

## Preparing for More Wage and Hour Audits

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*February 19, 2015*

The U.S. Department of Labor's Wage and Hour Division is making good on its repeated signals and threats to crack down on Texas employers who violate the Fair Labor Standards Act, especially those in the oil and gas, construction and hospitality industries.

It's not unusual for the Wage and Hour Division to select specific industries and geographic areas to audit for one or two years, rather than wait for an individual complaint, when it suspects that there are widespread industry violations of wage and hour laws. In the past, for example, the division has targeted industry-wide misclassification of certain positions, such as bank loan officers or paralegals.

This time, for fiscal year 2015 (which began October 1, 2014) the main targets are oil and gas, hotel, restaurant and construction employers in DOL's Southwest region. In particular, the focus of the heightened enforcement efforts will be on misclassification of workers as independent contractors, overtime violations and retaliation against employees who question their pay.

### **The Numbers**

The DOL's recent enforcement actions against employers in the area demonstrate that the agency is following through on its promises. Here are a few examples from just the last few months according to DOL/Wage and Hour press releases:

- January 2015: Specialty Painting & Wall Covering/M & S Enterprise paid painters and sheetrock installers \$108,738 in overtime back pay. Specialty paid its employees for 40 hours a week. When the workers went into overtime, they were paid straight time as independent contractors by M & S Enterprise, which also paid all of its own workers as independent contractors.
- January 2015: The DOL filed a lawsuit in Dallas federal court against No-Dig Tec, alleging the company retaliated against its workers for exercising their FLSA rights. The DOL alleges the workers of this underground utility contractor were wrongfully terminated after questioning the employer's pay practices and filing a wage and hour complaint.
- September 2014: Shell Oil and its marketer Motiva Enterprises have agreed to pay more than \$4 million in overtime back wages to current and former chemical and refinery employees. The Wage and Hour Division's Houston office found the companies failed to pay workers for time spent in mandatory pre-shift meetings, and failed to keep accurate time records.

- July 2014: B&D Contracting, a staffing agency that caters to oil field services along the Gulf Coast, agreed to pay more than \$1.6 million in overtime violations. DOL investigators found the company had mischaracterized certain wages as per diem payments and impermissibly excluded the wages from overtime calculations.
- June 2014: Justiss Oil paid almost \$620,000 in back wages, again for failing to pay for time spent in mandatory meetings and failing to keep records of that time.
- June 2014: Big Texan Steak Ranch in Amarillo was assessed \$800,000 in minimum wage violations and penalties after a DOL investigation.

## **How to Prepare**

To be audit-ready, employers first need to understand what the FLSA requires:

- At least minimum wage (\$7.25/hour) when the week's wages are divided by the actual hours worked;
- Time and one-half overtime for all hours worked over 40 in a week;
- Proper classification of employees as nonexempt from the overtime requirements of the FLSA, even when they are highly-skilled workers;
- Proper classification of workers as employees, and not independent contractors, when the work they do is integral to the employer's business purpose or under the employer's direction and control;
- Accurate records of all hours worked, including mandatory activities not part of the normal work day; and
- Non-retaliation.

Employers should conduct a self-audit to assess their compliance and vulnerabilities. Involving an employment attorney in the self-audit process can help shield the results under the attorney-client work product and communication privileges.

## **Employers should review the following:**

1. *Posters and documentation of wages and hours:* The auditor will check that the employer has posted federally mandated wage and hour and FMLA posters. I-9 work authorization forms should be in order, and the employer should have on file three years' worth of time and pay records showing that nonexempt employees' wages averaged at least minimum wage, and overtime was paid properly.
2. *Nonemployee workers:* The auditor will ask for listings of all contractors who did work for the company to assess whether any should have been classified as employees.
3. *Docking:* Most payroll deductions should not bring employees' wages below minimum wage or the minimum overtime rate. Exempt employees whose salaries are improperly docked can lose their overtime exemptions.

4. *Exemptions*: Only certain salaried employees may be classified as exempt from overtime under the FLSA. Simply being paid a salary, having a college degree or doing complex work may not be enough. It is the employer's burden to prove the position meets all the criteria of the exemption.

### **What Happens During an Audit?**

Usually, a Wage and Hour audit will be preceded by a notice letter and request for an appointment. If an auditor shows up unannounced, employers have the right to view credentials and to reschedule in order to prepare documents, obtain legal representation, and ensure the right people are present. Employers should be polite, but assert their rights.

The audit will begin with a preliminary conference, where the auditor will explain the law being investigated and the process. The employer has the right to legal representation during any meetings or interviews with management-level employees, but may not be present during interviews with nonmanagement employees.

The auditor may request payroll and timekeeping documentation, current and past employee lists, contract worker lists, and to view I-9 forms and posters. The auditor will ask to interview certain employees, and if the employer does not grant access during work, will contact those employees at their homes. The employee interviews will include questions about hours worked, pay and overtime received, and, for exempt employees whose classification is questioned, the nature of their work duties.

The investigation will end with a closing conference, where the findings and initial back wage determinations will be presented. This is often a "first offer" and is negotiable. The employer should not sign anything at this time, as an attorney can advise on whether to dispute or negotiate any of the findings.

### **Consequences of Violation**

Back pay determinations go back two years, or three years if a "willful" violation is found. Employers may also be assessed the same amount in liquidated damages, as well as penalties for record-keeping violations.

The DOL's initial assessment can be greatly reduced where employers negotiate pre-litigation settlements, along with promises of future compliance. In addition to monetary consequences, the DOL may report certain investigation findings, such as independent contractor misclassification, to the IRS. Intentionally withholding wages can also lead to criminal charges.

The DOL is getting serious about wage and hour violations in Texas and the major Gulf Coast industries. Employers should act now to ensure they are in compliance, and not wait until the government comes knocking at their doors.

Read more: <http://www.texaslawyer.com/id=1202718404950/Preparing-for-More-Wage-and-Hour-Audits#ixzz3SK86GYs8>

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