



## Episode 24: “What to Do When the DOL Comes Knocking, Bonus Episode: Top Five Ways to Be Prepared for an Audit”

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Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hey guys, welcome back to “What to do When the DOL is Knocking at Your Door.” This is a bonus episode: “Top Five Ways to be Prepared for an Audit.” I am thrilled to announce that back for this episode, we have our recurring guest, Ben Wilkinson. Good morning, Ben.

**[Ben Wilkinson]:** Good morning, Ari. Thanks for having me back yet again.

**[Ari]:** Of course, Ben. Again, thanks for joining. To our listeners if you’ve listened to the segment, you know that Ben is a labor and employment attorney and he also practices in our health care practice group, he is located in our Albany office. So, Ben, happy to have you back. Let’s dig in. You know, if you listened to the first few episodes of the segment, we really got into what to expect and how US DOL and New York State DOL audits are completed. So we just wanted to give you a few tips on the best way as an employer that you can be prepared for an audit. So, Ben, we’re going to talk about the top five ways to be prepared for an audit. Can you please start us off with number one?

**[Ben]:** Thanks, Ari. So all of these tips we’re going to do, the top five are related to a self-audit that you can do on your own business practices and your wage and hour practices. So businesses often think, you know, we’re doing everything with H.R. right, we’re doing everything with wage and hour correctly. You know, if an audit came, we’d be good. We’d be fine. Well, we usually recommend that you should actually verify that, double-check, see if that’s accurate. You know, maybe there’s something that evolved maybe there was a new change to minimum wage. Maybe there was a change to some sort of requirement on a different policy that you should have. So it never hurts to do, kind of like a check-in with your wage and hour practices. So all five of these key, key items are going to be what you do as part of that audit. So number one is making sure that your employee classifications are correct. And so when we say employee classifications, we’re talking about hourly employees that are not exempt from overtime, versus salaried exempt employees for the most part. So those employees you need to have clock in, clock out and that they’re hourly employees. And those are really where if there’s anything wrong with the mechanics in which they’re doing their timekeeping and if it’s on a widespread scale, if an auditor comes in and looks at your time-keeping records, that’s where there’s going to be a lot of problems. Yes. In comparison to those hourly non-exempt employees where you have to pay overtime, time and a half or anything in excess of 40 hours. Then we’re talking about salaried exempt employees where they’re obviously paid a salary and they meet a certain duties test, which is different under both the New York Labor Law and the Fair Labor Standards Act, the federal law, which I don’t think we’re going to go into in super detail today. But a key takeaway is just because someone is salaried does not mean that they are exempt from overtime. There are certain duties tests that they have to follow and that they have to meet, such as being a particular managerial role, having independent discretion and kind of overseeing the operations or a certain technical ability or expertise. It’s not just that they’re a salaried employee. If you had to, think about it this way, if you had everyone on an assembly line and you are paying the hourly employees, all of them hourly employees, except for one, and there’s

one person who's paid a salary but is doing the same job as everyone else. That person is unlikely to meet the duties test because you have everyone else being paid hourly and they don't meet that test of managerial or independent thought, discretion. And there are different tests for different types of exemptions. But it's important to keep in mind you need to make sure that you're verifying the duties test applies to that person.

**[Ari]:** Yes. Glad you started off with that one, Ben. I think that's a great tip. And I want to say that that's kind of almost like low-hanging fruit. I think it's a common subject of an audit and also something that employers can, I don't want to say figure out easily, but that's kind of an established area of the law, right.

**[Ben]:** It doesn't take long. if you're doing a self-audit and you're looking at who are the people that are overtime exempt because they're salaried. What's this group of people doing? And are they meeting the test. The New York DOL, for example, has a bunch of fact sheets that it says gives examples of what meets the test. So it can be fact-specific, but it's not really that confusing. It's something that's easily graspable.

**[Ari]:** Absolutely. So, Ben, hit us with number two.

**[Ben]:** So number two is that you want to keep accurate records, and that is—and you want to see it as part of the audit that you're keeping those accurate records...So when we say that, we're talking really about tracking the time in and out for hourly employees, that you're clocking in and out, having them clocking in, out for meal breaks. And, you know, in New York State, you would definitely see a fair amount of meal break litigation, where employees allege that they have not received the benefit of the meal break and that...which is required in the law...and that they instead had to work through the break. And sometimes if there are employers that auto-deduct for break out of their timecards and that practice can be a little bit problematic because then if you're not having the employees clock in and out and it's not based on, their time worked is not based on the actual raw authentic time entry for them, the clock in, clock out record. Then you can have an issue with being able to prove that you actually allow those employees to take that uninterrupted break because if they get together and there's a class action, alleged it's a large group of people where this applied to that can be very expensive. Even if the meal break is only supposed to be a half hour if you're talking about a longstanding practice and there's issues with that proof of those records, then you're talking about a large amount of liability potentially. So it's really important to keep those accurate records. You know, sometimes people use the biometric like thumbprint to clock in and out or you know, sometimes people use those cards where they actually slide it under and it punches the exact time you want it to be as specific as possible because then if an auditor comes in and they look at your time cards, they're not going to be questioning the validity of them like we talked about in one of our earlier episodes where they say, these are not correct, these are not accurately reflecting the amount of hours that were worked. And that is really the biggest issue, one of the biggest issues that you'll face is that they do not believe the authenticity of those records.

**[Ari]:** Great points, Ben. So number three, I think kind of goes hand in hand with that. But can you tell us number three?

**[Ben]:** Yeah. So we want to make sure we have a system set up so that we're keeping the accurate records so that they're correct as possible. But then sometimes employers forget: you need to keep those records for a long time. Right. And that's if an audit, an auditor-investigator comes back a couple of years later and says, we want to see from two years ago, we want to see what your timecards said. Oh, well, we threw them out. Well, that's a bad...don't do that. So in New York State, I think you're required to keep them for at least six years. And it's even if that law wasn't in place, I think we'd still recommend that. You know, if you're sued for some sort of historical practice that you had in place, you know, your record-keeping is what's going to save you. Having no records automatically puts an employer—or less records than you should —automatically puts an employer on the defense, because we're saying this

is what happened in our workplace. But our records don't necessarily reflect that. So the strongest amount of proof is if you just pulled up a timecard or a spreadsheet that shows every time someone clocked in and out and every time they got their meal break, if that's like the issue in the litigation. But if we don't have proof, then we have to rely on really a lot of anecdotal evidence, which is, as you know, might be persuasive in court. But in the early stages of an investigation, it's very hard to really push that narrative if you don't have the records.

**[Ari]:** Yeah, absolutely, Ben. But I think you're absolutely right. So keep your records also preserve your records.

**[Ben]:** Right. And people think, it's not just that the law requires you to keep the records, but it does a service to the employer by keeping the records. You ultimately, if you need them, then they're going to be there. So it's not just to think about it, not just as, well, the law requires us to, but it's also we might need these later. So we should keep them. That's a better way to think about it.

**[Ari]:** Absolutely. Absolutely. And I think as we've talked about, you know, the last few episodes, obviously, these types of documents are really relevant to most audits.

**[Ben]:** Right. Right. For sure.

**[Ari]:** All right, Ben. So number four.

**[Ben]:** So the world of employment law and wage and hour law is constantly changing. You know, we saw a lot of that with COVID, with different leaves that were created for people who were exposed or quarantined and whatnot. So the fourth thing as part of this overall preparation is to keep track of the applicable wage and hour laws and pay requirements with respect to pay rate notices and just stay up to date, essentially. So, you know, an example is in minimum wage across the state and depending on the location, you're in, you're operating in has gone up over the last couple of years. Right. So incrementally and it's changed by location. And so as an employer, as a business operator, you have to be aware of that, you know, our firm does a good job, I think, of sending out updates and alerts of different things that employers need to know about. But the onus is really on the employer as part of this kind of "we're making sure that we are not going to have issues related to an audit." The onus is on the employer to go out and seek out that information. The idea of, "oh, well, I didn't know, nobody told me" is not really going to work with an investigator if they come to your door, you know?

**[Ari]:** Right.

**[Ben]:** You need to be an active participant in that, in that component of your business operation. Yes. And, you know, a couple of years ago, there was a lot of discussion about the salary threshold that salaried employees needed to be paid in order to be exempt from overtime. Because the federal government was changing from a lower, like around \$35,000. They sought to increase it under President Obama. And then that was challenged in the courts. And then New York State raised their salary threshold. So that kind of didn't really even matter for employers in New York State. So that's one of those things where, if you have a salaried employee, they might meet the duties test. But if you're not paying them the threshold of what that salary should be because the law has changed, then that person is not exempt from overtime properly.

**[Ari]:** Right.

**[Ben]:** And if you're investigated by the DOL, New York DOL might say, well, that person never should have been classified like that. So if they worked more than 40 hours ever, you owe them overtime for the last six years.

**[Ari]:** Yes.

**[Ben]:** Which sounds like a nightmare to anyone who's running a tight budget kind of thing and doesn't have a whole bunch of cash lying around to pay an employee for an unanticipated expense. Right. So it's really about gathering as much, seeking out that information and gathering as much as you can. Being part of like a mailing list of different trade associations. You know, a lot of them, they sent out updates like that. You know, obviously, your counsel, our firm does a good job of that, like I mentioned. But it's really about staying up to date on what's happening.

**[Ari]:** Yeah. I think that's sage counsel, Ben, and it kind of reminds me of law school where we were always told like ignorance of the law is no excuse, like you need to be up on the law, so, all right, Ben, last but certainly not least, number five right?

**[Ben]:** So this is a big one. So we want to make sure that you both have updated policies in place for how to maintain your wage and hour practices properly and that you have your employees all the way up from management down the line are properly trained on your wage and hour practices. So we want to have policies in place that describe how you clock in clock out that cover meal breaks, that cover overtime. You know, those policies, it helps to eliminate confusion. Again, it also gives you a cover if an investigator comes in and says, what was your policy? And you got a lot of other...you maybe get employees that are telling you one thing, but then everyone signed off on an employee handbook that has this policy saying that they acknowledged this, but they understood that this was a policy then that creates a little bit more of a defense for you, if there's some issue that where the employees are saying that's the practice was different in real life. At least you have a policy that shows this is what was supposed to happen and this this is our official position. And then you want to make sure that your employees are aware, your supervisory employees, I'm sorry, are trained on proper wage and hour practices, clocking in, clocking out, taking breaks, making sure that employees are not working through breaks or they're not doing off-the-clock time. That's another big thing where...you don't want to have if you are a business operator and you are not there, you want to know that your employees are properly carrying out...those objectives. Right. So you don't want to be worried that everyone's working off the clock. And then there's a whole bunch of allegations, that the day was actually three hours longer and DOL comes in and says, no, we want to add three hours to every day for every employee. I've seen that, that's what has happened in some cases before because there's not enough scrutiny and kind of it's people are not conscientious enough about that process. And it's really, really important to have those employees that are on boots on the ground, that are on the front lines to be monitoring that to make sure that's not happening. Because the other thing to keep in mind is that if an employer has knowledge that an employee is working off the clock or extra or outside the confines of their timecard, then that then now becomes the employer's responsibility to pay those people. So if there's a tension between...our timecard shows this smaller amount of time, but then they were also working a larger amount of time off the clock, then that's really, really going to be a big issue that you're going to have to grapple with the investigator.

**[Ari]:** Yeah, that's...

**[Ben]:** ...I've seen that a hundred times.

**[Ari]:** Yeah. Those are such great points. And so thank you so much to recap for our listeners. Top five ways to be prepared for an audit in the context of really you doing a self-audit. Number one, make sure employee classifications are correct. Number two keep accurate records. Number three, preserve accurate records. Number four, keep track of applicable wage and hour laws. We know the law is changing, but it's super important to keep up to date. And number five, have updated policies in place and make sure your employees are trained on those policies.

**[Ben]:** Sounds good.

**[Ari]:** Ben, thank you so much. Thank you so much for joining us. This is great. I love that you were able to come on and just kind of give a summary of what we talked about and just really give our listeners, our clients, employers, some really practical advice for ways to self-audit. So thank you so much, Ben.

**[Ben]:** Of course. My pleasure. Thanks so much.

**[Ari]:** And to our listeners, tune in next week where we kick off our immigration related segment. You won't want to miss it.

**[Ari]:** The Labor Employment Podcast is available on [barclaydamon.com](http://barclaydamon.com), YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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