

# What To Do When The Government Comes Knocking: *Navigating Agency Investigations*

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Proskauer»

## Introduction

- Federal and state government agencies have broad authority to conduct workplace investigations and enforce wage and hour laws.
- These investigations are often, but not always, the result of a complaint and can occur on short—or even no—notice to the employer.
- Employers who are not prepared for an agency investigation can be left scrambling as they navigate an unfamiliar process that can have significant monetary and other consequences.
- It is therefore critical that your company prepares for what to expect *before* the government comes knocking.
- It's also crucial to know what to expect *during* an investigation.

## Agenda

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- USDOL Investigations
- USDOL PAID Program
- NYSDOL Investigations
  - Division of Labor Standards
  - Unemployment Insurance Division
- NYAG Investigations
- General Strategies and Considerations

## USDOL Investigations

## USDOL Wage and Hour Division (WHD) Fiscal Year 2019

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- Received more than 18,000 complaints.
- Reported record recovery of \$322 million in wages for workers.
- Continued to focus on low wage, high violation industries.
- Top four industries by total amount of recovery:
  - Construction
  - Food services
  - Health Care
  - Retail

## USDOL Audits: Sources of Authority

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- FLSA § 11(a) [29 U.S.C. § 211(a)] authorizes WHD to:
  - “investigate and gather data regarding the wages, hours, and other conditions and practices of employment”
  - “enter and inspect such places and such records”
  - “investigate such facts, conditions, practices, or matters as [it] may deem necessary or appropriate to determine whether any person has violated any provision of [the FLSA], or which may aid in the enforcement of the provisions of [the FLSA].”
- WHD interprets this provision to authorize it to interview employees.

## USDOL Audits: Sources of Authority

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- FLSA regulations [29 CFR Part 516] specify the records to be kept by employers.
- 29 CFR § 516.7 requires that:
  - “Each employer shall keep the records required [by Part 516] safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained.”
  - “Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the [WHD].”
  - “All records shall be available for inspection and transcription by the [WHD].”

## USDOL Audits: Sources of Authority

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- 29 CFR § 516.8 requires that:
  - “Each employer required to maintain records under this part shall ... submit to [WHD] such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in the records as the [WHD] may request in writing.”
- WHD does not require an investigator to previously announce the scheduling of an investigation, although in many instances the investigator will advise an employer prior to opening the investigation.

## USDOL Audits

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- WHD conducts investigations for a number of reasons, all having to do with enforcement of the laws and ensuring an employer's compliance.
- WHD does not typically disclose the reason for an investigation.
- Many investigations are initiated by complaints.
  - All complaints are treated as confidential.
  - The name of the worker and the nature of the complaint are generally not disclosed.
  - Whether a complaint even exists may not be disclosed.

## USDOL Audits

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- In addition to complaint-driven investigations, WHD selects certain types of businesses or industries for investigation.
  - Low wage industries, changing industries, businesses in specific geographic areas
- Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.

## USDOL Audits

- Generally, a WHD investigation consists of the following steps:
  - Initial conference
  - Examination of records to determine which laws or exemptions apply
  - Examination of payroll and time records
  - Private interviews with employees
  - Possible facility tour
  - Determination
  - Closing conference

## USDOL Audits: Appointment Letter

**U.S. Department of Labor**  
Wage and Hour Division  
26 Federal Plaza Suite 3700  
New York, New York 10278  
Office Number: 646-587-5322



10/7/2016

[Name]  
[Company]  
[Address]

Re: Wage & Hour Investigation

Mr. \_\_\_\_\_

The Wage and Hour Division (WHD) of the U.S. Department of Labor is responsible for administering and enforcing a number of federal labor laws, including the Fair Labor Standards Act (FLSA). This letter is to inform you of the agency's plans to visit your establishment on October 27, 2016 to determine your compliance with the FLSA. The enclosed pamphlet briefly describes the FLSA.

Authority for this investigation is contained in Section 11(a) of the FLSA. Section 11(a) states, "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."

I will visit your establishment on October 27, 2016 at 9:30 am to initiate the investigation. The normal procedure is to hold an opening conference with a representative of the company, check certain records for a two-year period, interview a representative number of employees, and hold a closing conference to discuss the results of the investigation. This may involve more than 1 working day depending on circumstances.

In order to conduct the investigation with as little disruption to your business operations as possible, have the following information available:

## Initial Conference

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- Investigator will hold an opening conference with the employer's representative(s).
  - Think carefully about who should attend on behalf of the company.
- During the conference, the investigator will explain the purpose of the investigation and ask for background information from the representative(s).
- The investigator will also discuss the documents they will review, employee interviews, and other plans for fact gathering.

## USDOL Audits: Documents Reviewed

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- Generally WHD will ask to review:
  - Contact information for owners (and percentage of ownership)
  - Organizational chart
  - Legal and DBA names
  - Records regarding gross annual dollar volume of sales for trailing three years
  - List of employees, including addresses, hourly rates or salaries, job titles, shifts, phone numbers, dates of hire, dates of termination, and exemption classification
  - Payroll and time records for the past two years, including a copy of the two most recently completed payroll
  - Birth dates for all employees under age 18 who worked during the past 24 months

## USDOL Audits: Documents Reviewed

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- Generally WHD will ask to review:
  - 1099 Forms and contract documents with any independent contractors, subcontractors or day laborers at this establishment
  - Federal Employer Identification Number (FEIN)
  - Address of all other locations and a point of contact for each location, and include email, phone number and fax number for each
  - Time Sheets with start and stop times for each employee and any other record of hours worked
  - List of all salaried employees, their titles, description of work, and weekly pay

## USDOL Audits: Employee Interviews

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- The investigator may interview employees.
- The employer is not permitted to be present for the interviews of non-exempt employees.
- Employers are permitted to attend interviews of managers (unless the subject of the questioning relates to their exempt status and work hours).
- The investigator may allow the employer to select employees to be interviewed or have a list of employees they wish to interview.



## USDOL Audits: Closing Conference

- The investigator will schedule a closing conference at the conclusion of the investigation to review the findings.
- If violations are found, the investigator will review the violations, the wages owed, and other corrective actions as appropriate, with the company's representative(s).
  - The investigator may present a WH-56 Form.
- The company should try to avoid responding and/or committing to any course of action during the conference.

## WHD Form WH-56

Summary of Unpaid Wages

U.S. Department of Labor  
Wage and Hour Division

Office Address: Brooklyn NY Area Office  
2 West 7th Street, 15th Floor  
100 Myrtle Avenue  
Brooklyn, NY 11205  
718-254-9410

Investigator: [Redacted]

Date: 01/05/2018

Employer Fed Tax ID Number: [Redacted]

1. Name	2. Address	3. Period Covered by Work Week Ending Dates	4. Act(s)	5. B/Ws Due	Total
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]

I agree to pay the listed employees the amount due shown above by

Employer Name and Address: [Redacted]

Subtotal: [Redacted]

Total: [Redacted]

Signed: [Redacted]

Date: 01/05/2018 11:42:17 AM

Form WH-56  
Page 1

Summary of Unpaid Wages

U.S. Department of Labor  
Wage and Hour Division

Office Address: Brooklyn NY Area Office  
2 West 7th Street, 15th Floor  
100 Myrtle Avenue  
Brooklyn, NY 11205  
718-254-9410

Investigator: [Redacted]

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[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]
[Redacted]	[Redacted]	08/01/2015 to 07/29/2017	FLSA	[Redacted]	[Redacted]

I agree to pay the listed employees the amount due shown above by

Employer Name and Address: [Redacted]

Subtotal: [Redacted]

Total: [Redacted]

Signed: [Redacted]

Date: 01/05/2018 11:42:17 AM

Form WH-56  
Page 2

## USDOL Enforcement Remedies and Procedures

- If a violation is found following an investigation, the USDOL can seek back wages, liquidated damages, and civil penalties.
  - Injunctive relief is also available.
- An employer can reach an agreement with the USDOL to make payments to affected employees, or refuse to cooperate and litigate.
- Many investigations in which violations are found are resolved through administrative settlements or consent judgments.

## USDOL Administrative Settlements

- If the USDOL supervises a settlement, a company can obtain an enforceable release of federal wage claims—but only from employees who elect to participate in the settlement.
- The USDOL primarily uses two forms for supervised settlements:
  - **WH-58:** Receipt for wages already received pursuant to WHD investigation.
  - **WH-60:** Notifies employee of one of three payment scenarios:
    - Settlement has been paid and is “on deposit with the U.S. Treasury.”
    - Employer has sent check to the USDOL.
    - Employer has agreed to pay affected employee upon notification to WHD of current address.

# Form 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, \_\_\_\_\_, have received payment of wages, liquidated damages, employment benefits, or other compensation due to me from \_\_\_\_\_  
(typed or printed name of employee) (name and location of the establishment)

for the period beginning with the workweek ending \_\_\_\_\_ through the workweek ending \_\_\_\_\_. The amount of the payment is received as shown below. The payment of wages and other compensation was calculated and approved by the U.S. Department of Labor Wage and Hour Division (WHD) and is based on the findings of a WHD investigation. The payment is required by the Act(s) indicated below in the boxed box(es).

One Amount Back Wages \_\_\_\_\_ One Amount Liquidated Damages \_\_\_\_\_  
Legal Deductions from Back Wages \_\_\_\_\_ Other Amount Paid \_\_\_\_\_ (please specify type)  
Net Amount Received \_\_\_\_\_

**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 in cases 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. Conversely, 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.

**IMPORTANT TAX INFORMATION:** The back wages you received are taxable wages subject to employment taxes (Federal income tax withholding, social security tax, Medicare tax, and Additional Medicare Tax). The taxes withheld from your back wages are listed on the box labeled "Legal Deductions from Back Wages." You should receive a Form 902, Wages and Tax Statement, from your employer reporting these amounts. Liquidated damages are not subject to federal employment tax purposes. However, liquidated damages are taxable income and you must report and pay income tax on this amount. You should receive a Form 1099-MISC, Miscellaneous Income, from your employer reporting the liquidated damages amount. For more information on the tax treatment of settlement proceeds, see IRS Publication 454, available at [www.irs.gov](http://www.irs.gov).

**RETRIBUTION 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 646-397-3300.

Signature of employee \_\_\_\_\_ Date \_\_\_\_\_  
Address \_\_\_\_\_

I understand that my signature on this receipt and when return to me is 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.

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

Date: 01/09/2016 3:21 PM

Form WH-58 (Rev. April 2017)  
Page 1

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



### EMPLOYEE'S CERTIFICATION TO WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR:

I hereby certify that I have on this (Date) \_\_\_\_\_ paid the above stated 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 \_\_\_\_\_ Title \_\_\_\_\_  
(employer or authorized representative)

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

Date: 01/09/2016 3:21 PM

Form WH-58 (Rev. April 2017)  
Page 2

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# Form WH-60

## U.S. Department of Labor

Wage and Hour Division  
Philadelphia Regional Office  
119 S. Independence Mall West Suite 800 West  
Philadelphia, PA 19106  
Phone: 215-681-5800  
Fax: 215-681-6882



From: \_\_\_\_\_  
Date: 07/06/2016  
To: \_\_\_\_\_  
Back Wages Due: \_\_\_\_\_  
Liquidated Damages Due: \_\_\_\_\_  
Less: Federal Income Taxes: \_\_\_\_\_  
Social Security Taxes: \_\_\_\_\_  
Total Amount Due: \_\_\_\_\_  
Interest and fees calculated are subject to change.

☐ You will be paid in installments as sufficient payments are received from the firm.

An investigation of the firm named above has been completed by this office. The investigation covered the time period beginning with the workweek ending 06/07/2015 through the workweek ending 06/07/2016. Back wages and any liquidated damages or other compensation in the amount shown were found due to you under the Fair Labor Standards Act.

- ☒ These back wages, and any liquidated damages or other compensation, have been obtained from the firm in full or in part and are in deposit with the U.S. Treasury.
- ☐ The firm has agreed to pay you upon notification by this office of your current address.
- ☐ The firm has agreed to pay you and a check for the amount due has been turned over to this office.

To facilitate proper preparation and/or delivery of your checks, please complete and return one copy of the form found on page 2; you keep the other copy. With the WH-60, submit a copy of your Social Security card, W-2, pay stub or other documentation that indicates your name and Social Security number.

**RETRIBUTION 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.

**NOTICE:** The amount of back wages, liquidated damages, or other compensation listed was agreed to by the WHD and your employer and is based on the findings of a WHD investigation. If you accept this payment of wages and liquidated damages due under the Fair Labor Standards Act (FLSA) or Family Medical Leave Act (FMLA), you waive any right you have to bring suit on your own behalf for the payment of such unpaid minimum wages and/or unpaid overtime compensation for the period of time indicated above and an equal amount in liquidated damages. This attorney's fees and court costs under Section 16(b) of the FLSA or Section 107 of the FMLA. Conversely, 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.

Form WH-60  
(Rev. May 2015)  
Page 1

Date: 07/06/2016 12:14:12 PM

## U.S. Department of Labor



If your address changes after you receive this form and before you receive the check(s) for total back wages and any liquidated damages or other compensation due you, or you do not receive a payment within six weeks, please notify this office immediately. If you write be sure to mention the name of the firm as shown above.

Sincerely,

BTORRESNY

Title \_\_\_\_\_

Firm Name \_\_\_\_\_

### COMPLETE ITEM 1 AND SIGN ITEM 2

1. I request that payment be addressed to me as follows:

Print Name: (First, middle, last) \_\_\_\_\_ Social Security No. \_\_\_\_\_

Address: (Number, street, Apt. No.) \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

2. Signature \_\_\_\_\_ Phone No. \_\_\_\_\_

E-mail Address \_\_\_\_\_

PRIVACY ACT NOTIFICATION: Your Social Security Number is used for paying income and PCA benefits. Disclosure is required by 28 U.S.C. 5316.

Form WH-60  
(Rev. May 2015)  
Page 2

Date: 07/06/2016 12:14:12 PM

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## USDOL Administrative Settlements

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- While both forms contain waiver language, employers can be left exposed to lawsuits even after tendering the full settlement amount to the USDOL.
- *Wai Hung Chan v. A Taste of Mao*, 15 Civ. 9723 (WHP), 2017 WL 2973982 (S.D.N.Y. July 11, 2017)
  - Employees who declined to sign Forms WH-60 permitted to proceed with collective action lawsuit in court despite employer's USDOL settlement remitting entire payment to the agency.

## USDOL Administrative Settlements

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- As a practical matter, cases like *Chan* are rare.
  - Most employees who are offered a payment in a USDOL-supervised settlement will sign the waiver form and accept the payment.
- Additionally, while there are risks of non-participation, an administrative settlement will not generally subject an employer to a permanent injunction and will avoid a public court proceeding.

## USDOL Consent Judgments

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- Another settlement option is a formal consent judgment.
- The USDOL will file a lawsuit concurrent with a consent judgment containing the parties' agreed-upon terms to resolve the matter.
- A consent judgment is subject to court approval.
- Terms:
  - Back wages for all employees identified on schedule(s)
  - Will typically include permanent injunction against future violations
  - Unclaimed funds revert to the U.S. Treasury

## USDOL Consent Judgments

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- Although a consent judgment is a judgment that is a matter of public record, it has its advantages.
- It is typically approved quickly with no fairness hearing.
- Bars future private litigation of FLSA claims by employees.
  - 29 U.S.C. 216(b): “The right...to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor[.]”
- Thus, even if an employees disagrees or is unhappy with the outcome, he/she will be bound by it (at least with respect to FLSA claims).

## USDOL Press Releases

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- The USDOL may release a press release concerning an administrative settlement or a consent judgment.
- Both the fact of a release and its contents are non-negotiable.
- It is important to have a pre-planned communication strategy in place that you can implement when a press release is issued.
  - Do you have clients, customers, or other stakeholders with whom you need to communicate?
  - What should you message to your employees?

## USDOL PAID Program

## USDOL PAID Program

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- In April 2018, the USDOL launched the PAID program.
- Under PAID, employers can come forward to voluntarily disclose wage and hour violations, and the USDOL will supervise the settlement of back wages payments due to affected employees.
- Employers who utilize PAID do not pay liquidated damages or civil penalties.
- Employers also obtain enforceable waivers of FLSA claims for employees who accept payment.

## USDOL PAID Program

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- PAID is not available to an employer if:
  - WHD is already conducting an investigation.
  - An employer is involved in FLSA litigation or arbitration.
  - An employer has been contacted by an employee's counsel regarding FLSA issues.
- Employees are not required to participate and are free to pursue litigation if they do not accept the back payment made by their employer.
- PAID participation does not insulate an employee from future wage and hour investigations.

## USDOL PAID Program

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- Based on a September 2019 WHD report, the program has not been particularly popular with private employers.
  - Between April 1, 2018-September 15, 2019, 74 PAID cases were completed and represented less than 1% of all WHD compliance actions.
  - State and local government employers represented almost ¼ of all completed cases.
- WHD concluded, however, that PAID has increased delivery of back wages to employees with minimal impact on WHD resources and priorities, and will continue to utilize the program.

## USDOL PAID Program: Questionable Value to Employers

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- Releases are narrow.
  - Limited to FLSA minimum wage and overtime claims for two-year limitations period and tailored to the specific practices/periods at issue.
- WHD cannot enforce or supervise settlement of state law claims.
- Employees who do not want to participate or do not know about ongoing negotiations can still file lawsuits, which will not go away simply because of the employer's participation in PAID.



## USDOL PAID Program: Questionable Value to Employers

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- There has been backlash against the program in certain states.
  - April 2018: A coalition of eleven States Attorneys General warns DOL that “we will continue to prosecute labor violations to the fullest extent of our authority, both civilly and criminally, regardless of whether employers have participated in the PAID Program.”
  - March 2019: NY AG filed a FOIA lawsuit against Trump Administration, seeking records about the companies that have participated in it.
- Many employers are wary of contacting a government agency preemptively about an internal issue that may never result in a claim.

## USDOL PAID Program: Questionable Value to Employers

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- There may be better alternatives.
  - *E.g.*, voluntary remedial back payment and correcting issue on going forward basis.
- Even if a particular issue does result in a claim down the road, each day that passes without a claim (for a practice you have corrected) erodes the limitations period.

# NYSDOL Investigations

## NYSDOL Powers to Investigate

Lab. L.	Powers
§ 21	General powers to enforce and investigate
§ 25	To enter and inspect premises
§ 26	To examine books, records, and documents
§ 29	To issue subpoenas for documents/testimony
§ 196	To investigate controversies under Articles 5, 6, 19, and 19-A)
§ 575	To inspect records of employment and remuneration “at any time”

## NYSDOL Powers to Investigate

Lab. L.	Powers
§ 660	To: (a) to investigate the wages of persons in any occupation in the state; (b) to enter the place of business or employment of any employer for the purpose of (1) examining and inspecting any and all books, registers, payrolls and other records that in any way relate to or have a bearing upon the wages paid to, or the hours worked by any employees, (2) ascertaining whether the provisions of [Article 9] and the orders and regulations promulgated hereunder are being complied with; and (c) to require from any employer full and correct statements and reports in writing, at such times as the commissioner may deem necessary, of the wages paid to and the hours worked by his employees.

## Employers' Duties: Labor Law

Lab. L.	Duties
§ 31	To furnish information requested by the NYSDOL; to truthfully answer all questions; to admit the NYSDOL to inspect premises; and to render assistance necessary for a proper inspection.
§ 32	"No person shall interfere with, obstruct or otherwise hinder any officer or employee[s] of the [NYSDOL] in the performance of [their] duties."
§ 661	To furnish to the NYSDOL, on demand, a sworn statement of the hours worked, rate of pay, gross wages, deductions, and "such other information as the commissioner deems material and necessary"; to keep such records open to inspection by the NYSDOL at any reasonable time; to permit the NYSDOL to question without interference any employee in a private location at the place of employment and during working hours regarding the employee or other employees.

## Employers' Duties: Minimum Wage Order

MWO	Duties
§ 142-2.6(d)	"Employers, including those who maintain their [wage] records ... at a place outside of New York State, shall make such records or sworn certified copies thereof available upon request of the commissioner at the place of employment."

## Labor Standards Investigations

- Provisions of state law and regulations relating to wage and hour protections are administratively enforced by the NYSDOL's Division of Labor Standards (DLS).
- The central office of the DLS is located in Albany, with district offices throughout the State.
- Investigations may be conducted by the DLS based upon complaints received from affected employees, employee advocates and others, or upon the Commissioner's own initiative.
- DLS investigations are usually complaint-initiated.


## Potential Steps in the DLS Investigation Process

- Investigation
- Findings
- Conferences
- Resolution
- Administrative Hearing
- Civil or Criminal Proceedings

## DLS: “Office” vs. Field Investigations

- In an “Office” or “In-House” investigation, all necessary information is gathered via correspondence, telephone calls, or meetings that emanate from, or occur at, a DLS District Office.
- A Field investigation involves one or more visits to the employer’s premises.
- Many one-off or individual wage and wage supplement claims are handled as Office investigations, without a field visit.
- In an Office investigation, if the DLS does not believe it needs additional information to substantiate the complaint, it will usually initiate contact with the employer via a Collection Letter (LS-159).

## DLS: Collection Letter (LS-159)

 New York State Department of Labor  
Andrew M. Cuomo, Governor  
Peter M. Rivera, Commissioner

DATE: October 3, 2012

ADDRESS REPLY TO:  
State Office Bldg. Campus  
Building 12, Rm. 185C  
Albany, NY 12240-0132  
Fax: 518-485-4001

REFER TO:  
LS10

Claim(s) for wages and/or wage supplements have been filed against you by the following employee(s):

Name	Occupation	Salary	Period of Claim	Type of Claim	Amount	
		5,000.00 Month	05/09/2011 - 09/30/2011	Wage Claim	\$15,250.00	
				Supplemental Wage Claim	\$19,733.12	
Complaint					Total:	\$34,983.12
Unpaid wages and expenses.						


This Department, in accordance with the New York State Labor Law, has been authorized to collect the amounts due and shown for the employee(s) as listed above.

Regardless of any dispute you have on other matters, if the claim is correct, please remit a check or money order payable to Commissioner of Labor and forward to this office by October 15, 2012. Payment should be in the amount due after legal deductions. Please include to show differences between the gross and net amounts.

Article 6 of the New York State Labor Law specifies that failure to pay earned wages or supplements falls within this department's civil and criminal jurisdiction. If you do not agree with these amounts due and payable to the claimant(s), provide a full statement giving your reasons. Include a copy of any payroll records, policies, contracts, etc. to substantiate your position. Your federal employer identification number (FEIN) must be shown on all payments and correspondence submitted to this office.

Failure to respond with payment or credible evidence to the contrary will result in the assessment of liquidated damages equaling an additional 25% of the original claim.

We trust that we can count on your cooperation in this matter.

Very truly yours,  
  
Philip Pisani,

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## DLS: Responding to a Collection Letter

- Employers should contact counsel and—on a privileged basis—gather all relevant information immediately upon receipt of a Collection Letter.
- The employer's counsel or representative should contact the investigator promptly to introduce himself or herself; to ask any clarifying questions about the information in the letter (or requested in the letter); and to inform the investigator that the employer will be responding to the letter in writing.
- The employer should confirm the deadline for responding to the letter, and request additional time if necessary.

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## DLS: Responding to a Collection Letter

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- The employer should send a carefully curated response, with a narrative explanation of its position/defenses and copies of underlying/supporting records.
- The employer also has the option of remitting the amounts allegedly owed.

## DLS: Other Initial Correspondence

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- If the DLS does not believe it has sufficient information to investigate or substantiate the complaint, it can send written requests for records and information to the employer (without specifying any amount allegedly owed), contact the employer by telephone, or visit the employer's premises (with or without prior announcement).
- Employers should follow the same processes with respect to a Collection Letter when they receive any request for information from DLS.
- Investigators are trained/expected to deal directly an employer's attorney when they are advised that an employer is represented.

## DLS: Other Initial Correspondence

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- Where an “informal” demand for records is unproductive, or otherwise when DLS deems it appropriate, it can send a subpoena for records.
- The DLS can mail written questionnaires to current and former employees.
  - The investigator can request that you provide contact information for such individuals.

## NYSDOL Audits: Field Investigations

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- Field investigations usually involve an initial site visit, which is ordinarily unannounced or scheduled on very short notice.
- The investigator is not required to provide a reason for the visit, or to disclose if there has been a complaint made by an employee (or the identity of the complainant).
- The investigator can request to, and often will, interview employees in private.
- The investigator can request to review any records on the premises.
- The investigator can request additional records in writing, and schedule a “revisit” (a follow-up visit).



## DLS: Notice of Revisit (LS-196)

**NEW YORK STATE**  
Department of Labor  
Division of Labor Standards  
**Notice of Revisit**

Date: 7/11/19  
Case ID#: \_\_\_\_\_  
Company name: \_\_\_\_\_  
Company address: \_\_\_\_\_

To: \_\_\_\_\_ Title: Regional Mgr  
I shall visit the above location again on 7/18/19 at about 11:00 A.M. ☐ P.M.  
Kindly arrange to have a responsible official of your firm present at that time and have the following available for inspection:  
☒ Payroll records of employees' hours worked and wages received covering the period 6/28/18 to 6/29/18 inclusive.  
☒ Time Records For Same Period

Please note that the provisions of the New York State Law require that the records must be available for inspection at the premises.  
If you wish to communicate regarding this notice, please direct your communications to the Division of Labor Standards at the address checked below.

☒ By Employee  
Notice of 5  
Pay Forms  
Information  
Letters  
Labor Standards Investigator: Adam V. Vachon  
518-937-7162

Office	Address	Area Code	Telephone No.
<input checked="" type="checkbox"/> Albany, 12240	State Office Campus	518	457-2730
<input type="checkbox"/> Binghamton (Subdistrict), 13901	44 Hawley Street	607	721-8014
<input type="checkbox"/> Buffalo, 14202	65 Court Street	716	847-7141
<input type="checkbox"/> Garden City, 11530	400 Oak Street	516	794-8195
<input type="checkbox"/> New York City, 10013	75 Vesck Street, 7th Floor	212	775-3895
<input type="checkbox"/> Rochester (Subdistrict), 14608	278 Waring Road, Rm. 104	585	268-4550
<input type="checkbox"/> Syracuse, 13202	333 East Washington Street	315	428-4057
<input type="checkbox"/> White Plains, 10605	120 Bloomingdale Road	914	967-9521

LS 196 (03/18)  
DOL copy White / Employer copy Yellow

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## Ten Tips to Surviving a Site Visit

1. Be ready for it. Know today who will be your point person if an investigator shows up unannounced (and have a backup). Make sure reception knows who those point people are.
2. Handle all internal wage complaints when they arise; don't let them fester.
3. Get your house in order. Make sure you have the required postings in your office or facility.
4. Have a discreet room available for the investigator to use. If he or she requests records, bring them to the room.

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December 12, 2019

Proskauer

## Ten Tips to Surviving a Site Visit

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5. When interacting with the investigator, use honey, not vinegar.
6. Know how to access your records. If they are not available on site, agree on a date to deliver them/produce them for inspection.
7. Keep the investigator “in sight.” Stay with the investigator for as long as he or she will let you.
8. Ask questions, but be cautious with answers (“I’m going to have to get back to you on that.”).
9. Take good notes, and write “Notes for Attorney” on the top of the page.
10. Don’t panic. Contact counsel (in-house or external).

## DLS Investigations: Findings

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- At the conclusion of the investigation, the employer may be served with one or more of the following documents:
  - A Service Letter containing a summary of the investigation and findings
  - A Notice of Labor Law Violation(s), describing the statutes or wage orders that were found to have been violated
  - A Notice of Payment Due and/or Recapitulation Sheet, specifying the amounts owed
- The letters provide deadlines on what to do next.

## What the NYSDOL Can Seek in Remedies

Remedy	Notes
Back Pay	Wages, wage supplements, or benefits found to be due
Liquidated Damages	<ul style="list-style-type: none"> <li>100% of the wages due, unless the employer demonstrates a good faith basis for failure to comply with the Labor Law</li> <li>Investigators have the discretion to impose less than 100%</li> <li>Orders to Comply will seek 100%</li> </ul>

## What the NYSDOL Can Seek in Remedies

Remedy	Notes
Penalties	<ul style="list-style-type: none"> <li>Up to \$1,000 for a first violation, \$2,000 for a second violation, and \$3,000 for a third or subsequent violation</li> <li>In assessing the amount of the penalty, the NYSDOL “shall give due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements” (Labor Law § 218(1).)</li> </ul>

## What the NYSDOL Can Seek in Remedies

Remedy	Notes
Penalties	<ul style="list-style-type: none"> <li>Prior to an Order to Comply, the amount of penalties (if any) is left to the discretion of the DLS investigator and supervisors, who evaluate the specific circumstances and, in accordance with established guidelines, may waive penalties entirely or set an amount within statutory limits.</li> <li>If the NYSDOL issues an Order to Comply, it can seek the maximum penalties available, including—if issued to an employer who previously has been found in violation of the laws or rules at issue or whose violation is willful or egregious—a mandatory additional civil penalty in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due.</li> </ul>

## What the NYSDOL Can Seek in Remedies

Remedy	Notes
Penalties	<ul style="list-style-type: none"> <li>The Labor Law is unclear as to whether the NYSDOL can seek a civil penalty on behalf of each employee affected by the violation, or only once for the violation itself.</li> <li>The agency's position is that it can seek a penalty for each employee affected by a single violation. <ul style="list-style-type: none"> <li>NYSDOL Op. Ltr. RO-07-0041 (May 8, 2007) ("[T]he Department interprets Labor Law §218(4) to mean that a separate penalty may be imposed for each violation occurring in regard to each separate worker on each separate payday.").</li> </ul> </li> </ul>


## What the NYSDOL Can Seek in Remedies

Remedy	Notes
Interest	<ul style="list-style-type: none"> <li>“At the rate of interest then in effect, as prescribed by the superintendent of financial services pursuant to [Banking Law section 14-a] per annum from the date of the underpayment to the date of the payment.”</li> <li>The rate is currently 16% per annum.</li> </ul>
Compliance	An Order to Comply can direct compliance with the Labor Law and rules.
For Non-Wage Violations	All of the remedies (other than back pay and interest) are available for non-wage violations (e.g., frequency and timing of pay, meal period violations, recordkeeping violations, pay notice and pay statement violations, etc.).

## What the NYSDOL Can Seek in Remedies

Remedy	Notes
For Failure to Satisfy or Appeal Order to Comply	At the discretion of the Commissioner, 15% “additional amount of damages” upon expiration of 90 days from an Order to Comply becoming final.
Public Notice	NYSDOL has the authority to direct an employer to post notice of Labor Law violations at the workplace for up to a year.
Criminal Referrals	NYSDOL can refer matters for criminal prosecution to the NYAG and to local DAs.

## DLS: Notice of Labor Law Violation (LS-142)

  
State of New York  
Department of Labor  
Division of Labor Standards

**Notice of Labor Law Violation**

Employer

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**Planet Fitness**  
FEIN: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Entity Type: \_\_\_\_\_  
Name and Address: \_\_\_\_\_

Case ID#: \_\_\_\_\_  
Job Location (if different): \_\_\_\_\_

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Investigation

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Responsible Person Notified:  
(Name, Title, Address) \_\_\_\_\_  
\_\_\_\_\_


Violation Date and Time: \_\_\_\_\_  
Date of Issuance: \_\_\_\_\_  
Phone: \_\_\_\_\_

**A VIOLATION OF THE WAGE AND BENEFIT SECTIONS OF CHAPTER 31 IS A MISDEMEANOR FOR A FIRST OFFENSE AND A FELONY FOR A SECOND OFFENSE, WITH PENALTIES AS PRESCRIBED BY LAW. YOU ARE HEREBY NOTIFIED TO TAKE IMMEDIATE ACTION TO COMPLY WITH ALL PROVISIONS OF THE LAW.**

Maura McCann, Director  
FOR THE COMMISSIONER OF LABOR

By: \_\_\_\_\_  
LABOR STANDARDS INVESTIGATOR

page 1

  
State of New York  
Department of Labor  
Division of Labor Standards

**Notice of Labor Law Violation**

Report of Findings

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Violation of the sections of the Labor Law noted on this report may subject you to an assessment of a civil penalty pursuant to Labor Law Sections 141, 216, 345 and 361. If you wish to discuss these findings please contact the district office below within 10 days of the date of issuance of this Notice of Labor Law Violation. Address your request to:

New York State Dept of Labor  
Division of Labor Standards  
State Office Bldg. Campus  
Building 12, Rm. 185A  
Albany NY 12240-0125

I hereby request a meeting to discuss these findings with the Division of Labor Standards.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name, Address and Phone Number (if different from above):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Article 19 - Minimum Wage Act and Minimum Wage Orders**

§ 601 Keep and have available for inspection a true and accurate record for each employee, showing daily and weekly hours worked, gross wages, deductions, any allowances claimed and net wages, and all other records required under the Minimum Wage Order for this industry found in NYS Codes, Rules and Regulations Title 12, Parts 137, 138, 141, 142, 143 or 145.

**Article 6 - Payment of Wages**


§ 101.1a Pay wages weekly to manual workers not later than 7 calendar days after the end of the week in which the wages are earned.

§ 105.1 Notify employees, at the time of hire, of the rate of pay and of the regular pay day designated in advance by the employer.

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## DLS: Notice of Payment Due

  
New York State Department of Labor  
Andrew M. Cuomo, Governor  
Roberta Reardon, Commissioner

**Notice of Payment Due**

The reverse side of this letter shows the Labor Department's calculation of money owed to your employees. If you agree with the total, obtain a check or money order in that amount payable to the Commissioner of Labor. Mail your payment to the office checked below within 20 days. If you wish to discuss the details of the claim or the amount due, call the number listed for that office within 10 days to speak to an investigator.

Labor Standards offices and phone numbers:

- ☐ State Office Bldg. Campus, Building 12, Rm. 185A, Albany, NY 12240 518 402-8010
- ☐ 65 Court St., Room 202, Buffalo, NY 14202 716 847-7142
- ☐ 75 Varick Street, 7th Floor, New York, NY 10013 212 775-3645
- ☐ 400 Oak Street, Suite 101, Garden City, NY 11530 516 228-3988
- ☐ 276 Waring Road, Room 104, Rochester, NY 14609 585 258-8805
- ☐ 333 E. Washington St., Rm. 121, Syracuse, NY 13202 315 428-4002
- ☐ 75 Varick Street, New York, NY 10013
- ☐ 120 Bloomingdale Rd, White Plains, NY 10605 914 997-9506

**Return a copy of this form with your payment to assure proper credit to your account.**

**Warning**

If you do not send the payment by the 20-day deadline or contact us about it within 10 days, we may issue an order to comply that will add a penalty to the amount owed. To obtain more information about this finding, call the number listed above.

An order to comply directs you to pay wages, benefits or supplements and adds interest charges at a rate set by the Superintendent of Banks under Section 14-a of the Banking Law. The interest rate is set each year and runs from the date of underpayment to the date the employee receives payment. The order to comply also adds a civil penalty of the total payment to the amount owed. (Sections 218-219, New York State Labor Law).

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## DLS: Recapitulation Sheet

Case # \_\_\_\_\_

RECAPITULATION SHEET - PRELIMINARY REPORT

SUMMARY OF CLAIMS FOR UNPAID WAGES, WAGE SUPPLEMENTS OR WAGES DUE UNDER THE PROVISIONS OF THE MINIMUM WAGE ORDER AND/OR STATUTORY MINIMUM RATE UNDER THE NEW YORK STATE MINIMUM WAGE ACT, GOVERNING WAGES IN THE Miscellaneous INDUSTRY

NAME AND ADDRESS OF EMPLOYER \_\_\_\_\_ FEIN \_\_\_\_\_ INVESTIGATOR \_\_\_\_\_  
ESTABLISHMENT I.D. \_\_\_\_\_ DATE 10/01/2019

Note: Violation of the Wage and benefit Sections of the Labor Law is a misdemeanor for a first offense and a felony for a second offense. The amount listed on this Recapitulation Sheet is the total gross due to the employee(s) listed. If you remit the net amount due you must itemize the legal deductions for each employee separately on an additional sheet.

THE EMPLOYEES LISTED BELOW ARE DUE: Minimum Wage, Wage Statement/Records/Payment

NAME AND SOCIAL SECURITY NUMBER OF EMPLOYEE	ADDRESS	PERIOD COVERED BY CLAIM OR UNDER-PAYMENT	Amount Due	Gross Amount Due	Liquidated Damages	Total Liquidated Damages	Grand Total Due	TOTAL DEDUCTIONS	NET DUE AFTER ALL DEDUCTIONS
		01/21/2019 to 06/23/2019	Min Wage \$46.81		\$11.70				
Total Amounts Due to:				\$46.81	\$11.70	\$58.51			
		01/21/2019 to 06/23/2019	Min Wage \$67.37		\$16.84				
Total Amounts Due to:				\$67.37	\$16.84	\$84.21			
		01/01/2018 to 06/25/2019	Min Wage \$1,201.12		\$300.28				
Total Amounts Due to:				\$1,201.12	\$300.28	\$1,501.40			
		01/21/2019 to 05/05/2019	Min Wage \$41.18		\$10.30				
Total Amounts Due to:				\$41.18	\$10.30	\$51.48			
TOTAL GROSS AMOUNT				\$1,355.48	TOTAL LIQUIDATED DAMAGES	\$339.12	\$1,695.60		

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## DLS Investigations: Conferences

- After receiving the findings from the investigator, the employer can request a meeting to discuss the findings with the DLS.
- The request is usually due within 10 days after issuance of the findings.
- If the employer does not request a meeting with the DLS within 10 days or pay the amounts due within 20 days, the Commissioner can issue an Order to Comply.
- Meetings usually take the form of a District Meeting or a Compliance Conference.

## DLS Investigations: District Meetings

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- A District Meeting is a scheduled discussion presided over by a District Supervisor.
- The meeting usually entails a face-to-face meeting at a DLS District Office, although it can be conducted via telephone or at an alternate location.
- The District Meeting is considered a continuation of the fact-finding, investigative process. Employers and employees can present additional evidence at the meeting.
- The aim of a District Meeting is to resolve outstanding issues, especially where the employer disagrees with the findings of the investigation.

## DLS Investigations: Compliance Conferences

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- A Compliance Conference is an informal meeting to discuss the investigation findings; it is similar to a mediation and its purpose is to facilitate a resolution.
- While a Compliance Conference can be scheduled at any time during an investigation, it is usually scheduled at the employer's request after DLS serves a notice of investigation findings.
- At the conference, DLS presents its investigation findings and the employer can present information or evidence not previously submitted.



## DLS Investigations: Compliance Conferences

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- A Compliance Conference Officer makes a non-binding recommendation to both parties in an attempt to resolve the dispute.
- If the conference results in an agreement to pay wages, damages, and/or penalties, DLS will arrange for and distribute payment to the claimant(s).

## DLS Investigations: Conferences

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- If an agreement is not reached at a District Meeting or Compliance Conference, DLS can initiate an Order to Comply.
- DLS District Supervisors have the discretion to determine whether to hold a District Meeting, a Compliance Conference, both, or neither prior to referring the matter for an Order to Comply.
- Throughout the investigation process, there are often other opportunities for the employer to discuss anticipated findings and the potential for resolution with the investigator and/or his or her supervisor (usually a Senior Investigator).

## DLS Investigations: Order to Comply

- If an employer fails to pay the amounts determined by DLS to be owed, the Commissioner can issue an Order to Comply.
- While investigators have the discretion to impose less than 100% liquidated damages and waive penalties, an Order to Comply will often seek 100% liquidated damages and can impose penalties of up to 200% of the wages found to be owed, together with 16% interest from the date the wages were due.
- If an employer disagrees with an Order to Comply, it has 60 days to file an appeal with the Industrial Board of Appeals (IBA) under Labor Law § 101.
- Orders to Comply that are not appealed or satisfied may be referred to the NYAG for civil enforcement/entry as judgments in court.

## DLS Investigations: IBA and Judicial Review

- The IBA is an independent state agency that, among other things, reviews orders issued by the Commissioner of Labor.
- After a petition is filed, a neutral hearing officer of the IBA conducts a formal administrative hearing at which the parties (the employer and the NYSDOL) can present evidence and argument.
- Parties that are dissatisfied with the IBA's decision can appeal to the State Supreme Court under CPLR Article 78 and Labor Law § 102.

## DLS Investigations: Settlements

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- There are various methods to memorialize a settlement with DLS, including:
  - A Stipulation of Settlement between the NYSDOL and the employer, under which the employer makes payment to DLS
  - An Authorization for Wage Resolution (LS-250) signed by the complainant, often in which the complainant agrees to accept a lower amount than the original wages claimed

## DLS Investigations: General Strategies

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- Cooperate.
- Provide as many records and as much information as will help defend your actions/position.
- Argue for a reduction in liquidated damages.
- Argue for a reduction in penalties, using the factors in Labor Law § 218 and noting your cooperation with DLS.
- Take advantage of all opportunities to discuss the matter with DLS (including, where strategic, with supervisory and District Office staff).

## DLS Investigations: General Strategies

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- Once DLS determines that a violation has occurred—and before issuing an Order to Comply—it usually presents the employer with a stipulated agreement to correct the violation and (as applicable). to remit payment amounts found due, which can include liquidated damages, penalties, and interest.
- Generally, the only reason to let a determination go to an Order to Comply is if you plan to appeal the underlying determinations.

## DLS Investigations: General Strategies

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- Including because the Commissioner has the ability to impose additional penalties in an OTC, and because challenging an OTC is time-consuming and costly, the conventional wisdom is that unless you really think you can win the case on the merits (and doing so is worth it, economically and strategically), it's better to settle at the lowest negotiated amount you can settle at with the investigation team.

## Concurrent USDOL and NYSDOL Investigations

- Nothing prohibits the USDOL and the NYSDOL from simultaneously investigating alleged wage and hour violations.
- Under a 2013 work sharing agreement, the NYSDOL and the USDOL's Wage and Hour Division have the ability to share resources, share information, conduct coordinated investigations, make and accept referrals of matters to and from one another, and otherwise aid each other's enforcement of laws.
- Practically speaking, we have not seen much coordination between the two agencies, even on parallel investigations.

## NYS Interagency Task/Strike Forces

- As a general matter, NYSDOL can make and receive referrals to and from other State and local agencies.
- On occasion, the NYSDOL formally partners with other agencies to investigate and remediate issues of broad concern.
- An example is the Joint Enforcement Task Force on Employee Misclassification (JETF), which included coordination among:
  - NYSDOL
  - NYAG
  - NYS Department of Taxation
  - NYS Workers Compensation Board
  - Office of the NYC Comptroller

## Unemployment Insurance Investigations

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- Provisions of state law and regulations relating to unemployment insurance contributions, coverage, and eligibility are administratively enforced by the NYSDOL's Unemployment Insurance Division (UID).
- The central office of the UID is located in Albany, with district offices throughout the State.
- UID auditors will investigate to determine, among other things, whether a claimant is eligible for coverage in the first instance, whether there are disqualifying circumstances (*e.g.*, resignation, misconduct-related termination), and the amount of wages subject to contributions.

## Unemployment Insurance Investigations

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- UID will also conduct "random" audits of employers to investigate compliance with the unemployment insurance laws (*e.g.*, to ensure that employers are not misclassifying workers as independent contractors and thereby avoiding UI contributions on their behalves).

## “Section 575” Audit Letter



NY STATE DEPARTMENT OF LABOR  
MANHATTAN-WEST DISTRICT OFFICE  
75 VARICK ST 7TH FL  
NEW YORK, NY 10013-0000  
Telephone: 212-775-3591 FAX: 212-775-3596

, 2015

Dear Employer:

**Your account has been selected for an audit. Please telephone me at (212)775-3591 by 10/15/15 to schedule a date and time for an appointment.**

We conduct audits of employers to ensure compliance with Section 575 of the Unemployment Insurance (UI) Law, and protect the integrity of the Unemployment Insurance Trust Fund.

For questions about the date, time, or location of your audit, call us immediately at the number listed above.

An Unemployment Insurance Employer Services Auditor will visit your place of business and meet with you to discuss the purpose of the audit. The auditor will give you a general overview of the audit process and examine the following books and records, from 2012 to date.

General Ledger, supporting ledgers and journals	Federal Income Tax Returns
Payroll records such as Individual Earnings Records, Payroll Journals, Payroll Books and Summaries	Copies of Federal and State payroll returns such as Forms 941's, 940's, NYS-45, NYS-45-ATT, W-2's, W-3's
Disbursement records such as the check register, cancelled checks, bank statements, check stubs, cash book, disbursements journal, petty cash journal, or any other record that shows payments made by cash and/or check	Records pertaining to services by individuals such as Forms 1099's and 1096's, contractor agreements, invoices, certificates of insurance
Founding documents such as Corporate minute book, certificate of incorporation (if incorporated), Partnership agreement (if a partnership), DBA certificate, etc.	Current Workers' Compensation policy
Records relating to the value of other remuneration such as meals, tips, lodging, automobiles, etc.	UI poster that shows registration with NYS DOL for UI
	Sales records such as a sales journal and sales tax returns

## NYSDOL “Section 575” Audits

- Generally UID will ask to review:
  - Federal annual income tax returns (Forms 1120, 1065, etc.)
  - Federal quarterly tax returns (Forms 941)
  - Federal annual FUTA tax returns (Forms 940)
  - Federal Forms 1099 and 1096
  - NYS Quarterly Tax Returns (Forms NYS-45 and NYS-45-ATT)
  - Quarterly and annual payroll register/earnings summaries
  - General ledger payments to individuals (QuickBooks, etc.)

## NYSDOL “Section 575” Audits

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- UID may also ask to review:
  - Federal forms W-2 and W-3
  - Bank statements
  - Workers’ compensation policies
  - Information regarding alleged independent contractors and other individuals paid on a Form 1099 basis
    - Contracts/invoices
    - Description of services provided
    - Evidence of independence
- UID may ask to review up to three years’ worth of records, but generally will agree to a more limited production.

## UID Audits

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- Many independent contractor audits arise from individual claims for unemployment insurance benefits, in which the claimant was paid on a Form 1099 basis.
- UID will closely examine Forms 1099 provided to individuals and single-member LLCs, to determine whether the recipients are truly in independently established businesses and not subject to the control of the business that engages their services.
- Evidence that the independent contractor makes his/her/its services available to the public or to other “clients” is crucial, and can include:



## UID Audits

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- A website
- Publicity regarding the services provided to others
- Invoices
- Business letterhead/business cards
- Marketing materials
- Evidence of actual work for others

## NYSDOL Litigation

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- The Commissioner can “bring any legal action necessary” on behalf of employees affected by wage violations, including a civil action in court.
- In a civil action, the Commissioner can seek all available remedies (e.g., back pay liquidated damages, penalties, etc.), together with reasonable attorney's fees, prejudgment interest, and costs.
  - Labor Law § 198.

# NYAG Investigations

## NYAG Investigations

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- The NYAG, through its Labor Bureau, can investigate and file a civil action against an employer for wage violations.
- Pursuant to Executive Law § 63, the NYAG has authority to investigate and prosecute violations of federal, state, and local laws, including the Labor Law.
- The NYAG's power to investigate and prosecute includes the authority to issue subpoenas for documents and testimony prior to the filing of any court proceeding.
- Employees can file complaints directly with the Labor Bureau.
- The NYAG, like all litigants or putative litigants, can settle cases at any point in the process.

## NYAG Investigations

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- The NYAG's Labor Bureau is also responsible for criminal enforcement of wage laws.
- Failure to pay wages in accordance with the Labor Law, and the officers and agents of any corporation who knowingly permit the corporation to violate the Labor Law by failing to pay such wages, can subject the employer, officers, and agents to prosecution for a misdemeanor for the first offense and a felony for any second or subsequent offense that occurs within six years of the date of conviction for a prior offense.
- Fines and imprisonment are available for all such violations.
- Criminal prosecution is ordinarily reserved for egregious, continued, and/or systemic violations.

## Strategic Responses and Considerations for All Agency Investigations

## Strategic Responses and Considerations

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- Understand the purpose of the investigation or audit, to the best you can.
- Understand how broad these investigations can be (or can become).
- In dealing with investigators and auditors, establish and maintain a rapport and a respect, cooperative working relationship.
- Understand what the investigator's/auditor's goals and practical limitations are.
- Be forthcoming but strategic.

## Strategic Responses and Considerations

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- Where possible, confirm the scope of the investigation/audit in writing.
- Perform a privileged self-audit in advance.
- Carefully curate your presentation.
- Push for off-site review.
- Have answers to anticipated questions and explanations for anticipated issues ready.
- Confirm any follow-up questions in writing.

## Strategic Responses and Considerations

- To the extent possible, minimize contact and communications between the investigator and your managers and employees.
  - Try to filter everything through counsel.

## What To Do When The Government Comes Knocking: *Navigating Agency Investigations*

Allan S. Bloom  
Rachel S. Phillion

December 12, 2019

Proskauer»

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