

## **KNOCK KNOCK, WHO'S THERE? HOW TO PREPARE FOR A DOL WAGE AND HOUR INVESTIGATION**

Understandably, the thought of a federal Wage and Hour investigator showing up at your workplace, often times unannounced, can result in a fair amount of anxiety. However, there are certain things you can do to prepare in advance so that you can face any investigation with confidence rather than trepidation.

By way of background, The United States Department of Labor (“DOL”) has 611 Wage and Hour Investigators (“WHI”) to cover the entire United States, which is made up of 165 million employees and 11 million workplaces. To break it down further, that is approximately one WHI for every 278,000 workers and every 20,000 workplaces. Significantly, this number does not account for those WHI who may have resigned in accordance with the DOL’s deferred resignation program, which means the number of investigators is likely reduced by another 20%.<sup>1</sup> What this means is the likelihood of being subject to a federal Wage and Hour investigation is low. This does not mean, however, that you should not prepare. Many states have their own wage and hour investigators, and it is predicted that states may play a more critical role in conducting investigations and enforcing labor laws in the future.

### **Tip #1 – Listen to Your Employees**

Wage and Hour initiates investigations in one of two ways – either through a complaint or through targeting of a specific industry. Most investigations of public sector employers will be under the Fair Labor Standards Act (“FLSA”) but Wage and Hour may also conduct investigations under the Family and Medical Leave Act (“FMLA”). Wage and Hour will not reveal how the inspection was initiated nor will they inform you if a complaint has been filed. In the public sector, most investigations will be complaint driven.

As a result, the first tip in addressing Wage and Hour issues is to listen and respond promptly to any pay inquiries raised by an employee (or the union). Providing an employee with a detailed explanation to address any concerns could obviate the need for an employee to seek outside help by filing a Wage and Hour complaint.

### **Tip #2 – Choose a Knowledgeable Management Representative**

If an employee does file a complaint and Wage and Hour is at your door, you can expect that they will first conduct an initial conference where they introduce themselves and discuss the scope of the inspection. The WHI will seek to interview a management representative to get background as to the organization and its operations. At this stage, the key is to have a knowledgeable person designated as the management representative to handle the inspection. Think carefully when selecting this person, as

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<sup>1</sup> These statistics are taken from Workplace Justice Lab’s Data Brief May 2025, “To Help U.S. Workers, We Need Labor Standards Enforcement, Not Mass Deportations,” a collaboration between Rutgers University and Northwestern University.

they should be well-versed in the organization's pay practices across all segments (for example they should be knowledgeable about police, fire and public works pay practices, job classifications and any collective bargaining agreements). The management representative should be able to speak confidently and with authority about a wide range of pay practices. The initial management interview is typically heavily relied upon by Wage and Hour and sets the tone for the investigation moving forward. The representative will want to convey that the organization is cooperative and committed to compliance from the outset. This type of approach goes a long way in making the investigation proceed smoothly. You may also want to consider having an attorney present from the outset of the inspection (see Tip # 4).

At this initial meeting, you can also expect that Wage and Hour will ask whether you employ any minors and request that you provide the nature of their duties and the hours of their work to determine whether there are any violations of the child labor regulations. They will also verify that all required posters are on site.

### **Tip #3 Take Recordkeeping Seriously**

Upon initiating an inspection, the WHI is going to request the employer's records. The WHI may do this either through an informal records request, a subpoena or in very rare occasions (largely used for perceived bad actors) through a warrant. The records the WHI will request include payroll records, timekeeping records which keep track of an employee's daily work hours, as well as any applicable collective bargaining agreements. The WHI may also ask for job descriptions in order to determine whether employees are properly classified as exempt from overtime. Under the FLSA, employers are required to keep payroll records and collective bargaining agreements for at least three years and timekeeping records for at least two years. Keep in mind that state laws may be more onerous, so also be sure to check your state law.

A good rule of practice is to make sure your timekeeping system properly captures all hours worked (for non-exempt employees), including pre- and post- shift work and whether an employee has worked through lunch. Automatic payroll deductions for unpaid lunch and break periods are common sources of underpayments and are strongly discouraged. Updating job descriptions as work duties evolve, particularly for those employees who are classified as exempt from overtime and who routinely work more than 40 hours in a work week is important. Written job descriptions should accurately reflect the work that is being conducted and have enough information in them to justify the applicable exemption. There are countless cases where employers owe back wages because they misclassified an employee as exempt who should have been considered non-exempt and paid overtime. Keep in mind Wage and Hour will likely not fault an employer for improperly paying extra overtime to an employee, above and beyond the statutory requirements. Therefore, when in doubt, employers should consider erring on the side of classifying an employee as non-exempt.

The importance of keeping accurate time records cannot be overstated. Under well-established Wage and Hour law, when an employer's time records are lacking,

employees are afforded a relaxed burden of proof and only need to establish the amount and extent of their work by a “just and reasonable inference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). The Wage and Hour Division has relied heavily on this principle to support back wage claims against employers with poor recordkeeping in Wage and Hour litigation.

We encourage you to consult with legal counsel about responding to records requests. Generally, it can be helpful to comply with records requests fully and completely and ensuring that your management representative (referenced in Tip #2) is well-versed in your recordkeeping practices. Failing to do so may elevate the WHI's concerns about the employer's pay practices and lead to more significant enforcement actions. However, we do recommend that you clarify the scope of the inspection. For example, if the scope of the inspection only involves the public works department, the WHI should not be requesting records relating to the police department. Be sure to read and consider any records requests carefully and don't be afraid to ask questions if needed.

#### **Tip #4 Understand the Process**

While it may be daunting having a WHI onsite at your organization, keep in mind that you are permitted to have an attorney or accountant present with you throughout the process. Your attorney can also assist with preparing management representatives for interviews and are permitted to sit in during on-site inspection activities. Neither your attorney or a management representative can sit in on interviews with non-management employees, however. An attorney can help you determine which interviews you can and cannot attend, and can advocate on your behalf with the WHI for a more expansive list of management employees.

In our experience, the Wage and Hour Division considers private employee interviews to be sacrosanct. This is to allow employees to feel free to disclose information to Wage and Hour without the fear of retaliation. The WHI may interview employees on site but they may also conduct follow-up interviews off-site or by telephone. While Wage and Hour will provide you with information at the close of the investigation, it will not provide you with the names of the employees the WHI interviewed. The identity of these witnesses is protected by the “government informer's privilege” and the identities of such witnesses will only be revealed on the eve of trial (if the matter gets that far). If an employee contacts you for advice on what to say to WHI, our advice is to inform them to listen carefully to the questions, tell the truth, and avoid guessing or speculation.

Recently, some WHI's have begun asking for employer position statements to address particular legal questions, such as whether an employee is properly classified as exempt. This practice was previously rare, if not unheard of. It remains to be seen whether more WHI's will follow this practice. If you are invited to submit a position statement, this is an important opportunity for the employer to be able to advocate on its own behalf, so engaging an attorney knowledgeable in wage-hour law is particularly important if you receive such a request.

At the end of the investigation, the WHI will hold a final conference where they will disclose their findings and inform you of any back wages that may be owed. This is your opportunity to fully understand the WHI's findings so we recommend asking detailed questions regarding the WHI's conclusions and what corrective actions you may need to take. If the WHI has concluded that back wages are owed, the prior practice was to request the immediate payment of back wages and liquidated damages (double damages). The theory behind liquidated damages are to make the employee whole, as the employee has been deprived of the full amount of wages for a period of time. In Field Assistance Bulletin 2025-3 issued June 27, 2025, the Wage and Hour division rescinded the practice of seeking liquidated damages administratively (prior to filing a lawsuit) as exceeding the authority of the Department. However, in the event a matter proceeds to litigation, the Department may still seek liquidated damages in court. Keep in mind that one viable defense to liquidated damages is that the employer acted in "good faith" and relied on the advice of an attorney or accountant when administering its pay practices. As a result, in the event you are faced with litigation over back wage liability, we recommend consulting with an attorney to discuss whether there is a valid defense to liquidated damages in your situation.

#### **Tip #5 Consider a Wage and Hour Internal Audit**

The good faith defense mentioned in Tip #4 is just one reason to consider conducting either an internal or external wage and hour audit. An experienced Wage and Hour attorney can assist you in properly classifying employees as exempt or non-exempt and also assist you in navigating the myriad of legal issues that come up in the public sector relating to wage and hour. The attorney or auditor can also assist you in ensuring that you are in compliance with any state-specific wage and hour laws. Simply put, our recommendation is to be proactive in this area to ensure you are following applicable law.

In sum, in our experience, Wage and Hour is focused on egregious violations of the law and bad actors who have deliberately deprived their employees of wages. Public sector employers, rarely, if at all, fall within this category. This does not mean that you will not be subject to an inspection, as employers do not have any control over whether an employee files a complaint. Nevertheless, if you are prepared and can demonstrate that you have diligently attempted to comply with this very complex area of law you can answer the door with confidence when Wage and Hour knocks.

*This article is not intended to provide legal advice. The facts of any case as well as the state in which a situation arises may render a different result. As always, consult your attorney if you have questions.*

Margaret A. Sewell, Partner

Clark Baird Smith LLP