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EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
35th Floor
Chicago, Illinois 60601-7553
312.499.1400

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1925 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 4300
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, DC 20037-1175
202.861.0900

WWW.EBGLAW.COM

GAO Criticizes US Department of Labor Wage and Hour Unit's Investigations into FLSA Violations

On July 15, 2008, the Government Accountability Office (GAO) issued two reports criticizing the United States Department of Labor's Wage and Hour Division (WHD) for mishandling numerous overtime, final paycheck, and back-pay complaints. The GAO reports detailed how WHD employees often failed to thoroughly investigate claims of Fair Labor Standards Act (FLSA) violations or prematurely ended investigations in order to advise complainants of their right to file a private lawsuit. The GAO proposed four specific changes to help the WHD increase efficiency and productivity. Specifically, the GAO recommended that the WHD evaluate complaint data more thoroughly; obtain and utilize input from external stakeholders; incorporate data from WHD commissioned studies; and leverage existing tools to minimize FLSA violations. Employers should consider the potential impact of the GAO reports on future WHD investigations, and the effect they may have on their own operations.

Founded in 1921, the Government Accountability Office audits, evaluates, and investigates federally funded programs on behalf of Congress. In the July 15, 2008, reports, the GAO responded to a Congressional request to determine whether the WHD vigorously enforced the FLSA and put federal funds, allocated for FLSA enforcement, to proper use.

To prepare the report, the GAO analyzed over 70,000 closed WHD cases between 2005 and 2007. The GAO examined WHD case files, interviewed WHD investigators who oversaw the complaints, and reviewed publicly available data about employers. In Congressional testimony, the GAO discussed 15 specific case studies that it cited in the reports as exemplifying inadequate WHD investigations into wage and hour complaints. In one case study, a delivery driver filed a complaint alleging his employer owed him overtime pay for working 55-hour weeks. The WHD waited 17 months before assigning an investigator to the case. Despite the delay, the investigator dismissed the complaint without an investigation or a reason. The case study investigation led the GAO to believe that the WHD insufficiently investigated many complaints and improperly closed cases.

The WHD proactively initiated enforcement actions into four specific industries believed to be common sites for FLSA violations: agriculture, accommodation and food services, manufacturing, and health care and social services. However, WHD-commissioned studies showed that the WHD should focus on low-wage industries, where FLSA violations are more likely to occur. Nevertheless, the WHD continued to devote the majority of its efforts to the previous four sectors. As a result, the GAO concluded that the WHD failed to address the needs of those most vulnerable to FLSA violations.

Change is Brewing

The GAO reports took the WHD to task for a number of agency practices. Responding to the reports, Representative George Miller observed that, “Although the Department of Labor currently has the necessary tools to fight wage theft, the GAO investigation suggests that the problem of wage theft is only getting worse because of weaker enforcement.” *Case Studies From Ongoing Work Show Examples in Which Wage and Hour Division Did Not Adequately Pursue Labor Violations: Hearing before the H. Comm. On Education and Labor, 110th Cong. (2008)* (statement of George Miller, Chairman, H. Comm. on Education and Labor). According to the GAO, the WHD assigned complaints too close to the expiration of certain statute of limitations and refused to investigate complaints that were anonymously submitted. The GAO also chastised the WHD for large reductions in the number of enforcement actions it filed each year. Despite a decrease in available WHD investigators, the GAO report stated that comprehensive investigations into all complaints and thorough screening techniques are still expected. In addition, the GAO advocated increasing the percentage of penalized employers in order to deter willful violators and repeat offenders. The GAO did concede, however, that the increase in collected back wages is a move in the right direction.

GAO’s Recommendations

The GAO will continue to scrutinize the WHD to determine whether these case studies highlight an ongoing problem regarding investigations and resolutions. The GAO recommended that the WHD increase the intensity of its investigations and refocus on low-wage workers who are most vulnerable to FLSA violations, rather than the previous four sectors.

The GAO concluded the reports by insisting that the WHD follow four specific steps to increase productivity:

1. *Evaluate complaint data:* WHD investigators should enter all complaints and subsequent actions in the Wage and Hour Investigative Support and Reporting Database (WHISARD). This information should be used to make staffing decisions and investigative time allocations.
2. *Use external stakeholders:* the WHD should establish a process to incorporate the input of external stakeholders, such as employer associations, worker advocacy groups, and state officials to improve the investigation planning process.
3. *Incorporate WHD studies:* WHD-commissioned studies offer a breadth of information that should be incorporated into the strategic planning process used to improve employer investigations.

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4. *Leverage existing tools:* the WHD should improve hotline, office phone line, partnership, and penalty assessment services, to better serve complainants. The GAO urged the WHD to increase the use and frequency of penalties and to maintain accurate records of FLSA violators in hopes of assessing even harsher penalties to repeat offenders.

What this Means for Employers

The GAO endorsed greater WHD investigations into low-wage industries. As such, low-wage employers may soon find themselves involved in their own investigation, if the GAO's recommendations are followed. In light of the GAO's critique, employers subject to the FLSA should review compliance measures and ready themselves for more exhaustive WHD investigations.

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If you would like additional information or have any questions about how the GAO reports might impact you and your company, please contact Dorothy Rosensweig at (212) 351-4798, or drosensweig@ebglaw.com, or A. Jonathan Trafimow at (212) 351-4573, or jtrafimow@ebglaw.com, in the New York office. Saira Khan, Summer Associate in the Labor and Employment Practice in New York, assisted in the preparation of this Client Alert.

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