

# Developing Your “Break the Glass” Kit: Department of Labor Wage and Hour Division Investigations

Investigations are among the least controlled of government activities and can be extremely intrusive, disruptive, and time-consuming for employers. The U.S. Department of Labor (DOL) has the authority to conduct workplace inspections and to bring enforcement actions against employers found to be in violation of the Fair Labor Standards Act (FLSA) and various other statutes governing wage payments. As the Wage and Hour Division (WHD) conducts virtually its entire litigation “discovery” through record audits and on-site inspections, and the FLSA gives the DOL broad investigative authority, it is critical for employers to prepare for, and to assert their rights and manage the flow of information during, investigations. Various state agencies have similar investigatory powers under state wage and hour laws.

Although cooperation is usually a good idea, *uninformed* cooperation may foreclose various strategic approaches and leave employers vulnerable to the whims of an enforcement agent. Employers should, therefore, develop a “break the glass” kit for handling the initial steps in responding to an investigation, until the stage where outside counsel is involved. Having a plan in place can help ensure that the right people in the organization learn about the investigation promptly, that the investigator receives the proper response to document and witness interview requests, and that the initial contact with government agents does not inadvertently waive rights, set the wrong tone with the investigator, and ultimately expose the business to additional liability.

This guidance document reflects the collective experience of the national Wage and Hour practice group at Epstein Becker Green, which has managed and counseled clients through hundreds of WHD inspections of all types across the nation. This document is intended to provoke thought and outline some key considerations for employers that may be subject to a WHD investigation. Of course, every investigation is unique, and how an employer responds in practice depends upon various factors, such as the nature/seriousness of inquiry, the breadth of inquiry, and the size/resources of its organization.

## What to Expect

Wage and hour investigations may arise from employee complaints, industry-focused enforcement initiatives, follow-up on previous investigations, information from third parties, media reports, congressional inquiries, and more. The manner in which the WHD first contacts an employer can vary considerably. An investigator may make a simple inquiry by telephone, or even approach employees outside of normal working hours at their homes. The WHD may also send a notice of inspection by mail, which may go to a company’s headquarters (or what the agency believes to be the headquarters) or a local or branch site. Employers may first learn of an investigation through an unannounced workplace visit, where investigators will likely ask to speak with managers, as well as non-exempt employees outside the presence of managers. Depending on the issues involved, investigators may seek to review payroll or other employee records while on-site.

While there is no way to know how or when a WHD investigation may occur, thoughtful planning and preparation will allow employers to successfully navigate the agency’s initial contact and mitigate the cost and disruption to their business.

## Prepare for the Initial Contact

Whether expected or unannounced, an employer’s initial contact with the WHD is a pivotal moment in any investigation. While it certainly helps to get off on the right foot, well-intentioned employees may unwittingly consent

to broad searches of records or areas in the workplace. Instead of blindly cooperating with investigators, employers should first gather as much information as possible to determine the scope of the investigation. For example, an employee who is contacted by the government should know to discover and confirm the identity of the agents, the agencies they represent, and their contact information. The employee should politely inquire as to the nature of the agents' visit, ask why the investigation was initiated, and explain that any substantive inquiries by the agents must be directed to company's designated point person for this type of investigation, which may mean inside or outside counsel, senior human resources personnel, or senior management.

The employee who receives the initial contact may not be the employer's general counsel or legal department. Frequently, the first person to speak to a WHD investigator is a receptionist or other non-managerial employee who happens to answer the phone or open the day's mail. Employers, therefore, should cast a wide net and train any employee who might have some interaction with WHD investigators.

Employers should use "cheat sheets" and one-page guidance documents for emergency situations, government visitors, and legal service, such as the sample attached below. By providing employees and staff with easy access to key information and step-by-step instructions, employers can ensure that their in-house and outside legal counsel can direct the matter from the earliest possible stage.

## **Develop a Response Plan**

WHD investigations can start suddenly and progress very quickly. Employers should work with their attorneys to develop one or more response plans tailored to the laws of each workplace. A response plan should include the following information:

- How the company will staff the investigation (i.e., outside experts)
- Step-by-step instructions for the initial contact
- Assurance that all employees know it is the company's policy to cooperate fully during an investigation or inquiry
- Whether an internal investigation will be initiated and its procedure
- Document production procedures
- A process for notifying employees that WHD investigators may request an interview, and that the employees have a right to cooperate or refuse
- A disclosure and public relations policy
- Identification of a senior official as a designated person (DP) and others as alternative DPs

In addition to training managers, employers should disseminate and make available the plan to all employees who could be in a position to have the first interaction with the agency. The numbers for any call hotlines or call trees used for rapid response should be readily available, and building security personnel should be aware of procedures for contacting the designated person or alternative designated persons.

## **Keep "House" in Order**

Employers can further limit the cost and hardship of an investigation by working with legal counsel to establish a comprehensive compliance program. Searches and requests for documents may be limited in scope by keeping privileged documents clearly marked and segregated. Business interruptions can be mitigated by maintaining an updated copy of essential records off-site (i.e., backup computer systems). Employers should regularly review and update the response plan in accordance with the latest agency guidance and refresh response plan training for key employees.

# Guidance for Initial Contact by Department of Labor Wage and Hour Division

The following steps should be taken in the event you are contacted by the Department of Labor Wage and Hour Division (DOL WHD). Please review these guidelines regularly.

## **Unexpected DOL WHD Site Visit:**

1. Cooperate but do not consent to anything without contacting the company's Legal Department first.
  - You can politely say, "Our Legal Department told us we must contact them immediately before letting you do anything or accessing our work space."
  - Don't answer any specific questions.
  - Politely ask the investigators to wait for the company's legal counsel (or other designated person).
2. Ask to see the investigator's badge/credentials.
  - Record the investigator's name and contact information.
3. Contact Legal at \_\_\_\_\_ or by phone ( \_\_\_\_\_ or \_\_\_\_\_). If you are not able to reach anyone in Legal, please leave a message and then contact \_\_\_\_\_ at [list contact information].
  - Legal will direct you on what to do (and will give a heads-up to Physical Security at \_\_\_\_\_).
    - » Legal may tell you to ask the government to wait for the company's legal counsel and/or to contact Office Leadership.
    - » Do not sign any documents presented by officials without approval from Legal.
4. Have a company employee (preferably Legal or an Office Leader) stay with the officials at all times and take notes on what they do, including questions asked and materials they request to copy or remove.
  - Do not authorize the removal of materials without approval from Legal.
5. Do not communicate with anyone inside or outside the company without business need to know.
  - Ban photos and social media.
6. Do not delete or destroy anything; do not obstruct or interfere with the officials' actions.
7. Ask for follow-up actions and expected communication that the company can receive in reference to the visit.

## **Legal Documents/Communications Received in Other Ways:**

1. Email the Legal Department at \_\_\_\_\_.
2. Do not correspond with any attorney outside of the company (unless at the direction of the company's Legal Department).

## **Telephone Inquiry:**

1. Ascertain the name of the government agent and the agency he/she represents.
2. Request the telephone number where the agent can be contacted.
3. Advise the agent that a corporate representative will immediately return his/her call.
4. Have the designated person promptly return the call, preferably in the presence of/after speaking with company's in-house or outside counsel.