

DANCING WITH THE FEDS

DEALING WITH ON-SITE INVESTIGATIONS



Presented By:

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WHO'S ON YOUR DANCE CARD?

- Department of Labor
 - Wage-Hour Division
 - OSHA
 - OFCCP
- EEOC
- NLRB
- Bureau of Immigration & Customs Enforcement (“ICE”)

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EMPLOYERS & LAWYERS, WORKING TOGETHER

OSHA INSPECTIONS

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FIRST CLASS SERVICE, COAST TO COAST

WHY OSHA INVESTIGATES

- Employee complaint
- Employer report of fatality or catastrophe (FAT/CAT)
- Random (general schedule) inspection
- High-hazard industry targeted by OSHA
- Imminent danger or hazard

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OSHA'S RIGHT TO ENTER

- Employer may require warrant
 - Overcomes element of surprise
 - But invites agency wrath
- Plain view exception (seen from public areas)
- Multiple employer worksite exception
 - May get site owner's permission
- Consider negotiating waiver of warrant for narrow scope of inspection

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PREPARING FOR OSHA INSPECTION

- Establish notification system (management & contractors)
- Preserve the accident scene
- Advance planning: decide who will be management's representative
 - Communicate this to all supervisors periodically
 - Emphasize need to refer inspector to the designated rep

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OSHA OPENING CONFERENCE

- No limit on number of employer reps
- Union/employee rep may attend
- Inspector may request company's safety and health program documents
 - OSHA 300 log – past 3 years
 - First reports of injury – past 3 years
 - Annual summary of injuries and illnesses
 - Safety training records
 - HAZCOM, lockout/tagout, confined space, etc.

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OSHA OPENING CONFERENCE

- Inspect investigator's credentials
- Request business card
- Ask what prompted the inspection
 - If complaint, request a copy
- Define what the inspector wants to see (purpose and scope)
- Keep notes of all that is said

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THE OSHA WALKAROUND

- Management and employee reps may accompany
- Limit inspector's visit to site(s) identified in opening conference
- Require the inspector to obey all safety rules
- If inspector notes easily correctable violations, correct them before s/he leaves

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OSHA EMPLOYEE INTERVIEWS

- Employer may deny permission
- If a supervisor, management has right to be present
- If non-supervisory employee, no management right to attend
 - But employee may request supervisor's presence
 - Or employee may decline interview
- Employee may request copy of statement

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HANDLING THE OSHA INSPECTION

- Protecting trade secrets
 - Identify areas containing trade secrets at opening conference
 - Instruct inspector what photos and samples must be labeled confidential
- Management's role during inspection
 - Take detailed notes
 - Take photos if the inspector does (still and/or video cam)
 - Never leave the inspector unattended

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OSHA'S CLOSING CONFERENCE

- Management and employee reps may attend
- Inspector must state whether violations were observed and if so, the nature
- Inspector should explain employer's rights

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Wage & Hour Audits

Wage & Hour Audits

- Department of Labor, Wage and Hour Division
- Compliance with minimum wage and overtime
- Field investigators conduct audits



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2006 Statistics

- \$135.7 million in minimum wage and overtime back wages collected
- \$2.9 million in FLSA civil money penalties
- Most frequent overtime violation:
 - “the employee's primary duty was not ‘the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.’”

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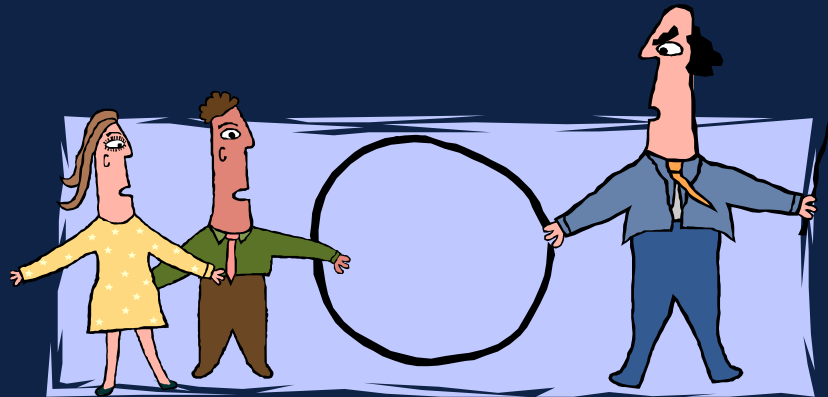
Reason for Investigation

- Random selection
 - Targeting low-wage industries
 - Restaurants and Healthcare
 - Geographic selection
- Complaint by employees
 - Most common reason for audit
 - Confidential

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Notice of Investigation

- May get a surprise visit
 - Need permission or a warrant
 - Don't allow impromptu visits
- Schedule a time
- Consider involving attorney



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Opening Conference

- Ask questions
- Define scope of the investigation
 - Single issue
 - Wall to wall
- Determine what information the investigator wants
 - What records
 - Which employees
 - What time period

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Typical Investigation

- Review records
 - Attendance
 - Payroll
 - Job descriptions
 - Personnel information
 - Bonus or commission plans
- Interview employees

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Control Information

- Take an active role in defining investigation
 - Suggest appropriate records
 - Inquire about sampling
 - Narrow scope as much as possible
 - Explain seasonal variations or other environmental factors
- Only have available what was agreed in advance

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Location Location

- Suggest that the records be available in counsel's office
- If allowing investigator on-site, select an isolated location
- Limit opportunities for investigator to view employees at work or to question employees informally

Employee Interviews

- Does the investigator have a list?
- Can you pick the employees?
- Interview the employee in advance
- Talk to employee afterwards

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Argue Your Case

- Do supply a statement of position
- Present arguments and evidence for applicability of exemptions
- Demonstrate company's good faith

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Closing Conference

- Find out whether investigator found violations
- If not, request confirmation in writing
- If so, ensure remedy and future compliance

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Settlement

- Do your own math
- Deductions available
 - Term of employment/time in position
 - Vacations, holidays, leaves of absence
 - Straight time paid for hours over 40
- If do not have record of hours, negotiate weekly overtime hours first, then take above deductions

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Settlement

- Get release forms from DOL
 - WH-56 lists all employees and backpay
 - WH-58 receipt for payment of wages

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EMPLOYERS & LAWYERS, WORKING TOGETHER

WHEN ICE VISITS

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I-9 INSPECTIONS

- ICE's & DOL's focus is on "high-risk" industries = construction, hospitality, food plants, textile
- Audit usually triggered by tip, wage-hour investigation, or OFCCP audit
- Will usually ask for 10% random sample of all I-9s.
 - And ask for more if problems encountered

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ADVANCE NOTICE REQUIRED

- If warrant presented, cooperate!
- If inspection of I-9s requested, must give 3 days' notice
 - Decline immediate inspection
- Use the 3 days to update the I-9s as necessary (good faith)
 - Analyze classification of independent contractors
 - Suspend workers who cannot be verified

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PREPARING FOR ICE AUDIT

- Separate I-9s from personnel files
- Consider arranging I-9 review at restricted location
- Prepare master list of all employees hired since 11/06/96?
 - Include hire and termination dates
- If ICE asks to see personnel records
 - Negotiate the matter
 - Offer master list instead
 - You may require a warrant

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WHEN ICE VISITS

- Accompany ICE officer at all times on-premises
- If ICE asks to interview employees, decline
- If you agree to produce documents . . .
 - Provide a copy, not the original
 - Consider bringing them to the ICE office

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EEOC On-Site Investigations

EEOC On-Site Investigations

- Not a surprise
- Generally employer has provided position statement
- Sometimes conducted when employer has not cooperated

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Trends

- Regional attorney in Atlanta: stepped-up enforcement
 - More on-sites
 - More subpoenas
- Investigators receiving guidance from legal

Typical Investigation

- Records
 - Personnel files
 - Payroll
 - Job descriptions
- Interview management and non-management employees
- Obtain statements from interviewees
- View worksite—Danger!

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Notice of Investigation

- Generally will receive a written request
 - Usually identifies employees and records
- Schedule a time that gives you time to do your own investigation
- Do not allow impromptu visits
 - Even if they have a subpoena
 - Five days to take exception

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Gatekeeper

- Ask who will be attending
- Cooperate with investigator
- Don't allow EEOC or Charging Party attorneys to participate

Limit Scope in Advance

- Offer to provide written information or affidavits
- Narrow issues for investigation
- Identify records in advance
- Conduct your own review

Control Access

- Have a discrete location available
- Away from employees and worksites
- Bring records to investigator
- Offer to let investigator tab documents and you make copies
- Escort interviewees to/from location

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Witness Interviews

- Meet with each employee in advance of interviews
- Management employees
 - Attorney or representative can be present during interview
 - No signing statements unless attorney reviewed
 - Consider clarifying testimony in interview

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Witness Interviews

- Non-management employees
 - No right to be present during EEOC interview
 - Interview in advance
 - Explain process, stress Company's desire to cooperate and non-retaliation
- Statements
 - Instruct not to sign statements without reading them carefully—make changes if not accurate
 - Tell employee to request a copy

Aftermath

- Meet with interviewees right after interview
 - Ask about interview
 - Ask for copy of statement
- Meet with investigator after finished
 - Did s/he get what needed
 - Offer to answer any questions

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