



**OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.**

Attorneys at Law

2400 N Street, N.W., Fifth Floor
Washington, DC 20037
Telephone: 202.887.0855
Facsimile: 202.887.0866
www.ogletreedeakins.com

Wage and Hour Investigations: How They Happen and How to Respond

By Alfred B. Robinson Jr.
alfred.robinson@ogletreedeakins.com

Under the new Administration, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) has announced that it has “reinvigorated” enforcement activities. It has accomplished this in two ways. First, WHD has hired approximately 220 investigators during the last 18 months and has plans to hire additional ones in this fiscal year. These WHD investigators have been deployed to various WHD district and field offices across the country. Also, many of these investigators have additional qualifications such as experience because they are in a second career or served in the Armed Forces, have foreign language capabilities or possess post-graduate degrees, or combination thereof. They have undergone basic training and are conducting investigations, many times accompanied by a more experienced investigator or manager. Bottomline, WHD has more investigators to conduct more investigations and even the new investigators have other experiences or credentials that will enable them to be aggressive.

The other way WHD is emphasizing enforcement activities is through increasing its initiatives or directed enforcement activities. One such initiative that WHD has had for many years is its low-wage initiatives. The lodging and restaurant industries (or Hospitality industry) are businesses that WHD has targeted on multiple occasions for such “self-directed” investigations. In other words, WHD selects or targets these businesses to investigate even though there is no complaint. These targeted investigations are contrasted from complaint investigations, or enforcement activities that WHD may undertake as a result of a complaint filed with WHD and that it then investigates. In the past, WHD directed or targeted cases have ranged from a low of about 15% to as much as 25% or more of its total caseload, depending upon the

number of investigators. Now with more investigators on staff, WHD can not only conduct the investigations resulting from complaints, but it also can conduct more directed or targeted investigations as the result of initiatives, just like that directed toward the Hospitality industry.

WHD Enforcement Authority and Procedures

Section 11 of the Fair Labor Standards Act (FLSA) empowers WHD to enter an employee's premises to conduct an investigation of the employer's compliance with the FLSA's requirements. These requirements include (1) maintaining certain payroll and employment records; (2) compensating employees for all hours worked; (3) paying employees at least minimum wage and an overtime premium for hours worked in excess of 40 in a work week; and (4) complying with limitations on the hours of work and types of jobs which apply to youth employees under 18 years of age. Other statutes, such as those with immigration work visa programs like the H-2 guest worker program, also charge WHD with administrative and enforcement authorities. In most instances, WHD will follow the same basic procedures in conducting an investigation.

A. Scheduling an Investigation

Most WHD investigations are scheduled in advance by an investigator either by sending a scheduling letter or by telephone call. A scheduling letter is nothing more than a letter informing an employer of a date and time at which the investigator will visit an employer. Oftentimes, the scheduling letter will include a list of documents, records and other information that the investigator will need or review as part of the investigation. The FLSA requires employers to keep records and the regulations specify the exact information an employer should retain.

Sometimes, an investigator will not advise an employer in advance of an investigation; rather, the investigator will make an "unannounced" call on the employer and inform the employer that it is there to conduct an investigation. We are seeing an increased usage of such unannounced investigations. Regardless of the manner in which an investigation schedule, most investigators will work with an employer to conduct the investigation at a convenient time and to

afford an employer the opportunity to gather its employment documents and records. However, if an investigator makes an “unannounced” visit and insists on conducting an investigation right then and there, they legally can insist on that. However, an employer can refuse to permit such an investigator to come upon its premises to conduct an investigation. When contemplating such action, please know that WHD has subpoena power and will not hesitate to use it to gain access to the employer’s premises in order to enforce the law.

B. On-Site Visit

Once on-site, an investigator will present their credentials and conduct an “opening” conference. During this meeting, the investigator will meet with representatives of the employer, explain the purpose and plans of the investigation, inform the employer of what documents and records they will review, provide information on the time period covered by the investigation, advise the employer of whether they plan to interview employees and other relevant aspects of their “fact-finding” investigation. We are finding that investigators are conducting more broad or expansive investigations and not limiting their investigation to one issue involving compliance with the FLSA. Investigators generally will not indicate whether the investigation is the result of a complaint or is part of targeted initiative. Once this opening conference is completed, the investigator may request to take a tour of the facility being investigated.

Another important aspect of a WHD investigation is whether the investigator will expand the geographical reach of the investigation to facilities beyond that visited by the investigator. This will depend on whether the company has other locations where employees perform the same type of work. If so, WHD has a policy pursuant to which the investigator will contact the WHD district office (DO) closest to the company’s headquarters or main office (MO). Oftentimes referred to as the MODO policy, it requires the investigator to coordinate the investigation with the WHD DO office and may result in the WHD DO assuming responsibility for the investigation and expanding the investigation to include other facilities of the company. In addition to trying to limit the issues covered by an investigation, another reason for an employer to be proactive is to limit the geographical scope or reach of an investigation.

An employer has a right to have its attorney or other representative (such as an accountant) present during the investigation. Employers should have a human resource official and/or other location management present as well. These individuals can explain the employer's commitment to compliance with the FLSA or other applicable law, respond to questions, monitor the activities of the investigator, especially regarding employment and payroll documents and records, influence the scope of the investigation and otherwise protect the company's interests.

C. Employee Interviews

One component of most investigations is employee interviews by the investigator. The investigator may interview non-exempt as well as exempt employees. A company official or representative is not permitted to sit-in on the interviews of non-exempt employees; these are private. Generally, a company official or representative is permitted to be present for the interview of an exempt manager. In some cases, investigators will conduct employee interviews after work time by telephone or by sending an employee a questionnaire in the mail. An employer should be perceptive to employee comments of telephonic or mail interviews as they are the subject of a WHD investigation. If the investigator has a list of employees who they wish to interview or allows the employer to pick such employees may provide some insight into the type of investigation it is and its focus.

D. Closing or Final Conference

Once an investigator has completed their fact-finding, review of records, interviewing employees, etc., they will schedule a closing or final conference with the employer to review the findings. The investigator will ensure that the company representatives have authority to make decisions and commit the employer to certain corrective action in the event that the investigator has found violations. During the closing conference, the investigator will review their findings with the employer and seek agreement to pay back wages if any are found due and owing and to commit to comply with the law if there are violations. While an employer is expected to reply at the final conference, there may be reasons for an employer to defer a response – such until the employee has had an opportunity to review the findings, submit a position statement or verify back wage computations. Depending on the size and scope of the violations, an investigator may

request that the employer make such backwage computations, subject to review and verification by WHD.

E. Post-Investigation

In the event that an employer does not agree to comply with the law and/or pay back wages at the closing conference, WHD will continue to make every effort to resolve an investigation at the administrative level. However, failing agreement, WHD may refer its investigatory findings to the Office of the Solicitor for litigation. Also, WHD will notify employees of their right to file a private lawsuit under section 16 of the FLSA. In private litigation, an employer could be liable for back wages, liquidated damages in an amount equal to back wages, attorneys' fees and costs.

Finally, WHD has the authority to assess a civil money penalty (CMP) of up to \$1,100 per violation under the FLSA after an investigation. WHD has an enforcement policy that it can assess a CMP to a repeat or willful violator. A repeat violator is an employer who has a history of a prior violation of the minimum wage or overtime requirements of the FLSA. In order for WHD to assess a CMP against a repeat violator, the violations need not be the same. A willful violator is defined as an employer who knew that the FLSA prohibited its conduct or exhibited "reckless disregard" for compliance with the FLSA.

Conclusion

In April, DOL announced a new public awareness campaign called "We Can Help" in describing its focus on enforcing wage and hour laws. In a speech to unionized employees, organized labor and other workers' rights advocates, Secretary of Labor Hilda Solis warned employers that "a new sheriff is in town" and that the Department would focus on employers who have denied workers their fair wages. Not only is the "We Can Help" campaign designed to encourage employees to report wage and hour violations to WHD, but it also is designed to protect low-wage employees in industries like the Hospitality industry which will be the target of more WHD self-directed investigations. In light of DOL's commitment of its energy, resources and priorities, employers in the Hospitality industry would be well-served to review their

compliance with the FLSA and other visa employment programs and take corrective actions as soon as practicable. Also, employers in the Hospitality industry should be prepared for a visit by the “new sheriff” or a local WHD investigator with little or no warning. Finally, employers in the Hospitality industry would be wise to monitor upcoming regulatory proposals and changes to its sub-regulatory guidance as WHD begins to implement measures that will effectuate the Department’s new “Plan/Prevent/Protect” initiatives.

Mr. Robinson is a shareholder in the Washington DC Office of Ogletree Deakins and was at the Wage and Hour Division (WHD) of the US Department of Labor from 2002 until 2006. He served as the WHD Acting Administrator from 2004 until 2006.

**ATLANTA**

One Ninety One Peachtree Tower
191 Peachtree Street, N.E., Suite 4800
Atlanta, GA 30303
P: (404) 881-1300; F: (404) 870-1732

AUSTIN

301 Congress Avenue, Suite 1150
Austin, TX 78701
P: (512) 344-4700; F: (512) 344-4701

BIRMINGHAM

One Federal Place
1819 5th Avenue North, Suite 1000
Birmingham, AL 35203
P: (205) 328-1900; F: (205) 328-6000

BLOOMFIELD HILLS

33 Bloomfield Hills Pkwy., Suite 120
Bloomfield Hills, MI 48304
P: (248) 593-6400; F: (248) 593-2603

BOSTON

One Boston Place, Suite 3220
Boston, MA 02108
P: (617) 994-5700; F: (617) 994-5701

CHARLESTON

211 King Street, Suite 200
Charleston, SC 29401
P: (843) 853-1300; F: (843) 853-9992

CHARLOTTE

201 South College Street, Suite 2300
Charlotte, NC 28244
P: (704) 342-2588; F: (704) 342-4379

CHICAGO

Two First National Plaza, 25th Floor
20 South Clark Street
Chicago, IL 60603
P: (312) 558-1220; F: (312) 807-3619

CLEVELAND

127 Public Square
4130 Key Tower
Cleveland, OH 44114
P: (216) 241-6100; F: (216) 357-4733

COLUMBIA

1320 Main Street, Suite 600
Columbia, SC 29201
P: (803) 252-1300; F: (803) 254-6517

DALLAS

700 Preston Commons
8117 Preston Road
Dallas, TX 75225
P: (214) 987-3800; F: (214) 987-3927

DENVER

1600 Broadway, Suite 1940
Denver, CO 80202
P: (303) 764-6800; F: (303) 831-9246

GREENSBORO

2725 Horse Pen Creek Road, Suite 101
Greensboro, NC 27410
P: (336) 375-9737; F: (336) 375-4430

GREENVILLE

300 North Main Street
Greenville, SC 29601
P: (864) 271-1300; F: (864) 235-8806

HOUSTON

One Allen Center
500 Dallas Street, Suite 3000
Houston, TX 77002
P: (713) 655-0855; F: (713) 655-0020

INDIANAPOLIS

111 Monument Circle, Suite 4600
Indianapolis, IN 46204
P: (317) 916-1300; F: (317) 916-9076

JACKSON

100 Renaissance, Suite 200
1022 Highland Colony Pkwy.
Ridgeland, MS 39157
P: (601) 360-8444; F: (601) 360-0995

KANSAS CITY

4717 Grand Avenue, Suite 300
Kansas City, MO 64112
P: (816) 471-1301; F: (816) 471-1303

LAS VEGAS

3800 Howard Hughes Pkwy., Suite 1100
Las Vegas, NV 89169
P: (702) 791-7600; F: (702) 369-5694

LOS ANGELES

633 West Fifth Street, 53rd Floor
Los Angeles, CA 90071
P: (213) 239-9800; F: (213) 239-9045

MEMPHIS

International Place, Tower II
6410 Poplar Avenue, Suite 300
Memphis, TN 38119
P: (901) 767-6160; F: (901) 767-7411

MIAMI

701 Brickell Avenue, Suite 2020
Miami, FL 33131
P: (305) 374-0506; F: (305) 374-0456

MINNEAPOLIS

Wells Fargo Center, Suite 3800
90 South Seventh Street
Minneapolis, MN 55402
P: (612) 339-1818; F: (612) 339-0061

MORRISTOWN

10 Madison Avenue, Suite 400
Morristown, NJ 07960
P: (973) 656-1600; F: (973) 656-1611

NASHVILLE

SunTrust Plaza, Suite 1200
401 Commerce Street
Nashville, TN 37219
P: (615) 254-1900; F: (615) 254-1908

NEW ORLEANS

639 Loyola Avenue, Suite 2550
New Orleans, LA 70113
P: (504) 648-3840; F: (504) 648-3859

ORANGE COUNTY

Park Tower, Suite 1500
695 Town Center Drive
Costa Mesa, CA 92626
P: (877) 883-2818; F: (877) 804-5830

PHILADELPHIA

1600 Market Street, Suite 2020
Philadelphia, PA 19103
P: (215) 419-6530; F: (215) 419-6535

PHOENIX

2415 East Camelback Road, Suite 800
Phoenix, AZ 85016
P: (602) 778-3700; F: (602) 778-3750

PITTSBURGH

444 Liberty Avenue, Suite 400
Pittsburgh, PA 15222
P: (412) 394-3333; F: (412) 232-1799

RALEIGH

4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
P: (919) 787-9700; F: (919) 783-9412

SAN ANTONIO

2700 Weston Centre
112 East Pecan Street
San Antonio, TX 78205
P: (210) 354-1300; F: (210) 277-2702

SAN FRANCISCO

Steuart Tower
One Market Plaza, Suite 1300
San Francisco, CA 94105
P: (415) 442-4810; F: (415) 442-4870

ST. LOUIS

7700 Bonhomme Avenue, Suite 650
St. Louis, MO 63105
P: (314) 802-3935; F: (314) 802-3936

ST. THOMAS

1336 Beltjen Road, Suite 201
St. Thomas, VI 00802
P: (340) 714-1235; F: (340) 714-1245

TAMPA

100 North Tampa Street, Suite 3600
Tampa, FL 33602
P: (813) 289-1247; F: (813) 289-6530

TORRANCE

990 West 190th Street, Suite 450
Torrance, CA 90502
P: (310) 217-8191; F: (310) 217-8184

TUCSON

6760 N. Oracle Road, Suite 200
Tucson, AZ 85704
P: (520) 544-0300; F: (520) 544-9675

WASHINGTON, D.C.

2400 N Street, N.W., Fifth Floor
Washington, DC 20037
P: (202) 887-0855; F: (202) 887-0866