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702 An Insider's Guide to Working with the Department of Labor

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Faculty Biographies

Anita Drummond

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Tammy McCutchen

Tammy McCutchen, a former administrator of the wage and hour division of the US Department of Labor, is a leading authority on federal and state wage and hour law. Currently, she focuses her practice on auditing and correcting wage and hour compliance issues for management clients and implementing compliance programs designed to avoid disputes and lower potential litigation liabilities.

As administrator of the Labor Department's Wage and Hour Division, Ms. McCutchen was responsible for enforcing some of the country's most comprehensive labor laws, including the Fair Labor Standards Act, the Family and Medical Leave Act, and the Davis-Bacon Act. Ms. McCutchen was a primary architect of the first major changes to the DOL overtime regulations in 50 years. Before her work at the Department of Labor, Ms. McCutchen was senior counsel at Hershey Foods Corporation among other roles.

Ms. McCutchen received a BA from Western Illinois University and a JD from the Northwestern University School of Law.

Salvador Simao

Salvador Simao is a shareholder with Littler Mendleson in Newark, NJ. He focuses his practice on employment law, with an expertise in wage-hour matters. His extensive wage-hour experience includes litigating matters in the US District Courts of New York, New Jersey, and Puerto Rico, as well as in administrative courts, arbitrations and negotiating settlements.

Mr. Simao's wage and hour experience also includes assisting a Fortune 50 company to negotiate the largest private settlement at that time with the Department of Labor as well as providing advice including drafting policies and training to Fortune 500 companies. Mr. Simao is also an expert in conducting efficient wage hour audits. Mr. Simao also worked as a trial attorney at the US Department of Labor, Office of the Solicitor.

He received a BA from Seton Hall University and a JD from the Rutgers School of Law.

Introduction

- *DOL Investigations*
- *Working with DOL to Resolve Self-Discovered Compliance Issues*
- *Avoiding Wage-Hour Problems*

DOL Investigations

Selection for Investigation

- Complaints
 - Employees, unions, competitors, advocacy groups
 - DOL will not disclose whether a complaint has been filed or the source of the complaint
- Targeted Investigations
 - Designed at district or regional level to address specific issue in an industry or geographic area
- Statistically Valid Compliance Surveys
 - National surveys to assess compliance in an industry (e.g., retail) or with a specific FLSA provision (e.g., child labor)

Types of Investigations

- Full Investigation
 - Investigation of all FLSA issues
- Limited Investigation
 - Investigation of specific FLSA issues
- Office Audit
 - Employer produces documents at DOL offices
- Self Audit
 - Employer does fact-finding and computes back wages
- Conciliation
 - Resolution of minor violations by telephone

Scheduled or Unannounced

- Scheduled Investigations
 - By telephone or appointment letter
 - Allows employer to prepare a FLSA compliance presentation and plan a facility tour
- Unannounced Visits
 - The investigator will present official credentials
 - You should have a procedure in place for providing notice to HR and/or Legal
 - You should allow the investigator to proceed

USDOL Investigation Process

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graph TD; A[Investigation Preparation] --> B[Opening Conference]; B --> C[Document Review]; C --> D[Employee Interviews]; D --> E[Back Wage Calculations]; E --> F[Closing Conference];
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Investigation Preparation

- Before arriving at your facility, the Wage and Hour Division (WHD) investigator will:
 - Interview the complainant (if any)
 - Research the employer's enforcement history in the WHISARD database
 - Research the pay practices and violation patterns in the employer's industry
 - Prepare a document request
 - If not already requested by appointment letter or telephone

Opening Conference

- The investigator should begin by presenting his/her official credentials, and explaining purpose of visit and investigation procedure
- The investigator will start to gather information
 - Basic company information
 - General information about the company's employees, work schedules, pay practices, recordkeeping, and employment of minors
- Investigator will request facility tour, documents, and employee interviews

Opening Conference

- Who should attend for the employer?
 - Highest level of manager at the facility
 - HR professional familiar with pay systems
- Employer should use the opening conference to establish itself as a good faith employer
 - Prepare a presentation highlighting the company's compliance efforts
 - Assure the investigator that all employees have been instructed to cooperate fully

The Care and Feeding of A USDOL Investigator

- Always treat with deference and respect
- Provide a private and comfortable room
 - Preferably in an area where the investigator will not have immediate access to employees
- Assign a management employee to facilitate the investigation
 - Gather requested documents
 - Assist with scheduling employee interviews
 - Ensure investigator does not wander unescorted

Facility Tour

- A facility tour is SOP for an investigator
- Best to pre-plan your route and ensure it is free of obvious violations
- Investigators will be looking for:
 - FLSA and other required posters
 - Employees who appear to be under 18, especially in areas with equipment prohibited to minors
 - What type of work is being performed
 - Number of employees and supervisors

Examination of Records

- Types of records
 - Financial records (to establish FLSA coverage)
 - Payroll records
 - Time cards or other records of hours worked
 - Records to establish exemptions
 - Child labor records
- Investigations cover a 2-year time period, but investigator may initially focus on the last few payroll periods or profile workweeks
- If the employer does not provide photocopies or electronic documents, the investigator must sit and take extensive notes

Employee Interviews

- Interviews are usually conducted at the employer's facility, but may also occur
 - At employees' homes or DOL offices
 - By telephone
 - Through the mail using questionnaires
- Investigator should agree to schedule interviews to minimize disruption of operations
- The employer may participate in interviews of exempt managers, but do not push to be present at non-exempt employee interviews

Typical Interview Questions

- *How are you paid? Hourly? Salary?*
- *What is your normal work schedule? More than 40 hours/week?*
- *Are you paid overtime? How? ST? ½ time? Comp time?*
- *Do other employees work more than 40 hours? Who?*
- *How does the company keep time records?*
- *Do you keep a personal record of hours?*
- *Do you get a meal break? How long?*

Typical Interview Questions

- *Do you work before start time? After quitting time? During lunch?*
- *What deductions are taken out of your pay?*
- *Do you receive any bonuses?*
- *What are your primary duties?*
- *What is your academic background? Licenses/ certificates?*
- *Any minors work for the company? Names? Ages? Duties?*
- *What equipment do minors use?*

Closing Conference

- Investigator should:
 - Inform the employer of the violations found
 - Suggest ways to ensure future compliance
 - Present back wage calculations
 - Discuss possibility of CMP assessment
- The employer should:
 - Come to table with settlement authority
 - Assure the investigator that you will comply
 - NOT feel compelled to reach an agreement or pay back wages on the spot

Keys to Successful Resolution of a US DOL Investigation

- Involve attorneys at an early stage
 - But, in most cases, behind the scenes
 - Investigators will feel less threatened working with an HR professional of facility manager
 - If investigation cannot be resolved with the investigator, attorneys can "appeal" to the District Director
- Establish a reputation as a good faith employer and your commitment to compliance
- Cooperate with the investigation
 - Do not give in to unreasonable demands
 - Do not tolerate an abusive investigator

Keys to Successful Resolution of a US DOL Investigation

- Work towards getting the investigator out of your workplace quickly
 - Investigators should start small (spot check of payroll records, a few employee interviews), and close the investigation quickly if satisfied that the employer is in substantial compliance
 - If investigator is not satisfied as to compliance, s/he will expand the investigation
- Commit to taking additional steps to ensure future compliance
 - DOL considers back wages as a necessary but temporary resolution, and thus cares more about future compliance

Working with DOL to Resolve Self-Discovered Compliance Issues

Why Should I Confess to USDOL?

- *Believe it or not:* a WHD investigator can be more reasonable than a plaintiffs' attorney
 - DOL usually will require only 2 years of back pay
 - DOL usually does not ask for 3rd year of back wages, liquidated damages or interest
- Better for public, government and employee relations
- Only way to obtain employee waivers, outside of litigation

Section 16(c) Alternatives

- Supervision of Back Wages
 - The agreement of any employee to accept back wages paid under DOL's supervision "shall upon payment in full constitute a waiver by such employee ..."
- Complaint/Consent Decree
 - Right to file private litigation "shall terminate upon the filing of a complaint by the Secretary ..."

Complaint/Consent Decree

- Advantages
 - Cuts off private rights of action for employees who have not already filed suit, even if they disagree with the back wage amount
 - Complaint and consent decree filed simultaneously and signed by the judge on the same day
 - No fairness hearing, no opportunity for plaintiff's counsel to intervene or object
- Disadvantages
 - Consent decree will contain permanent injunction against future violations of the FLSA

Consent Decree Terms

- Permanent Injunction
- Back Wages
 - Generally 2 years
 - The amount to each employee is listed in "Exhibit A"
 - Effort to locate former employees
 - Back wages for deceased employees
 - Disposition of unclaimed funds
- Interest
 - Generally not required when employer voluntarily approaches the DOL
 - If required, generally use Treasury rate

Supervision of Back Wages

- Advantages
 - Administrative settlement, with no complaint or consent decree
 - Employer does not have to agree to permanent injunction, not subject to contempt proceedings
- Disadvantages
 - Only employees who agree to and accept the back wages waive their right to bring a private action
 - Less streamlined process as obtaining employee signatures may add additional time

WH-58 Waiver Form

- DOL can authorize employer to send the WH-58 waiver forms to employees
- Informs employees that:
 - DOL has reviewed back wage amounts
 - They must sign the form to receive back wages
 - The amount of the back wages they will receive
 - They will waive their right to sue if they accept the back wages
- DOL has become more reluctant to authorize use of WH-58s when they have not conducted a full investigation

What if the DOL Will Not Issue the WH-58s?

- WH-56 Back Wage Summary Form
 - Lists the back wages that the employer has agreed to pay to each employee
 - Acknowledges that the back wages are being paid under DOL supervision
 - If WH-56 used, unclaimed back wages go to DOL
- Company should prepare its own waiver
 - Have employees sign waiver form and include waiver language on the back wage check
 - Waiver language should state that by accepting the back wages, employee is waiving the right to sue

Other Disadvantages

- Tolling Agreement
- Due Diligence
- Press Release
- State Law Issues

Tolling Agreement

- USDOL will require the employer to enter a tolling agreement during negotiations
- New standard agreement requires tolling of private claims, in addition to claims that can be brought by the Secretary of Labor
- USDOL unlikely to depart from standard tolling agreement language

DOL Due Diligence

- Level of review will vary depending on size and type of violations
- Because of recent criticisms and challenges to settlements by the plaintiffs' bar, USDOL seems to have increased its scrutiny of employer self-audits
- USDOL likely will:
 - Review sampling of time and payroll records
 - Test your back wage formulas and calculations
 - Conduct some employee interviews

Press Release

- USDOL likely to issue a press release
 - Will not negotiate over whether to issue or the content of the press release
- However, when employers voluntarily approach USDOL to resolve a compliance issue, the press release generally is favorable
- USDOL may agree to provide the press release to the employer shortly in advance of issuing

State Law Issues

- Remember...
None of this waives state law claims
 - California, of course
 - New York, 6 year statute of limitations
 - Illinois, significant additional penalties
- The employer may want to consider voluntarily contacting targeted states

Impact of the Election

- What to expect from an Obama Administration?
 - Increased budget and more investigators for the Wage & Hour Division
 - During the Bush Administration, the number of investigators declined from 945 to 732.
 - Wage-Hour Administrator with close ties to organized labor
 - More resources to self-initiate investigations, less to resolve employee complaints
 - Decreased cooperation with employers

What Can an Employer Do To Avoid Wage-Hour Liability?

Develop a Wage-Hour Compliance Program

- Prevent compliance issues
- Uncover compliance issues before litigation and retain maximum flexibility to fix issues consistent with business operations
- Develop evidentiary record to establish good faith defenses
- Ensure that employees are paid correctly

Components of a Wage-Hour Compliance Program

- Assess Compliance
- Resolve Compliance Issues
- Review Policies & Procedures
- Implement Complaint Process
- Conduct Training
- Maintaining Compliance

Assess Wage-Hour Practices

- Time & Attendance System
- Payroll Programming
- Classifications
- Other State Law Issues

Resolve Compliance Issues

- Job restructuring
- Reclassification
- Correcting regular rate issues
- Payroll system reprogramming
- Pay back wages

Review Policies & Procedures

- Policies
 - Work Time Policy
 - Payroll Integrity
 - Overtime
 - Meals and Rest Periods
- Procedures
 - Time adjustments
 - Paycheck method, frequency, disclosures
 - Earnings and deduction codes
 - Classification of employees
 - Payment of final wages

Implement Complaint Process

- Treat like other workplace complaints
 - Use existing complaint processes and mechanisms
 - Apply same standards - well publicized, with multiple avenues for complaints
- Follow through on complaints
 - Written investigation procedures, assigning accountability so complaints do not fall through the cracks
 - Ensure confidentiality to extent possible
 - Investigate promptly and thoroughly
 - Fix problems promptly, and provide closure to complaining employee

Conduct Training

- Who
 - Non-exempt employees and their supervisors
- What
 - Issues regarding hours worked, including meal periods
 - Review of company policies, including prohibition against off-the-clock work and payroll integrity
 - Reporting errors and misconduct
 - Managers also should be training on manager misconduct (e.g., requiring off-the-clock work, time shaving) and handling employee complaints
- When
 - Employee orientation, new manager training, and at least every two years
- Where/How
 - Computer-based learning

Maintaining Compliance

- Enforcement of wage-hour policies
- Use of employee acknowledgment
 - Review of hours worked by non-exempt employees
 - Confirmation of job duties by exempt employees during annual performance appraisal process
- Annual audit program
 - Complete and consistent time records
 - Pre- and post-shift activities by employees
 - Employees taking meal and rest periods
 - Review of employee complaints
 - Review compliance with wage-hour processes

ACC Extras

Supplemental resources available on www.acc.com

DOL Guidance on the Proper Classification of Workers as Independent Contractors or Employees.

Quick Reference. May 2009

<http://www.acc.com/legalresources/resource.cfm?show=234603>

Fact Sheet #28: The Family and Medical Leave Act of 1993.

Quick Reference. January 2009

<http://www.acc.com/legalresources/resource.cfm?show=224007>

Tips & Insights: Employment and HR Issues with Gregory R. Watchman.

ACC Docket. March 2008

<http://www.acc.com/legalresources/resource.cfm?show=14370>

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.