

Proskauer»

Wage and Hour:

Auditing Wage and Hour Issues the Smart Way

Allan S. Bloom, Partner
Rachel S. Philion, Partner

May 19, 2026

Labor & Employment
**The 2026 Workplace
Briefing Series**

Agenda

- Prioritizing the areas for review
- Nationwide versus state-specific considerations
- “Top 10” wage and hour issues to consider auditing
- Resources
- Auditing while a claim or lawsuit is pending
- Preserving privilege

Introduction



Why audit?

- Wage and hour class actions continue to dominate the federal and state court dockets.
- All it takes is a single plaintiff.
- Most if not all plaintiffs' attorneys are on the lookout for wage and hour violations, even in disputes arising from other concerns.
- Statutes of limitations won't expire on continuing violations.

Why audit?

- All violations are fixable on a going-forward basis.
- The best defense is a good offense.
- In time, a successful audit (and remediation) can significantly reduce—if not eliminate—risk.

“How did we get here?”

- Why are wage and hour violations so prevalent, even at businesses and organizations with the best intentions and compliance processes in place?
 - Longtime/historical practices that are entrenched
 - Lack of complaints, leading to complacency/inattention
 - Lack of expertise
 - Integration/acquisition issues
 - Diffuse “ownership” of wage and hour compliance responsibility
 - Requirements can be hyper-technical
 - Federal and state laws often differ, and sometimes conflict

Auditing vs. Remediation

- Today's discussion focuses principally on audit steps and strategies, as opposed to remediation.
- Remedial strategies and timing will depend on a number of business and operational considerations.
- If and when an audit reveals an actual or potential violation, the company should engage in privileged discussions with counsel as to how to best address the violations.

Prioritizing the Areas for Review



Prioritizing the Areas for Review

- Exposure potential
- Trends—what areas are under attack?
- Time and resources
- Targeted versus wall-to-wall audit?
- Management commitment to fix
- Actual legal claims/claims anticipated
- Timing concerns—are there events that can provide “cover” for a change in pay practices (e.g., year-end, updated handbook, change in payroll vendor)?

Nationwide vs. State-Specific



Nationwide vs. State-Specific Audit Considerations

- In most cases, federal law sets a floor, and not a ceiling, for wage and hour compliance.
- As such, state law will ordinarily determine compliance requirements with respect to many wage and hour practices.
- In a nationwide audit, employers should first examine practices through a federal lens and then determine whether state and local wage and hour laws and rules may require a different or more nuanced analysis.
- Employers should focus not only on locations where they have offices or facilities, but also on locations where remote/field/at-home workers perform services.

Top 10 Wage and Hour Issues to Consider Auditing



① Regular Rate Calculation



Regular Rate Calculation: Compliance Point

- Overtime pay is calculated based on the “regular rate of pay.”
- All remuneration must be included in determining the regular rate of pay unless it falls within one of the eight excluded categories in Section 7(e) of the Fair Labor Standards Act (FLSA).
- Employers must know “what’s in and what’s out.”
- Regular rate claims are easy to bring, susceptible to class litigation, and don’t require any factual proof beyond the nature of the payment and whether or not it was included in the numerator of the regular rate calculation.
- Sources: 29 U.S.C. §§ 207(a)(1), 207(e).

Regular Rate Calculation: Audit Steps

- Identify each category of remuneration paid to non-exempt employees.
 - Payroll can usually generate a list of all payment categories/codes.
 - Many categories will be self-explanatory, but some may need explanation.
- Determine, with respect to each category, whether the amount (or value) must be included in the regular rate calculation.
- If you identify includable categories that have **not** been factored into the regular rate, consider an immediate change on a going-forward basis and the pros and cons of remedial back payments.
- Ensure your payroll administrator/processor (whether internal or external) understands and is complying with the rules.

Regular Rate Calculation: Audit Steps

- Remuneration that is often mistakenly excluded from the regular rate calculation can include:
 - Certain bonuses
 - Differentials
 - Hazard pay and other special payments for hours worked
 - Cash in lieu of benefits
 - Signing bonuses, referral bonuses, and other payments tied to retention/continued employment
 - Certain prizes and awards
 - Certain non-cash remuneration

Regular Rate Calculation: Audit Steps

- Check your math!
- The regular rate calculation differs depending on how and employee is paid and what an employee is paid:
 - Hourly versus salary
 - Bonuses and commissions paid “in real time” versus on a deferred basis (e.g., monthly, quarterly, annually)
 - Impact of shift differentials and other additional remuneration

② Employee/Non-Employee Status



Employee/Non-Employee Status: Compliance Point

- The facts and law—and not the preference of the business or the worker/service provider—determine whether an individual is or isn't an employee.
- Misclassification of employees as independent contractors remains a high focus point of the plaintiffs' class action bar and state agencies.
- The answers (and risk) can vary from state to state.
- Implications include wages, taxes, and benefits.

Employee/Non-Employee Status: Audit Steps

- Understand where and how your company uses non-W-2 labor.
- Identify all workers/service providers who are not paid on a W-2 basis, focusing on individuals and single-member LLCs/sole proprietorships (as opposed to vendor and other B2B relationships).
 - Generate a list of 1099 payments for the trailing three years.
- Examine all written agreements/SOWs/etc. with non-W-2 service providers.
- Determine whether the facts and federal/applicable state law support a non-employee classification.
- Decentralization of contractor retention/onboarding/relationships can make fact-finding a significant exercise involving a number of stakeholders.

Employee/Non-Employee Status: Audit Steps

- It's a “red flag” when a contractor:
 - Is not in a demonstrable independently-established business offering services to the public/other clients
 - Performs work that is integral to the company's business
 - Is actively supervised by a manager employed by the company
 - Supervises company employees
 - Performs services for the company for an extended period of time
 - Performs services exclusively for the company
 - Regularly performs services at company facilities

Employee/Non-Employee Status: Audit Steps

- It's a “red flag” when a contractor:
 - Is restricted from performing work for other businesses
 - Performs work that company employees also perform
 - Has unnecessarily broad access to company facilities/systems
 - Wears an identification badge/company uniform
 - Has a desk at the company's facility
 - Has a company email address/phone/business card
 - Attends company functions and events, or otherwise is integrated into the workforce

③ Pay Frequency and Timing



Pay Timing: Compliance Point

- Under the FLSA, payment of overtime premiums may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due, and in no event may payment be delayed beyond the next payday after such computation can be made.
 - Source: 29 C.F.R. § 778.106.

Pay Frequency: Compliance Point

- Certain states have weekly pay requirements for certain workers:
 - **New York:** “Manual workers” must be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned.
 - N.Y. Lab. Law § 191(1)(a).
 - **Rhode Island:** Absent a waiver from the State Department of Labor, every private sector employee must be paid their wages due weekly “except those employees whose compensation is fixed at a biweekly, semi-monthly, monthly, or yearly rate.”
 - R.I. Gen. Laws tit. 28 § 14-2.2.
 - **Vermont:** Employers may pay employees biweekly or semimonthly only after giving written notice of such practice.
 - Vt. Stat. tit. 21 § 342(a)(1)-(2).

Pay Timing and Frequency: Audit Steps

- Employers should examine their payroll timing and frequency to ensure it comports with all applicable laws in the jurisdictions in which employees are working (including remotely).
- In New York and other states that may require weekly pay, employers should determine whether that obligation has been triggered.
 - *Vega v. CM & Associates Const. Mgmt.*, 107 N.Y.S.3d 286 (1st Dep't 2019).
- NYSDOL: Workers who spend more than 25% of working time engaged in “physical labor” are “manual workers.”
- NYSDOL: “Physical labor” includes a “wide range of physical activities undertaken by employees.”
 - Source: [N.Y.S. Dep't of Labor, Op. Ltr., RO-09-0066](#) (May 21, 2009).

④ Pay Statements



Pay Statements: Compliance Point

- Many state laws require that pay stubs contain certain itemized information, with monetary penalties for non-compliance.
- Example: In New York, pay statements must list the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof (e.g., hourly, salary, commission, etc.); gross wages; deductions; allowances claimed; net wages; regular hourly rate or rates of pay; overtime rate or rates of pay; number of regular hours worked; and number of overtime hours worked.
- Source: N.Y. Lab. Law § 195(3).

Pay Statements: Compliance Point

- Example: In California, with each payment of wages, an employer must provide an employee with notice that sets forth the amount of paid sick leave available to the employee, either as part of the wage statement or in a separate writing on the designated pay date.
 - Source: Cal. Lab. Code § 246(i).
- California pay stubs also must include the last four digits of the employee's social security number or an employee identification number other than a social security number.
 - Source: Cal. Lab. Code § 226(a).

Pay Statements: Audit Steps

- Employers should print out a recent example of a pay statement in each state in which employees are working (including remotely) and review those statements to ensure they contain the required information.
- Employers who pay on a bi-weekly or semi-monthly basis must ensure that their pay statements reflect actual hours worked on a weekly basis, and not a bi-weekly, semi-monthly, or average basis.

⑤ Time Sheets



Time Sheets: Compliance Point

- The FLSA requires an employer to maintain records regarding non-exempt employees' (a) hours worked each workday; and (b) total hours worked each workweek.
 - Source: 29 C.F.R. § 516.2(a)(7).
- Recording exact start and stop times is advisable in states with “split shift” laws that may require additional non-overtime pay for days on which working hours are not consecutive (e.g., California, District of Columbia, Hawaii, New York) and states that require employers to record start and stop times of meal periods (e.g., California).

Time Sheets: Risk Management

- From the standpoint of defending against potential wage claims, the ideal timesheet:
 - Includes the total number of hours and minutes worked each day.
 - Includes, for each day, start time, time(s) out and in for breaks and meals, and stop time.
 - Includes an employee certification as to its accuracy and completeness.
 - Includes an employee certification disclaiming “off the clock” work.
 - Is accompanied by accurate records of any adjustments made by managers or other approvers to the time entered by an employee, the reasons for such adjustments, and the communication to the employee explaining such adjustments.

Time Sheets: Audit Steps

- Employers should examine their time entry systems and processes to ensure they comport with applicable laws and best practices in each jurisdiction in which employees are working (including remotely).
- Employers should review historical records of any adjustments made to time entered by employees to ensure that such adjustments are bona fide and that adequate records exist to explain such adjustments.

Time Sheets: Audit Steps

- Red flags:
 - Time entries consistently corresponding to office hours or the top of the hour.
 - Employees don't enter their own time.
 - Prepopulated time sheets.
 - Managers unilaterally adjusting time entries/no process in place for validating adjustments.
- How and why to audit rounding practices.

⑥ Exempt/Non-Exempt Status



Exempt/Non-Exempt Status: Compliance Point

- Employers have heightened pay, time keeping, record keeping, notice, and other obligations for employees who are not exempt from the minimum wage and/or overtime laws.
- An employer may have just assumed an employee was exempt or never conducted a proper exemption analysis.
- Some employers mistakenly focus only on pay (e.g., assuming all salaried employees are exempt) or title/role, and not on actual duties.
- Duties or circumstances may have changed over time, making a historically justified exempt classification less defensible.
 - *E.g.*, remote work, technology advancements

Exempt/Non-Exempt Status: Audit Steps

- If you haven't looked at your exempt/non-exempt classifications in a while, compile a list of all exempt roles and identify those whose exempt status is not readily apparent.
- Confirm satisfaction of state minimum salary for exemption.
- Engage in a privileged analysis of duties to ensure they are/remain consistent with an exempt classification.
- Pay particular attention to duties that may have changed over time.
 - *E.g.*, outside sales employees not customarily and regularly engaged away from the employer's place or places of business
 - *E.g.*, discretion curtailed because of technological advances

Exempt/Non-Exempt Status: Audit Steps

- Ensure that job descriptions and performance reviews are consistent with an exempt classification/don't undermine exempt status.
- Pay close attention to team structures where the exempt classification of more senior employees may be more defensible than more junior employees.
- Pay close attention to “inherited” classifications from mergers, acquisitions, and team hires.

⑦ Pay Policies



Pay Policies: Compliance Point

- Certain key pay policies—including in an employee handbook or otherwise communicated to managers and employees in writing—may limit exposure to pay claims or (in some circumstances) provide a complete defense to such claims.
- Examples:
 - Requiring time entry for all work regardless of day/time/location
 - Prohibiting overtime or off-schedule work without authorization (but directing that that the time is paid for if worked).
 - Prohibiting “off the clock” work (but directing that the time is paid for if worked).
 - Defining what time the employer will and won’t pay for (e.g., travel time, after-hours events, study and education time, etc.)
 - Requiring prompt notice of pay discrepancies

Pay Policies: Audit Steps

- Review all pay policies communicated to employees to determine what is missing and whether any policies should be revised to reflect best practices.
- Pay particular attention to policies regarding compensable time/hours worked and “off the clock” work.
- Review manager training processes to ensure they include training on pay policies and practices.

⑧ Wage Deductions



Wage Deductions: Compliance Point

- State laws may strictly limit the deductions an employer can take from wages, and require advance notice, authorization, and/or other processes.
- Some states regulate deductions that employers may assume to be categorically permissible, such as for wage advances and inadvertent overpayments of wages.

Wage Deductions: Audit Steps

- Identify each category of wage deductions that may be applied to/appear on a pay statement.
 - Payroll can usually generate a list of all deduction categories/codes.
 - Many categories will be self-explanatory, but some may need explanation.
- Ensure deductions are permissible in the jurisdictions where employees are working (including remotely), both as to nature and process.
- Identify any “off-pay statement” circumstances where employees are obligated to make payments to the employer, to determine whether they are consistent with state deductions/separate transaction rules.
 - *E.g.*, repayment or reimbursement agreements

⑨ Notices at Hire and Termination



Notices at Hire and Termination: Compliance Point

- Some states require employers to provide written notice containing specific pay and other information at the time of hire.
 - *E.g.*, Cal. Lab. Code § 2810.5(a).
 - *E.g.*, N.Y. Lab. Law § 195(1)(a).
- Some states require employers to notify employees in writing of any changes to the information provided at hire within certain time periods.
- Some states require employers to provide certain information at the time of termination.
 - *E.g.*, N.Y. Lab. Law § 195(6) (exact date of such termination, exact date of cancellation of employee benefits); 12 NYCRR § 472.8 (right to file an application for unemployment benefits).

Notices at Hire and Termination: Audit Steps

- Review the package of information provided to employees at hire/onboarding and termination, as well as for a change in pay, to ensure it complies with state law where the employees work.
- Review employee communications at the time of any changes in pay practices (e.g., pay day, pay frequency, method/basis of pay), or when corporate information changes, to ensure compliance with state laws.

⑩ Compensation Plans



Compensation Plans: Compliance Point

- Compensation plans—including commission plans, sales plans, incentive pay plans, bonus plans, etc.—should contain certain key provisions to limit exposure to pay claims.
- Key provisions include:
 - Clearly defined earning and forfeiture provisions, including all conditions to earning and payment
 - Examples of calculations
 - Proration based on employee start/end dates
 - Provisions regarding rights upon termination and leave
 - Employer/plan administrator discretion as to eligibility and awards (fact and amount)

Compensation Plans: Compliance Point

- Key provisions include:
 - Language making clear that any draws or advances are unearned until such time as conditions to earning/vesting are satisfied
 - Ability to make adjustments/offsets based on post-payment events (e.g., transaction cancellations, client/customer non-payment, etc.) and to recover unearned amounts from future amounts owed
 - No guarantee of continued employment through plan end date
 - Employer right to amend/discontinue the plan
 - Merger/integration language
 - Dispute resolution procedures

Compensation Plans: Audit Steps

- Employers should review all existing compensation plans to ensure they are consistent with best practices and limit exposure.

Resources



Resources

- Documents/data/systems
 - Timekeeping records
 - Payroll records
 - Log-in/log-out records
 - Written policies
 - Performance evaluations
 - Statements of work/services agreements
- People
 - Internal (Legal/HR/Compensation/Payroll/Management)
 - External (Outside counsel/experts)

Resources

- Knowledge
 - Historical practices
 - Explanations
- Privilege protocols

Auditing While a Claim or Lawsuit is Pending

Auditing While a Claim or Lawsuit is Pending

- Any wage and hour lawsuit with potential merit should prompt a broader audit into the alleged violation.
- Particularly in a putative class action, the employer should endeavor to understand—as soon as possible—the breadth of the potential violation, the scope of the putative class(es), and the potential monetary exposure.
- Privilege preservation is exceptionally important while a lawsuit is pending but is usually made easier when defense counsel is handling the fact investigation and the audit is made part of that exercise.

Preserving Privilege in Internal Audits



Preserving Privilege in Internal Audits

- It's crucial to take steps to establish and maintain the privileged nature of any audit.
- Who is on the team? Limit to necessary members.
- Subject matter waiver issues.
- All audit-related materials, including any documents and information that you will gather and compile (and ask others to gather and compile)—together with the emails and other communications transmitting such materials—should be deemed and prominently labeled confidential, attorney-client privileged communications, attorney work product, and/or materials prepared in anticipation of litigation.

Preserving Privilege in Internal Audits

- Materials should be maintained as confidential and distributed on a need to know basis only.
- Outside counsel should engage any third-parties (e.g. experts, consultants).

Preserving Privilege in Internal Audits

- The audit manager/point person (preferably an attorney) should send an email to all internal team members who will assist with the gathering, compiling, and/or transmission of documents and information, alerting them that they will be helping to gather and compile such materials in connection with a privileged and confidential legal matter, and that they should treat any communications, meetings, gathering of data and materials, and other related efforts as privileged and confidential.
- Team members should be instructed not to have any communications (written or oral, including emails or texts) that do not include the audit manager/point person or company counsel.

Preserving Privilege in Internal Audits

- All team members should label all audit-related emails and other communications as privileged and confidential (e.g., “Privileged and Confidential/Prepared at the Request of Legal Counsel”).
- Necessary discussions with non-audit team members (e.g., managers, senior leadership, employees) should be carefully scripted.
 - While changes may need to be communicated, findings and decision-making rationales should not be widely shared.

Contacts



Allan S. Bloom

Partner

+1.212.969.3880

ABloom@proskauer.com



Rachel S. Philion

Partner

+1.212.969.3623

RPhilion@proskauer.com



Proskauer»

Proprietary & Confidential. For discussion purposes only. The information provided in this slide presentation is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the Firm, our lawyers or our clients. No client-lawyer relationship between you and the Firm is or may be created by your access to or use of this presentation or any information contained in it. Rather, the content is intended as a general overview of the subject matter covered. Proskauer Rose LLP (Proskauer) is not obligated to provide updates on the information presented. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Proskauer Rose LLP. All Rights Reserved.