

## ASSOCIATION OF CORPORATE COUNSEL

**TITLE:** A Guide to Wage and Hour Compliance in 2008: Cutting Edge Strategies

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**PRESENTED BY:** ELT, Inc.

**SPONSORED BY:** ELT, Inc.

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**MODERATOR:** Shanti Atkins, Esquire, President & CEO, ELT, Inc.

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**Operator:** Just a reminder, today's conference is being recorded.

**Shanti Atkins:** Welcome to this ACC Webcast. Good morning, everyone, and good afternoon to those of you who are on Central Time or East-coast time. Thank you for attending this ACC-sponsored Webcast. My name is Shanti Atkins, and I'm going to be the moderator for today's session. And we're going to just get started in a few minutes.

Today's presentation is going to be about wage and hour compliance for 2008. Cutting edge strategies that you, as in-house counsel, can employ to reduce wage and hour litigation risk. And with that, I would like to just introduce the speakers for today. As I mentioned, my name is Shanti Atkins. I'm going to be your moderator. I'm the president and CEO of ELT. We're a company that specializes in online ethics and legal compliance training. I advise clients across multiple industries, and of all five is about strategic risk management and compliance initiatives, and wage-hour compliance has really become the new number one requests area that ELT is being asked to assist in.

The real star of today's presentation, however, is Tammy McCutchen. She is really the preeminent expert on wage and hour compliance in the nation. Tammy is currently a shareholder at the national employment law firm at Littler Mendelson, but was formerly the administrator for the wage and hour division at the U.S. Department of Labor between 2001 and 2004. So Tammy has incredible experience from the enforcement side of what it means to tackle sticky wage and hour compliance issues. In her current practice, Tammy represents management and litigation and employment matters with an emphasis on wage and hour. She routinely advises her clients on legal compliance and litigation prevention measures in this area, and assists clients on implementing compliance programs to manage wage and hour risk.

A few housekeeping items about today's presentation. I want to let all of you know that we're going to try and keep today's presentation very interactive, and we're going to do that in two ways. One is that we're going to periodically send out poll questions throughout the Webcast, and Tammy and I really ask that you participate in those polling questions so that we can get your feedback and participation. I think one of the additional benefits of these types of Webcasts is that you can get to see data and statistics and information from your peers and other organizations.

If you have questions, we'd also love you to submit them during the Webcast. You should see a question window in the bottom left-hand corner of your screen. You can type your question into that window and we'll make every effort to respond to it, either during the Webcast and we're also

going to leave a few minutes at the end of the Webcast to go through those questions. Keep in mind, however, we do have several people on the line today, so we won't necessarily be able to get to all your questions. We will put our contact information up at the end of the presentation, however, should you have additional questions you'd like answered and we're not able to get to you.

All right. So with that, I'm going to advance the presentation. Looks like we're having a little bit of a technical difficulty here. I want to confirm that I have the ability to advance ((inaudible)). There. It's been passed back to me. Thank you so much.

So first, a little bit of background about who we are and our organizations. As I mentioned, ELT is an affiliate company of Littler Mendelson. We were actually spun out of Littler Mendelson in 1996. Littler Mendelson is the nation's largest employment law firm. It currently has almost 700 attorneys practicing management side employment law, in 44 offices around the country. ELT was spun out of Littler Mendelson to focus exclusively in online compliance training solutions. So at ELT we offer online training to your front-line level employees and managers on topics like harassment, discrimination prevention, ethics training and, of course, the topic of today's Webcast, wage and hour training. We're currently used by more than a thousand organizations around the globe and have trained more than 2 million employees and managers to date.

But the goal of today's presentation is not to provide the type of training that would go to front-line employees and managers. It's to provide education to you as legal professionals about how to manage this ever-increasing risk when it comes to wage and hour issues. And I do know we have a very sophisticated audience on the line today, a lot of very senior and seasoned in-house counsel. So we'll really go quickly through some of the awareness-type issues, because I think there's a high level of knowledge on this topic, and get more into the detail on the – on the recommendations for compliance and some real practical tips that we have on our suggested wage-hour compliance plan.

So our presentation is basically going to be in two parts. One is uncovering the risks, and the second is avoiding wage and hour liability by building an effective compliance program. Tammy and I are going to really try and focus our efforts on the second part of the program. So I'm going to put the first poll question out to the audience, again, to encourage your participation and ask, are you concerned about potential wage and hour compliance issues in your organization? And we can see some of the poll results are coming in here. I think the vast majority of you are going to answer yes to this question and, Tammy, while those poll results are coming in, why don't you let our audience know just a little bit about the state of the nation?

**Tammy McCutchen:** I certainly will.

Well, one of the reasons why I think I'm happy that you all joined me today, and I'm really excited to do a presentation for the Association of Corporate Counsel.

You know, most employers these days have a very sophisticated and well developed compliance program for issues such as discrimination, harassment, and reasonable accommodation under the ADA. But my experience has been that a lot fewer employees actually thought about an established compliance program to deal with wage and hour issues in their organization.

Which is something that is – that's actually surprising to me, because – you know, today FLSA and California, Florida, collective and class actions to collect overtime pay outnumber all other types of federal discrimination class actions combined. In other words, the – the number of FLSA collective actions filed out number all of the harassment, race, sex, national origin discrimination class actions combined.

In terms of the number of – the amount of litigation out there and the types of judgments and settlements that we're seeing, the other overtime claims are much bigger risk to employers today,

which seems to me that the – that there is absolute return on investment in having a compliance program, because just like the discrimination, harassment, reasonable accommodation risk, FLSA overtime risk can be managed, as long as an employer thinks about how to manage it and have the compliance program before you're hit with a DOL investigation, or a private lawsuit.

Plaintiffs firms these days, are beginning to specialize more and more on wage and hour class actions and abandoning efforts to get class actions on the discrimination side and the reasons are – the reasons are very clear. One, the money is getting bigger and bigger – you know, we're seeing – used to be, unusual to see a multimillion dollar judgment and today – you know, judgment is in the 30, 60, 100 million, and the settlements at that level are no longer rare, they occur on a monthly basis.

And the overtime, particularly the FLSA class action, is much easier to get certified because the standards are lower than the normal rules of civil procedure. There are often because employers have not planned, and have not developed any defenses. There are often few or no defenses that an employer can actually – can actually (assert) especially if there's record keeping issues.

It's very easy to file the complaint and there's copy-cat claims out there, you've seen it – you know, one big judgment against an insurance company and the next thing you know, the entire – you know, every insurance company has been sued for the same type of – for the same type of issue.

DOL is estimating through its enforcement efforts that 70 percent of employers are out of compliance. And I think that is probably pretty accurate. Getting it wrong is expensive – you know, two years of back wages, a third year if you found to have acted willfully of course, and then ((inaudible)) unless the employer can prove good faith, there's automatic double damages, liquidated damages opposed by the courts of course, plus the expense of litigations, and (fines).

And if you don't have records, then the benefit of – the benefit of the doubt, the burden of proof is always yours, rather than the employees'. Unless of course we get the macho employee who's – who claims to have worked 60 weeks every week, without any rest for vacation or days off. So you really have to preplan to make sure you have the records you need to defend a case, and that you have a compliance program so that you can reduce the amount of back wages or even eliminate the amount of back wages that you can be called upon to pay in a court action.

So what are the biggest wage and hour risks today? I think they're the same as they have been for a while, off the clock continues to be a huge – have huge cases filed, particularly in California, and Florida where – are the hot beds of off the clock suits. Meal and rest periods continue to be a big issue. Not people being interrupted during their meal and rest breaks, or not taking their meal and rest breaks. We continue to see allegations of time shaving of time records where managers are shaving off time, from time records. And of course the whole preliminary and post luminary dawning and (doffing) type of cases. Work that is being done before someone clocks in and after someone has clocked out, continue to be areas of concern.

And this classification employees, and this classification cases are still very big. This is basically as you know, a challenge that you have impromptly classified an employee as non – as exempt, when they should be non-exempt. Usually in this case, there are no time records, and so the employer is stuck with the statements of the employee, how much time they're working a week and each week.

The areas of where sort of industries that are seeing a lot of activity these days, including the financial services industry, the ((inaudible)) you can just advance that slide, those are the most – administrative and computer employee are the types of claims that we're seeing most today.

We used to see a lot of executive assistant manager cases in the retail industry, those cases have all been litigated – a lot of those have been litigated already, and employers have changed

their classifications in that area so we're seeing less activity, however we are seeing more activity for retail managers in small stores like – and when – for retailers for example have most of their locations in malls.

And they have very few employees so are getting a lot of – seeing a lot of play in the two or more requirement for the executive exemption for those managers in the small stores. Other areas, insurance and insurance claims adjusters is – continues to be hot. The financial services industry – can you flip back one?

**Shanti Atkins:** Sure.

**Tammy McCutchen:** OK, thanks.

Technology is really, really hot right now. IBM – it started with IBM settlement, for \$65 million. There's been computer science corporation, and Electronic Arts have all been hit. And there's actually – especially in California there's plaintiff lawyers out there that are advertising for technology employees to come and talk to them so they can try to put together a class action.

And of course, pharmaceutical sales employees, there's almost every pharmaceutical company is facing a suit these days about their sales employees. So outside sales – computer, technology workers, financial services and insurance continues to be the big areas.

OK, go ahead.

**Shanti Atkins:** You have an example here, some of the mega settlement are fined in the financial industry, is just one slice of the pie.

**Tammy McCutchen:** And every time I look at the slide, I'm just – I was – right after I came out of the Department of Labor ((inaudible)) we had revised the part 5.41, white-collar exemption regulations. I can't tell you how many financial services industry groups I talked to saying, "It's coming, it's coming, do something."

Unfortunately, they didn't act fast enough and these are the types of – on your screen, these are the types of settlements and judgments that you're seeing now in the insurance industry. We're also seeing a lot for loan officers and other things despite the department of labors efforts to write some favorable opinion letters.

**Shanti Atkins:** So what are some ways to control risk with miss-classification.

**Tammy McCutchen:** Well you – for miss-classifications, you've got to make sure your claim. You need to – you need to conduct and audit first, to make sure that your jobs are correctly classified. And then you have to figure out what do you now. Once we're clean, how do we keep our classifications up to date, and make sure that there's no changes?

And to me, that's about your job description, making sure your job descriptions are adequately reflecting what your employees are doing and having the employees confirm the accuracy during – your annual performance appraisal process. Why? You probably heard a lot that job titles and job descriptions really do not provide good evidence or good defense when you're in litigation.

Well, that's true, if it's just the document. However, if you have a job description, and you have your employees sign off that's it's an accurate description of the job duties that they perform. And it's a job description that's written with the exemption requirements in mind and not just to address ADA, or discrimination issues, then you have yourself a piece of evidence that's powerful when you put up the job descriptions with the plaintiffs signatures on it that's saying that its accurate.

It makes it much harder for an employee who, when they're trying to – you know, get their job in a higher pay grade, tell you that they're doing all sorts of wonderful discretion judgmental – judgment things, and instead they – in court, they turn around and say all they do is data entry.

So it can be a powerful piece of evidence, if you can get the employee sign off. I think it's important to have centralized and systematic review of new jobs and jobs where the duties are changes. When you're having reorganizations within your company, there ought to be a protocol and a centralized review of the jobs as they come – as they are new and as they are changed to make sure you're getting the right result.

And of course, this type of training – I think it's obviously miss training on miss classifications is not something you want to give to your front line managers and your employees, but your HR departments, and everybody who's responsible for wage and hour inside your ((inaudible)) – you know, ought to have some periodic training to make sure they're up to date with all the newest legal developments.

**Shanti Atkins:** Let's turn to the other big risk, which is, off the clock work and I'm going to send another poll question out to the audience, in terms of what they think the state of this issue as of their respected organizations. Now rest assured your responses here are completely anonymous.

Do you feel that you're confident that your employees are reporting all the hours that they work? And reporting is really the name of the game when it comes to this type of risk. So if you can answer this poll question, that would be very helpful and handy – I think we can already see that the (yesses) are in the minority here in terms of confidence in the employees are reporting all hours that they work, and that's not unusual at all.

**Tammy McCutchen:** It's not unusual and it's a much more difficult issue to deal with – you know, you're – because as the in-house lawyer or the HR professional, you can control whether a job is correctly classified as exempt or not exempt, of course always having to deal with push back from your business clients who may not want to have a position be non exempt.

But how do you make sure that your employees are reporting all hours you work? You know, my answer to that is you'll never 100 percent – be 100 percent that every single hour, every single minute, every single 10 minutes of work is being recorded. But you can protect yourself by saying, I limit your liability if you have a compliance program and we'll talk a little bit more later on about what you can try to do to control the amount of off the clock work that's going on in your organization.

Of course, off the clock work can be both voluntary, the employees' choice, or involuntary. And as we'll discuss later on, the involuntary type when an employee is a manager insisted on employee clock out and continue to work, that is a situation you can manage by having a good policy that allows you to discipline or discharge the manager that's requiring the off the clock work.

But there's also the voluntary – what I call the earnest employee. You know, your secretary just wants to come in a half hour early to finish something up, and doesn't want you to have to be responsible for the overtime pay. And so you also need a policy – a clear policy – so I think to make sure your employees know, that it's a bad thing, and they're not helping you if they're performing work willing off the clock.

So let's start out with the definition of work.

Work is almost everything. And that's – what I see a lot is employers trying to say that this isn't work, and that's not work and make miss steps because work includes anything that employee suffers, permits, requires, reasonably knows about, from the first principle activity to the last principle activity of the employee.

And of course the definition of first principle activity – I think that's on the next slide, Shanti, if I recall. No, the definition of principle activity is actually the first action an employee takes that is – that is necessary to the job that is – that he or she is being performed. And it can include things of the first principle activity that starts the time clock, can include things like reading e-mail. And there are actually some plaintiff lawyers out there who are now claiming in litigation, that if an employee gets on a computer at home and reads the e-mail, that has – that starts the work clock for non exempt employees, and turns their commuting time into work time.

And hopefully those types of claims will not be successful, but that's the type of thing we're seeing the plaintiffs bar, and these are the top lawyers in the bar, not the bottom lawyers trying to claim...

**Shanti Atkins:** And Tammy maybe you can comment a little bit on the continuous work day doctrine, because we actually just had a question come in about that, and how that relates to off clock work.

**Tammy McCutchen:** Yes, and that's what – continuous work day doctrine, that's that first principle activity to the last principle activity, and what the department of labors position is – you know, has been endorsed but United States Supreme Court, is that once you start work – you do that first task that's an essential part of your work, until you perform the last task that's necessary to perform your work, that's a continuous work day, and have to be paid for the entire time except for example, bona fide meal periods.

So just a couple examples, in the call center there is been a lot of cases about people who work in call centers, who a lot of times might – the clocks for them, might start running when they take a phone and they take the first call. But prior to that, they might be going to a staff meeting, they might be reading the latest guidance on how to ask – answer a particular question or otherwise responding to their e-mail.

All those things are part of the employees work day, and they have to be paid for. Thus, when we – just an example of that, the DOL settles a case, involving call centers for Cingular Wireless, back in 2005, shortly after I left the Department of Labor, and I believe they settled for six (minutes) a day. It's the same – that's the same chicken processing dawning and doffing, you've got to put on your protective equipment in order to do your job.

And therefore the time spent putting on and taking off that equipment at work, because it's required at work. Is part of the continuous work day and must be paid.

So you need to look at the types of – and when you're trying to – one of the ways to manage this type of continuous work day issue off the clock issue, is to make sure you understand as the attorney, when our people clocking in, and what types – when are they clocking out, and are there any ((inaudible)) activities that they're doing before or after that's necessary for them and is part of their job.

Here's the liability that we're getting on off the clock cases, again, we're not talking about 10s of just a few million dollars, we're talking about 10s of millions of dollars for these types of cases. Mostly it's rest and meal periods, but there have been significant settlements, \$30 million of wages in the food processing industry, such as chicken processing.

**Shanti Atkins:** So let's talk a little bit about controlling risk in this area.

**Tammy McCutchen:** Well you – you know, as I was mentioning before, it's hard – you know, you can't take a non-exempt employee, drag them and say, "Clock in." There's way too many employees and not enough lawyers, so what can you do? I mean, what you need to do is make sure you have appropriate policies. Policies that tell your employees what that they're expected, that off the clock work is prohibited, that they can be disciplined or discharged for working off the clock.

That helps to define for your non exempt employees, what is work that they should be on the clock for, and what – and what they could be off the clock for.

The policy should also very – make clear to your management, that if they request or require an employee to work off the clock, that that's a terminating offense, and I think you really have to have very effective enforcement that managers who are requiring employees to work off the clock do no longer continue in your employ.

A payroll integrity policy is something I also recommend. That would be a policy where you – handling not only off the clock work as being inappropriate, but things like clocking in for friends, of not reporting breaks that you take – you know, just a policy that says you're time records has to be accurate. And if they're not accurate, if you're – if either the manager or the employee is changing any time records, if they're doing any time shaving, if they're – if a manager is – you know, not reporting or changing electronic records. Then that is a terminating offense.

Of course, a rest and meal break policy is essential. The complication there is if you're a national employee or the rest and meal break rules are of course state law by state law, so you have to make sure if you have a national policy that it applies in every state. And some of the states have very strange requirements. Some for example – in New York, the state law actually tells you like the two hour window where you have to take a lunch depending on when you start the day, and when you end the day. And it's very complicated, so you have to think about state law, and not just federal law.

The overtime policy, it seems really simple, but two – you know, everybody – most employers I run into have an overtime policy that says – you know, you can't work overtime unless you get prior permission from your supervisor. But what I find is that most the times the policy don't go – the policies don't go on to clearly state, what happens if the employee works overtime anyway. So you get supervisors who try not to pay people, when they work unauthorized overtime, and of course that's not acceptable.

So I recommend a policy that says, if you work overtime, you would be subject to discipline, however you will be paid for that time. Whether it was preapproved or not, and make it a – I know this is really hard, with some of our business clients out there. It's a management issue and not a pay issue, if somebody is working unauthorized overtime.

And of course, look at your – you know, conduct periodic audits of your payroll records. And ((inaudible)) talk in detail about some of these in just a minute but look at your payroll records and compare to your – compare your time and attendance records to your payroll records every once in a while. Do periodic audits of your paper time cards if you have them, to what's getting in the electronic system, and try to look for red flags where you see that changes have been made, you can also setup processes so that when there's a change to a time entry, that it has to be approved by the employee and at least one other person, other than the person who's making it.

Setting up processes to control who has access and who can change the payroll records. Of course, provide that training to front line managers and employees, and this is particularly important in the off the clock area, because employees need to know – OK, if I clock out for lunch, and the people supervising them need to know, that if they're clocked out for lunch they can't do any work or they're going to have to be paid for that time period.

And employees and their supervisors need to know, if I take a few minutes off to give blood, can I – do I – can I clock out for that? Can I not be paid for that? What about volunteer activities and travel time? You need to train employee – hourly employees, non exempt employees, and the people who directly supervise them about – in my opinion, what is work, and what is not work. And what your policies say about keeping accurate time work records and working off the clock. And finally of course, hold managers accountable.

**Shanti Atkins:** Yes, I think this is an area – you know, where the opinions of managers are maybe not aligned with reality in terms of their perception of how severe a wage hour violation is compared to something like a discrimination violation. But I think...

**Tammy McCutchen:** Yes, let me give you a good example of that.

Complete – a manager, who completely thought – he had no idea who was doing anything wrong. I had a situation for a client, where there's a shift – the week was ending, right. And so, midnight was the end of one work week, and the beginning of a second. And there was a group of employees, who were already at 40 hours of work for the week, whose shifts started at 11 p.m. So if they work that extra hour it would be an overtime hour.

So the employees – so when they came to work, they manager wanting to save money on his overtime said, go sit in the break room, until midnight, and then you can clock in and start working.

Of course, the fact that they went – came to work because they were told to, and the manager told them to go sit in the break room. Well guess what, they're required to be at the facility by the employer, just because they were sitting in the break room doesn't mean they weren't working. They were working, and they were owed that extra hour of pay.

The incident of course resulted in the deal, of an investigation and a payment of a significant amount of back wages. And it had the manager been better trained, he would have known that just sitting somebody down in the break room and telling them to stay there, is not sufficient to make that hour or hours, not be work.

**Shanti Atkins:** And there's just a basic lack of knowledge over that being incorrect – you know, whereas I'm sure that manager would know implementing indiscriminately policies is an absolute no-no, for there's just a real learning curve that I think particularly the front-line managers that's required in this area.

**Tammy McCutchen:** Right. That actually leads us to the other questions I see on my screen.

Why don't you go ahead and do this – go ahead and do this polling point, and I'll answer the question that came through the screen.

**Shanti Atkins:** Sure.

So the – we're going to move now to the section of the program about the specifics of implementing a compliance program so I've sent out the next poll question to the audience is just try to get a bench mark on how many of you have wage and hour compliance programs in your organization, and remember these are anonymous responses, so you can feel comfortable voting and Tammy's going drop some of the questions that's coming on the console.

**Tammy McCutchen:** Right.

One of the questions I see is – Can an employer refuse to pay a non exempt employee for travel time in conjunction with the company's sponsored event? And why I associate that with the prior slide is because as the rules on when you have to pay an employee – a non exempt employee for travel time are actually very complex. And there are four different situations, and what you have to pay is different in each of four of those different situations.

So that's like travel time pay for non exempt employees is one of the areas where I would address in a travel time policy. And basically if it's a company-sponsored event, a non-exempt employees is traveling within the hour that they normally work, no matter what day it is in the week, yes, you have to pay them.



So for example, if somebody is – normal work hours is 9 to 5, and is asked to travel on a Sunday, from 3 to 5 to go to a company sponsored event, you would have to pay them. But those rules are very complex, and we don't have time to (build) them completely today, but you know what, click on my bio if I don't answer your questions, and we'll get my contact information, and I'd be happy to answer them.

**Shanti Atkins:** All right. So we see that the majority of our audience does not have a wage and hour compliance program, so let's move to the talking about the specifics of building a solid compliance program. Obviously, risks are real here, as we've seen from some of those headline grabbing damage awarding settlements.

And compliance here is obviously not going to happen by accident – you know, a lot of the laws are very complex and particularly for your front-line employees and managers – you know, just with the example that Tammy gave, they may defy common sense, but you really need to take a proactive preventative approach.

And Tammy, maybe you can start first with the value proposition around doing a solid compliance program, what are some of the benefits to establishing something like this?

**Tammy McCutchen:** Well, it's the affirmative defenses that so many people don't know about. There are, of course, as we discussed before your liability is two years of back wages, three years if you're found to be willful, with double liquidated damages unless you complete and prove that you, as an employer, had acted in good faith.

There are also in the portal to portal (act) amendments the FLSA, there are affirmative – basically, affirmative defenses that you can build, if you establish a compliance program. There are three types.

First, there's absolute bar to liability. No monetary damages at all. If an employer can complete and prove that they acted in good faith, in reliance on any written guidance published by the wage and hour administrator.

So for example – a few years ago, the Department of Labor issued an opinion letter about lost prevention managers in the retail store level. Where they describe the duties of those loss prevention managers and found that they were exempt.

So if you had your in-house lawyer – in-house lawyer, or you had your outside lawyers look at the duties performed by the loss prevention managers in your organization compare them to the facts in that opinion letter and at the end you concluded our employees are – perform the same duties as those in the opinion letter, and therefore we're going to classify them as exempt.

You can use – then use that opinion from your in-house or outside attorney, as a complete defense to monetary liability if you ever get sued.

Now the court can decide that your outside attorneys and the wage and hour division is wrong, and enter an injunction for you to treat the employees as non exempt in the future, but cannot impose monetary liability.

Most the times in court when this affirmative defense is raised, it's not successful. And the reason it's not successful is because you have – you have had to had somebody analyze the position, find the wage and hour guidance that's published and rely on that, and established before you get sued, that you looked at the issue, you relied on the DOL guidance, and based on the legal opinion and reliance on that guidance, you decided to classify the first one as exempt.

It's – but I think it is something that if employers thought about it, had compliance programs, did audit, that you could successfully completely bring your monetary liability down to zero.

A second affirmative defense says that the court can choose not to award those liquidated damages if the employer can demonstrate good faith. And demonstrating good faith could be simple as having an opinion from an outside attorney that the practice or the – the paid practice or the classification that you made is in compliance with the FLSA.

So that second affirmative defense can cut your back wage liability from six years, down to three years. Otherwise the judge doesn't have any choice; he has doubled your damages.

Finally of course, if you could prove good faith, if you could prove you thought about the issue, and you took expert advice on how to deal with it, you can of course, avoid being found to have willfully violated, and avoid that third year back wages. So a compliance program does give you a return on investment...

**Shanti Atkins:** And so Tammy, if we do some of the math there, the worst case scenario is two plus one times two – the two years of back pay, that extra third year for willful violations and then doubling it with the liquidated damages.

**Tammy McCutchen:** Right.

**Shanti Atkins:** So...

**Tammy McCutchen:** And you can take – which means you can take your liability from six years of back wages down to two.

**Shanti Atkins:** Two.

**Tammy McCutchen:** Or even zero.

But it cannot be done, and you cannot establish these defenses after you've been hit with litigation or department of labor investigation. You have to think about things before hand.

Now what I have found challenging working with employers is, of course, conducting an audit and establishing that is not cost free. There are costs associated with it, and the bigger the – for example, miss classification audit. The larger the employer, the more jobs you have, the more expensive it's going to be to hire attorneys and make – and have the right legal memos supporting your exemption.

And so – but what – so sometimes it's very hard to convince your business clients and your company that it's worth the costs. But to me the return on investment is clear.

Say you're a large national employer. Spend – you know, you can spend \$2 million getting into shape, \$3 million getting into shape and making sure that you are in compliance with the FLSA and state law. You know, compare that with the settlements we're seeing of \$10 million, \$20 million, \$30 million, \$60 million. It is a return on investment, but often it's hard to convince your business leaders to spend the money when they're – when they haven't been sued yet.

And unfortunately, if you wait that long, it's too late, and you're not going to have any of these defenses.

**Shanti Atkins:** So let's get into the details of the four components of an effective wage and hour compliance program. We're going to talk about policies complaint and investigation procedures, audits and training...

**Tammy McCutchen:** You know, I've been thinking about our order. Maybe we should actually flip the – some point and talk about audits first. And really, and so I'm just going to do a little bit of preview on the audits before we – and we'll go on to policies.

Really the first thing you need to do is to audit your practices and audit classifications to make sure you as a company are in compliance. And do that as part of the beginning of your compliance program, and we're going to talk a lot – a little bit more – I see lots of questions coming in about how you conduct and audit and we're going to spend a lot of time on that in just a few minutes.

So I'm going to go quickly, we've talked about policies, you just need to have a set of policies that address wage and hour issues, from the payroll integrity, to the overtime pay, to the off the clock work, and for your exempt employees you would need to have one of those salary basis policies that gives you the protection against salary basis issues as written into the regulations that went to effect in 2004.

And make sure your employees, like all other policies, they know where the – they know how to – they acknowledge ((inaudible)) of it, and that they understand and are trained on your policies.

Go to the next slide. I think the next slide is a list of some of the policies and we've talked about most of those, so we're going to go...

**Shanti Atkins:** All right. I'm going to setup the next poll question to the audience which is going to investigations and complaint procedures which is our next component and then audit will be after that Tammy, I'm going to send out this poll question regarding whether you're confident that employees at our organization know how to make a wage and hour complaint, and that the complaint would be addressed promptly.

This is something that courts really care about when they look at certain wage hour violations and whether or not an employer is acting in good faith. And I see the poll results coming in and we got the majority of people disagreeing with this statement.

**Tammy McCutchen:** Right.

And this is particularly a sore issue with me. It's like – you know, you got your ethics (claim) number, you've got your complaint procedures and your harassment policy. There's absolutely no reason, to – that you should – and particularly there's no additional administrative costs really to just expand those discrimination harassment ethics, complaint procedures to wage and hour.

And an effective policy and complaint mechanism is the same as you would do with your discrimination and harassment policy. Make sure you're off the clock work policy states that employees who feel they are not being paid for all hours that they're working can file a complaint. The complaint mechanism allows you as the employer to uncover and correct the issues before they become big, and before litigation.

And allows you as an attorney to spot issues that could be potentially lead to class wide claims, and gives you an opportunity to correct and deal only with the employee before the employee gets the plaintiffs attorney and then you're just – you're (sunk).

So you – the complaint mechanism can be – you know, the 1-800 number, the e-mail, it can use your existing procedures so there's really little additional costs to – added to your other normal procedures. Of course, just like in a sexual harassment, racial harassment situation, you need to have a – procedures that complaints are investigated thoroughly and promptly, you're ensuring confidentiality and that you're providing closure and resolve in the issue to the complaining employee.

And I just apply the same principles that you are applying in your discrimination harassment policy as you would for this wage and hour process.

**Shanti Atkins:** OK. This is actually an easy part of the compliance program. It really is just adding this issue into existing processes and procedures from those organizations.

**Tammy McCutchen:** Exactly.

**Shanti Atkins:** But let's dive into the much more complex issue of conducting an audit. So I'm going to send out the next poll question to the audience.

And this is about whether the (been) audit practices at your particular organization, again, your responses here are anonymous.

Have you conducted a wage and hour compliance audit within the past one to two years, three to five years, are you not aware of a review or have not (been) audit within the last five plus years? And I'm seeing the majority here, Tammy, are answering C, that they're not aware of a review.

**Tammy McCutchen:** And I think that's – I think that's very typical. I think more employers have not than have. And I think that's particularly because – I don't think many people started talking about these affirmative defenses and what an audit can do for you. A lot of employers are afraid of uncovering the wage and hour – the wage and hour issues, they don't want to know about it, they – the problem is unlike a discrimination claim, if you ignore a wage and hour problem, it doesn't go away.

And it's just – let me give you an example to back up what I'm saying.

Somebody's terminated. They have a very limited amount of time to file a complaint for discriminatory termination and then if they don't file, it's gone. And with the wage and hour violation, every day that goes of the statute of limitations, a new day comes on, so you're constantly carrying that six years of potential liability, whether you know the issue is there or not. And so sticking your head in the sand doesn't do anything for you, doesn't make the claim go away, the claim continues, unlike most discrimination harassment claims.

There are issues however, important issues for you consider before you even start an audit, and I guess the number one issue which is not actually not on our slide is, you need to make sure you have buy in from the highest levels of your organization, that when you find an issue, that you are going to have the authority to get it fixed, even if it costs some significant dollars. There has to be an understanding in a buy in at the highest levels about what the consequences are going to be, because – you know, frankly, if you're not going to have authority to reclassify people you find to be miss classified to pay people back wages when they've been working off the clock.

Then you're probably going to create more problems for your company than fixing it. None the less, I still think, and I'm a big advocate of doing the audit, you can protect yourself.

First of all, of course, having attorney involvement, the HR department should not be doing this alone. You want to use the results – you want to be able to use the results of your audit and litigation if you get sued, but you want to make sure that until that time everything that you do in the audit is protected by the privilege. And that it's your choice, when to wave that privilege.

And so you have to think – you have to, in my opinion, you have to have attorney involvement, and not just – you know, by work, just – it has to be real involvement, real involvement in conducting interviews and doing the analysis so that the work product can be protected by the privilege.

You also have to think about how you do the audit. And what you're going to wave, if you have to wave it. For example, when I do audits of classifications, I will do a separate memo for each job that I review, because if my client eventually decides – get sued, and they have to – they want to wave the privilege over a particular position, I don't want to have a document that discusses a hundred different positions.

That I might have to give over to the plaintiffs counsel and that gives him a complete – him or her, a complete map to all the other positions that might be miss classified. So I like to do my work one job at a time.

You have to think about the documentation that you are going to be generating, who's going to be generating it, so you make sure you know from the start, what types of documentation is going to be privileged, which documentations won't be privileged. You have to have, as I said, make decisions about whether you're going to pay back wages, whether you're going to want to work with the united states department of labor to get those back wages claims and try to get waivers from your employees. You have to think about how the reclassification is going to occur, how are you going to set the hourly rates.

What benefits the reclassified employees will be entitled to, how you're going to communicate the reasons for the reclassifications. And all these types of big issues are things that you need to think about before you are even start. I also have (socks) up here because if – you know, you do an audit and it reveals a significant amount reclassifications of back wages due, you might have to consider whether that's an issue that needs to be disclosed for (socks) compliance.

And of course you can never, never forget about the state law, you could do – get yourself in compliance with the FLSA, but if you haven't – if you have employees in California, and you haven't thought about California, then you're probably still holding a lot of risk.

**Shanti Atkins:** All right. So let's talk about the compliance areas to audit.

**Tammy McCutchen:** To me there's – even though the exempt classifications and off the clockwork are the hottest areas in terms of litigation and should be audit, I also wanted to bring to your attention that you should audit your regular rate calculations. Do you know, all the types of bonuses and prize and awards programs that you're non exempt employees participate in, and whether or not those bonuses are included in the calculation overtime pay?

So you have to make sure that you're calculating your overtime pay rate correctly. Now that is the type of audit mostly by looking at your pay roll systems and talking to your pay roll folks, but it's something that you should look at in addition to off the clock and exempt classifications.

**Shanti Atkins:** Can we have a little bit more detail of that in a few minutes; let's start with the exempt classification.

**Tammy McCutchen:** Well, what do you – what do you work with?

The exempt classification I audit has basically two steps.

First, you review the documents and then interviewing employees. What types of documents can help you? Anything that's preexisting that describes the duties of the jobs. Job descriptions of course, performance reviews, compensation analysis, training materials and other manuals are also – can be very indicative and help you as an attorney try to get the facts right about what is in the job.

In particular, compensation analysis can be very helpful, because in my experience, when employees are trying to get more pay, and into a higher pay grade they usually say really nice

things about how complex and advanced and requiring decision independent judgment their job is.

You also need to interview employees. And here we're going to get – here we're going to get a little bit of controversy. I – my clients usually have no problem with letting me talk to the manager, the exempt subject matter expert manager who's managing the employees that we're looking at, but that's simply not enough.

In my experience, a lot of times, the managers who are supervising have a more aspirational view of what their employees are doing every day rather than real detailed knowledge about the duties they perform. Because that's what the DOL cares about, that's what the judge cares about, they're going to care about what the (incumbents) are actually doing.

And the best – and the person they're going to listen to the (incumbents) themselves, not the manager. So if the manager tells you one thing, and you do an analysis, but then the (incumbent) comes to court and says well that's not what my job was, and I'm asked as a expert witness, well why didn't you interview the (incumbent)? That's not a – there's no answer to that.

So a lot of companies are hesitant to allow attorneys to go ahead an interview the (incumbents) but if you're going to do this right, and you're going to protect yourself from liability there, you really have to have an opportunity to interview some of the (incumbents) now I don't think you have to interview all (incumbents), generally the department of labor when they're doing an investigation will start out interviewing 5 percent of the (incumbents), and as long as they're finding the same story, the same consistent description of the job duties they stop from there.

If you find that the (incumbents) are describing vastly different job duties, then you might have to go on. You can use that – what you're – the documents that you've received and reviewed in the interviews you conducted to update your job descriptions. So doing an exempt classification audit is a great time to get those job descriptions updated, so what I like to do is write the new job description, give it back to the (SME) manager, give it back to the (incumbents) and have them both agree and reach a consensus that this job description is accurate.

If there's no consensus, you might have to do some more work, some more fact finding. Such as, job shadowing an (incumbent) in the job. I like to do this before I give my legal opinion. Why? You're going to think I'm cynical, but your business clients, they get to know what discretion independent judgment is, and why it's required and if – you can get gamesmanship going on here.

You tell them these are – you write your opinion and you say well this job has to be non exempt and then all of a sudden the manager or the (incumbent) coached by the manager, starts coming up with new facts and new job duties that weren't explored during the fact finding.

So I like to get everybody on board first on a consensus – this is what the job does, these are the job duties. Then take that back, and render my legal opinion. That allows a lot less gamesmanship with – you get somebody who doesn't like the decision that you've – that you've reached.

Off-the-clock work, how can you – how can you possibly audit off-the-clock work? I think a much harder proposition, but you have to of course look at your policies and practices for recording hours and look for any weaknesses. Understand and – through interview with employees, interviews with payroll, HR payroll, through interview with your IT payroll. And make sure you understand all the processes, for clocking in and clocking out, for reporting time, for what – how do employees work remotely, how are they reporting their hours, what are your rounding rules, and are those in compliance.

How are – how and who can make adjustments to your time record, and of course practices regarding dawning and doffing pre and post luminary work rest and meal periods. That to me is sort of the interview portion of off the clock work. Just making sure you understand what the practices are, and trying to discover if there are any practices out there – for example, a time clock that always rounds down, that could lead to violations.

It's also a – there's also opportunities to find potential violations by comparing your time punches with your payroll data. You know, your – look at your time and attendance systems and see what changes get made between there and the payroll data. And then with – if you have electronic paychecks, with what's actually on the pay checks.

Of course, you don't have to look at everything, but what the Department of Labor would do if they came in is they would pick a work week, for example, and look at all the records and time records for a sample randomly selected work week for employees in a single location, and see if that raises any red flags with them.

You can also compare within your payroll data, with other electronic touches that an employ does at your work place during the day. Do you track when they're signing in, signing out of their computer system. Is there a – do you have a pass card to get in and out of secure locations. When are people coming in and coming out, and if you find that there's a lot more time that your non exempt employees are on the computer, then they're actually reporting work hours, then you know that's something that you need to address.

And I think we're ready for the next slide, which is regular rate, yes.

Do you know all your pay and bonus programs? Do you know all – do you know them all. Do you know all and a lot of the payroll systems that I have experienced with usually earnings codes and deductions codes. Do you know what is in each earning code, and whether that earning code in your pay roll system is a code that goes in to calculating the overtime pay rate or not.

Do you know all the things that are in each deduction code, and have you check to make sure that those deductions are allowable under federal and state law? Have you review your payroll systems to make sure that their formulas for calculating the regular rate are actually at – are actually accurate? Don't rely on your payroll companies, because they're – a lot of people, two times think that you know, that your payroll company is like guaranteeing you compliance, they're not.

They're just doing what you – what your payroll IT people tell them to do. They're not legal experts, so you can't rely on them unless you got a really good contract where they pay every wage and hour violation, resulting from their payroll program, which would be a good idea too I guess if you could get it.

So you got to review those calculation formulas, not just for federal law, but for your state, daily over time in your state double time making sure your regular – a lot of people have biweekly payroll systems and as you – there was a settlement last year with Wal-Mart for rate regular – with DOL, with regular rate issues and one of the issues there was calculating regular rate for each work week, and not each biweekly payroll period.

And of course, how are you paying your salary non exempt, how are you calculating the overtime rate for your salary non exempt is something you all want to look at and make sure is correct.

**Shanti Atkins:** All right. Well in the interest of time, we're going to move to the last section of the compliance program, which is training, and with that I'm going to send the last poll question out to the audience, we're just going to take about two or three minutes on this and then leave about 10 minutes for questions.

We've have an – great questions that have come in that I want to pose to you, Tammy, so you can share your guidance and wisdom on some of these issues.

The question for the audience right now is do you currently provide wage an hour training to your work force?

I'm sure if this question was, you provide harassment and discrimination training to your work force? The vast majority of you would be responding, yes. But as you can see from the poll results the vast majority of you are responding no. Which is really a shame given the lack of knowledge that front line employees and managers have such that training can actually prevent problems from occurring in a very real way, and of course being able to (avail) yourself of those very powerful affirmative defenses that Tammy eluded to.

So, I'm just going to go very briefly over the training component of the compliance program, and then I'm going to go into the Q & A session.

You know, as I mentioned most employees and the managers don't know the basic rules or understand them. It's because there hasn't been a lot of training in this area, and frankly, some of the rules are not intuitive. And so you have a lot of inadvertent errors being made, even by very sophisticated managers. And I've certainly experienced that, where rounding errors are made, or redoing somebody's time record, or letting them skip a meal break and leave early, all things that seem reasonable and OK to do in a regular course of business, you just have managers that have no idea that they're running a foul of federal and possibly state wage an hour laws.

And while you may have great policies in these areas, we all know as legal professionals, that the best policies are some what useless if employees don't understand them. So training is really going to give your employees the tool that they need to become your compliance allies, so that you are getting great documenting and accurate reporting, and that you can build those defenses in the event that you find yourself the subject of a lawsuit in this area.

You know, training has to be integrated into the employment relationship and should be done regularly to enforce policies and understanding. On the screen here are a few obvious areas or times that you would be doing training – during orientation, your manager training, obviously when there's any major legal developments or policy changes, but overall you should be thinking about doing training in this area periodically as meaning every two years, and that's a standard I'm sure many of you are familiar with in terms of doing your harassment discrimination training, as well as your ethics training so that the idea of doing, at least, every other year.

You might want to do it a little bit more often for highly specialized compensation jobs.

Remember that training has to be targeted to suit the needs of the different employee audiences, what you train your payroll and compensation specialists on is going to be very different than your managers are going to get which is going to be very different that what your hourly employees get.

Hourly employees, you really want to focus on the basics and you want to keep that training program fairly short. You want to explain what are hours worked, rules relating to overtime, how does that employee report errors or misconduct. And obviously that really important prohibition against off the clockwork, and the consequences for working unauthorized overtime or working off the clock.

Manager training obviously, has to be more in depth and detailed, given the special duties and responsibilities of a manager, and really – you know, impressing upon managers the importance of good record keeping, accurate records, how to handle employee complaints, and the severe consequences that managers should expect for misconduct in this area.



As I mentioned earlier, in today's webcast – you know, my experience with a lot of managers in this area is that they don't think that they're doing anything wrong, and even when they find out they're violating policy, they don't – it doesn't really have much grab ((inaudible)) with them, because it seems somewhat, (innocuous) – you know, I shaved a few minutes off this person's time record, or I asked someone to come a half an hour early, or stay a half an hour late. I maybe gave the impression that people shouldn't be recording overtime.

You're – you really need to start establishing a culture around your – with your managers that this is really severe and high impact type problems that they are very much responsible for in their day to day management of hourly employees.

So the benefits of training are obvious – you know, you're going to actually prevent misconduct from occurring in the first place, which in this arena is obviously incredibly powerful, well-trained employees and managers are less likely to violate the FLSA intestinally and obviously companion state statutes, the training is going to help build that compliance mentality in that culture of compliance around wage an hour claims.

I think most importantly training can really help reduce damage awards and build safe defenses and if you take away one piece of information from today's Webinar it should be that, a well thought out compliance program in this area that includes policies, appropriate levels of auditing, investigation and complaint procedures and training are going to pay off in an enormous way in the event that you are sued for wage an hour violations.

And we've all been trained to think that way about harassment and discrimination and it time to start thinking that way about wage hour violations.

So putting it all back together, I just got the – a sort of summary of what we covered during today's webcast, I'm going to leave that up on the screen for people to ((inaudible)).

And Tammy what I want to do is start getting to some of these excellent questions that have come in from our audience, and the first one that I want to ask you is what is your recommendation for total time accounting for exempt employees?

**Tammy McCutchen:** ((inaudible))

**Shanti Atkins:** Tammy, are you still there?

**Tammy McCutchen:** Sorry. I was typing in answers to some of these things, afraid we were not going to get to them all.

But especially – you know, you're going to get a lot of business resistance for exempt employees to keep time records, because exempt status, too often, is associated with being management. And it's a really tough communication piece to explain to people, what are classified as exempt whether they're keeping time records or not is not a function of their value to the company but is a function of the law.

However, especially for those great jobs that are really close on the border between exempt and are not exempt that are high risk for litigation, I think it's a good idea to keep – to have your exempt employees track their time, because if you are sued you have the evidence of the time that was actually worked and it gives the employee a lot less room to make extravagant claims about their work hours.

Another one, I answered, in response to all, so you can see my answer on the contraction driving times, I really want to go to a very important question, how do you reclassify somebody without blowing the whistle on yourself and company up to claims.

Very good question, very difficult, something that you need to strategize on before you start an audit, I have come across two ways that I think are helpful, of course the best one is if you find a problem voluntarily engaging yes, voluntarily engaging the U.S. Department of Labor to assist you in doing the reclassification, and making the back wage payments.

Because if you do that, you especially if you use their procedure that ((inaudible)) what they refer to as the Complaint Consent Decree Procedure, where the – you volunteer – you go to the – this is what Wal-Mart did, for example, you go to the Department of Labor, you say, I got a problem please help me. The department of labor will file – you'll do the deal with the department of labor, negotiate what the payment of back wages are.

And then on the same day, the department of labor will file a complaint in a Consent Decree, the judge usually signs it within about an hour, and the deal is done. And it cuts off the private rights of actions of any employee who's listed as getting back wages in the Consent Decree, they cannot sue, and they cannot challenge the settlement.

That's the most full proof way to make sure that you're settling on your terms in the way that's the most favorable to you rather than opening up your company to the plaintiffs bar.

Another way that's probably more palpable to most of you is, doing these types of audits, doing these types of classification changes within the context of a (big), or HR project. Like for example, as a reorganization or restructure, or as part of a job description review or a thing that I think is best, as part of a compensation analysis, where you're looking at the compensation structure making changes to the compensation structure, if you could put them as classification audits in the middle of a compensation analysis much bigger issues come to bare and it's easier to get things by without opening your company up.

But there is a risk there, and I think part of that risk is to if you are willing to pay back wages you're going to open up your – you're going to reduce the risk, make your company less – a less of a target of the plaintiffs bar, because don't forget, they're motivation is to make money, and if they think that you paid out every that you owe, there's not going to be anything left for them to recover and it's not worth their time.

So I think you should not let that scare you into not doing a compliance audit and getting your company into compliance.

**Shanti Atkins:** And so Tammy I think that answers the question you've already addressed, this great one that came in and said, if you do find a miss classification do you recommend paying the back pay.

**Tammy McCutchen:** Yes, And I do think that there is – it's something that you have to consider strategically. If you're talking about a job that has a couple (incumbents) then you probably don't need to pay back wages, and because – you know, your potential liability is going to be small and if they do end up suing you then you can pay them and get out of the litigation fairly quickly.

But if you're talking about reclassifying a large number of employees, or if your already the target of lawsuits, on wage an hour issues, you're not going to avoid paying back wages someone is going to sue you, and so you ought to just go ahead an pay it. And paying back wages in conjunction with the deal – well of course, is what gets you the only way to wave – there's only two ways to wave FLSA claims, and that is by working with the DOL or settling a private lawsuit.

And who wants to deal with the plaintiff's bar. so, I do – really do recommend going to the department of labor and having them help, they can be, at least for the next year, they can be very helpful. After 2008, I can't say – I can't say.

**Shanti Atkins:** Tammy, we only have about, less than two minutes, I just want you to answer one more question, and with that I'm going to draw everyone's attention to the last slide I put up on the screen, which includes our contact information for those of you that we couldn't get to but the last question I think would be helpful because two people have asked it, and it's in slightly different ways.

Who should conduct an audit of compliance, a help counsel or an independent third party?

**Tammy McCutchen:** I recommend engaging – I think it has to be a team effort, but I recommend engaging outside counsel. The way that you can do that cost effectively is for the in-house counsel just sort of review all the jobs and identify the high risk areas like you know, there's – you know, high risk areas in the jobs that might be miss classified.

For example – you know, it's a waste of my time as an outside counsel and a waste of your money if you have me look at VP levels or even director levels that have significant number of direct reports. But for example you know, you as an in-house counsel can help identify – like so your bottom two pay (days) are the high-risk area, or your IT employees are the high-risk area. Define the number of jobs you want to look at, define the pay practices we want to look at. But I think you're going to get a stronger defense if you engage a outside counsel to do the actual analysis.

And the other thing too is, do you really want make yourself a witness. When I conduct these audits, basically I know that when I'm conducting these audits and rendering their opinions I'm not going to be representing you in litigation if you get sued, I'm going to be your fact witness if you get sued.

About the types of things you and your company did to ensure you were complying with the FLSA and most of the in-house attorneys that I know don't really want to make themselves the back witness. And so that's why I would recommend going to outside counsel.

**Shanti Atkins:** OK. Well with that we have a few questions we didn't get to, but again if you would like to follow up on those questions we really encourage you to contact us. Tammy is just an incredible expert in this area; you can see her e-mail address is available on the screen right now...

**Tammy McCutchen:** And please, if you didn't get your questions answered really do send to me in an e-mail and I will respond.

**Shanti Atkins:** All right. And with that I want to thank the Association of Corporate Counsel for sponsoring today's event. I thought it was great to have such a participatory audience, I really appreciate everyone answering the poll questions and staying engaged, so thank you to everyone for attending, and we look forward to our next even with the Association of Corporate Counsel.

Good afternoon, everyone.

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