

Off-the-clock work legal risk: Practical guidance for conducting self-audits

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INTRODUCTION

The landscape in employment law is turbulent, and many employers are uncertain how federal and state laws may be enacted and enforced moving forward. To manage this ambiguity, leading employment law firms are advising clients to conduct "self-audits" to assess legal vulnerability in high-risk areas of the business, where off-the-clock work is most likely to occur.

Self-audits typically are conducted under the attorney-client privilege and provide several potential benefits. First, they help ensure that employees are paid fairly. Issues uncovered by the audit can be addressed to ensure compliance moving forward and potentially can be corrected retrospectively.

If an employee's activity is potentially compensable and performed off-the-clock, it becomes critical to measure the frequency and duration of these activities.

Modifying policies or practices that led to violations also stops the accumulation of liability if litigation arises in the future. Also, an audit can be used to demonstrate a "good-faith effort" to comply, which may be beneficial in the event of an external audit or litigation.

Given these benefits, many employers are seeking practical guidance on how to effectively conduct an audit and address areas of potential vulnerability that may be discovered. In this article, we describe approaches, many of which are based on scientifically sound job analysis techniques, to audit some commonly alleged off-the-clock wage and hour violations.

These approaches were originally developed, and have been effectively used, to address litigation but are equally applicable for proactive audits.

THE SELF-AUDIT

As a first step, it is wise to carefully examine the work environment and hourly workers' pre- and post-shift activities. This examination typically reveals areas where off-the-clock work *may* occur.

We highlight four potential issues below where employers are particularly vulnerable to off-the-clock work allegations and describe methods that can be used to evaluate compliance.

For all these issues, a preliminary consideration is whether the time spent by employees on activities in question is compensable and meets the legal definition of "hours worked." This determination may require legal expertise, and we offer no opinion about whether these activities are compensable.

If the activity is potentially compensable and performed off-the-clock, it becomes critical to measure the frequency and duration of these activities. This is where workplace measurement techniques are necessary.

ISSUE 1: ENTRY AND EXIT SCREENING

In many work environments, employers take measures to manage security and protect company assets. Where employee theft is of particular concern (e.g., retail stores, distribution centers), it is common for employers to conduct exit screenings (or "bag checks"). An exit screening often involves employees passing through a metal detector and/or having personal belongings inspected.

In other work environments where security is an issue, employees' belongings may be searched as they *enter* the facility as a measure to ensure prohibited items are not brought *into* the workplace. Recently, COVID screenings have become common in many workplaces as a safety measure to avoid employee/customer exposure to the virus.

These screenings can involve activities such as employees answering health questions, measuring body temperatures, disinfecting hands and putting on new masks before entering the workplace. Each activity can involve waiting time depending on the available resources to conduct the screening and the number of employees arriving at the same time.

Observational methods commonly are used to study entry and exit screenings. Observation studies involve documenting employees' activities and their durations. Through observation, the sequence of events leading up to the screening, time spent waiting for the screening and the screening itself can be documented individually and timed.

Employee screening activity data can be collected using live and video observation. Live observations capture contextual information that may not be visible or audible through video. In some situations, context plays a role in the accurate interpretation of employee activities.

For example, live observers often are able to observe and document the reasons for deviations from the typical process. With video, a large amount of data can be collected in a relatively short period of time, and video can be rewatched by multiple observers to maximize timing accuracy and reliability.

Alternatively, video footage can be analyzed using artificial intelligence (AI) technology such as “computer vision.” These video analysis programs can be applied to track employee movement on video. The feasibility of this approach depends on video quality and positioning of the camera.

When existing video is insufficient, new cameras can be installed to capture analyzable video moving forward. These programs can be implemented with minimal marginal cost and generate a large amount of data quickly and efficiently.

In some cases, electronic data may enable comparison between employees' first recorded work activities and their clock-in. Data quality is a critical issue impacting the value of these analyses.

Implementing a combination of methods may allow employers to benefit from the strengths of each of the approaches by capturing and analyzing relevant observation data at a particular worksite.

ISSUE 2: COMPUTER BOOTUP AND SHUTDOWN

In many companies, hourly employees clock in and out using an application on their computer. Thus, they must be logged on to the computer before they can clock in. Many employers (e.g., call centers) have faced litigation for failing to compensate employees for the time their computer is booting.

Although the primary issue in most cases is the bootup time at the beginning of the shift, time waiting for one's computer to log off after clocking out at the end of the shift may generate similar vulnerability.

Observation and simulation methods are useful for measuring computer bootup time. Observations provide the frequency and duration of different activities as they occur naturally in the workplace, whereas simulations involve replicating and measuring the duration of the bootup process repeatedly.

Simulations generate a significant amount of data within a relatively short period of time. Also, a variety of different scenarios can be replicated, as opposed to waiting for them to occur naturally during observation. When conducting simulations, it is important to replicate the actual employee environment as closely as possible.

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ISSUE 3: TIME ROUNDING

It is common in many organizations to “round” employees’ start and end times to a predetermined interval. For example, many organizations round time to the nearest fifteen minutes. That is, an employee who clocks in between 7:53 am and 8:07 am would be paid starting at 8:00 am.

Most rounding policies are neutral in theory, and disputes typically center around whether the overall effect of the policy is neutral. A common allegation is that hourly employees tend to clock in a few minutes early (rather than a few minutes late), which is rounded in the employer’s favor. Over time, this pattern has an aggregate outcome that favors the employer.

In other workplaces, rounding can occur because employers self-report their start and end times. It is common for employees to round their self-reported time for simplification purposes. For example, an employee may enter that he/she worked from 8:00 a.m. to 4:00 p.m. every day, even though their actual start and end times varied somewhat day to day. Imprecise time reporting can leave employers vulnerable to off-the-clock claims, because there is no record of when employees *actually* started and ended working each day.

In the event of an audit or litigation, studies conducted by an objective third party are likely to be viewed more favorably.

Evaluating time-rounding issues usually requires analyzing electronic data or performing periodic audits of self-reported time. When time is automatically rounded, most timekeeping systems retain both the punch time and the rounded time, making it possible to conduct a comparison of the two. Conducting that same analysis for all employees retrospectively will determine whether the aggregate effect of the rounding policy is neutral.

To evaluate potential self-reported time rounding, the timeclock data can be analyzed to identify patterns that suggest rounding is occurring. For example, a distribution of self-reported times that peaks at even intervals (e.g., every quarter-hour) suggests that employees are rounding their

time as opposed to reporting precisely. In litigation, disputes over just a few minutes a day can cost employers millions of dollars depending on the size of the workforce.

ISSUE 4: REPORTING COMPENSABLE ACTIVITIES

Another possible cause of employee pay inaccuracy is based on employees' understanding of which activities are compensable. For example, in some work environments, time spent donning and doffing certain protective clothing or equipment (personal protective equipment, or PPE) is considered compensable.

In other work environments, this activity is comparable to getting dressed and therefore is not compensable. Employees must have a correct understanding of which activities are compensable to report time spent on all compensable activities as work time.

Similarly, employees may perform work-related activities outside of their normal work hours. For example, an employee might read and send work-related emails or participate in work-related phone calls or text messages in the evening after clocking out.

When this occurs, employers may consider implementing a method for employees to report time spent on these compensable activities. These issues have become increasingly relevant in the past year, as many hourly employees have transitioned into a remote work environment, blurring the line between work time and personal time.

Indeed, in a nationwide study we conducted in late 2020,¹ the authors found variability in the activities employees considered compensable and in whether they accurately reported time spent on work-related activities performed after work hours.

One of the best methods to determine whether employees have a consistent and accurate understanding of

compensable activities is to ask them through self-report tools such as interviews or surveys.

In some work environments, employee time reporting can be audited by comparing self-reported time to either video footage or other electronic data (e.g., email) showing when employees are performing work activities.

CAN I CONDUCT A SELF-AUDIT IN-HOUSE?

The approaches described here can be conducted in-house, assuming the necessary resources and expertise are available. Using in-house resources can save immediate costs and avoid retaining an external party.

Alternatively, external firms can be retained to conduct the self-audit. Using an external firm involves advantages to be considered. First, the increased costs of hiring an external firm may be offset by preserving the work time for internal employees who would likely be required to sacrifice other major work responsibilities to complete this project.

Many of our clients find external expertise beneficial, particularly when the firm specializes in this type of study and has experience gained from other organizations. Last, studies conducted by an external researcher have a greater perception of objectivity.

This can be advantageous when communicating with employees, because they may be more likely to provide honest information. Further, in the event of an audit or litigation, studies conducted by an objective third party are likely to be viewed more favorably.

CONCLUSION

Undercompensating employees for time worked continues to be a challenge for many employers. In our experience, most employers are motivated to identify whether off-the-clock work is occurring and want to correct the issue to ensure fairness for employees and to reduce legal risk.

Table 1: Summary of methods

| Issue | Method(s)* |
|-------------------------------------|---|
| 1. Entry and Exit Screening | Observation |
| 2. Computer Bootup and Shutdown | Observation, Simulation |
| 3. Time Rounding | Data Analysis, Random Audits |
| 4. Reporting Compensable Activities | Data Analysis, Random Audits, Self-Report |

*Note that these are the methods we use most frequently when studying compliance. However, combinations of these and other methods may be appropriate in certain circumstances.

We have highlighted some areas in which off-the-clock work may occur and described methods to evaluate compliance using a self-audit. These self-audit methods include observations, work simulations, analysis of electronic data and self-reporting. Applying these techniques can help employers identify problems and achieve compliance.

Notes

¹ Elizabeth Arnold and Chester Hanvey, *Wage and Hour Compliance for Remote Workers during COVID*, Berkeley Research Group study (October 2020), available at: <https://bit.ly/3dFGG7b>

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