



202:HR Do's & Don'ts

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Albert C. Peters II
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Andrea L. Phillips
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Meredith B. Stone
Vice President, General Counsel, Americas
NACCO Materials Handling Group, Inc.

Faculty Biographies

Lynn B. Jongleux

Lynn B. Jongleux is senior vice president, general counsel, and secretary for the Indiana Farm Bureau Insurance Companies in Indianapolis. Her responsibilities include serving as the companies' chief legal counsel, managing the corporate law department, acting as corporate secretary, and serving as a member of the executive management group, with responsibility for human resources, training, and public affairs.

Before joining Farm Bureau Insurance, Ms. Jongleux was in private law practice with the firm of Sommer & Barnard in Indianapolis. Her areas of primary focus were labor and employment law and employee benefits.

She has held leadership positions with various bar associations, and currently serves on the board of directors of the Indiana Legal Foundation. Ms. Jongleux is a member and past chairman of the board of trustees of Vincennes University, and is also a member of the boards of Big Brothers Big Sisters of Central Indiana and Eagle Creek Park Foundation.

Ms. Jongleux received her AB from Indiana University, and her law degree from Indiana University School of Law-Indianapolis.

Albert C. Peters II

Albert C. Peters II is assistant chief counsel with the Pennsylvania Turnpike Commission. His primary practice areas include labor and employment, contracts, and litigation management. He also conducts training programs in labor relations and supervisory development.

He is former chair of ACC's Small Law Department committee as well as past president of ACC's Central Pennsylvania Chapter. Mr. Peters is an evening instructor for Penn State Harrisburg where he teaches a four credit course on business environments and decision-making (law, ethics, and social responsibility).

Mr. Peters received a BA from the University of Virginia and a JD from the University of Pittsburgh School of Law.

Andrea L. Phillips

Andrea L. Phillips is employment counsel for Rolls-Royce, North America, a global provider of power generation services on land, sea, and air with headquarters in Chantilly, Virginia. Her responsibilities include handling all U.S. employment matters, including conducting investigations, providing training and responding to EEO charges, advising on FMLA, ADA, harassment and discrimination issues, among others.

Prior to joining Rolls-Royce, Ms. Phillips was a trial attorney with the U.S. Department of Labor-Office of the Solicitor in Chicago. Her responsibilities included litigating wage and hour disputes,

Occupational Safety & Health (OSHA), and FMLA issues. Before becoming in-house counsel, Ms. Phillips also worked as a litigation/labor associate at law firms in New York and Chicago.

Ms. Phillips is active with ACC's WMACCA chapter and has spoken at previous ACC Annual Meetings. In addition to ACC, Ms. Phillips is a member of the ABA's labor and employment division.

Ms. Phillips received her BA from Oberlin College in Oberlin, Ohio and her JD from Harvard Law School in Cambridge, Massachusetts.

Meredith B. Stone


Vice President, General Counsel, Americas
NACCO Materials Handling Group, Inc.

Meredith B. Stone, vice president, general counsel Americas for NACCO Materials Handling Group, Inc. in Greenville, North Carolina, is responsible for the legal compliance of NMHG's Americas division activities in North, South, and Central America, including providing advice on and representing the company on corporate transactions, litigation, negotiating, drafting, and approving contractual commitments, advising and counseling the corporation on employment law issues, and providing preventative legal training to employees.

Prior to joining NACCO Materials Handling Group, Inc., Ms. Stone was the vice president, general counsel, and secretary of Konica Business Technologies, Inc., a general attorney for the Long Island Railroad Company in Jamaica, New York, an associate attorney with Levine & Robinson, P.C. in Mitchel Field, New York, and an assistant corporation counsel for the law department of the City of New York.

Ms. Stone is a member of the ABA (business law, employment law, and antitrust sections), the New York State Bar Association, and the North Carolina State Bar Association. She is the immediate past president of ACC's Connecticut Chapter and currently serves as secretary of ACC's Small Law Department Committee.

Ms. Stone earned her BA from the University of Vermont and JD, cum laude, from St. John's University School of Law in Jamaica, New York.



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CHOOSING AN EMPLOYMENT LAWYER OR FIRM

What to look for:

- EXPERIENCE
 - Knowledge/expertise in full range of laws
 - Experience in "preventive maintenance", counseling employers on day-to-day issues
 - Practical knowledge of HR/personnel issues
 - Litigation/administrative agency experience
 - EEOC, NLRB, DOL

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- Responsiveness: my calls are important
- Practical, real-life approach to problems
- Access to wide range of services
 - “Traditional” labor law incl. arbitration
 - Employment law other than discrimination
 - Discrimination law
 - Benefits
 - Personnel/HR practices & procedures
- Comfort level—this is a relationship based on trust

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- An interest in and understanding of your company's business and culture
 - Culture especially critical with employment law issues
 - Looks at all solutions, not just rush to litigate
- Designated legal team to work with you, not “pot luck”—more efficient, knowledge of company
- Reasonable fees for wide range of services

BOTTOM LINE: A GOOD FIT!

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MANAGING THE RELATIONSHIP

- Telephone calls
 - Need to have agreement about prompt call-backs/accessibility
- Many situations on short time fuse—need timely advice
 - Examples: OSHA inspector on doorstep; pickets outside; employee who just returned from FMLA leave having a meltdown

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- Billing Arrangements – work out in advance
 - How telephone calls will be charged
 - Minimum charge?
 - Part of retainer?
 - Don't begrudge—you're paying for experience
 - Consider options for non-litigation matters
 - Retainer
 - Flat fee for services
 - Result fees

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BILLING (continued)

- Research
 - Establish parameters up front regarding scope and how time will be charged
 - Get estimate and ask for notice when near that amount
 - Beware of "swamp dredgers"!
 - Do a cost/benefit analysis
- Agreement on how many lawyers involved
- Double billing

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- Stay on same page re risk management, expectations, strategy
 - Outside counsel needs to be sensitive to business realities and needs
 - Company culture affects level of risk tolerance and strategy
 - Explore creative ways to resolve disputes short of litigation
- Decision re whether outside counsel has direct contact with HR, other management

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- Litigation
 - Establish budgets and track/update quarterly
 - Guided by agreed-upon strategy
 - Settle vs. trial
 - Budget should be broken down by stages of litigation
 - Agreement re who does what (inside counsel vs. outside counsel)
 - Internal collection of documents, interviews of witnesses vs. having outside counsel do the work
 - Discovery responses—can save fees by doing work internally if time available
 - Handle EEOC charges internally? Pros and cons

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WARNING SIGNS WITH OUTSIDE COUNSEL

- Doesn't return phone calls promptly
- Pushing towards litigation or other aggressive results
- Disregards company culture
- Disregards direction set by internal counsel & management of company

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- Unreasonable bills, especially if outside of budget
- Acts as if doing you a favor to respond
- "My way or the highway" attitude
- Lack of candor

May signal you're being taken for granted



BALANCING DUAL ROLES— ATTORNEY & MANAGEMENT

- Most important goal: protect the attorney-client privilege
 - Always know which hat you're wearing
 - Distinguish between advice as attorney and management decision-making
 - Tell clients what is legal advice and what is business advice
 - Minimize risk of becoming a witness in situation requiring waiver of privilege



- Mark written legal documents clearly: e.g. "confidential, attorney-client privileged information"; "do not duplicate"; "for Board use only"
- Don't overuse "privileged and confidential"
 - Limit to documents clearly generated in role as corporate attorney
 - Fact a document was prepared by attorney doesn't mean it's privileged
- Use outside counsel to reinforce the privilege where your role is unclear

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- Avoid conflicts of interest
 - Don't give legal opinions on decisions in which you participate
 - Don't allow desire to achieve management results to influence legal opinion
 - Query: impact of Sarbanes-Oxley "report up" requirement
 - Objective assessment of risks and advice consistent with risk

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- Some Advantages of Dual Role
 - See “big picture”—can spot legal issues before they surface (e.g. discussion of reduction in force, early retirement program)
 - Opportunity to be advocate to management re strategic role of HR, risk management
 - Use legal analytical skills to add value to bottom line

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DEALING WITH THE EVIL HR DIRECTOR

You know the type:

- An HR Director whose knowledge is out-of-date
- An HR Director who takes pleasure in terminating employees
- An HR Director who is afraid to make a decision
- AN HR Director who allows his/her own viewpoint to color/guide an investigation

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KNOW YOUR HR DIRECTOR'S STYLE

- Is your HR Director flexible or Lock-step?
- Does he/she conduct full and complete investigations?
- Does HR have credibility in your organization?
- Does Legal have credibility in your organization?
- Can HR be trusted by your employees?
- DO ask questions
- DO Listen
- DON'T assume all HR groups are the same
 - What is the culture of your company?

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WHAT WORKS?

- Work with your HR Director to foster the right working environment
- Fairness and due process fosters a positive employment relationship
 - Increases productivity
 - Improves performance and decreases turnover
 - Avoids Litigation
 - Avoids Union activity

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PRE-EMPLOYMENT ACTIONS

- DO Conduct background checks post-offer, pre-employment
- DO Legal should review all negative background checks
- DO Educate HR staff on proper pre-employment interviewing and screening

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EDUCATION OF YOUR HR STAFF

- Plan a training program for HR
 - Brown bag lunch
 - Continuing education
- DON'T assume their knowledge level
- DO attend HR meetings
- DO respond to questions promptly

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TRAINING PROGRAMS

- DO review materials
- DON'T consider this an "HR issue"
- DO make sure all areas are covered
 - Sexual harassment
 - Discrimination
 - Reasonable accommodation
 - Diversity
 - Management skills

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WHAT YOU SHOULD ASK:

- Am I sure I know all the fact accurately?
- Is this employee receiving the same treatment others have received for the same offense?
- Is the rule which has been violated reasonable?
- Did the employee know the rule? or Should the employee reasonably have known about the rule?
- Has the rule been applied consistently and reasonably?
- Have procedures been followed?
- Except in extreme cases, has the employee received prior discipline?

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THE RELUCTANT SUPERVISOR

- Who is a reluctant Supervisor:
 - Uncertain when discipline is appropriate
 - Concern for reputation among employees
 - The “bad apple” syndrome
- Don't ignore the reluctant supervisor
- Ask Questions
- Follow Leads
- Don't be afraid to disagree

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LITIGATION LANDMINES

- Ill-considered e-mail messages
- Failure to document misconduct and performance problems
- Inappropriately complimentary evaluations
- Failure to follow policies and procedures
- Talking with others about why an employee was discharged
- Failure to communicate problems
- Uncontrolled letters of reference
- Failure to treat like cases alike
- Showing favoritism
- Failure to obtain advice when a situation arises that is not covered by specific policy

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BOTTOM LINE

- NO GOOD DEED GOES UNPUNISHED
 - Consistency in application
 - No "sweetheart" deals
 - Focus on leave situations
- Create an atmosphere of trust
- Listen first, talk second
- Advocacy
 - Corporate risk analysis

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UNION-LABOR RELATIONS

HAVE A GOOD, READY REFERENCE FOR QUICK,
FACTUAL QUESTIONS

AN EXAMPLE WOULD BE

HOW ARBITRATION WORKS OR

www.HRhero.COM

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UNION-LABOR RELATIONS

BE FAIR

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UNION-LABOR RELATIONS

USE THE JUST CAUSE STANDARDS AS A GUIDE FOR
YOUR ACTIONS.

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UNION-LABOR RELATIONS

- Notice to employee about rule
- Reason for rule; relation to the business
- Investigation before discipline
- Fair and objective investigation
- Evidence that employee is guilty
- Equal application of the rules
- Reasonable penalty

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UNION-LABOR RELATIONS DON'T PLAY "GOTCHA!"

IF YOU ARE CONSIDERING DISCHARGING AN
EMPLOYEE FOR:

- VIOLATING A RULE OR POLICY
- HAVING LOW PRODUCTIVITY
- OR BEING CHRONICALLY ABSENT FROM WORK,
MAKE CERTAIN THE DISCHARGE IS FOR OFFENSES
OR REASONS THAT WOULD GENERATE THE
DISCHARGE OF OTHER EMPLOYEES.

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UNION-LABOR RELATIONS

DON'T RESIST THE UNION CONTRACT

SUPERVISORS SHOULD KNOW THE "CONTRACT" AS WELL AS
– OR BETTER THAN - THE STEWARDS AND
OTHER UNION OFFICIALS.

OUR SUPERVISORS ARE ALSO REMINDED THAT THE
UNION CONTRACT IS ANOTHER CONSTRAINT THEY
MUST CONTEND WITH [LIKE TRAFFIC AND THE
WEATHER].

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GRIEVANCES

AS WITH ANYTHING ELSE IN THE BUSINESS AND
PROFESSIONAL WORLD, FIND OUT ALL THE REVELANT
FACTS QUICKLY!

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GRIEVANCES

WHEN WRITING DOCUMENTS [SUCH AS GRIEVANCE RESPONSES], KEEP IN MIND OTHER MEMBERS OF YOUR AUDIENCE: SUCH AS

- ARBITRATORS
- MEDIATORS
- JURY MEMBERS

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UNION AVOIDANCE

- Educate your supervisors on how to interact with employees
- Educate your supervisors on what they can do during a union campaign
- Review policies
 - Fair
 - Equitably applied
- Company communications
 - Open door
 - Two way communication
 - Top down information
 - Employee surveys

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PREVENTIVE LAW TRAINING

CONDUCTING PREVENTIVE TRAINING WITH SUPERVISORS AT THEIR LOCATIONS:

- PROVIDES THEM INFORMATION;
- HELPS THEM SOLVE THEIR PROBLEMS;
- HELPS ENHANCE THEIR REPUTATION IN FRONT OF THE EMPLOYEES THEY SUPERVISE;
- HELPS THEM COLLECT CREDIBLE FACTS [FOR YOU];
- MAKES THEM MORE LIKELY TO CALL YOU FOR ADVICE OR ASSISTANCE.

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PREVENTIVE LAW TRAINING

"LAWYERS DON'T WIN CASES; FACTS WIN CASES. LAWYERS LOSE CASES BY NOT PAYING ATTENTION TO THE FACTS."

Joshua Lock
Harrisburg, PA Attorney

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WORKPLACE LAW FOR SUPERVISORS

Supervisory Challenges
(Dealing with Judgment)

- The Basic Challenge "Being Flexible v. Being Strict"
- Exercising Authority
- Fulfilling Responsibility

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PREVENTIVE LAW TRAINING

Labor Relations Training
(Annual Presentation)

- Review arbitrations and significant grievances from preceding year.
- Planned presentation (something practical like a video or role play)
- Question and Answer session.

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PREVENTIVE LAW TRAINING

Remind Supervisors:

- DON'T neglect your supervisory role by concentrating on operational responsibilities.
- Supervision is an important part of your job.
- If you "don't" or "won't" document, give your supervisory title and salary to someone who will.

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PREVENTIVE LAW TRAINING

DEVELOP AN ACRONYM METHOD TO HELP MANAGERS AND SUPERVISORS STRUCTURE MEMOS AND NOTES FOR MEETINGS WITH EMPLOYEES. AN EXAMPLE IS F.O.S.A. ["FACTS, OBJECTIVES, SOLUTIONS, ACTIONS"].

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GENERAL ADVICE

LEARN THE HUMAN RESOURCE BUSINESS OF YOUR COMPANY BY REVIEWING:

- THE JOB APPLICATION
- EMPLOYMENT HANDBOOK
- HIRING PROCESS
- EVALUATION PROCESS
- DISCIPLINARY PROCESS
- AND THE DISCHARGE PROCESS.

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GENERAL ADVICE

CONDUCT MONTHLY OR QUARTERLY COORDINATION MEETINGS [e.g. LABOR RELATIONS, "BERMUDA TRIANGLE"].

MONTHLY OR QUARTERLY MEETINGS HELP YOU TO BETTER KNOW YOUR HUMAN RESOURCES COLLEAGUES, SHARE INFORMATION, AND BUILD TIES THAT LEAD TO BETTER AND EARLIER COMMUNICATION.

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GENERAL ADVICE

KEEP IN MIND THAT MANY DOCUMENTS IN A HUMAN RESOURCES FILE CAN BE VIEWED BY A THIRD PARTY DECISION-MAKER [e.g. JURY, JUDGE, ARBITRATOR], EMPLOYEES, AND THEIR ATTORNEYS. THEREFORE, YOU WANT ALL THE DOCUMENTS TO TELL THE STORY THAT THE EMPLOYER WAS REASONABLE.

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GENERAL ADVICE

When reviewing files, DON'T overlook multiple files for the same employee (HR, Department, Location/Supervisor)

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GENERAL ADVICE

DON'T NEGLECT TO STAY INFORMED ABOUT "PROBLEM" EMPLOYEES. *[GET OUT OF YOUR OFFICE AND TALK TO DEPARTMENT HEADS, MANAGERS, ETC. ABOUT THEIR EMPLOYEES SO YOU CAN GET A HEADS-UP ON PROBLEMS THAT MIGHT BE DEVELOPING].*

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GENERAL ADVICE

DON'T IGNORE STATUTORY TIME PERIODS. UNDER SOME STATUTES, EMPLOYEES GAIN ADDITIONAL RIGHTS AFTER BEING EMPLOYED AT CERTAIN MILESTONES. [e.g. 1 YEAR]

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**HUMAN RESOURCE
AUDITS**

FIND OUT AND FIX IT BEFORE YOU ARE SUED

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WHAT IS AN HR AUDIT?

An audit is a means by which an organization can measure where it currently stands and determine what it has to accomplish to improve is human resource function. It involves systematically reviewing all aspects of human resources, in checklist fashion, ensuring that government regulations and company policies are adhered to. It's a discovery tool not a test.

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HR AUDIT: WHAT'S THE POINT?

Monday morning and there is a letter on your desk addressed to Legal or simply the CEO, from a former employee saying he's owed a bonus payment according to state regulations. You've got a an email from an HR staff member asking whether it is okay to deduct PTO that is owed from employee paychecks at termination, and you've got a staff meeting in 5 minutes to figure out how to answer your GC's question about how many email or internet violations our North America sites have had in the last 2 years and what was the discipline.

You think, "Where's that bottle of aspirin/tequila/Vicadin" (insert your own remedy)?

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HR AUDITS: THE WHY

There's a lot to keep on top of in managing the Human Resources function today. Laws on the Federal, State and Local level. Aligning your various programs in support of company and strategy. Ensuring your operating model is efficient in quality output and in dollars spent. Conducting a Human Resources Audit can help you identify where you are succeeding, and areas for improvement.

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WHY DO AN AUDIT?

- Risk avoidance—Are your policies and procedures compliant with state and federal law?
- Is the Company following its own policies?
- Has there been a significant change in federal or state laws?
- Are processes in line with the Company's goals and strategies?

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WHAT TYPE OF AUDIT?

- Compliance-- reduce legal exposure by focusing on legal aspects such as FLSA, FMLA, Title VII, Foreign Corrupt Practices Act, etc.
- Best Practices—focus audit on industry standards or recent court/administrative decisions such as performance evaluation processes, hiring and termination procedures
- Strategic— focus audit on determining whether HR processes are in line with the company's strategic plan. For instance, audited areas may include length of time to fill an open position, increase or decrease in employee complaints (internal/external), ineffective training programs in certain areas, etc.
- Function Specific— focuses on a particular area such as pay practices/wage and hour, affirmative action, ethics, etc.

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HR FUNCTIONS TO AUDIT

- Legal compliance (EEO, AAP, FMLA, IRCA, FCPA, government compliance)
- Compensation/Pay & Benefits
- Hiring/Recruitment
- Health, Safety & Security (OSHA, Drug Free Workplace)
- Policies and Procedures
- Training and Development
- Employment claims

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WHO SHOULD CONDUCT THE AUDIT?

- HR Department
- Legal Department
- External Consultant
- DOL—The Department of Labor has been inviting employers to seek compliance assistance without fear of enforcement. NOT A GOOD IDEA TO LET DOL KNOW ABOUT YOUR AUDIT.

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HR AUDITS: PRIVILEGE

- Privilege will not likely apply to the facts/results of the audit.
- Privilege will apply to the legal analysis, recommendations or conclusions provided by legal counsel in response to HR's request for legal advice.
- An HR audit is not an investigation into specific employment claims ("in anticipation of litigation") so don't assume that if legal conducts the audit it will be protected within the scope of the work product doctrine.

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HR AUDITS: THE HOW

Generally, the auditor should be looking at 3 things:

- Has the company documented its policies and made them available to managers and employees?
- Are the people responsible for administering the policies (HR and managers) aware of them and are they administering them consistently?
- Does written documentation in the personnel files match the other two sources of information?

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HR AUDIT – THE TOOLS

There is no one way to conduct an audit. An effective audit can use a variety of tools such as surveys, questionnaires, interviews, examinations of records and documents and other techniques.

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Special Issue: The Wage and Hour Audit

- At issue will be how your company categorizes its employees as exempt or non-exempt under the FLSA;
- At best this involves a systematic analysis of each job in your organization.
- At least identify jobs classifications that are potentially "at risk".
- Don't rely solely on job descriptions.

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Special Issue: Wage and Hour Audits (cont.)

- A combination of various tools should be employed: review documents such as job descriptions, organizational charts, pay rates PDR goals and objects; also, talk to HR, managers and maybe even employees.
- Examine industry specific exemptions to determine overtime status.
- Pitfalls of interviewing employees: some employees may have an idea of what the inquiry is about and try to tailor their responses to achieve a certain result...exempt or non-exempt—rather than to correctly classify their job.

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WAGE AND HOUR AUDITS: ADDRESSING PROBLEMS

If your audit reveals problems, you will need to remedy potential violations. Doing this can be a very bitter pill to swallow. For instance, reclassifying employees from exempt to non-exempt could be costly and time consuming. Non-exempt employees must be paid for certain functions, such as training, travel, driving, working meals, etc.

Note: If changes need to be made, you are neither obligated, nor advised to announce possible errors to employees.

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WAGE AND HOUR AUDITS: ADDRESSING PROBLEMS

One of the toughest questions employers face is whether to remedy possible wage and hour violations going forward, or whether to pay all the back pay that would have been owed under the FLSA's two year statute of limitations. This involves a balancing of costs and risks in line with corporate values. There is no one right answer.

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THE AUDIT REPORT

Should outline the risk levels:

- High/Urgent—Legal requirements that require immediate attention.
- Medium/Not Urgent but Important— Best practices that help a company avoid risks and are therefore recommended. These items should be dealt with in a short time frame as they might become high risk if they fall through the crack.
- Low/Not Urgent— Best practices based upon our experience with HR in other similar organizations. These are typically administrative suggestions to make the department more effective and efficient.

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THE AUDIT REPORT

- Legal Counsel should review any written reports and recommendations before the report is finalized.
- Recommendations should be cited as goals not as admissions of non-compliance with the law (i.e. constructive comments not deficiencies).
- Any recommendation in the audit report must be acted upon so don't include recommendations that cannot realistically be implemented.
- A good audit report that is followed is a key defense shield in litigation. It shows the company took steps to identify and correct problems.