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EMPLOYER NEW YEAR'S RESOLUTION #2—COMPREHENSIVE WAGE & HOUR AUDIT

As we start the second full week of January, we bring employers a second employment law resolution: a comprehensive wage and hour audit. So, even if you're sticking to your commitment to less screen time in 2026, this is worth a read.

In addition to lawsuits brough by individuals, either on behalf of themselves or on behalf of a class of similarly situated employees, the Department of Labor remains focused on enforcement of the FLSA. In fiscal year 2025, the DOL recovered more than $259 million in back wages for nearly 177,000 employees. Between government scrutiny and the persistent threat of class-action litigation, employers must be proactive. To mitigate risk, focus your audit on two primary areas: classification and the regular rate.

1. Exempt vs. Non-Exempt Employees

Misclassification remains one of the most common—and expensive—mistakes an employer can make. Under the FLSA, the default rule is that every employee is entitled to overtime pay (1.5 times their regular rate for hours worked in excess of 40 in a workweek). The employer carries the burden of proving that an employee fits into a specific exemption to the payment of overtime.

To correctly classify an employee as exempt under the FLSA, they generally must meet two criteria:

1. The Salary Basis Test: The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. The salary must, as of today, be at least $684 per week.
2. The Duties Test: Just because an employee is paid on a salary basis doesn't mean they are exempt. They must also meet the duties test, meaning that their actual job duties must primarily involve executive, administrative, professional, outside sales, or high-level computer-related tasks. The duties test requires a fact intensive inquiry that does not simply rely on a job title.

2. The Regular Rate

Even if you know an employee is entitled to overtime, calculating the correct overtime pay can be challenging, as it is 1.5 times the *regular* rate, not the *hourly* rate. The FLSA defines the regular rate as the hourly rate actually paid to the employee for "all remuneration for employment." This must include things such as non-discretionary bonuses, shift differentials, on-call pay, and commissions, but it can exclude discretionary bonuses, gifts, benefit contributions, and paid time off.

Resolution: Audit Now, Before the DOL Does

Misclassifying an employee as exempt when they should be non-exempt or miscalculating the regular rate is a costly mistake. It doesn't just result in liability for the unpaid overtime; it often brings along liquidated damages (double the back pay), attorneys' fees, and potentially a multi-year look-back period for a class of similarly situated employees. Even a well-meaning employer can find themselves facing significant monetary penalties based on calculation errors or reliance on job titles or outdated job descriptions.

Don't wait for a DOL investigator to knock on your door or a plaintiff's attorney to send a demand letter. Make 2026 the year you audit your wage and hour practices.

As always, **O'Neil Cannon** is here for you. We encourage you to reach out with any labor and employment questions, concerns, or legal issues you may have, including assistance with wage and hour audit and litigation.