Wage & Hour:  
Managing this Risk in a New Era of Enforcement

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Vice President Compliance & Ethics Services

Ms. Hutchens is Vice President of Compliance and Ethics Services for Watermark Risk Management International. She is a former federal prosecutor and is experienced in advising executive management on compliance and ethics matters and helping corporations meet the requirements of the Federal Sentencing Guidelines and the Federal Acquisition Regulation. Certified by the Society of Corporate Compliance and Ethics as a Compliance and Ethics Professional, she is a leading consultant on all aspects of compliance programs, to include risk assessment, policy drafting, employee training, development of codes of conduct, and implementation of monitoring and investigative protocols.
Overview

- DOL WHD Enforcement Philosophy and Focus
- 2011 Enforcement Statistics
- Targeted Enforcement Industries
- Employer Resources
- New Local Initiatives for Outreach/Enforcement
- State Trends
- Integrating Wage & Hour into Your Corporate Compliance Program

WAGE & HOUR UPDATE

“Make no mistake, the DOL is back in the enforcement business.” June 29, 2009

“The day after President Obama named me Labor Secretary, I said there's a new sheriff in town. And I meant it.” August 6, 2011

Hilda Solis, Secretary of Labor
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• Philosophy: enforcement alone is not sufficient and given the tools, most employers want to comply with the law
• Enforcement will be focused on “achieving sustainable compliance”
• 2011-2016 DOL Strategic Plan sets forth strategies, initiatives and goals
• The plan is about “workers, accountability and doing what works”
• Targeted and directed investigations will continue, “Compliance Evaluations” will point to solutions

“Plan, Prevent, Protect”

“The Labor Department's goal is to foster a wide-ranging culture of responsibility and compliance with a focus on prevention. To achieve this goal, a new system is needed to replace "catch me if you can." Employers and other regulated entities should be encouraged to plan to prevent violations and protect workers, while the Labor Department's worker protection agencies should create and strategically deploy the tools needed to ensure that employers and other regulated entities that continually fail, or simply refuse, to comply with the law are held accountable.”

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- Enforcement Focus Area – Misclassification
- DOL: “alarming trend” with “significant violations”
- WHY IS THIS IMPORTANT? Misclassification deprives a worker of federal and state employment law protections and deprives the governments of taxes they otherwise would be receiving.
- Enforcement approach: directed investigations focused on industries where misclassification is prevalent.
- VP Joe Biden’s Middle Class Task Force, Misclassification Initiative was launched. Lead to DOL entering into MOU with IRS and 12 states to cooperate in sharing resources and data on misclassification (contractor/employee)

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WAGE & HOUR UPDATE

<table>
<thead>
<tr>
<th>Wage &amp; Hour Division</th>
<th>FY 2009</th>
<th>FY 2010</th>
<th>FY 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Back Wages Collected</td>
<td>$172,615,125</td>
<td>$176,005,043</td>
<td>$224,800,000</td>
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<tr>
<td>Complaints</td>
<td>26,311</td>
<td>26,486</td>
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<tr>
<td>Enforcement Hours</td>
<td>816,623</td>
<td>884,419</td>
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WAGE & HOUR UPDATE

- Directed and Complaint-Based enforcement will continue in 2012 with focus on:
  - Restaurants
  - Construction
  - Agriculture
  - Hotel/Tourism
  - Garment Manufacturing
  - Healthcare: hospital, nursing homes
  - Grocery Stores
  - Automobile Maintenance and Repair

Low Wage Industry Stats

<table>
<thead>
<tr>
<th>Industry</th>
<th>FY 2011 Cases</th>
<th>Back Wages ($K)</th>
<th>Employees</th>
<th>FY 2010 Cases</th>
<th>Back Wages ($K)</th>
<th>Employees</th>
<th>FY 2009 Cases</th>
<th>Back Wages ($K)</th>
<th>Employees</th>
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<tbody>
<tr>
<td>Agriculture</td>
<td>1,527</td>
<td>2,862,595</td>
<td>6,547</td>
<td>1,259</td>
<td>3,153,957</td>
<td>5,744</td>
<td>1,379</td>
<td>1,404,125</td>
<td>5,523</td>
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<tr>
<td>Day Care</td>
<td>1,025</td>
<td>2,235,672</td>
<td>5,837</td>
<td>694</td>
<td>1,018,255</td>
<td>3,028</td>
<td>714</td>
<td>1,074,842</td>
<td>3,310</td>
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<tr>
<td>Restaurants</td>
<td>5,161</td>
<td>24,460,222</td>
<td>46,125</td>
<td>3,759</td>
<td>16,415,519</td>
<td>23,042</td>
<td>3,818</td>
<td>17,216,109</td>
<td>24,375</td>
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<tr>
<td>Garment Manufacturing</td>
<td>254</td>
<td>2,426,074</td>
<td>2,256</td>
<td>374</td>
<td>2,142,336</td>
<td>2,215</td>
<td>371</td>
<td>2,413,839</td>
<td>2,734</td>
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<td>Guard Services</td>
<td>631</td>
<td>9,779,518</td>
<td>565</td>
<td>563</td>
<td>7,623,112</td>
<td>10,093</td>
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<td>Health Care</td>
<td>1,502</td>
<td>11,911,409</td>
<td>21,455</td>
<td>1,104</td>
<td>12,456,283</td>
<td>20,888</td>
<td>1,046</td>
<td>12,616,148</td>
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<td>Hotels and Motels</td>
<td>1,122</td>
<td>2,467,691</td>
<td>272</td>
<td>242</td>
<td>1,935,241</td>
<td>4,015</td>
<td>208</td>
<td>1,763,195</td>
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<td>Janitorial Services</td>
<td>748</td>
<td>3,600,309</td>
<td>4,781</td>
<td>751</td>
<td>2,774,972</td>
<td>2,543</td>
<td>447</td>
<td>2,770,279</td>
<td>3,261</td>
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<td>Temporary Help</td>
<td>255</td>
<td>1,189,104</td>
<td>5,115</td>
<td>237</td>
<td>1,676,467</td>
<td>2,524</td>
<td>216</td>
<td>2,082,453</td>
<td>8,937</td>
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<tr>
<td>Total Low-Wage Industries</td>
<td>12,225</td>
<td>59,132,496</td>
<td>108,064</td>
<td>9,303</td>
<td>53,324,841</td>
<td>74,666</td>
<td>9,360</td>
<td>52,063,110</td>
<td>80,759</td>
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DOL/WHD Director of Communications, Michael Kravitz

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Employer Resources

• Almost 900 outreach seminars, conferences, speeches, symposiums, panel discussions, and presentations where the target audience is employers, employer representatives, human resource professionals, and/or employer associations

• WHD District Offices can provide free on-site training to management personnel on wage and hour compliance (training is not investigation, does not trigger an investigation)

• WHD provides educational and compliance materials including bulletins, fact sheets, checklists, self-audit packages, posters, bookmarks, videos, pamphlets, and the interactive e-laws program online

NEW Fact Sheet #77A – Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)

• Discusses the prohibitions, coverage and enforcement issues related to section 15(a)(3) of the FLSA

• Violation for any person to “discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding…”

• Covered complaints may be made ORALLY or in writing, and the retaliation protections may extend to internal complaints and former employees, as well

• Enforcement is either through the DOL or pursue a private lawsuit (unlike the EEOC)


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• Retaliation takes on new importance
• Even purely internal complaints can support an FLSA retaliation claim
• Complaint must be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."
• The Minor court interpreted the words "filed any complaint" to require even "intracompany complaints to be considered protected activity within the meaning of [the FLSA's] antiretaliation provision." http://pacer.ca4.uscourts.gov/opinion.pdf/101258.P.pdf

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• NEW Fact Sheet #77B Protection for Individuals under the FMLA
• Outlines Section 105 of the FMLA and 825.520 of the FMLA regulations
• Prohibits employers from retaliating against an individual for exercising his or her rights or participating in matters protected under the FMLA
• Provides examples of prohibited conduct
• Complaints of retaliation may be made within two years of the date of violation

http://www.dol.gov/whd/regs/compliance/whdfs77b.pdf

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**Employer Resources**

- NEW Fact Sheet #77C Prohibiting Retaliation under the Migrant and Seasonal Agricultural Worker Protection Act
- Covers the protections and enforcement procedures under the retaliation provisions of the Act
- It is a violation to “intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against any migrant or seasonal agricultural worker” because the worker has filed any complaint, participated in proceedings or testified under the Act

http://www.dol.gov/whdregs/compliance/whdfs77c.htm

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- Employee Resources
- We have an APP for that!
- DOL has an app for employees to log their own work time!


- **EAT SHOP SLEEP** – a new smartphone app for consumers to check if a business has been investigated or had violations

http://informaction.challenge.gov/submissions/4585-eat-shop-sleep
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RECENT CASES – July 2011

Public Agency

Prince George’s County, MD to pay $4,222,146 in back wages


Issues:

• Failure to pay H1B employees properly
• Illegal reduction of wages by requiring applicants to pay fees restricted to employers
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RECENT CASES - October 2011

Hilton Reservations Worldwide, LLC to pay $715,507 in back wages/overtime


Issues:
- Payment for pre-shift and post-shift activities for customer service employees in 4 states
- Starting computers and reading email may be compensable work

STATE TRENDS

- New York “Wage Theft Prevention Act” went into effect on April 9, 2011
- Additional recordkeeping and notice requirements for employers
- Fierce penalties for non-compliance
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STATE TRENDS – January 1, 2012

California Wage Theft Prevention Act went into effect.

Includes new written notice requirements for new employees, at the time of hire:

- Rate of pay, whether paid by hour, shift, day, week, commission or otherwise
- Allowances claimed as part of minimum wage
- Regular payday
- Name of employer including any D/B/A names
- Physical address of employer’s main office and mailing address
- Employer’s telephone number
- Name, address and telephone number of workers compensation carrier
- Other necessary information as deemed by the Labor Commissioner

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Integrate W&H into your existing compliance infrastructure:

- Oversight
- Standards & Procedures
- Training & Education
- Monitoring & Auditing
- Reporting
- Investigations
- Incentives/Discipline
- Response/Remediation

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Compliance actions to consider:

- **RISK ASSESSMENT**: thoroughly probe and examine where your organization’s highest wage and hour risks are – break it down to relevant issues. Gov contractors: include Davis-Bacon Act and Service Contract Act pay requirements in your risk assessments.

- **Oversight**: ensure a high level point of contact has authority over wage issues (Gen Counsel, Payroll Mgr.).

- **Standards and Procedures**: review all pay and timekeeping policies; add language about proper pay in your Code of Conduct.

- **Training & Education**: re-train managers and employees.

- **Auditing**: double-check for effectiveness all procedures in place for requests, authorizations, reporting, recording, computation and payment of work hours and overtime; audit independent contractor status.

- **Monitoring**: establish separate “Pay Hotline” or make clear to employees that the existing hotline may be used for pay problems or complaints after notifying Payroll – add hotline to employee ID cards.

- **Investigations**: thoroughly investigate and document complaints of wage/hour violations.

- **Discipline for violations of overtime work policies**.
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SUMMARY

• DOL is continuing its enforcement momentum with record numbers
• DOL is reaching out to workers directly
• DOL is making more resources available to employers
• Litigation continues
• States are ramping up enforcement efforts
• Leveraging your compliance and ethics program can mitigate the risks

Questions?

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