

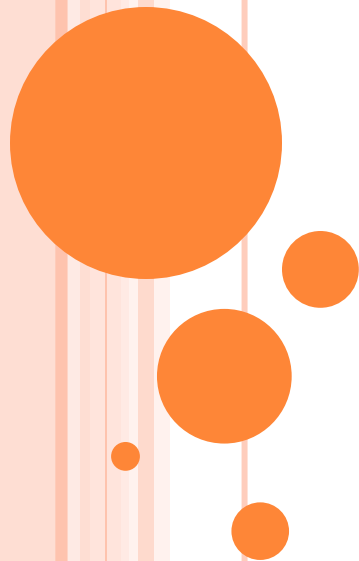
# AUDITING COMPENSATION PRACTICES

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# WHY CONDUCT YOUR OWN AUDIT?

(INSTEAD OF WAITING FOR THE GOVERNMENT OR A PLAINTIFF'S LAWYER TO DO IT FOR YOU)

- Litigation over compensation is on the rise
- Aggressive OFCCP, DOL Wage & Hour, IRS, and State Agency auditing and enforcement
- Unlawful practices create significant liabilities (like liquidated damages, fines and/or penalties)
- Compensation problems are usually easily identifiable and can be fixed
- Pay administrators and managers can be held personally liable (\$\$ and/or jail)
- Pay practices can impact federal contractor status
- Conducting an audit and making corrections may help you if you are audited or are sued

# AUDIT BASICS – HAVING COUNSEL MATTERS

- Conduct audit under direction of counsel
  - Attorney-client privilege and work-product protections
- Knowledgeable HR personnel and key managers should be involved
- Audit without fear of finding problems (you should actually be looking for them)
- Carefully manage communications about the audit
- Make corrections carefully and thoughtfully

# AUDITING PAY PRACTICES

- Exempt Classification
- Payment of Non-Exempt Employees
- Equal Pay Act Issues
- Administration of Benefits Linked to Compensation
- Use of “Independent Contractors”
- Executive Compensation Agreements and Compliance With IRC 409A
- Recordkeeping and Posting

# AUDITING EXEMPT AND NON-EXEMPT EMPLOYEE PAY?

- Classification of Employees as Exempt
  - Does each employee qualify based on actual duties?
    - What do: “independent” “discretion” “judgment” and “matters of significance” really mean?
  - Watch Out For Deductions From Pay
    - In what circumstances does company make deductions?
    - Does company have proper, signed authorization or valid garnishment order?
- Payment of Wages to Non-Exempt Employees
  - Payment for all “hours worked”?
    - On call time
    - Blackberry and iPhone time
  - Are non-discretionary payments included in “regular rate”?
  - Do time sheets match pay records?

# EQUAL PAY ACT AND THE OFCCP'S INITIATIVES?

- Equal Pay Act
  - Identify factors influencing compensation
  - Review compensation policies and practices
  - Assess performance metrics used for compensation
- Recently Published OFCCP Rules
  - Applicable to federal contractors
  - Look at language in master service agreements and purchasing agreements for EEO 11246 “pass down”

# EQUAL PAY ISSUES – GENDER & NEGOTIATION

- 2012 Study by National Bureau of Economic Research (quoted by WSJ online April 1, 2013)
  - Two advertisements placed for same position in nine U.S. cities:
    - First was ambiguous as to salary negotiations
    - Second explicitly invited salary negotiations
  - Approx. 2500 job seekers responded to ads
  - Findings:
    - Men more likely to negotiate when it was ambiguous
    - **Women more likely to negotiate when invited to do so**
    - Gender played less role if negotiation was impersonal, as opposed to face to face
    - **Women disproportionately applied for position for which salary negotiation was invited**

# WHAT ELSE SHOULD BE AUDITED?

- Administration of Benefits Tied to Compensation
  - 401k and retirement plan “matching”
    - Based on base pay or all compensation?
  - Severance benefits
    - Paid in a consistent manner pursuant to a written policy?
    - Pursuant to an unwritten policy?
    - Pursuant to an ad hoc practice?
- Frequency of Payment of Wages
- Direct Deposit Practices
- Timing of Payment of Last Paycheck



# WHAT ELSE SHOULD BE AUDITED?

- Use of Independent Contractors
  - Factual inquiry
    - Nature and scope of work
    - Length of relationship
  - IRS and state agencies may use different independent contractor standards
  - State agencies are actively auditing and sharing info
- Executive Compensation Agreements
  - Applicability of IRC 409A
  - Severance, change of control, and deferred comp arrangements

# WHAT RECORDS SHOULD BE AUDITED?

- Payroll Records
  - Form W-4
  - Time Sheets
  - Pay Records
  - Authorizations for Deductions/Withholding
  - Garnishment Orders
- Records of PTO Accrued and Used
- Required Posters
- Job Descriptions
- Performance Appraisals and Disciplinary Documents Affecting Compensation
- Written Company Policies
  - Hours of work, expense reimbursement, overtime, deductions, vacation, travel, etc.
- Severance Plans/Policies and Documents Reflecting Severance “Practices”
- Independent Contractor “Agreements” and I-9s
- 401k and Retirement Plan Records
- Executive Compensation Agreements (Severance, Change of Control, Deferred Comp)

# YOU FOUND PROBLEMS; NOW WHAT?

## ○ Multiple Options:

1. Fix for future, fix in past
  - a. Eliminates new liability
  - b. Significantly reduces risk of lawsuit
  - c. Can be very hard to accomplish with former employees
  - d. Communication must be well drafted
  
2. Fix for future, leave the past behind
  - a. Eliminates new liability
  - b. Preserves past liability (no closure)
  - c. May facilitate willful finding in some courts
  - d. Careful communication is key
  
3. Don't fix anything, keep hope alive
  - a. Prepare for litigation, expect a willful finding

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