

Wage & Hour Investigations: What To Do When The Department Of Labor Comes Knocking

**June 21, 2012
Atlanta, Georgia**

**Kathryn Hinton
Baker Donelson
3414 Peachtree Rd, N.E.
Atlanta, Georgia 30326
404-223-2216
khinton@bakerdonelson.com**

ROADMAP

- Why this topic?
- What does the DOL audit?
- Audit Process Overview
- Audit Rules
- What can you do to protect yourself?

Why This Topic?

- In 2009, the GAO was critical of the DOL for failing to thoroughly investigate claims.
- In response, the DOL hired 350 more investigators and sought more money from Congress.
 - April 2010: “We Can Help”
 - Jan 2011: “Bridge to Justice”
- FLSA private litigation → so hot right now

FLSA In the News

- **Wal-Mart:** May 1, 2012, Wal-Mart Stores Inc. has agreed with the DOL to pay \$4,828,442.00 in back wages and damages to more than 4,500 employees nationwide, as well as \$450,000 + in civil money penalties, for misclassification of vision center managers and asset protection coordinators as exempt from FLSA.
- **Chuck E. Cheese:** (“*Where A Kid Can Be A Kid*”) January 2012, fined \$28,000 for violation of FLSA child labor provisions
- **Mass. Restaurant Industry:** March 2012, ongoing investigation found \$1.3M in back wages due to 478 employees; assessing liquidated damages

What to Expect

- DOL more aggressive
- More thorough investigations
- Additional document requests
- Focus on certain industries

What Does The DOL Investigate?

- Fair Labor Standards Act: (FLSA)
 - Minimum wage + overtime for non-exempt employees
 - Compensation for all hours worked
 - Proper record-keeping
 - Child labor limitations
- Other laws: Immigration/Nationality Act, FMLA, OSHA, MSPA

Who Is Subject to the FLSA?

- Almost all private and public employers
 - Two tests:
 - (1) individual coverage → employees engaged in commerce/production of goods for commerce; or
 - (2) enterprise coverage → annual business of \$500,000+, 2 or more employees engaged in interstate commerce/production of goods for interstate commerce
- Exempt v. Non-Exempt Employees
 - Specific types of employees exempt: bona fide executive, administrative, professional, outside sales, highly compensated

Types of Investigations

- Full investigation of all FLSA issues
- Limited investigation of specific FLSA issues
- Office audit
- Self-audit
- Conciliation/resolution of minor violations by phone

Investigations → Process Overview

- 1. Selection of Company
- 2. Initial Contact
- 3. Document Requests
- 4. Employee interviews
- 5. Settlement Conference
- 6. Litigation?

1. Selection of Company: **What Triggers An Audit?**

- Complaint
- “Directed investigation”
- Random selection
- Follow-up to previous investigation

NOTE: DOL will not disclose particular trigger

2. Initial Contact

- Typically, the investigator either calls or sends a letter notifying employer of date and time of intended visit.
- Response
 - Immediately develop rapport
 - Gather documents
 - Designate point person
 - Call your lawyer and/or accountant
 - Begin to build credibility

3. Opening Conference

- DOL has authority to:
 - investigate and gather data concerning wages, hours and other employment practices;
 - enter an employee's premises and inspect their records and workplace ;
 - and question employees in their investigation of the employer's compliance with the FLSA's requirements.
- Expect the following:
 - Explain purpose and investigation procedure
 - Gather and review data
 - Tour of facility
 - Interview employees

The Unannounced Visit

- DOL has the authority to show up without notification
- Cooperate – can signal DOL anticipates trouble
- Have procedure in place for immediate notification of HR and legal departments

4. Document Review

- Typical requests:
 - Information re: FLSA coverage
 - Payroll
 - Time cards
 - Exemption classifications
- Considerations:
 - Does the information require an explanation?
 - Keep the relevant time frame in mind
 - REMEMBER: DOL has broad subpoena power.
 - The key is a thorough, thoughtful response, with limits.

5. Employee Interviews

- The DOL views interviews as their most important investigative tool.
- Testing the accuracy of employer's records
- Considerations:
 - Who will they interview?
 - Purpose of interview?
 - Management presence? (exempt v. non-exempt)
 - Place of interviews?
 - Message to employees?

The Aggressive Investigator

- Make sure conversations are witnessed.
- Confirm in writing.
- Do not take the bait.

Investigation Findings

- Typically, the investigator will schedule a conference.
- May have counsel or other representative at this meeting.
- If violations found, investigator will tell the employer what to do to come into compliance with the law.
- May assess back wages and specific corrective actions required to come into compliance.

Tips for Navigating Settlement Discussions

- Ask detailed questions and seek written documentation providing breakdown of any calculations made.
- Do not agree to anything immediately → investigation findings are not a final order to pay
- Beware statute of limitations tolling agreements
- Ask about civil monetary penalties (CMPs)

Settlements

- Compromise settlements to pay back wages
- Employees who accept full back wage payments waive right to bring suit under FLSA
- Process:
 - WH-56: Summary of Unpaid Wages
 - Lists all employees owed back wages, period for which wages due, and amount owed
 - Employer must sign → NOT an admission of liability
 - WH-58: Receipt for Payment of Lost Wages
 - Receipt and waiver by employee of right to bring future claims against employer

Appealing an Investigative Finding

- Have option to appeal both administratively and in federal court
 - Investigator → local WHD Administrator → regional WHD Administrator → regional Solicitor
- **Proceed with caution** → only with advice of counsel
- Can backfire and lead to enhanced investigation, litigation and greater penalties

Audit Rules

- Select “point person.”
- Engage counsel at start.
- Genuine response to document requests.
- Fully engage in settlement discussions.

Tips For Survival

- Familiarize yourself with the process.
- Familiarize yourself with the law
- Assess problem areas with self-audit.
- Records will make or break you.
- Reign in your supervisors.
- Do not get angry.
- Select an audit team.
- Don't always trust that the DOL will be fair.

Be Proactive and Prevent Claims

1. Pay Employees On Time and Completely
2. Get Your Exemptions In Order
3. Keep Accurate and Complete Records
4. Do Not Retaliate
5. Respond to Internal Complaints Quickly