure? ☐ Yes ☐ No

If *yes*, please attach.

If *no*, how is the procedure communicated to employees?

_____

4. Is there a procedure in place for an employee to report a longer or shorter meal period? ☐ Yes ☐ No

(a) If *yes*, is there any writing regarding this procedure? ☐ Yes ☐ No

If *yes*, please attach.

If *no*, how is the procedure communicated to employees?

_____

5. If an employee does not take his or her meal period, is there any penalty or discipline? ☐ Yes ☐ No

(a) If *yes*, is there any writing regarding this penalty or discipline? ☐ Yes ☐ No

If *yes*, please attach.

D. Do non-exempt employees spend time in lectures, meetings, or training? ☐ Yes ☐ No

If *no*, go to Section E.

If *yes*, ask the following:

1. Does the lecture, meeting, or training take place during the employee's regular working hours? ☐ Yes ☐ No

(a) If *yes*, is the time spent in the lecture/meeting/training counted as working time? ☐ Yes ☐ No

If *yes*, go to Section E.

(b) If *no*, is the employee required to attend the lecture/meeting/training which occurs outside of the employee's regular working hours? ☐ Yes ☐ No

(1) If *yes*, is the time spent in the lecture/meeting/training counted as working time? ☐ Yes ☐ No

If *yes*, go to Section E.

(2) If no, is the lecture/meeting/training directly related to the employee's current job? ☐ Yes ☐ No

(i) If *yes*, is the time spent in the lecture/meeting/training counted as working time? ☐ Yes ☐ No

(ii) If *no*, while attending the lecture/meeting/training, does the employee perform any productive work? ☐ Yes ☐ No

1. If *yes*, is the time spent in the lecture/meeting/ training counted as working time? ☐ Yes ☐ No

E. Do any non-exempt employees have access to email or the company's intranet via computer from home? ☐ Yes ☐ No

1. If *yes*, Do non-exempt employees report time spent accessing email or the company's intranet via computer from home, for business purposes? ☐ Yes ☐ No

F. Do any non-exempt employees perform tasks from home? ☐ Yes ☐ No

If *yes*, check all tasks that apply:

☐ Reviewing and/or responding to email

☐ Receiving and/or making calls

☐ Receiving assignments

☐ Scheduling

☐ Checking schedule for day

☐ Completing reports

☐ Sending reports to company

☐ Completing electronic time sheets

☐ Planning routes

☐ Other: _____

If any task is checked, ask:

1. Do non-exempt employees who perform tasks from home report time spent on these tasks? ☐ Yes ☐ No
2. Is there a policy or written communication provided to non-exempt employees regarding performing tasks at home? ☐ Yes ☐ No

If *yes*, please attach.

G. Do any non-exempt employees perform tasks in the field? ☐ Yes ☐ No

If *yes*, check all tasks that apply:

☐ Reviewing and/or responding to email

☐ Receiving and/or making calls

☐ Receiving assignments

☐ Scheduling

☐ Checking schedule for day

☐ Completing reports

☐ Sending reports to company

☐ Completing electronic time sheets

☐ Planning routes

☐ Other: _____

If any task is checked, ask:

1. Do non-exempt employees who perform tasks in the field report time spent on these tasks? ☐ Yes ☐ No
2. Is there a policy or written communication provided to non-exempt employees regarding performing tasks in the field? ☐ Yes ☐ No

   If *yes,* please attach.

H. Do any non-exempt employees perform tasks for the benefit of the company on the way to work or on the way home (e.g. pick up or drop off mail, make bank deposits, make deliveries to or pick up items from customers)? ☐ Yes ☐ No

If *yes,* do employees report the time spent on these tasks? ☐ Yes ☐ No

I. Do any non-exempt employees have radios or cell phones that are used for communication with them outside of work hours (employee calls in and/or is contacted)? ☐ Yes ☐ No

If *yes,* ask:

1. Do non-exempt employees who receive or make work-related radio or cell phone calls outside of work hours report time spent on these calls?

   ☐ Yes ☐ No
2. Is there a policy or written communication provided to non-exempt employees regarding time spent initiating or responding to radio and/or cell phone contact performing tasks at home? ☐ Yes ☐ No

   If *yes,* please attach.

J. Do any non-exempt employees commute in company-owned vehicles? ☐ Yes ☐ No

1. If *yes,* is the time spent by non-exempt employees commuting in company owned vehicles counted as working time? ☐ Yes ☐ No
   (a) If *yes,* how is the time recorded?

   _____

2. If *no,* ask:
   (a) Is the travel in the commute within the normal commuting distance of other employees in the area? ☐ Yes ☐ No

   If *yes,* ask 3 questions:

   (1) Is the driving strictly voluntary and not a condition of employment? ☐ Yes ☐ No

   (2) Is the vehicle the type that would normally be used for commuting? ☐ Yes ☐ No

   (3) Are there any costs to the employee for driving the company vehicle or parking it at the employee's home or elsewhere? ☐ Yes ☐ No

   (b) Do any employees transport other employees to and from work while driving a company vehicle? ☐ Yes ☐ No

   If *yes,* ask 2 questions:

   (1) Is the arrangement the employee's choice and for his or her convenience? ☐ Yes ☐ No

   (2) Does a company manager tell the employee driver to report to a pickup point and then transport the other employees to the workplace? ☐ Yes ☐ No

   (c) Are non-exempt employees passengers in a "vanpool" that uses a company vehicle? ☐ Yes ☐ No

   If *yes,* ask:

   (1) Is the time spent by the driver of the vanpool counted as working time? ☐ Yes ☐ No

   (2) Is the time spent by the passengers in the vanpool counted as working time? ☐ Yes ☐ No

   If *yes,* go to next Question K.

   If *no,* ask:

   (i) Is the transportation primarily for the participating employees' benefit? ☐ Yes ☐ No

   (ii) Do employees participate voluntarily and are they free to accept or reject participation at any time? ☐ Yes ☐ No

   (iii) Do the participating employees choose the employee-driver? ☐ Yes ☐ No

   (iv) Do the participating employees set the pickup times and choose the route? ☐ Yes ☐ No

K. Do any non-exempt employees' responsibilities require travel, other than the ordinary home to work and work to home commute? ☐ Yes ☐ No

1. Are any non-exempt employees required to report to a meeting place to get instructions, perform other work there, or pick up tools before going to their first work site? ☐ Yes ☐ No
   (a) If *yes*, is the travel time from the meeting place to the job site counted as working time? ☐ Yes ☐ No
      (1) If *yes*, how is the travel time recorded?

      _____
2. Is any non-exempt employee, who has gone home at the end of a work day, called out without prior notice to travel a substantial distance because he or she must handle an emergency job for a company customer? ☐ Yes ☐ No
   (a) If *yes*, is the travel time counted as working time? ☐ Yes ☐ No
      (1) If *yes*, how is the travel time recorded?

      _____
3. Do non-exempt employees travel between job sites during their workday? ☐ Yes ☐ No
   (a) If *yes*, is the travel time between job sites recorded as working time? ☐ Yes ☐ No
      (1) If *yes*, how is the travel time recorded?

      _____
4. Do non-exempt employees, who regularly work in one location, occasionally receive a one-day special assignment at a fixed location in another city that does not require an overnight stay? ☐ Yes ☐ No
   (a) If *yes*, is the travel time counted as working time? ☐ Yes ☐ No
      (1) If *yes*, how is the travel time recorded?

      _____
5. Do any non-exempt employees travel away from home where such travel includes an overnight stay? ☐ Yes ☐ No

   If *yes*, ask 4 questions:

   (a) If a non-exempt employee's travel time as a passenger on an airplane, train, bus, or car occurs on a normal workday, does the company treat the travel time as work time? ☐ Yes ☐ Yes, if the travel occurs during the normal hours worked by the non-exempt employee ☐ No
   (b) If a non-exempt employee's travel time as a passenger on an airplane, train, bus, or car occurs on a weekend (which is not a normal workday), does the company treat the travel time as work time? ☐ Yes ☐ Yes, if the travel occurs during the normal hours worked by the non-exempt employee ☐ No
   (c) If a non-exempt employee performs tasks (reading memos, checking emails, returning telephone calls) during his or her travel time as a passenger on an airplane, train, bus or car, does the company treat the travel time as work time? ☐ Yes ☐ No
   (d) If a non-exempt employee drives to the overnight location, does the company treat the employee's driving time as work time? ☐ Yes ☐ No

L. Do non-exempt employees perform tasks prior to the beginning of their scheduled shift start time (pre-shift activities)? ☐ Yes ☐ No

M. Do any non-exempt employees put on a uniform at work prior to beginning their scheduled shift start time? ☐ Yes ☐ No

1. If *yes*, which positions?

   _____

   For each position ask:

   (a) Does the non-exempt employee wait in line to "check out" his or her uniform? ☐ Yes ☐ No
   (b) What does the "uniform" consist of? (e.g., gloves, boots, shirts, jumpsuits)

   _____
   (c) Are the non-exempt employees required to change at work? ☐ Yes ☐ No
   (d) Are non-exempt employees required to remove the "uniform" or parts of the uniform during rest breaks and/or meal periods? ☐ Yes ☐ No
   (e) Is the time spent on this activity treated as working time? ☐ Yes ☐ No

N. Do any non-exempt employees put on safety equipment at work prior to beginning their scheduled shift start time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

For each position ask:

(a) Does the non-exempt employee wait in line to "check out" his or her safety equipment? ☐ Yes ☐ No

(b) What does the "safety equipment" consist of? (e.g., steel-toed boots, safety glasses, vests, hard harts)

_____

(c) Are non-exempt employees required to change at work? ☐ Yes ☐ No

(d) Are non-exempt employees required to remove any of their safety equipment during rest breaks and/or meal periods? ☐ Yes ☐ No

(e) Is the time spent on this activity treated as working time? ☐ Yes ☐ No

O. Do any non-exempt employees log on to a computer and perform work-related tasks prior to the beginning of their scheduled shift start time? ☐ **Yes** ☐ **No**

1. If *yes*, which positions?

_____

(a) For each position, is the time spent on this activity treated as working time? ☐ Yes ☐ No

P. Do non-exempt employees check out equipment or tools prior to the beginning of their scheduled shift start time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

(a) For each position, is the time spent on this activity treated as working time? ☐ Yes ☐ No

Q. Do non-exempt employees perform company vehicle safety checks prior to the beginning of their scheduled shift start time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

(a) For each position, is the time spent on this activity treated as working time? ☐ Yes ☐ No

R. Do non-exempt employees attend any meetings (*i.e.*, safety meeting), prior to the beginning of their scheduled shift start time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

(a) For each position, is the time spent on this activity treated as working time? ☐ Yes ☐ No

S. Do non-exempt employees "clock in" prior to the beginning of their scheduled shift start time but are not paid until a certain specified time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

T. Do any non-exempt employees perform tasks or activities after the end of their scheduled shift end time (post-shift activities)? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

(a) For each position, is the time spent on this activity treated as working time? ☐ Yes ☐ No

U. Do any non-exempt employees take off a uniform at work after the end of their scheduled shift time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

For each position ask:

(a) Does the non-exempt employee wait in line to "turn in" his or her uniform? ☐ Yes ☐ No

(b) What does the "uniform" consist of? (e.g., gloves, boots, shirts, jumpsuits)

_____

(c) Are non-exempt employes required to change at work? ☐ Yes ☐ No

(d) Is the time spent on this activity treated as working time? ☐ Yes ☐ No

V. Do any non-exempt employees take off their safety equipment at work after the end of their scheduled shift time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

For each position ask:

(a) Does the non-exempt employee wait in line to "turn in" his or her safety equipment? ☐ Yes ☐ No

(b) What does the safety equipment consist of? (e.g., steel-toed boots, safety glasses, vests, hard hats)

_____

(c) Are non-exempt employees required to change at work? ☐ Yes ☐ No

(d) Is the time spent on this activity treated as working time? ☐ Yes ☐ No

W. Do any non-exempt employees wash up at work after the end of their scheduled shift time? ☐ Yes ☐ No

1. If *yes*, which positions?

_____

For each position ask:

(a) Does the non-exempt employee wait in line to "wash up"? ☐ Yes ☐ No

(b) Are non-exempt employees required to wash up at work? ☐ Yes ☐ No

(c) Is the time spent on this activity treated as working time? ☐ Yes ☐ No

X. When a non-exempt employee responds to calls during his/her "on-call" duty assignment, does the employee record the actual amount of time spent responding to the call? ☐ Yes ☐ No

Y. When a non-exempt employee responds to calls during his/her "on-call" duty assignment, does the employee record a predetermined amount of time, (*i.e.*, 1 hour), even though time spent responding to the call was less (*i.e.*, 15 minutes)? ☐ Yes ☐ No

Z. Do any non-exempt employees drive company vehicles which have a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater? ☐ Yes ☐ No

APPENDIX E

Sample Policy: Protection Against Retaliation[56]

Retaliation is prohibited against any person by another employee or by the company for using the company's complaint procedure, reporting harassment, or for filing, testifying, assisting or participating in any manner in any investigation, proceeding or hearing conducted by a governmental enforcement agency. Protected conduct includes lodging a complaint about not being paid for all hours worked and/or about not being paid in accordance with applicable law.

Prohibited retaliation includes, but is not limited to, termination, demotion, suspension, failure to hire or consider for hire, failure to give equal consideration in making employment decisions, failure to make employment recommendations impartially, adversely affecting working conditions or otherwise denying any employment benefit.

Please report any retaliation to your supervisor, a human resources representative, or the toll-free hotline. Any report of retaliatory conduct will be investigated in a thorough and objective manner. If a report of retaliation is substantiated, appropriate disciplinary action, up to and including discharge, will be taken.

Sample Vacation Policy

The company provides paid vacation benefits to its regular full-time employees. Optional: Part-time and temporary employees do not accrue paid vacation.

Eligible employees accrue vacation as follows:

Length of Service	Yearly Accrual	Maximum Accrual

Vacation accrues as service is performed. Once the maximum accrual amount has been reached, no additional vacation will be earned until previously accrued vacation is used. You will not be given retroactive credit for any period of time in which you do not accrue vacation because you were at the maximum. At year end, unused vacation at or below the maximum accrual amount will carry over to the subsequent year.

Employees should request to schedule vacation time off as far in advance as possible. Vacations will be scheduled so as to provide adequate coverage of jobs and staff requirements. The company will make the final determination in this regard.

Vacation pay is not counted for the purpose of calculating an employee's overtime hours of work or overtime premiums. Moreover, vacation does not accrue during unpaid leaves of absence or other periods of inactive service.

Upon termination of employment, employees will be paid for all vacation time that has accrued but remains unused through the last day of work. Vacation will be paid at the employee's regular rate of pay at the time of termination. [Alternatively: Accrued but unused vacation benefits will not be paid upon termination of employment unless state law requires otherwise].

APPENDIX F

Sample Policy Approved by U.S. Department of Labor ("DOL") for FLSA Purposes Only

The Fair Labor Standards Act (FLSA) is a federal law which requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as *bona fide* executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

Salary Basis Requirement

To qualify for exemption, employees generally must be paid at not less than $455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least $455 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, *i.e.*, because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a *bona fide* plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

Company Policy

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

What To Do if an Improper Deduction Occurs

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [**insert alternative complaint mechanism(s)**].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.

APPENDIX G

Littler's Training Options

Legal Learning Group®

The Training Division of Littler Mendelson, P.C.

IF YOU COULD TAKE ONE STEP AND LIMIT DAMAGES IN WAGE AND HOUR LITIGATION, WOULD YOU DO IT?

The Challenge

The wage and hour class action has become the "plaintiff's attorney's best friend." The U.S. Department of Labor has estimated that fewer than 30% of employers are in substantial compliance with federal wage and hour laws (that does not include the additional state law requirements). Thus, it is not surprising that wage/hour collective and class actions are filed more often than all types of discrimination and harassment class actions combined.

Wage and hour class litigation can expose employers to millions of dollars of potential liability. Recent examples include a jury verdict of over $160 million to employees who worked during their unpaid meal breaks. This environment leaves no room for error—even for "minor" violations.

The challenge is made more difficult by the fact the wage and hour laws are some of the nation's oldest (and antiquated) set of employment laws. These laws often defy a common sense approach and require specific knowledge by HR professionals, managers, and employees to ensure compliance. Yet, most employees have received no training on their legal obligations or the policies designed to meet those obligations.

The Solutions

Training can help employers establish an "affirmative defense" that can limit damages in wage and hour litigation. For example, employers are only responsible for work allegedly performed off the clock if the employer had reason to know the work was being performed. If employees are specifically trained regarding the activities that must be reported as work, the prohibition of off-the-clock work and the requirement to report any violations, it will be much easier to establish the employer did not have reason to know off-the-clock work was being performed. Also, liquidated (double) damages are virtually automatic under the Fair Labor Standards Act ("FLSA") unless the employer establishes it acted in good faith. If the employer acted in reckless disregard of the law, the statute of limitations under the Fair Labor Standards Act is extended from two to three years.

Training is one of the proactive steps an employer can take to show its good faith compliance efforts and possibly avoid liquidated damages and reduce the statute of limitations for any claims. The tolling of damages can be obtained even during litigation. These benefits are not theoretical. The attorneys of Litter Mendelson have convinced even the most aggressive plaintiff's counsel to agree to limit damages after an employer completed comprehensive wage training of managers and employees.

Littler Mendelson Can Help

Littler Mendelson provides a wide range of services to assist employers in their efforts to avoid and defend wage/hour litigation. We offer several tools that can be used to avoid and limit wage/hour liabilities by developing more effective policies, conducting compliance audits, and educating their employees. And while Littler puts a strong emphasis on prevention, we are also prepared to counsel and to represent management when the wage/hour collective or class action looms.

We are so committed to helping our clients prevent employment law pitfalls that we created the Legal Learning Group (LLG), a division within the Firm whose training programs enhance employer efforts to reduce legal risk while improving employee performance and potential. LLG works with clients to ensure that each training experience matches the organization's objectives, core values, culture, and working environment. LLG's award-winning programs reflect our primary goals of helping employers avoid litigation, minimize operating costs, and maintain a trouble-free workplace.

Our Training Offerings

Training that ignores the individual duties of the participant will not be effective. That is why Littler offers a multilevel approach:

1. Detailed training on the law and best practices for HR and Compensation professionals
2. Mid-level training for managers who must understand legal basics and act as the organization's first line of defense
3. Quick, basic training for non-supervisory employees focusing on the organization's polices

All programs are customized to include the organization's policy and relevant state law

Supervisory Training

Too often managers do not understand what they can do to protect their organization from liability. This module remedies that lack of knowledge. Recognizing that managers do not need an in-depth analysis of the FLSA's legal intricacies, we work through interactive case studies focusing on Littler's best management practices. Participants also review common manager mistakes — mistakes that can lead to millions of dollars of potential liability. Issues such as meal breaks, comp time, working off-the-clock, and record keeping are all analyzed and practical business strategies are developed. With a course developed by the nation's leading experts on defending wage and hour claims, your managers will become the first line of defense to the most common wage-related claims.

- **Live Training For Managers**

  Our experience shows that managers have important, complicated questions to ask about the law and organizational policy. Live training enables managers to get the answers they need and to build consensus around an organization's policies. To guide managers through their most difficult issues, the training will be conducted by the Littler attorneys who focus their practice in this area. Case studies, quizzes and video vignettes will teach managers the critical thinking needed to respond to specific, real-life situations.

- **Executive Sessions**

  No training program will succeed without executive buy-in, as they are responsible for setting and enforcing the organization's policies. This executive program modifies the manager training program to focus on the issues most vital for high-level employees.

  The organization's own policies and relevant state law will be incorporated into the sessions. This program is most effective in a classroom setting; however, a webinar option is also available. Program length can run from 1-3 hours depending on organizational needs.

- **Material License with Train-the-Trainer Services**

  Provide the organization's internal trainers with the same materials Littler provides its own attorneys. LLG can also conduct train-the-trainer sessions, ranging from a telephone conference to a full-day session, based on your organization's needs.

- **Build a Course**

  Some clients demand courses specifically built for their environment. LLG can fulfill this need. Whether you require live or on-line instruction, attorney-educators will build a course tailored to your environment. We can also review your existing training materials.

- **Legal Boot Camp for Managers**

  For a more comprehensive approach, this full- or half-day course covers the most critical employment law compliance issues for managers, including crucial areas of discrimination, harassment, retaliation, privacy, ethics, and performance management, in addition to wage and hour.

- **E-Learning**

  E-Learning can set the base line for all managers and may be the only practical method for large numbers of lower level supervisors. Self-paced e-learning is provided through an exclusive alliance with ELT, Inc. — the only e-learning company authorized to use Littler content. These programs will be deployed for both managers and employees and be 50 state compliant.

Employee Training

Training of non-supervisory employees is also an important tool for avoiding wage and hour liability. Such training must carefully explain the organization's policies and the employee's responsibilities, without using legal and technical jargon.

- **Training Materials for Your In-House Team:** This complete package of training materials includes a PowerPoint (with videos incorporated) for trainers and an employee workbook. All materials can be easily customized to include the organization's policies and procedures. LLG can provide further customizations upon your request.
- **E-Learning:** For many organizations, e-learning will be the only practical way to train a large number of previously untrained workers. Littler provides self-paced e-learning through an exclusive alliance with ELT, Inc. — the only e-learning company authorized to use Littler content. These programs will be deployed for both managers and employees and be 50 state compliant.

Intensive Training for HR and Compensation Professions

Good training leads to more employees bringing their concerns to HR (as opposed to outside the organization). Are your HR professionals prepared to investigate and resolve these concerns? This program drills down and provides the intensive training the HR community needs to identify and respond to employee concerns. Taught by Littler's most experienced wage and hour attorney/educators, this program allows participants to have their questions answered. With guidance on setting policies and procedures, the program will help build consensus among your HR team.

Recommended for: Human Resource Professionals, In-House Counsel and other managers charged with investigating allegations of wage and hour issues.

Format: Participants are immediately engaged in this uniquely interactive program involving professional live actors appearing as characters in a wage and hour workplace drama. Participants working in small groups conduct a "real time" investigation involving witnesses and documentation files. Attorney-facilitators guide the groups by utilizing lectures, large-group discussions, past investigation experiences, legal stories, and humor to stimulate meaningful discussions, critical thinking and recall. Video case studies are utilized, along with the optional use of live actors.

Length: Full day recommended. Other lengths available.

Contact Us

The information provided here is merely a brief overview of the many ways Littler Mendelson and LLG can help your organization. To learn more, visit us on the web at **www.legallearninggroup.com** or contact us at **contact@littler.com**.

APPENDIX H

Presented below is an article from ELT's CEO, Shanti Akins, focused on the affirmative defenses and damage reduction benefits from wage and hour complaint procedures, training, and compliance systems.

E L T - SPECIALISTS IN ETHICS & LEGAL COMPLIANCE TRAINING

Wage & Hour Training ROI:
Building A Good Faith Defense and Limiting Damages

In the compliance training world, hard ROI (Return on Investment) information is hard to come by. So many variables impact the analysis, and determining whether or not training has actually saved an employer money can take years due to litigation and training cycles.

But wage and hour training offers a solid and *tangible* ROI. Given the nature of wage and hour claims and the types of damages that are available, employers can quickly gain real financial benefits from training.

Training: A Key to Building a Good Faith Defense

Wage and hour laws aren't just complex -- they're the fastest growing problem for US employers, with wage and hour class action claims now outnumbering all other forms of employment class actions combined.

Thankfully, employers who take the right preventative actions can build a strong **affirmative defense** to wage and hour claims under the Fair Labor Standards Act (FLSA).

> "I can hit a company with a hundred sexual harassment lawsuits, and it will not inflict anywhere near the damage that [a wage and hour suit] will."
>
> *J. Nelson Thomas (Plaintiff's Counsel)*
> *BusinessWeek 10/1/2007: Wage Wars: Workers--from truck drivers to stockbrokers —are winning huge overtime lawsuits.*

Wage and hour training for employees and managers is a critical part of a prevention program, helping to cut damage awards in half, and preventing litigation from occurring in the first place.

Understanding Wage & Hour Liability & Damages

To see how training can create tangible ROI, employers need to understand the three main components of wage and hour liability:

Back Pay

If an employer pays an employee improperly, the employer is strictly liable for the underpayment. Period. It does not matter whether the underpayment resulted from intentional misconduct or an innocent error or omission.

Employees who have been underpaid can recover up to 2 years of back pay, unless a willful violation is established. With evidence of good faith efforts, which include training, an employer may successfully limit back pay awards to two years.

Willful Violations

A legal determination that an employer engaged in a willful violation of the law will extend a back pay award from 2 years to 3 years.

A violation of the FLSA will be deemed willful if the employer either:

- Knew, or
- Showed reckless disregard for whether its payroll practices violated the FLSA.

Employers who demonstrate that they acted in ***good faith,*** and made a sincere effort to comply with the law, will have a much easier time proving a violation was not willful.

Employers who utilize a high-quality and effective wage and hour training program for managers and employees will be better positioned to establish a good faith defense. Appropriate training will be viewed as an honest and reasonable effort to insure that payroll practices and manager actions complied with applicable laws.

Liquidated Damages

Liquidated damages, if awarded, can double a back pay award. A two or three year liability instantly becomes a 4 to 6-year liability.

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It is increasingly common for courts to automatically award liquidated damages if an employer is found to have engaged in willful misconduct under the FLSA.

An employer may be able to avoid an award of liquidated damages if it can show that its actions were taken in ***good faith***, and that the employer had "reasonable grounds for believing" its actions did not violate the FLSA. (*See* FLSA, 29 U.S.C. Section 260).

Again, training provides employers with solid evidence of good faith efforts to comply with the law. A solid training program demonstrates an employer's commitment to achieving legal compliance--especially on the front line where many of the most costly mistakes occur.

Forward Looking Damages – The Case for Training Mid Litigation

It is also important to note that during litigation, damages continue to accrue forward in time until the employer demonstrates that it has corrected the FLSA problem.

This means that the monetary damages will continue to increase as a lawsuit slowly progresses, which can take years in many cases. For an employer who does not take prompt corrective action, liability can quickly exceed 4 or 5 years in tough cases or collective actions.

An employer who implements training, even mid-litigation or audit, has taken a significant step forward in demonstrating that a particular problem or error has been corrected.

The net result? Training can actually stop damages from accruing the moment it's is rolled-out to employees and managers. In these instances, employers experience virtually immediate and significant ROI.

Damages Add Up Quickly Without Evidence of Good Faith Efforts.

Back Pay:	$2 Million (2 years)
Willful Violation:	$1 Million
Liquidated Damages:	$3 Million
Accruing Damages:	$1-2+ Million
	$7-8+ Million
	+ attorneys fees

With proper good faith efforts an employer may be able to cap damages at the $2 million dollar level--a savings of more than $5 million.

Take Steps Now To Build A Solid Good Faith Defense

Educating employees about their rights and obligations is critical to establishing a good faith defense to wage and hour liability.

Training has a two-fold effect.

•Employees and managers who understand the basic rules are less likely to violate wage and hour laws inadvertently. Many cases involving massive liability could have been avoided with simple educational efforts.

•Wage and hour training is compelling evidence of good faith efforts to comply with the law. If and when mistakes happen, your organization will be positioned to establish a good faith defense, and dramatically reduce damage awards or the settlement value of a case.

Wage and hour training can easily save your organization *millions* of dollars. The ROI is real.

Utilizing online training provides another layer of ROI by saving the time and expense of classroom education. Employers can reach a large, geographically dispersed workforce, seamlessly tracking and archiving data for each employee who takes training and acknowledges the organization's policies.

Now those are training dollars well spent.

For more information on Wage & Hour and other ELT online compliance solutions, visit us on the web at www.elt-inc.com

APPENDIX I

Legal Learning Group Sample Course Description

Conducting Lawful Investigations — A "Rational" Process To Resolving Wage and Hour Disputes

The wage and hour class action has become the "plaintiff's attorney's best friend." The U.S. Department of Labor has estimated that only 20% of employers are in substantial compliance with federal wage and hour laws, not including additional state law requirements. Thus, it is not surprising that wage/hour collective and class actions have doubled in the past five years, and are filed more often than all types of discrimination and harassment class actions combined. This type of litigation can devastate employers. Not only does it often result in multi-million dollar verdicts or settlements but it also affects large portions of the workforce. Recent examples include a $120 million verdict against a company that misclassified employees as overtime exempt and a $170 million dollar jury verdict involving an organization that failed to pay for meal breaks!

Properly investigating and resolving wage and hour disputes is critical to reducing liability and cutting off damages. Often these cases are resolved (or not), based on how complaints are handled internally and the practical and effective resolution of the issues. Yet the process of investigating wage and hour disputes can raise as many issues as it solves.

This comprehensive program addresses these issues and provides the skills needed to conduct effective internal investigations that produce objective results and withstand scrutiny in litigation. Using a unique methodology, participants take on the role of an employment relations specialist in a fictional company and work through an entire wage and hour case taken from litigation files. Attorney-trainers monitor and guide small groups throughout the investigation, giving feedback and advice. Each participant can practice interviewing witnesses and evaluating documentary evidence. Participants will learn legally sound procedures for handling a complaint from the moment it is received until trial and a final verdict.

Learning Topics and Activities Can Include (depending on course length and organizational needs):

- **The Changing Landscape**
  - o Review legal trends that have made proper investigations critical to an organization's success
  - o We will review several Wage and Hour Hot Spots including:
    - Misclassification issues
    - Off-the-clock hours
    - Meal and rest breaks
    - Donning and doffing
    - Proper reporting
    - Documentation
    - Attorney-Client Privilege issues
- **Planning the Investigation**
  - o By working in teams the participants will learn:
    - Whom to interview and in what order
    - What documents to obtain
    - Defining the scope of the investigation
    - Electronic sources of information
    - What the appropriate level of confidentiality is
- **Receiving the Complaint**
  - o We teach the proper methods used to respond to an initial complaint and how to pick up on other leads to investigation
- **Interviewing Witnesses**
  - o Participants will strengthen skills by interviewing live actors playing the part of the complainant, the target supervisor and third-party witnesses. Participants receive instant feedback from attorney-facilitators regarding what they did well or could do better. Issues include:
    - Keeping interviews on track
    - Open-ended questioning techniques
    - Confidentiality
    - How much information to tell the accused and other witnesses
    - Learning how to work with difficult witnesses
    - When you become the target
    - Scope of interviews
- **Decision and Resolution Techniques**
  - o Learn how to evaluate evidence and reach a conclusion that furthers the organization's goals and will survive legal scrutiny. Issues include:
    - Making credibility determinations
    - Evaluating evidence
    - Determining the seriousness of the problem
    - Remedial action
    - "Selling" the decision to senior management
    - Practical resolutions to difficult wage hour issues
- **Documentation and Reports**
  - o Through in-depth, hands-on exercises, attendees will learn how to draft investigative reports that focus on objective, detailed assessments of evidence and reach good faith conclusions regarding the specific allegations being investigated.

Recommended for: Human Resource Professionals, In-House Counsel and other managers charged with investigating allegations of wage and hour issues.

Format: Participants are immediately engaged in this uniquely interactive program involving professional live actors appearing as characters in a wage and hour workplace drama. Participants working in small groups conduct a "real time" investigation involving witnesses and documentation files. Attorney-facilitators guide the groups by utilizing lectures, large-group discussions, past investigation experiences, legal stories, and humor to stimulate meaningful discussions, critical thinking and recall. Video case studies are utilized, along with the optional use of live actors.

Length: Full day recommended. Other lengths available.

ENDNOTES

1 Michael Orey, ***Wage Wars***, Bus. Wk., Oct. 1, 2007.

2 *Id.*

3 Employers should be mindful of the possible waiver of the attorney-client privilege with the assertion of the "good faith" defense during litigation. Additional information about the waiver of the attorney-client privilege can be found, infra, and in Appendix B.

4 *See, e.g., Niland v. Delta Recycling Corp.*, 377 F.3d 1244, 1247-48 (11th Cir. 2004) (employer's self audit and payment of back wages to employees were adequately supervised by the Department of Labor and employees' acceptance of payments barred their right to pursue additional compensation where an independent accounting firm had been retained by the employer to calculate the employees' back wages based on formulas, assumptions and factors approved by the DOL).

5 *See, e.g., Stender v. Lucky Stores*, 803 F. Supp. 259, 330 (N.D. Cal. 1992) (notes taken in compliance training used by plaintiffs as evidence of management's awareness of pattern of discrimination).

6 *See Upjohn v. United States*, 449 U.S. 383 (1981). Counsel should advise employees that: (1) he/she represents the company, not the individual witness-employee; (2) the interview is being conducted for the purpose of providing legal advice to the company, and thus the attorney-client privilege applies; and (3) because the attorney-client privilege applies, the employee should keep the discussions confidential and not disclose the contents to anyone else unless and until the company consents in writing to such disclosures.

7 *Wimer v. Sealand Serv, Inc.*, 1997 U.S. Dist. LEXIS 9475, at *1 (S.D.N.Y. July 3, 1997).

8 *But see Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 330 n.4 (2004) (class action in which plaintiffs alleged misclassification as exempt employees; California Supreme Court noted: "[D]efendant's interrogatory responses indicate that during the class period it reclassified all [employees in particular job category included in plaintiff class] from exempt to nonexempt with 'no change in the job description or job duties.' ***The court could rationally have regarded the reclassification as common evidence respecting both defendant's classification policies and the [employees'] actual status during the relevant period.***") (emphasis added).

9 *See, e.g., Gieg v. DRR, Inc.*, 407 F.3d 1038 (9th Cir. 2005) (employees handling finance and insurance aspects of car sales, who were compensated almost exclusively by commission, may be exempt under the commission sales exemption despite fact that insurance and finance sales are generally not considered "retail;" relevant inquiry is not whether the particular transactions on which employee worked should be considered retail, but rather whether the sale of automobiles should be considered retail).

10 *See, e.g., Martin v. Indiana Michigan Power Co.*, 381 F.3d 574 (6th Cir. 2004) (IT support specialist, whose duties included installing and upgrading hardware and software on workstations, configuring desktops, checking cables, replacing parts, troubleshooting and drafting network configuration documentation, not exempt under FLSA's computer professional exemption).

11 *See, e.g.*, Cal. Lab. Code § 226.

12 Caution: Some courts have reasoned that "treating" employees as a group is a factor supporting class certification in litigation.

13 For further information on OCEG or to subscribe, please see www.oceg.org.

14 *See Deel v. Bank of Am.*, 227 F.R.D. 456, 459 (W.D. Va. 2005) (noting employer's "fatal flaw, however, was that it did not clarify to the employees completing the questionnaire that it needed the information to obtain legal advice").

15 See Appendix E for sample policies.

16 Sample policies on some of these topics are set forth in Appendix E.

17 California law requires that any paycheck must bear the name and address of an established business within California at which the check can be cashed without discount. An employer that has paychecks drawn on a bank that has no California branches must make arrangements for their California employees to cash the paychecks free of charge and must make their employees aware of those arrangements.

18 In *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 330 n.4 (2004), a misclassification wage and hour class action, the court noted that: "[D]efendant's interrogatory responses indicate that during the class period it reclassified all [employees in particular job category included in class] from exempt to nonexempt with 'no change in the job description or job duties.' ***The court could rationally have regarded the reclassification as common evidence respecting both defendant's classification policies and the [employees'] actual status during the relevant period.***" (emphasis added).

19 Some employers try to mitigate the employee curiosity and evidentiary risks by making compliance-targeted changes at the same time as, or as part of, some larger reorganization or operational "overhaul." Likewise, some employers may opt to mitigate some portion of their total potential exposure by paying the back wages that result from errors lacking a good faith defense.

20 *See, e.g.*, Cal. Lab. Code §206(a).

21 29 U.S.C. 216(c).

22 Cal. Lab. Code §1193.5(b).

23 Cal. Lab. Code § 206.5.

24 *See, e.g., Reid v. Overland Machined Prods.*, 55 Cal. 2d 203, 207 (1961) (employer and employee may compromise bona fide dispute over wages so long as all concededly owed wages are paid prior to execution of release of claims over disputed wages); ***Sullivan v. Del Monte Masonry Co., Inc.***, 238 Cal. App. 3d 630, 634 (1965) (same); ***Perez v. Uline, Inc.***, 157 Cal. App. 4th 953, 958-60 (2007) (finding that employee's claims for defamation and overtime were released by severance agreement, but claims under uniformed services law were nonwaivable); ***Bowen v. Linuxcare, Inc.***, 2006 WL 2089916, at*6 (Cal. Ct. App., 1st Dist. 2006) (upholding trial court decision on summary adjudication that California Labor Code § 206.5 did not invalidate a release of claims and restating holding of Sullivan that "a compromise of a ***bona fide*** dispute may be waived") (unpublished); ***Tompkins v. Ramona Auto Servs., Inc.***, 2003 WL 22905330 (Cal. Ct. App., 4th Dist. 2003) (upholding trial court's enforcement of settlement of wage claims over objection based on § 206.5; finding § 206.5 bars only releases in which employer did not pay "all wages … [it] conceded to owe to the Employees") (unpublished).

25 The DOL has made it clear that private waivers are not available for FLSA claims. ***Lynn's Food Stores, Inc. v. United States***, 679 F.2d 1350, 1354 (11th Cir. 1982) (private compromise and release of FLSA rights that is not DOL supervised or court approved is not enforceable regardless of ***bona fide*** dispute). However, one case from the Western District Court of Texas found otherwise. ***Martinez v. Bohls Bearing Equip. Co.***, 361 F. Supp. 2d 608, 618-32 (W.D. Tex. 2005) (purely private compromise and release of FLSA rights involving a ***bona fide*** dispute as to liability, such as the amount of hours worked or compensation due, is not prohibited).

26 See the discussion regarding the avoidable consequences doctrine beginning on page 18.

27 29 C.F.R. §541.603(a). Isolated or inadvertent deductions do not result in loss of the exemption if the employer reimburses the employees for the improper deductions. 29 C.F.R. § 541.603(c).

28 29 C.F.R. §541.603(d).

29 *Id.*

30 *See State Dep't of Health Servs. v. Superior Ct. (McGinnis)*, 31 Cal. 4th 1026 (2003); 6 Witkin, Summary Of California Law 10th (2005) Torts, § 1297, (noting "avoidable consequences" is one of the "special ameliorative doctrines" in Restatement 3d, Torts, Apportionment of Liability § 3, Comment 6).

31 Compare ***Burlington Indus., Inc. v. Ellerth***, 524 U.S. 742 (1998) and ***Faragher v. City of Boca Raton***, 524 U.S. 775 (1998) (where employee subject to a hostile work environment but no tangible employment action, employers have an affirmative defense to liability if they have exercised reasonable care in attempting to prevent and correct workplace harassment, and the employee unreasonably failed to take advantage of such opportunities) with ***McGinnis, supra***, 31 Cal. 4th at 1043-1044 (while an employer can not avoid liability for sexual harassment by a supervisor, an employer can limit damages awarded to an employee based on the doctrine of avoidable consequences).

32 *McGinnis*, 31 Cal. 4th at 1034; see also ***Stokes v. Dole Nut Co.***, 41 Cal. App. 4th 285, 295 (1995) (it is a "fundamental principle of our law that a potential victim has a duty to avoid injury").

33 29 U.S.C. § 255. ***See McLaughlin v. Richland Shoe Co.***, 486 U.S. 128 (1988).

34 *McLaughlin*, 486 U.S. at 133.

35 132 F. 3d 115, 119-20 (2d Cir. 1997).

36 29 U.S.C. § 260.

37 996 F. Supp. 840, 849 (N.D. Ind. 1998).

38 2004 U.S. Dist. LEXIS 22625, 10 Wage & Hour Cas. 2d (BNA) 430 (E.D. Pa. Nov. 9, 2004).

39 2008 U.S. Dist. LEXIS 3024 (D. Tex. 2008).

40 516 F. Supp. 2d 317 (S.D.N.Y 2007).

41 *Savaglio v. Wal-Mart Stores, Inc.*, No. C-835687 (Cal. Super. Ct., Alameda Co. Dec. 22, 2005).

42 487 F. Supp. 2d 344, 347 (W.D.N.Y. 2007).

43 The question of whether an employee is entitled to one hour of pay for each incomplete break or whether an employee gets one hour of pay total – regardless of how many rest breaks s/he misses during a day – has not been resolved by the California courts. The California Division of Labor Standards Enforcement (DLSE) has taken the position that the maximum payment is two additional hours of pay each day – one for all of the meal periods that are missed (regardless of the number) and one for all of the rest breaks that are missed (regardless of the number).

44 See Appendix D for a sample excerpt of the kinds of questions available through Littler's Audit QB.

45 See Paul D. Weiner and Nina K. Markey, ***Qualcomm v. Broadcom: Morgan Stanley Redux?***, to be published, Spring 2008, ABA LITIG. SECTION EMPL. & LAB. REL. NEWSLETTER (article on file with authors).

46 ***See, e.g., Cynthia Diane Deel v. Bank of Am.***, 227 F.R.D. 456, 459 (W.D. Va. 2005) (employee interviews became discoverable because the employer did not give appropriate warnings in advance or advise that information was being gathered for purposes of providing legal advice).

47 For information on preserving privileges and a possible dual, non-privileged audit for use as a defense to "willful" and penalty claims see ***Wolfslayer v. IKON Office Solutions, Inc.***, 10 Wage & Hour Cas. 2d (BNA) 430 (2004) (company's audit policies to ensure company did not violate FLSA negated willfulness finding).

48 *See* ***McCoo v. Denny's, Inc.***, 192 F.R.D. 675, 683 (D. Kan. 2000) ("[t]he inchoate possibility, or even likely chance, of litigation does not give rise to the privilege").

49 ***Garrett v. Metropolitan Life Ins. Co.***, 1996 U.S. Dist. LEXIS 8054, at *10 (S.D.N.Y. June 12, 1996).

50 *See, e.g.,* ***Holland v. Muscatine Gen. Hosp.***, 971 F. Supp. 385, 390-91 (S.D. Iowa 1997); ***Aramburu v. The Boeing Co.***, 885 F. Supp. 1434, 1441 (D. Kan. 1995).

51 *See, e.g.,* ***Coates v. Johnson & Johnson***, 756 F.2d 524, 552 (7th Cir. 1985) (appellate court did not need to decide on district court's decision refusing plaintiffs' request to discover self-critical portions of the company's affirmative action plans because company waived any qualified privilege by voluntarily using its affirmative action efforts at trial to prove nondiscrimination); ***Steinle v. Boeing Co.***, 1992 U.S. Dist. LEXIS 2708 (D. Kan. Feb. 4, 1992) (after plaintiff complained that she was not in an appropriate job classification and pay status for position she was performing, company conducted an internal investigation into matter. In subsequent litigation, plaintiff sought internal investigation records. The company refused, claiming self-evaluation privilege. A magistrate judge found that the plaintiff privilege is limited to subjective, evaluative materials prepared for mandatory government reports. On appeal, the court concluded the magistrate judge's interpretation was not "clearly erroneous," and agreed that the company had not demonstrated a sufficiently compelling reason to prevent the plaintiff from discovering the investigative materials.).

52 *See, e.g.,* ***Torres v. Kuzniasz***, 936 F. Supp. 1201, 1214-15 (D.N.J. 1996); ***In re Crazy Eddie Secs. Litigation***, 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992).

53 *But see* ***Sav-On Drug Stores, Inc. v. Superior Cour***t, 34 Cal. 4th 319, 330 n.4 (2004) (class action in which plaintiffs alleged misclassification as exempt employees; California Supreme Court noted: "[D]efendant's interrogatory responses indicate that during the class period it reclassified all [employees in particular job category included in plaintiff class] from exempt to nonexempt with 'no change in the job description or job duties.' *The court could rationally have regarded the reclassification as common evidence respecting both defendant's classification policies and the [employees'] actual status during the relevant period.*") (emphasis added).

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55 *IMPORTANT NOTICE: This is a sample questionnaire that is intended for information purposes only and is not intended for the purpose of providing the recipient with legal advice. This excerpt, which is from a wage and hour questionnaire currently used by Littler attorneys in conducting wage and hour audits, does not reflect a complete wage and hour practices questionnaire. The complete questionnaire forms the backbone of Audit QB, Littler's web-based audit system, which is available through Littler and can be customized and updated for particular states, industries, and tasks. It is contemplated that the questionnaire will be used as part of an attorney-client process.*

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