

# **U.S. DEPARTMENT OF LABOR INVESTIGATES WAGE AND HOUR ISSUES:**

## **WHY AND WHAT STEPS SHOULD HOTEL AND HOSPITALITY OPERATORS TAKE IN LIGHT OF POSSIBLE AUDITS/INVESTIGATIONS? ©**

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## BACKGROUND

Due to pressure from political influences, the need for increased tax revenues, and possibly due to concerns over illegal immigration, the U.S. Government has stepped up enforcement activities of various targeted industries, including the hotel and hospitality industry. The Wage and Hour Division of the U.S. Department of Labor has the authority to conduct investigations in a particular industry or locality, especially when there are indications of widespread violations. In the past, such a trend occurred where the DOL learned that food and food-service related businesses had a pattern of not complying with the FLSA overtime and child labor provisions.

Let us assume the Wage and Hour Division of the U.S. Department of Labor (DOL) contacts you to investigate or conduct an audit. It turns out that an employee has raised concerns about your pay practices. As a result, the employee is alleging that you have not complied with the wage and hour requirements of the Fair Labor Standards Act (hereinafter "FLSA"). This memorandum discusses what you, as an Employer, can expect from a wage and hour audit and/or investigation.

### A. Purpose of Investigations/Audits—Why Do They Arise?

Employers must understand that the vast majority of wage and hour audits occur due to current or former employee complaints. Many former employees are disgruntled, who have been fired or perceive that they've been mistreated. But, from time to time, targeted industry investigations also occur as a result of a strategic decision by the U.S. Department of Labor.

### B. Investigations/Audits: What Will Occur During One?

#### 1. Contact

An investigator will contact the employer and set up a time to meet to review payroll and time records. Many times, some investigators will just show up at the employer's premises and demand to review documents. **If that occurs, you as the employer do not need to allow the investigator to immediately review documents.** You may, instead, ask the investigator to schedule a time with your labor attorney to schedule a time to talk and then review documents. It is highly recommended that you utilize an experienced labor attorney who can manage the audit and, if needed, then any negotiations with the investigator.

## **2. Scope of Audit/Investigation**

After an audit has commenced, the Wage and Hour Division generally will not limit the scope of its audit/investigation to any specific complaint brought, but rather, **will likely expand the scope to other employees or former employees**. In particular, the Wage and Hour Division will likely review all personnel time records and payroll records to determine whether there has been compliance with all aspects of the FLSA for all current and former employees on the employer's payroll for the past two years (or three years in cases of reported or willful violations). In addition, recently, the Department of Labor has stepped up review of immigration records for certain classes of employees with special visa status.

## **3. What if Violations Are Found?**

In the event an audit reveals certain violations, then the U.S. Department of Labor will generally require that the employer take steps to correct the violations. The DOL will also require the employer to agree to comply into the future, while also making payments towards the back wages found to be owed during the audit. Depending on the jurisdiction, any potential violations with the employer's I-9 forms may be referred to the federal Department of Homeland Security (which has taken over the duties of the Immigration and Naturalization Service). Therefore, please ensure, as an employer, that you make it a practice to self-audit your wage and hour (and immigration) policies, procedures and records at least once annually.

If it is found that you as the employer owe back wages, the DOL will demand that you pay it in full. Moreover, the DOL may also seek a federal injunction to restrain you, as the employer, from committing future violations and may impose civil penalties of up to \$1,000 per violation per employee. Criminal prosecution in rare cases may also occur if the conduct involves known, willful violations. It is important to have a labor attorney involved to protect your rights, including the right to obtain releases from employees for purposes of being sued for back wages and overtime in the event the employer has complied with an audit.

## **C. What Steps Should An Employer Take Now In Response to an Anticipated DOL Audit/Investigation?**

1. Conduct an immediate self-audit of your time records to ensure that all non-exempt employees are accurately keeping time of actual hours worked.
2. Conduct an immediate self-audit of your payroll records to ensure that all non-exempt employees have been paid for all actual hours worked, including any overtime premium.

3. If time and pay records reveal any potential discrepancies, then discuss with the employee (and any supervisor) to correct the errors.
4. To the extent errors exist, document the errors and the steps taken to correct the errors, including any back wage payments. Keep records of all corrections and back wage payments.
5. Review current personnel policies to ensure proper, accurate timekeeping policies/procedures are in place, and also your policy on whether overtime work is authorized or not. Policies should contain a procedure to report errors or complaints. Ensure that all employees receive a copy of these policies.
6. If concern exists that the records (time and pay) have not been maintained in accordance with wage and hour law, then contact an experienced labor attorney to obtain advice and counsel towards a plan of correction. Doing so in advance of any audit will also allow you, as the employer, to claim good-faith. **Using a labor attorney to conduct a self-audit is highly recommended.**
7. If a wage and hour audit or investigation commences, please be courteous and cooperative. Failing to do so may lead to suspicion about your motives.
8. If an investigator arrives on your workplace, as stated earlier, it is highly recommend that you respectfully request a postponement in producing records for a day or two so you can obtain advice from counsel. Please contact your labor attorney immediately.
9. When speaking to the investigator, please do not volunteer any information.
10. That said, while an investigator may not demand that they be permitted to interview employees at the workplace, it may be to your advantage to allow them to conduct those interviews at the workplace. Employees off-site are more likely to exaggerate.
11. Through your labor attorney or by yourself, you can request a meeting with the investigator to learn what the employees are claiming, though the investigator cannot identify the names of the particular employees.
12. You then should be prepared, either on your own or preferably with labor attorney present, to rebut those allegations with additional witness testimony or documentation.

13. After an audit/investigation is completed, the findings are submitted to the employer. If the findings are adverse, you as the employer will have an opportunity to contest them. Negotiations over any back wage findings may also be conducted. Again, it is highly recommended that you obtain advice and counsel from your labor attorney to ensure your rights are fully protected. ©