

# DOL/WHD Investigations

**Jill Jensen-Welch, Attorney and Shareholder**  
**Mike Staebell, Compliance Specialist**

Dickinson, Mackaman, Tyler & Hagen, PC  
699 Walnut Street, Suite 1600, Des Moines, Iowa 50309  
[www.dickinsonlaw.com](http://www.dickinsonlaw.com)  
515.244.2600



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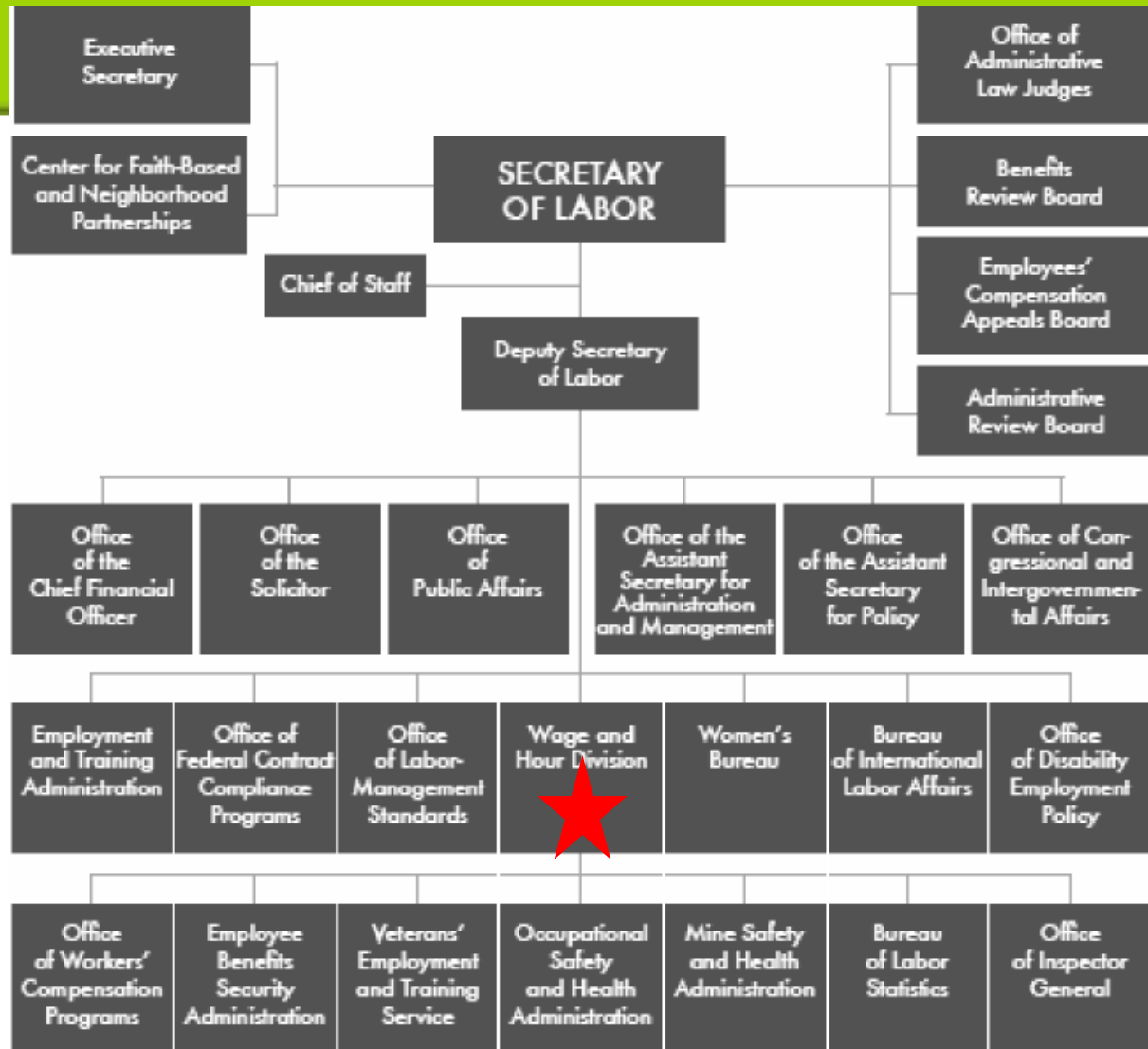
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- It is not intended and it should not be construed or relied upon as legal advice.
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- Consult with your own legal counsel before taking action or making changes.

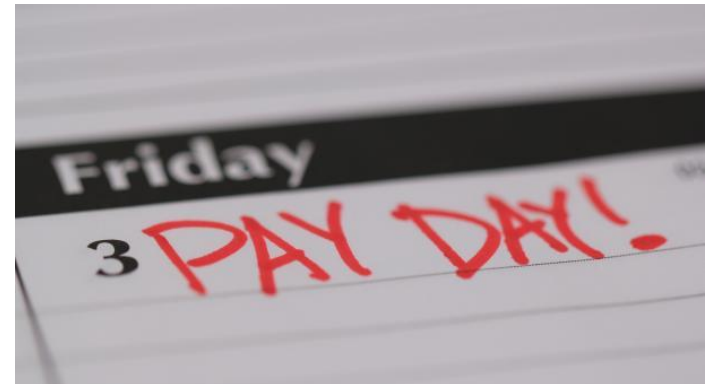


# DOL



# Major Laws Investigated by WHD

- FLSA
  - Child Labor
  - Minimum Wage
  - Overtime
  - Pay for hrs worked
  - Recordkeeping
  - Misclassifications
    - Exempt/Non-Exempt
    - Employee/Independent Contractor
  - Meal and break periods
  - Payroll practices
- FMLA
- IRCA (I-9s)
- Garnishments
- Davis-Bacon Wages
- H1-B Wages
- ETC...



# Triggers



1. Complaint made by a worker
2. Competitor complaints
3. Re-inspection following a previous violation
4. Targeted industry checks



# Employer Don'ts



KEEP  
CALM  
AND  
DON'T  
ASK ME

- A. Ask Why or guess why – whether in front of the investigator or when s/he's gone
- B. Ask or guess about who complained – whether in front of the investigator or when s/he's gone
- C. Talk about, or Retaliate against, presumed complainer(s)
- D. Obstruct or Lie – to the investigator or ask others to do so



# Employer Dos



- A. Confirm Credentials
- B. Cooperate Courteously,
  - But don't be a push-over
  - Involve professionals: Attorneys, Accountants
  - When pushing back/challenging/questioning, do so gently
- C. Provide Reasonable Assistance
  - Don't offer more than asked
  - Negotiate politely against what seems unreasonable
- D. Present Organized Records

# STEP 1: Notice and Document Review



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# DOL/WHD Authority to Investigate

## FLSA

§ 211(a) Collection of data (a) Investigations and inspections The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.



# Employer Obligation to Keep Records

## FLSA

§ 211(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.



# Notice



# Response to Notice



A. Require a Subpoena → Refuse entry or cooperation without a subpoena

B. Delay → Reschedule for a more convenient time, time to get to attorney, or ask for more time to respond (base on business reasons)

C. Go Forward as Asked → Let them in; go ahead with their requests and deadlines without question or delay



# Document Review

- **Company Information**

- Revenues and proof of Interstate Commerce
- Legal structure & Owners
- Government Contracts
- Policies and CBAs

- **Employee Information**

- Employee Lists with phone & address
- Timekeeping records
- P/R records
- Employee Files (e.g., FMLA files)

- **Position Information**

- Job descriptions
- Exempt/Non-Exempt designations
- Independent Contractor lists and contracts



# Docs

1. The business names under which you have conducted business, the addresses at which such businesses have been conducted, and the Federal Tax ID number for each location.
2. Names and ownership percentages of corporate owners, partners, or sole proprietors.
3. Records or documents which reflect the annual dollar volume of business done for each business entity for the past three years (e.g. tax return, end-of-year financial summary, profit/loss statement).
4. A list of all employees for the past two years (current and former). Please include name, address, telephone number, position, pay rate, and period of employment. Please also provide the date of birth for employees under the age of 18 (*including those employed while under the age of 18 anytime during the past 2 years*).
5. A copy of the time and payroll records for the most recently ended pay period prior to my contact (May 7th ending pay period) along with the time and pay roll records for the pay period ending April 30th. In addition, I will need time and payroll records for four (4) pay periods from the past two years: two adjacent pay periods in the beginning of August 2013, and two adjacent pay periods in the beginning of November 2014. The payroll records should convey the employees' rates of pay, total hours worked each workweek, gross pay, deductions, and actual wages paid. The time records should correspond to the payroll records provided. Please do not include pay periods that have holidays within them.
6. A list of all salaried employees considered FLSA/overtime exempt. Please include name, position, the exemption claimed, salary, and the time period on salary.
7. A list of all persons classified as independent contractors and/or paid on a 1099 along with all of their contact information including telephone number. Please delineate those that work for a subcontracted company (include company name) and those that work for themselves.
8. A copy of the employee handbook (if available).

Other records may be required. This will be determined during the course of this investigation.



# Game for Anything

**Once DOL starts an investigation under one law, anything they see or hear that gets into another law DOL enforces can be fair game—and the investigation can be expanded discretionarily.**



# Step 2: Opening Conference





# Opening Conference

- **At your business**
- **With Employer representatives**
- **Discussion Points**
  - Purpose of Investigation
  - General Scope of Investigation
  - Initial Expectations and Process
  - Cover std questions
  - Gather documents
  - Tour Facility
  - May interview workers



# Tension

## WHD

- Establish applicability of law(s)
- Interview workers w/o interference from Employer

## Employers

- Maintain secrecy of business info
- Maintain worker privacy



# Step 3: Employee Interviews



# Employee Interviews

- **Purpose**

- Test employer's records and statements
- Look for possible violations of law
- Test exempt designations
- Test pay and pay methods

- **Attendees**

- Employer rep can attend interviews of supervisors and managers
- Employer rep cannot attend non-sup/non-mgr interviews

- **Format Options for Interviews**

- In person
- By phone
- By written questionnaire



# What Are They Looking For?

- **Compliance with federal law & state law** (Memorandum of Understanding with IWD)
- **Exempt Classifications** (e.g., misclassified job, improper pay-docking)
- **Independent Contractors who are really employees**
- **Pay Violations for Non-Exempts** (e.g., min. wage, comp time, travel time, training time, breaks/meals, intern pay, tips)
- **OT Calculation Errors** (e.g., bonuses, gifts, non-working time)
- **Garnishment errors**
- **Records & Poster Violations**
- **Retaliation**



# Step 4: Closing Conference

- Review findings
- Give guidance/education
- Recommend/Require corrective actions
- Seek payment & voluntary compliance agreement
  - Refuse to comply
  - Defer agreement
  - Agree on the spot
- Payments usually include releases



# Costs and Penalties

- Wages due (including overtime)
- Liquidated damages
- Injunction
- Civil Penalties
- Criminal Penalties



# Step 5: The Final Paperwork





# WH-56

## Summary of Unpaid Wages

U.S. Department of Labor  
Wage and Hour Division



**Office Address:** Des Moines IA District Office  
210 Walnut Street  
Room 643  
Des Moines, IA 50309  
515-284-4625

**Investigator:**  
Melissa Wright

**Date:**  
09/02/2015

**Employer Fed Tax ID Number:** [REDACTED]

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. BWs Due	Total
1. [REDACTED]	[REDACTED]	04/09/2014 to 05/20/2015	FLSA	\$1,455.66	\$1,455.66
				\$1,455.66	\$1,455.66
2. [REDACTED]	[REDACTED]	04/09/2014 to 08/12/2015	FLSA	\$1,434.42	\$1,434.42
				\$1,434.42	\$1,434.42

I agree to pay the listed employees the amount due shown above by 10/02/2015

**Employer Name and Address:**

[REDACTED]

<b>Subtotal:</b>	\$2,890.08	\$2,890.08
<b>Total:</b>	\$2,890.08	\$2,890.08

**Signed:** \_\_\_\_\_

**Date:** \_\_\_\_\_

Form WH-56

Date: 09/02/2015 12:08:39 PM

Case ID: [REDACTED]

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# Instructions

## BACK WAGE DISBURSEMENT AND PAY EVIDENCE INSTRUCTIONS

As provided in the acts enforced by the Wage and Hour Division, the Administrator of the Wage and Hour Division is authorized to supervise the payment of back wages. This document contains specific instructions on providing evidence of payments to the Wage and Hour Division.

**Per our agreement, your firm will make full back wage payment on or before:** **October 2, 2015**

**Preliminary Back Wage Evidence Due:** **October 9, 2015**

A report listing employee's name, check number, gross and net amounts paid.

**Final Proof of Payment Due:** **November 1, 2015**

Original WH-58 Forms, canceled checks (front & back), a bank statement indicating debits (check or direct deposit), or bank records showing minimized copies of the front of checks, annotating clearance.

Provide a list of anyone who has not been paid, including name, last known address, phone number, e-mail address, and Social Security number.

Provide copies of any envelopes returned to you as undelivered by the Post Office.

**Wage and Hour Contact:** **November 6, 2015**

No further action should be taken until you receive instructions regarding payments to unlocated or unpaid employees. Payment to the WHD on behalf of these employees will be required within 10 days of your receipt of written instructions.

**Above check to be received no later than:** **November 16, 2015**

**Send all back wage evidence to the following address:**

U.S. Department of Labor-WHD	Phone: (515) 323-2196
Attn: Melanie Donahue	Fax: (515) 323-2196
210 Walnut Street, Suite 643	E-mail: <a href="mailto:donahue.melanie@dol.gov">donahue.melanie@dol.gov</a>
Des Moines, IA 50309	

### If you fail to make payment:

Any defaulted balance shall be subject to the assessment of interest and penalty interest at rates determined by the U.S. Treasury as required by the Debt Collection Improvement Act of 1996 (Public Law 104-134) published by the Secretary of the Treasury in the Federal Register. Other delinquent charges and administrative costs shall also be assessed. In the event of default, the Department intends to pursue additional collection action that may include, but is not limited to, administrative offset, referral of the account to credit reporting agencies, private collection agencies, U.S. Treasury's Debt Management Service, and/or the Department of Justice.



# WH-58

**U.S. Department of Labor  
Wage and Hour Division  
Receipt for Payment of Back Wages, Liquidated Damages,  
Employment Benefits, or Other Compensation**



I, [REDACTED], have received payment of wages, liquidated damages, employment benefits, or other compensation due to me from [REDACTED].  
(typed or printed name of employee) (name and location of the establishment)  
[REDACTED] Des Moines IA [REDACTED]

for the period beginning with the workweek ending 04/09/2014 through the workweek ending 08/12/2015. The amount of the payment I received is shown below. This payment of wages and other compensation was calculated or approved by the U.S. Department of Labor Wage and Hour Division (WHD) and is based on the findings of a WHD investigation. This payment is required by the Act(s) indicated below in the marked box(es):

Fair Labor Standards Act ( FLSA )

Gross Amount Back Wages \$1,434.42 Gross Amount Liquidated Damages \$0.00  
Legal Deductions from Back Wages \$448.75 Other Amount Paid \_\_\_\_\_  
Net Amount Received \$985.67 (please specify type)

**NOTICE TO EMPLOYEE:** Your acceptance of this payment of wages and/or other compensation due under the Fair Labor Standards Act (FLSA) or Family Medical Leave Act (FMLA), based on the findings of the WHD means that you have given up the right you have to bring suit on your own behalf for the payment of such unpaid minimum wages or unpaid overtime compensation for the period of time indicated above and an equal amount in liquidated damages, plus attorney's fees and court costs under Section 16(b) of the FLSA or Section 107 of the FMLA. Generally, a suit for unpaid wages or other compensation, including liquidated damages, must be filed within two years of a violation of the FLSA or FMLA. Do not sign this receipt unless you have actually received this payment in the amount indicated above.

**RETALIATION AND KICKBACKS PROHIBITED:** Your employer is prohibited from retaliating against you for accepting payment of wages you are owed or from requiring you to return or decline payment of the wages owed to you. Your employer is also prohibited from retaliating against any person who files a complaint with the Wage and Hour Division (WHD) or cooperates with a WHD investigation. Your employer is also prohibited from interfering with, restraining, or denying the exercise of Family Medical Leave Act (FMLA) rights. You should contact the WHD immediately if your employer takes any of these actions or fails to comply with the law in the future. Your identity will be kept confidential to the maximum extent possible under existing law. You may contact the WHD by calling 1-866-487-9243 or 515-284-4625 .

Signature of employee [REDACTED] Date 10/1/15  
Address [REDACTED] Des Moines IA [REDACTED]

I understand that my signature on this receipt and waiver attests to the fact that I have actually received the payment in the amount indicated above of the wages, liquidated damages, or other compensation due to me, and that I waive my right to bring suit as described above, and covering the period set forth above.

**EMPLOYER'S CERTIFICATION TO WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR:**

I hereby certify that I have on this (Date) October 1, 2015 paid the above-named employee in full covering lost or denied wages, liquidated damages, or other compensation as stated above. I further certify that I have not and will not retaliate against the above-named employee for accepting this payment and I have not and will not ask the employee to return all or part of this payment to me.

Signature Jill Gesein-Welch Title Attorney for [REDACTED]  
(employer or authorized representative)



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**PENALTIES INCLUDING FINES OR IMPRISONMENT ARE PRESCRIBED FOR A FALSE STATEMENT OR MISREPRESENTATION UNDER U.S. CODE, TITLE 18, SEC. 1001**

# FMLA Investigations

- Rare
  - Initiative to increase FMLA investigations a few years ago was abandoned
  - Usually handled via phone
  - FMLA investigations usually cover one employee's specific situation, so complainant's identity can't be protected
  - Employee lawsuits are more likely than WHD investigations
- Common Violations
  - Refusing to offer/provide/authorize FMLA leave
  - Discouraging use of FMLA
  - Manipulating work hours to avoid use of FMLA
  - Using FMLA requests as negative factors in employment decisions (hiring, promotion, discipline)
  - Counting time on light duty as FMLA
  - Not keeping FMLA (medical) records separate from regular personnel files



# FMLA Investigations

## Tips for Surviving an FMLA Investigation

- Have an up-to-date Policy (last regulatory changes were effective 3/2015)
- Use the most current FMLA forms 7/2018  
<https://www.dol.gov/whd/fmla/2013rule/militaryForms.htm>
- Post the most recent Poster (4/2016)
- Separate FMLA documents from personnel files (requests, med certs, FFD certs, doctor's notes)
- Check your handling of "key employees"
- Check your handling and accounting of Intermittent leaves
- Check you handling of certifications
- Train managers



# Thank you!



Jill Jensen-Welch  
Michael Staebell

[jjensen@dickinsonlaw.com](mailto:jjensen@dickinsonlaw.com)  
[mstaebell@dickinsonlaw.com](mailto:mstaebell@dickinsonlaw.com)

515-244-2600



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