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New Incentives to Proactively Achieve FLSA Compliance

The Fair Labor Standards Act (FLSA) is vigorously enforced by the DOL Wage and Hour Division (WHD). There are myriad reasons for scheduling investigations. Any background that influenced the selection of your business for investigation will not likely be revealed to you. Three of the more common reasons for scheduling an investigation are:

- Confidential informant information is received by the WHD
- Your establishment is in a targeted industry
- WHD experiences with similar establishments in the area indicate a high probability of violations

The WHD was *informally* targeting certain industries long before the advent of strategic planning. The hospitality industry has been at or near the top of the list of investigated establishments for at least thirty-five years. The WHD continues to find significant FLSA violations in food and lodging establishments.

If you have not been through a WHD investigation in recent years, you are probably not aware of current tactics. Basic procedures are theoretically the same, but investigation methodology and ramifications for employers have drastically changed. The evolution of enforcement has made it much more costly when an employer fails to maintain FLSA compliance.

From the experiences of my clients in recent years, and based on what I have been told by employment law attorneys and other FLSA consultants, these are *examples* of WHD practices that are costly to employers and, often, unreasonable. Some of these tactics are of dubious legitimacy, and the first one might create confidentiality and security risks.

- Records are sometimes *demanded* in the form of electronic documents to be emailed to the investigator. I am not aware of any legal authority for such a demand, but employers and their attorneys are informed by the investigator that they have no choice.

- The three-year statute of limitations is sometimes threatened or implemented at the beginning of the investigation. One of my clients was told by the investigator “We now cover three years.”

- Employers are being pressured to sign the Form WH-56 Summary of Unpaid Wages without an opportunity to review the accuracy of back wage computations, to obtain the advice of counsel, or to confer with an FLSA consultant.

- Employers are being forced to pay liquidated damages (doubling the back wage bill). It is my understanding that the Form WH-56 Summary of Unpaid Wages now includes liquidated damages, confirming an inference in the WHD strategic plan to the effect that liquidated damages may be assessed administratively (i.e., without litigation). Additionally, the current WHD fact sheet regarding investigation procedures states “In lieu of litigation, the Department may seek back wages, liquidated damages, and civil money penalties, if applicable, through settlements with employers.” My view of this new WHD tactic is that the investigator *threatens* litigation, even when the case does not qualify under the agency’s “potential litigation” criteria, as an excuse to double the back wages.

- Investigators often insist that the employer sign a tolling agreement to allow additional time for completion of the investigation (a tolling agreement freezes the running of the statute of limitations). When an employer resists signing the tolling agreement, the investigator threatens litigation.

- Even when there is no signed tolling agreement, the WHD attempts to prevent an employer from taking advantage of the running of the statute of limitations. It is not unusual for an investigation to be completed months after it was begun. That is ordinarily not the fault of the employer. One of my clients has been under investigation for eight months, through no fault of his. The statute of limitations is, obviously, *statutory*; it is not subject to modification by Wage and Hour Division investigators or managers. Nevertheless, they attempt to collect back wages covering a much greater period than allowed by the plain wording of the FLSA statute of limitations.

- Investigators often make little effort to recognize and grant exemptions, other than the common "white collar" and agricultural exemptions (there are more than thirty-five *other* exemption sections in the FLSA).

- The WHD typically refrains from granting a "good faith defense," even when warranted. The agency's official policy, since 1947, is that violations resulting from the employer's reliance on a regulation or an official ruling or interpretation of the WHD Administrator will not result in a back wage demand from an investigator. The statutory basis for such a position has not changed, but the WHD now threatens litigation rather than to drop a back wage demand. As an example, one of my clients, investigated nearly six years ago, had relied on a regulation and an erroneous exemption explanation in an official Administrator's ruling. These documents were readily available on the WHD web site for eighteen months. The Administrator's ruling was finally corrected during the week when the investigation against my client began. The regulation continues to be erroneous. The WHD district director refused to acknowledge the clear "good faith" defense and threatened litigation. My client's attorney advised the employer that it would not be worth the expense of risking litigation; therefore, back wages were "voluntarily" paid.

In addition to the examples of official or sanctioned unfair treatment of employers, there is another development that results in some employers facing undeserved consequences. Many current WHD investigators and managers possess insufficient technical expertise. This may lead to:

- The inappropriate assertion of violations (a back wage demand when the employer did not actually violate the FLSA), or

- Failure to recognize and assert *actual* violations. This gives an employer a false sense of security. The next investigator might find and assert the violations. The initial investigator's ineptness will not be taken into consideration; the employer is now treated as a "violator" and back wages are demanded. Rather than admit that the first investigator made a mistake, the WHD will take the position that "findings were based on information made available."

The described enforcement tactics and errors are *not* limited geographically. My communications nationally with clients, attorneys, and other FLSA consultants reflect that these tactics are occurring all over the United States.

During my WHD career, the official policies of the agency, and attitudes of most investigators and their superiors, were in sharp contrast to the current state of affairs. We expected each investigated employer (when there were violations) to agree to future compliance and to pay back wages owed during the *two-year* investigation period. Litigation was initiated selectively, and we did *not* threaten litigation as a negotiating tactic unless the case clearly met the "potential litigation" criteria. Liquidated damages (usually equal to the back wages) were assessed only as a component of litigation. We never applied the three-year ("willful") statute of limitations, except when a case was litigated. Records were examined *at the employer's establishment*; removal of records (with the employer's consent, of course) was rare. Statute of limitations tolling agreements were the exception and rarely used, except when back wages were paid under an installment plan. Assessment of a civil money penalty (CMP) was dependent on the facts of the case; official policy was that the CMP enforcement prong was not to be used as a negotiating tool.

It is not my purpose to encourage you to "poke the bear." To be confrontational with a WHD investigator would be a mistake. If you are investigated, you should *assume* that you will be treated fairly and with

respect. Many of the WHD investigators and managers are well trained, conscientious, and professional in how they go about FLSA enforcement. They will be as fair with you as allowed by current WHD policies dictated by the National Office. Irrespective of how you are treated, a WHD investigation is not to be taken lightly, and you probably need legal and expert guidance (especially if violations are asserted).

http://www.dol.gov/whd/regs/compliance/whdfs44.pdf explains the enforcement procedures. In my opinion, this is an incomplete portrayal of possible actions by the WHD during the investigation.

There is no way to prevent an investigation from occurring, but you can *be prepared* for one. I recommend that employers, especially in the hospitality industry, carefully examine practices and policies that relate to FLSA compliance, make corrections when necessary, and look ahead to the day when a WHD investigator will walk through their door. Please keep in mind, if you *are* investigated, that there might *not* be dubious treatment by the investigator or violation assertions. If there are, you do have rights. Above all other considerations, do not sign *anything* without your attorney's concurrence.

As "getting your house in order" is essential as a part of the anticipation of a future investigation, I recommend that you begin by utilizing resources available to BizKeys members, including the FLSA Self-Audit Guide and the Reference Section A-Z Index.

The October "Off the Cuff" will include guidance regarding how you can prepare for an investigation and suggestions for dealing with the investigator and WHD management officials.