

WAGE AND HOUR DIVISION (WHD) INVESTIGATION CHECKLIST

LABOR AND EMPLOYMENT PRACTICE

The U.S. Department of Labor (DOL) has the authority to conduct inspections of workplaces and bring enforcement actions against employers found to be in violation of the Fair Labor Standards Act (FLSA), and related statutes governing wage payments. As the Wage and Hour Division (WHD) conducts virtually its entire litigation “discovery” through record audits and on-site inspections, and the FLSA gives the DOL broad investigative authority, it is critical for employers to prepare for, and assert their rights and manage the flow of information during, investigations. Various state agencies have similar investigatory powers under state wage and hour laws.

This WHD Investigation Checklist reflects the collective experience of the national Wage and Hour Practice Group at Epstein Becker & Green, P.C., which has managed and counseled clients through hundreds of WHD inspections of all types across the nation. The checklist is intended to provoke thought and careful planning by employers, not to proscribe a single, one-size-fits-all method for dealing with every DOL audit. Preparation is now more important than ever before because of the current enforcement-heavy philosophy of the WHD and state agencies.

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SECTION I: PREPARATION BEFORE A WHD INVESTIGATION

Develop and Implement a Comprehensive Wage and Hour Program

Preliminarily, long before a government investigation begins or a lawsuit is filed, there are self-audit and preventive measures that employers should take to minimize their exposure. For example:

- ❑ Employers should check current 1099's as well as all 1099's going back several years and review the actual job duties of those persons paid as independent contractors to verify that they were not, in fact, employees.
- ❑ Employers should examine very closely all written job descriptions to ensure that they: (i) accurately reflect the work done, (ii) have been updated where necessary, and (iii) indeed justify the applicable exemptions.
- ❑ Employers should review time keeping systems to ensure that non-exempt employees are being paid for all work performed, including work pre- or post-shift and during meal breaks; for example, employers should not automatically deduct time for employee meals or breaks without verifying whether they were taken.
- ❑ Employers may round up or down small fractions of hours up to 15 minutes but should not be rounding down in all cases.
- ❑ Employers should ensure that required payroll records and written policies and procedures are current, accurate, and compliant.

In addition, employers should:

- ❑ Confirm that the timekeeping system allows for the convenient entry of all hours worked.

- ❑ Verify that compliant policies are implemented in practice.
- ❑ Develop a formal program for reporting and resolving employee wage concerns.
- ❑ Establish a committee to:
 - ❑ evaluate wage programs as written and implemented;
 - ❑ audit the workplace for potential aberrations; and
 - ❑ review and discuss workplace practices and employee complaints.

Conduct Internal or External Wage and Hour Audits

- ❑ Whenever possible, audits—whether handled by your supervisors, committee, or counsel—should be conducted at the direction of in-house or outside legal counsel to protect the audit findings under the attorney-client privilege.
- ❑ Review recommendations from *prior* wage audits to ensure that specific recommendations were addressed and problem areas are not ongoing concerns.
- ❑ Ensure that *new* audit recommendations are addressed and the steps taken to address these recommendations are documented.

Train Staff

Familiarize Managers with Key Concepts of Wage Hour Laws

- ❑ Exempt/non-exempt status is a matter of law and cannot be altered by agreement between an employer and employee.
- ❑ Non-exempt employees must be paid for all hours worked.
- ❑ The salary of an exempt employee is not subject to deductions related to the quality or quantity of work.

Familiarize All Employees with Basics of Overtime and Record Keeping

- Ensure that employees understand:
- that the FLSA applies to your industry;
- your wage and hour policies and procedures; and
- their own record-keeping obligations.

Familiarize Key Employees with Your DOL Inspection Procedures

Employees should understand that every employer has a right to do the following:

- Refuse to allow the DOL investigator on site without a search warrant.
- Request a period of 72 hours to comply with any investigative demand.
- Request that the interviews and on-site inspection take place at reasonable times (see *Protect Employer Interests When the DOL Arrives*).
- Participate in the DOL's opening conference (for more information, see *Opening Conference*).
- Escort the Wage Hour Investigator (WHI) through inspections of the workplace (for more information, see *On-Site Inspection Activities*).
- Participate in management interviews (for more information, see *Employee Interviews*).
- Protect trade secret and confidential business information.
- Participate in the DOL's closing conference (for more information, see *Closing Conference*).
- Contest alleged violations (for more information, see *Post-Audit Considerations*).

Familiarize Non-Exempt Employees with Your Procedures to Protect Their Wage Rights

- Inform employees that senior management requires compliance with the FLSA.
- Encourage employees to use the timekeeping system.
- Encourage employees to resolve any wage questions directly with their supervisors without fear of retaliation.
- Inform employees that they have the right to file a complaint with the DOL or participate in the inspection by requesting private interviews with the WHI, also without fear of retaliation or discrimination for exercising their rights.

Familiarize Key Employees with the DOL's Inspection Rights

Your response team should understand that the DOL has the right to do the following:

- Decline to provide advance notice of on-site audits.
- Investigate an employer with or without probable cause or consent.
- Inspect payroll and tax records.
- Conduct surveillance, take photographs, and collect evidence.
- Conduct employee interviews.
- Issue and enforce subpoenas for records and interviews.

Establish Response Team and Inspection Protocols

- Prepare a notification plan, identifying who must be informed (and by whom) of the start of a DOL inspection, including:
 - senior management;
 - field supervisors; and
 - wage and hour counsel.

- ❑ Designate an inspection team and assign the following roles and responsibilities (one person can fill multiple roles):
 - team leader (a management spokesperson and the DOL point person, who is generally the wage and hour counsel or a senior management representative);
 - opening & closing conference participants (who generally consist of a senior management representative and wage and hour counsel);
 - on-site representative (to escort the DOL throughout the inspection);
 - document production manager (to manage the document control system);
 - contractor liaison (to coordinate inspection activities with contractors);
 - union liaison (to coordinate inspection activities with the employees' union); and
 - interview representative (to prepare employees for interviews and participate in management interviews).
- ❑ Equip the inspection team with the following materials:
 - a template for the Document Control Log;
 - labels for designating documents as "proprietary" or "business confidential";
 - notebooks; and
 - a contact list.
- ❑ Designate, in advance, a location for the opening/closing conference, employee interviews, and where the WHI can work. See *Preliminary Inspection Issues & Opening Conference*.
- ❑ If advance notice of the inspection has been received:
 - Confirm with the DOL the documents and witnesses it expects for the audit; consider requesting that the scope of the audit be narrowed.
 - Review documents covered by the DOL notice; locate supplemental documents to close any gaps, determine other evidence that may be used as potential substitute, and/or identify witnesses to explain any deficiencies.
 - Review job descriptions and actual duties to ensure that exempt employees are properly classified.
 - Identify the circumstances, if any, under which salaried employees are not paid a full week's salary.
 - Identify any written policies regarding the procedures through which employees may address improper deductions.
 - Identify any circumstances under which non-exempt employees (i) are required to be on the premises while off the clock, or (ii) restricted in their activities while off the premises.
 - Meet with witnesses to review matters covered by the audit.
 - If additional time is needed to prepare, request that the audit be rescheduled.

SECTION II: PRELIMINARY INSPECTION ISSUES & OPENING CONFERENCE

There are a number of steps that you can take at the beginning of an investigation to help ensure that the process proceeds smoothly.

Protect Employer Interests When the DOL Arrives

- ❑ When the DOL arrives, notify your team leader, counsel, and others identified on your notification plan.
- ❑ Clarify the scope of the investigation. The investigator may be seeking records solely with respect to one or two categories of workers—for example, office workers or factory workers. In that case, there is no reason for you to produce records for other groups of employees, and certainly no reason to produce records for exempt personnel. Records may need to be redacted to delete addresses, social security numbers, or other information irrelevant to the investigation. Do not provide to the investigator more than what is asked for.
- ❑ If the team leader is not available, WHIs must wait a reasonable amount of time (normally not to exceed one hour) for management to arrive to represent an employer during the inspection. Employers should understand and exercise their right to have a designated representative present when the DOL is on site.
- ❑ Verify the credentials of the DOL investigator. Companies have been known to send in industrial spies to ferret out competitors' secrets.
- ❑ Ask the DOL to return on another day. The DOL must generally give an employer 72 hours to respond to investigative demands. Consider whether

to demand a subpoena instead of consenting to investigation when:

- you need additional time before the investigation; and
 - the DOL is unwilling to negotiate a reasonable scope or procedure for the investigation.
- ❑ Note, when the investigation is unannounced, the records sought to be inspected or reviewed might not be on the premises (for example, at a payroll company, with your outside accountants, or in off-premises storage).
 - ❑ Consenting to an investigation instead of requiring a subpoena is generally advantageous, but only after negotiating a reasonable scope of the audit. When evaluating whether to consent to an inspection, consider:
 - the risk of signaling to the DOL that you may have something to hide;
 - the loss of control over the inspection's scope;
 - the benefit of cooperating with the DOL; and
 - the benefit of the opportunity to negotiate the scope and procedures of the investigation.
 - ❑ Regardless of subpoena or consent, the DOL's on-site investigation must be conducted:
 - at reasonable times (generally during normal work hours);
 - in a reasonable manner; and
 - within reasonable limits.
 - ❑ The investigator may not interfere with normal business operations.

Opening Conference

At the very start of its investigation, the DOL must conduct an opening conference. It is advantageous to understand the basics of an opening conference and requirements for the parties involved.

Understand and Enforce the DOL's Opening Conference Obligations

During the opening conference, the WHI owes several duties to an employer. If the WHI does not adhere to these obligations, you may request clarification on all points. Obligations include:

- ❑ describing the intended scope and duration of the inspection; and
- ❑ delivering the DOL's first request for documents and information.

Your Best Practices During the Opening Conference

During the opening conference, your designated team leader should:

- ❑ Introduce a response team to the DOL's investigations.
- ❑ Resolve the subpoena question (see *Protect Employer Interests When the DOL Arrives*).
- ❑ Ask for clarification on all points if the DOL does not volunteer all of the information outlined above.
- ❑ Describe your document production protocol (see *Adhere to Best Practices for Document Production*). The response leader should request that DOL's document and information requests be:
 - delivered in writing; and
 - provided to the designated wage and hour counsel.

- ❑ Discuss protocol for arranging employee interviews (see *Employee Interviews*).
- ❑ Expect the DOL to request and be prepared to provide copies of:
 - at least the previous three years of payroll records; and
 - written policies, practices, and procedures (for example, time-keeping requirements, and procedures for employees to record all time worked on- and off-site).

In both cases, provide only those records with respect to the groups of employees specifically under investigation. The WHI rarely seeks information wall to wall.

- ❑ Arrange for daily close-out meetings with the WHI to:
 - learn about concerns that the WHI has identified;
 - consider proactive presentations regarding the WHI's concerns (it is much easier to avoid findings of violation before back wages are calculated; so, if the WHI expresses concerns about an issue, consider preparing an explanation of how your practices comply with requirements);
 - learn who the WHI wants to interview, and schedule the interviews;
 - keep track of the length of time of each interview; and
 - manage the audit to a rapid conclusion.

SECTION III: DOCUMENT PRODUCTION

Adhere to Best Practices for Document Production

- ❑ Label all documents produced with the words “Confidential and Proprietary,” and identify numbers for tracking and for future reference during settlement negotiations and litigation.
- ❑ Question the request to inspect trade secret or confidential business information (CBI). The DOL may not need all the records that it requests.
- ❑ If you do produce trade secret or CBI:
 - clearly label information as “Confidential and Proprietary”; and
 - produce documents under cover sheets setting forth confidentiality and proprietary protections.
- ❑ Make and keep duplicates of every record produced to the DOL.
- ❑ Track all documents produced on the Document Control Log.

Avoid Common Document Production Mistakes

- ❑ Do *not* generate non-privileged documents during an inspection.
- ❑ Do *not* give more than requested or leave documents or information in plain sight (for example, file away loose time sheets).
- ❑ Do *not* volunteer information (unless the DOL will misunderstand a fact to your detriment without additional information).

SECTION IV: ON-SITE INSPECTION ACTIVITIES

The WHI may conduct a “walkaround” inspection of the facility, observing employee duties and looking for wage and hour violations.

Understand the WHI’s Activity During the Audit

During the audit, the WHI may:

- ❑ give employees his or her business card and advise employees that they may call the DOL at another time;
- ❑ conduct “stop and talk” interviews with hourly employees;
- ❑ take handwritten notes of practices that may violate the FLSA; and
- ❑ identify alleged violations and suggest corrective action.

Employer Participation in the Audit

During the investigation, you should:

- ❑ Escort the WHI at ALL times while on-site (unless the WHI is conducting an interview of a non-management employee). The escort should be a manager.
- ❑ Be cordial and professional, but protect your rights by limiting disruption to normal business operations.
- ❑ Gather intelligence about the DOL’s focus by tracking:
 - which employees the WHI asks to interview;
 - the subjects of the WHI’s questions; and
 - the subjects of the WHI’s written notes.
- ❑ Take detailed notes about everything that the WHI says, does, or asks.

SECTION V: EMPLOYEE INTERVIEWS

The WHI will conduct employee interviews of managers and hourly employees.

Understand the Role of the WHI in the Employee Interview Process

During inspection interviews, the WHI may do the following:

- Demand privacy for hourly employee interviews. This right belongs to the hourly employees, not the DOL. Be aware that management employees do not have a corresponding right to a private interview. You may insist that your counsel or another high-level management official attend and take notes.
- Take handwritten interview notes.
- Ask to record the interviews.
- Ask witnesses to write statements, or review and sign narrative statements or the WHI's notes.
- Ask questions about documents (written programs, training records, operating procedures, etc.) that have been produced during the inspection.

Understand Your Role in the Employee Interview Process

With respect to employee interviews, you:

- must never retaliate against employees for agreeing to be interviewed or because of anything they say to the DOL during an interview;
- should schedule interviews in advance;
- should object to impromptu, onsite interviews that last more than approximately five minutes on the grounds that they are interfering with the operations of the business;

- do not have a right to participate in non-exempt employee interviews, but do have a right to participate in all management interviews, and should exercise that right;
- can request alternative times and locations for interview if the interview unduly hinders the business operation; the DOL must be reasonable in its response to alternative time and location requests; and
- should prepare all employees for their interviews (see below).

Prepare All Employees Scheduled for Interviews

You should consider designating wage and hour counsel to prepare employees for the DOL interviews by:

- explaining what to expect; and
- encouraging truthfulness.
- Avoid coercing or intimidating employees into:
 - refusing an interview;
 - providing specific answers; or
 - requesting that a manager be in the interview.
- Inform employees that the interview is voluntary.
- Describe the employees' interview rights, including the right:
 - to have a representative at the interview with them;
 - not* to be video or audio recorded;
 - not* to write out or sign their own statement or the notes of the WHI;
 - to demand a copy of the statement if one is written or signed;
 - to examine document(s) that are the subject of interview questions; and

- to take a break at any time for any reason.
- Offer employees the following interview tips:
 - Always tell the truth.
 - Listen carefully to the question.
 - Answer only the question asked.
 - Give short, concise answers, and wait for the next question (do not fill awkward silences).
 - Stick to the facts and provide only firsthand knowledge.
 - Do not guess or speculate.
 - Answering “I don’t know” or “I don’t remember” is appropriate, when true.
 - Be positive and confident.
 - Do not let the WHI put words into your mouth.
- Remind employees of applicable policies, practices, procedures, and training that they have received. Use records to refresh their memory.

Provide Additional Preparation for Management Employees

- Inform managers that the DOL treats them as your agents, and their statements, admissions, and knowledge are attributed to you.
- When participating in management interviews (or hourly employee interviews at the request of the hourly employee), the interview representative should:
 - take detailed notes (including what questions were asked; what answers were given; and who and which locations, dates, activities, and documents were referenced by the WHI); and
 - help witnesses speak up for their rights.

SECTION VI: CLOSING CONFERENCE, BACK WAGE FINDINGS, AND POST-AUDIT CONSIDERATIONS

Closing Conference

If the DOL intends to issue findings of back wages due, it must conduct a closing conference. A closing conference is generally held at the close of the investigation, which may be weeks after the close of the on-site inspection (generally, simultaneously with or a few days before delivery of back wage findings).

Between the close of on-site inspection activities and the closing conference, the WHI:

- Reviews:
 - documents and records; and
 - interview notes.
- May conduct off-site follow-up employee interviews.
- Researches:
 - standards;
 - interpretations; and
 - directives.
- Calculates proposed:
 - back wages; and
 - penalties.
- Gets the calculation of back wages approved by the WHI’s superiors and finalized.

At the closing conference, the WHI will generally do the following:

- Communicate the DOL’s findings, including clarifying who are the particular employees involved and:
 - standards allegedly violated;
 - bases for alleged violations; and
 - actions necessary for compliance.
- Explain your post-audit rights.
- Not share the identity of any complainants or informants.

During the closing conference, you should:

- Listen carefully and take detailed notes.
- Avoid agreeing with any observations of violations or make or concede damaging admissions.
- List for the WHI any alleged violations that have already been corrected.
- Make no promises.
- Ask the WHI about characterizations and penalty amounts.
- Request time to provide supplemental information to correct any factual errors that form the basis of a proposed finding of violation.

Issuance of a Finding of Violation

Be aware that the DOL will likely issue a press release.

Post-Audit Considerations

After receiving a DOL finding of back wages due, you may:

- Pay the amount without question and accept the DOL's findings. This is rarely the best option.

- Resolve disputed findings and negotiate reduced amounts at an informal settlement conference with the WHI or his/her supervisors. This is generally the best option.
- Contest the findings and negotiate a formal settlement with the DOL's counsel.
- Contest the findings, prepare the defense, and proceed to trial in court.

In deciding whether to contest the DOL's findings, consult counsel and consider:

- Are the alleged violations accurate, and do they amount to an actual violation of law or are they highly exaggerated, based on an untested assertion that may be unnecessary (the DOL was wrong in its interpretation of overtime due pharmaceutical sales reps)?
- Does the finding expose you to costly compliance measures?
- Are proposed penalties excessive?
- Are your sister facilities able and willing to conform to the requirements?

Contact an Epstein Becker Green attorney today to discuss how we can help meet your wage and hour challenges in an efficient, comprehensive, and cost-effective manner.

For more information about wage and hour, visit the Wage and Hour Defense Blog:
<http://www.wagehourblog.com>

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This WHD Investigation Checklist reflects the law as of the date of publication. You should consult with an attorney before relying on any information contained herein, as the law may have changed, and outcomes may vary depending on individual circumstances.