



Seyfarth Shaw LLP

Spotlight on Wage & Hour Investigations: How to Prepare for and Respond to a DOL Investigation

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Overview



Why Now



What Will We Cover?

Investigation basics

Responding to an investigation

Common questions

What can we do before the investigation?



Wage and Hour Division (Federal)

Structure of Organization

Coordination of Efforts

Current Enforcement Efforts

Who Are the Investigators?

Who Are the Leaders?



The Fissured Workplace

by David Weil

(Current Administrator of Wage & Hour Division)

A maid works at the San Francisco [BRAND] on Fisherman's Wharf. The hotel property is owned by [OWNER], a lodging real estate company. The maid, however, is evaluated and supervised daily and her hours and payroll managed by [MANAGEMENT CO.], a national third-party hotel management company. Yet she follows daily procedures (and risks losing her job for failure to accomplish them) regarding cleaning, room set-up, overall pace, and quality standards established by [BRAND], whose name the property bears.

Anatomy of an Investigation: The “Knock” at the Door



U.S. Department of Labor
Wage and Hour Division
299 East Broward Boulevard, Room 408
Fort Lauderdale, Florida 33301



www.dol.gov/whd/

[VIA IN PERSON]

November 19, 2015

Re: Wage & Hour Investigation

Dear

The Wage and Hour Division (WHD) of the U.S. Department of Labor is responsible for administering and enforcing a number of federal labor laws, including the Fair Labor Standards Act (FLSA). This letter is to inform you of the agency's plans to visit your establishment on **November 20, 2015** to determine your compliance with the FLSA. The enclosed pamphlet briefly describes the FLSA.

Authority for this investigation is contained in Section 11(a) of the FLSA. Section 11(a) states, "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter or which may aid in the enforcement of the provisions of this chapter."

I will visit your establishment on _____ at **10:30 AM** to determine such compliance. The normal procedure is to hold an opening conference with a representative of the company, check certain records for a two-year period, interview a representative number of employees, and hold a closing conference to discuss the results of the investigation.

In order to conduct the investigation with as little disruption to your business operations as possible, please have available for our inspection on the above date, all documents providing the following information for the last two years, ending with your last completed payroll:

- (1) Names, addresses, and telephone numbers of all business owners and company officers (e.g., President, Treasurer, Secretary, Board of Directors and other Corporate Officers) along with a company organizational chart if you have one;
- (2) Legal name of the company and all other names used by the company (e.g., "Doing Business As" names);
- (3) Records demonstrating your gross annual dollar volume of sales. Please provide these records for the **past three years**; example Federal corporate Income Tax Returns – IRS Form 1120
- (4) A list of all employees with their address, hourly rate or salary, descriptive job title, shift, and whether you consider that employee exempt from overtime for all current and former employees;

Working for America's Workforce

- (5) Payroll and time records for the past two weeks, if there are apparent FLSA violations; I will need to see and review the entire two years of payroll and time records.
- (6) Birth dates for all employees under age 18 who worked during the past 24 months
- (7) 1099 Forms and contract documents with any independent contractors, subcontractors or day laborers at this establishment
- (8) Federal Employer Identification Number (FEIN)
- (9) List of addresses of other locations owned by you
- (10) Organizational chart of the business structure
- (11) Employee handbook

We request that you have all of the listed documents available on the designated meeting date pursuant to the authority contained in Section 11(a) and (c) of the FLSA and in Part 516 of the Code of Federal Regulations.

Per section 15(a)(3) of the FLSA, you are prohibited from retaliating against any person who files a complaint with the Wage and Hour Division or who cooperates with a Wage and Hour Division investigation. You are also prohibited from retaliating against your employees for accepting payment of the wages owed to them or from requiring your employee to return or decline payment of the wages owed to them.

Every effort will be made to conduct this investigation expeditiously and with a minimum of inconvenience to you and your employees. However, please note that the above is not intended to be an exhaustive or final list of records to be examined.

If you are unable to be present on the date and time indicated, you may designate a representative to act on your behalf. Additionally, should you or your representative be unable to attend the scheduled meeting, please notify me as soon as possible but no later than the preceding business day.

If you have any questions, feel free to call me at

Sincerely,

Enclosed:

Fact sheets# 44, 77A, and 28D, HRG, FLSA Posters: Spanish & English, Publication # 516.



Anatomy of an Investigation: The Standard Information Request

Names/Addresses of Owners and Officers

Company Name

Annual Dollar Volume

Employee Data

Payroll/Time Records

1099 Information

Sets Initial Conference



Anatomy of an Investigation: Background Work by Investigator

Complaint

Directed or Targeted



Anatomy of an Investigation: Key Events

What's Involved in an Opening Conference?

What Happens After the Opening Conference?

When Do We Get Preliminary Findings?

When is the Final Conference and What Does it Entail?



Anatomy of an Investigation: Potential Outcomes

No Findings

Back Wages

Liquidated Damages

Civil Money Penalties

“Self-Audit”

Expanded Investigation



Anatomy of an Investigation: Potential Outcomes

Litigation Under 16(c)

Notification of Employee Rights
Under 16(b)

16(b) Litigation

Anatomy of an Investigation: The Forms

WH-56

WH-58

Settlement
Agreements

Compliance
Agreements

Consent
Judgments

Anatomy of an Investigation: The Forms

FORM WH-56

Summary of Unpaid Wages

U.S. Department of Labor
Wage and Hour Division



Office Address: Baltimore MD District Office 2 Hopkins Plaza Suite 601 Baltimore, MD 21201 410-962-6211			Investigator: Gwendolyn Pfeiffer		Date: 11/04/2015
			Employer Fed Tax ID Number:		

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
1.		12/10/2011 to 05/24/2014	SCA	\$7,039.73	\$7,039.73
				\$7,039.73	\$7,039.73
2.		12/10/2011 to 05/24/2014	CWHSSA SCA	\$25.60 \$15,330.79	\$25.60 \$15,330.79
				\$15,356.39	\$15,356.39
3.		01/11/2014 to 03/15/2014	SCA	\$572.80	\$572.80
				\$572.80	\$572.80
4.		12/10/2011 to 05/24/2014	SCA	\$4,130.28	\$4,130.28
				\$4,130.28	\$4,130.28
5.		06/08/2013 to 09/28/2013	SCA	\$411.03	\$411.03
				\$411.03	\$411.03
6.		08/03/2013 to 12/07/2013	SCA	\$861.24	\$861.24
				\$861.24	\$861.24

I agree to pay the listed employees the amount due shown above by	Employer Name and Address:	Subtotal: \$28,371.47	\$28,371.47
		Total: \$28,371.47	\$28,371.47
Signed: _____			
Date: _____			

Anatomy of an Investigation: The Forms

Form WH-58

**U.S. Department of Labor
Wage and Hour Division
Receipt for Payment of Back Wages, Liquidated Damages,
Employment Benefits, or Other Compensation**



I, _____, have received payment of wages, liquidated damages, employment
(typed or printed name of employee)
benefits, or other compensation due to me from _____
(name and location of the establishment)

for the period beginning with the workweek ending 10/04/2014 through the
workweek ending 05/02/2015. The amount of the payment I received is shown below.
This payment of wages and other compensation was calculated or approved by the U.S. Department of Labor Wage and Hour
Division (WHD) and is based on the findings of a WHD investigation. This payment is required by the Act(s) indicated below in
the marked box(es):

☒ Fair Labor Standards Act (FLSA)

Gross Amount Back Wages \$13,964.74 Gross Amount Liquidated Damages \$0.00
Legal Deductions from Back Wages _____ Other Amount Paid _____ (please specify type)
Net Amount Received _____

NOTICE TO EMPLOYEE: Your acceptance of this payment of wages and/or other compensation due under the Fair Labor Standards Act (FLSA) or Family Medical Leave Act (FMLA), based on the findings of the WHD means that you have given up the right you have to bring suit on your own behalf for the payment of such unpaid minimum wages or unpaid overtime compensation for the period of time indicated above and an equal amount in liquidated damages, plus attorney's fees and court costs under Section 16(b) of the FLSA or Section 107 of the FMLA. Generally, a suit for unpaid wages or other compensation, including liquidated damages, must be filed within two years of a violation of the FLSA or FMLA. Do not sign this receipt unless you have actually received this payment in the amount indicated above.

RETALIATION AND KICKBACKS PROHIBITED: Your employer is prohibited from retaliating against you for accepting payment of wages you are owed or from requiring you to return or decline payment of the wages owed to you. Your employer is also prohibited from retaliating against any person who files a complaint with the Wage and Hour Division (WHD) or cooperates with a WHD investigation. Your employer is also prohibited from interfering with, restraining, or denying the exercise of Family Medical Leave Act (FMLA) rights. You should contact the WHD immediately if your employer takes any of these actions or fails to comply with the law in the future. Your identity will be kept confidential to the maximum extent possible under existing law. You may contact the WHD by calling 1-866-487-9243 or 213-894-6375.

Signature of employee _____ Date _____
Address _____

I understand that my signature on this receipt and waiver attests to the fact that I have actually received the payment in the amount indicated above of the wages, liquidated damages, or other compensation due to me, and that I waive my right to bring suit as described above, and covering the period set forth above.

EMPLOYER'S CERTIFICATION TO WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR:

I hereby certify that I have on this (Date) _____ paid the above-named employee in full covering lost or denied wages, liquidated damages, or other compensation as stated above. I further certify that I have not and will not retaliate against the above-named employee for accepting this payment and I have not and will not ask the employee to return all or part of this payment to me.

Signature _____ Title _____
(employer or authorized representative)

**PENALTIES INCLUDING FINES OR IMPRISONMENT ARE PRESCRIBED FOR A FALSE
STATEMENT OR MISREPRESENTATION UNDER U.S. CODE, TITLE 18, SEC. 1001**



Anatomy of an Investigation: Options for Resolution

Pay

- Timing
- Process
- Communications
- Un-located employees

Escalate

- Options
- Timing

Contest

- Options
- Timing

Do Nothing

Responding To An Investigation

Pre-Work

- Develop escalation process
- Notify front-line personnel about what to do if contacted
- Make sure posters are posted
- Develop understanding of baseline practices at all locations
- Consider implementing best practice model of pay, timekeeping, and exempt classification
- Consider building a “Wage & Hour Task Force” comprising legal, HR, and Payroll

Responding To An Investigation

First Steps

- *If initiated by letter*
- *If initiated by surprise onsite*

Responding To An Investigation

First Steps

- Information to review
 - List of jobs, exemption status, and compensation levels
 - Samples of pay records, time records, and time-punch / time cards
 - Clock and time / pay computation rules (e.g., rounding, grace periods, meal break deductions, commission / incentive payment calculations)
 - Supervisory hierarchy (looking to see if supervisors actually have enough direct reports, etc.)
- Walk the facility (where are the time clocks? where do employees park? where are the break rooms?)



Responding To An Investigation

Opening Conference

- What to expect
- What information to provide and how

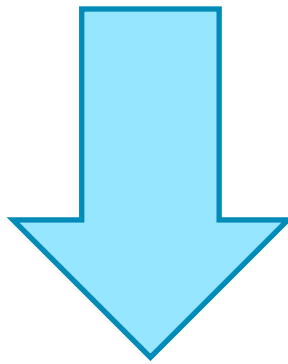
Response to Document and Information Requests

- Sampling
- Facilitate don't impede

Responding To An Investigation

Response to Request to Interview

- What to expect
- What to do about nonexempt employees
- What to do about exempt employees
- What's happening outside the business?





Responding To An Investigation

Responding to Preliminary
Conclusions

Closing/Final Conference



Special Considerations: Multiple Locations

Businesses with multiple locations should notify all locations of the possibility that an investigation will occur and of what to do if one does. A simple message will suffice for now: *“It is possible that a representative from the U.S. Department of Labor’s Wage and Hour Division will contact you about pay and timekeeping practices at your location. If one does, please contact NAME at CONTACT INFO immediately. If the representative appears unannounced at your location, please let them know that you cannot proceed without letting NAME know that he or she is there. You should not provide the representative with information, documents, or access to employees before you coordinate with NAME.”*



Special Considerations: Franchisors

If you have franchise operations, you can let franchisees know that they might also be contacted by a Wage and Hour Division representative. You should not direct them how to respond to the contact. The simple message to franchisees is: *“It is possible that a representative from the U.S. Department of Labor’s Wage and Hour Division will contact you about pay and timekeeping practices at your location. If one does, please let us know. It is your obligation to comply with federal and state wage and hour laws. You should consider seriously whether to engage legal counsel to assist you with this investigation.”*



Special Considerations: Franchisees

If you are a franchisee, you should let the franchisor know if you are investigated. Please note that the investigator will almost certainly request a copy of your franchise agreement. You should decide what your response will be to that request.”

Responding To An Investigation





Common Questions

Must an investigation be initiated by an employee complaint? Or can WHD initiate on its own?

Can an employer refuse to allow an investigator on business property?

Can I refuse to produce records?

Do I have to immediately produce records / employees?

Do I have to let an investigator interview my employees?

Do I really *need* a lawyer?



Common Questions

The investigator seems so nice. Do I even need to worry? (“She says she’s here as a courtesy to help educate us about the law.”)

What can I or you, Ms. Attorney, do in advance of the interviews with those employees?

Who should attend the opening conference?

How much should I say at the opening conference?

The investigator says he wants to interview a bunch of X employees. He didn’t tell me who. How do I select who should be interviewed? And what if they don’t want to be interviewed?

Can a lawyer sit in on my managers’ interviews?

Who can sit in on my non-managerial employees’ interviews?



Common Questions

What if my employees want legal representation (or the Company's attorney) there?

What if my unionized employees would like a union rep there?

How long will it take for the investigator to complete investigation and reach a determination?

Any chance the investigator will forget about my case and never reach a determination?

Am I stuck with whatever decision the investigator makes?

When will we see the investigator's written determination?

Closing Tips



Helpful
Tips

When in doubt, reach out

Stress cooperation, ease, assistance

Always keep records of what you provide

Remember that DOL's servers cannot handle large volume



Questions



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