

## How to Prepare for a DOL Wage and Hour Division FLSA Investigation

Last month, I reviewed tactics now being utilized by the DOL Wage and Hour Division (WHD) that result in significant employer expenses beyond merely paying the back wages. While an investigation is never convenient, you can avoid most of those hassles and expenses with proper planning. Because of the inconvenience and uncertainty of being subjected to an investigation, and the costly outcome if violations are asserted, it is prudent to be well prepared and to know how to deal with the enforcers.

Planning for a WHD investigation should be done long before you hear from an investigator. Being in a state of preparedness will serve you well when that day arrives.

At the conclusion of last month’s “Off the Cuff,” I stated that the October article will include “guidance regarding how you can prepare for an investigation and suggestions for dealing with the investigator and WHD management officials.” In order to allow me to create a more useful and informative article about the “preparation” phase, I am delaying the second part until November. The November article is tentatively titled “How to Deal with the Enforcers.” If you receive a notice of investigation from the WHD prior to receipt of the November BizKeys “Off the Cuff,” [call me](#) or send an [email](#) and I will send an advance copy of the November draft.

The following recommendations should be helpful, but you need not follow them sequentially. Your circumstances might warrant rearranging the order.

- Designate a member of the management team to oversee Fair Labor Standards Act (FLSA) compliance, research and answer questions from employees regarding compliance with the FLSA, and conduct FLSA training for other managers throughout your organization. This person will likely be your human resources director, compensation manager, CFO, CEO, or (in a small business) the proprietor. I shall refer to this designee as your “**FLSA Director**.”
- Develop a plan as to how a branch manager should react if a WHD investigator enters the establishment or if an appointment letter is received. I shall have more to say about this next month. The manager should, at a minimum, call your FLSA Director for guidance.
- Formulate a plan for responding to and dealing with a WHD investigator. In particular, determine who will be authorized to answer the investigator’s questions and provide records. Your FLSA Director is usually the appropriate person, typically with the participation of the manager of the establishment under investigation.
- Ensure that the FLSA poster is displayed in each establishment. The poster is very difficult to read when combined with one of the commercially available multiple-poster displays. FLSA posters may be accessed (for download and printing) at <http://www.dol.gov/whd/resources/posters.htm>.
- Establish an “open-door” policy. It is preferable that employees with questions or concerns about compensation, timekeeping, tip practices, etc. feel comfortable getting answers from their employer in lieu of calling the WHD. Your FLSA Director should investigate and promptly resolve any indications of violations. The employee should be given a clear explanation.
- Create an advisory to be displayed next to the official FLSA poster. This should explain your open-door policy and how employees may discuss concerns with their manager or *confidentially* receive answers to their questions by calling your FLSA Director. Employees who raise questions should be absolutely insulated from discrimination or retaliation.

- Your FLSA Director should become as educated as possible with regard to the FLSA and how it applies to your industry. There are extensive compliance materials on the WHD web site ([www.wagehour.dol.gov](http://www.wagehour.dol.gov)), and numerous non-government resources offer FLSA guidance. Be cautious when researching the FLSA, and verify anything you read that appears to be dubious.
- It is advisable that your FLSA Director obtain specialized technical training from an FLSA expert and legal guidance from an attorney who is experienced in the application of this statute to your industry. Establishing these relationships will be useful “down the road” when complex issues arise or when assistance is needed during a WHD investigation.
- Executives should receive FLSA training, to be administered by your FLSA Director (or, in a large enterprise, a designee will provide the training). In a retail enterprise (including restaurant and lodging establishments), training of branch managers regarding FLSA provisions is vital.
- I recommend that you conduct a **self-audit** of FLSA-related policies and practices. A good place to begin is through the utilization of resources available to [BizKeys](#) members, including the FLSA Self-Audit Guide and the Reference Section A-Z Index. The suggestions that follow are *not* intended to be exhaustive, but these are key areas to include.
  - Scrutinize your employment-related records versus the Code of Federal Regulations, Title 29 Part 516 ([Record Keeping Regulations](#)).
    - The term “deduction” is much broader than the connotation of taking money out of an employee’s pay. For FLSA purposes, a “deduction” includes a job-related expense borne by an employee or monies paid in cash by an employee to an employer.
    - Another misunderstood term is “regular rate.” In order to reflect the correct regular rate in your records, as required by the record keeping regulations, it is essential to comprehend the principles of 29 CFR Part 778 (the [Overtime Compensation Interpretative Bulletin](#)).
    - The record keeping regulations include specific requirements concerning tipped employees.
    - [Service charges](#) are *not* to be recorded as tips. Service charges are supplemental compensation (the regular rate is affected). There are also IRS rules regarding this issue.
    - Record keeping regulations require that the records reflect, weekly, “Total premium pay for overtime hours ---.” This means overtime hours multiplied by 50% of the regular rate. The entry for “regular earnings” or “straight-time compensation” will be total compensation for all hours worked, prior to calculation of the overtime premium compensation. Adhering to these record keeping rules will make it easier to understand and comply with overtime compensation provisions.
    - The date of birth of any employee less than nineteen years of age should be verified and must be recorded.
  - Examine policy manuals and employee handbooks for statements that might encourage FLSA violations. A common such policy is “Overtime work is not permitted without prior authorization from management.” This invariably leads to “off the clock” work. During my WHD career, I found violations in hundreds of establishments with such a policy. An employer obviously has the right to limit hours of work, but it must be done through appropriate management and supervision.
  - Confer with the payroll manager or CFO to learn details about tip policies and practices, methods used to compute overtime compensation, and whether there are complex issues

- (e.g. joint employment, multiple rates of pay, or [tipped employees](#) performing non-tipped work beyond the regulatory limitations) that could lead to violations.
- Ensure that the regular rate computation includes all non-excludable compensation.
  - A common basis for the assertion of minimum wage and overtime violations is the failure to record and pay for all hours of work. Your policies and practices in this regard should be compared to the [Hours Worked Interpretative Bulletin](#).
  - Determine whether job-related expenses cause employees to earn less than the minimum wage. Examples are:
    - Cost of uniforms
    - Maintenance of uniforms
    - Motor vehicle expenses of delivery employees who are owner-operators
  - If any workers are treated as "[independent contractors](#)," ensure that this is a correct classification.
  - Examine exemption classifications for accuracy of determinations.
  - If there are employees who are under eighteen years of age, the child labor standards should be carefully reviewed to ensure compliance.

If your self-audit reveals violations, corrective action should be taken. If there is uncertainty about your conclusions, discuss them with your outside advisors prior to making changes. Achieving compliance is the primary objective. Whether to compute and pay back wages is dependent on several considerations; input is needed from your expert and legal advisors. If the facts are clear, there is rarely a reason not to pay back wages, applying the two-year statute of limitations. You remain vulnerable to a possible assertion that liquidated damages are owed and/or that a three-year period should have been covered.

In summary, the effort and expense of "getting your house in order" and enhancing the ability to communicate with a WHD investigator will save time, money, and aggravation.

I have focused on the Fair Labor Standards Act (FLSA). However, the WHD also has enforcement responsibilities under many other statutes. In the hospitality industry and other retail businesses, the generally applicable WHD laws are the Family and Medical Leave Act, the Employee Polygraph Protection Act, and garnishment provisions of the Consumer Credit Protection Act. The WHD also is responsible for administering various provisions of the Immigration and Nationality Act. Note: It is generally preferable that [I-9](#) forms be filed separately from personnel records.

This article is limited to WHD enforcement. Certain employment-related statutes are enforced by *other* federal agencies. Examples are OSHA, EBSA, EEOC, IRS, DHS/USCIS, NLRB, and HHS/CMS.

It is important to take into account any state law provisions that differ from FLSA requirements (the standards that are most beneficial to employees must be observed).

Next month, I will explain the WHD investigation procedures and make suggestions that will help you to be aware of your rights and to avoid mistakes during the proceedings.

I am not an attorney. This publication does not contain legal advice. The information provided is based on my experience as a Wage and Hour Division enforcement officer (retired) and as a consultant to employers and attorneys. Your specific factual circumstances should be reviewed by your attorney.