



## **DOL Crackdown On Texas Employers May Come In 2015**

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During a recent gathering of business executives, a representative from the U.S. Department of Labor's Wage and Hour Division warned Texas employers that some of the state's most active industries may be under increased scrutiny in 2015. The representative went on to say that during the DOL's 2015 fiscal year, which began Oct. 1, the oil and gas services industry, such as those providing fracking services, as well as the construction and hospitality sectors will receive considerable attention.

To ensure these initiatives and others are fully enforced, the DOL requested an 18 percent budget increase as well as 2,000 additional staffers for its Wage and Hour Division. Additionally, according to the proposed budget, a significant amount of funding will be "dedicated to greater directed investigations that are strategically selected to solve critical compliance challenges in industries with business models that are at high risk of wage payment violations." The DOL also plans to devote considerable resources to developing a more efficient system for analyzing trends in labor law violations, target investigations and compliance efforts and assess the impact and quality of enforcement.

### **What Are the DOL's Target?**

Though many investigations are initiated by a job applicant or employee complaint, it is also common for the DOL to select certain businesses or industries for additional focus. Common targets include low-wage industries, industries that employ a large number of vulnerable workers and industries that are experiencing rapid growth or decline.

In addition to specific industry targets, the DOL occasionally targets a particular geographic area. For example, the DOL issued a press release in March revealing its initiative to crack down on worker retaliation in the Southwest, including Texas. The Southwest was targeted after the division saw a 571 percent increase in the number of retaliation investigations concluded, up from seven in fiscal year 2013 to 40 in fiscal year 2014.

### **Don't Wait for an Audit Before You Assess Your Risks**

Employers in the Southwest, especially those in the fracking, construction and hospitality industries, should take precautions well before the DOL targets them for an investigation. The first step is to find and organize all employee paperwork including time and payroll records, along with I-9 forms. After employee paperwork is properly organized, an employer is better equipped to determine its potential vulnerability and confirm compliance with federal and state regulations.

Employers should, at a minimum, ensure the following:

- Nonexempt employees are being paid the required minimum wage. Local and state laws may have a greater minimum wage requirement than the national \$7.25 per hour. Also, deductions must not reduce an employee's pay below minimum wage, even with a signed authorization.
- Nonexempt employees are paid overtime for hours worked in excess of 40 hours in a workweek. As with the minimum wage, deductions may not cut into overtime pay.
- Nonexempt employees are accurately recording hours. All work, including training time, meetings, preshift and postshift work, on-call work and work done from home should be recorded.
- Employees classified as exempt do in fact meet exemption criteria. Remember that employees on salary are not necessarily exempt.
- Improper deductions are not taken from an exempt employee's salary. Although some exceptions apply, generally, if an exempt employee performs any work during the workweek he/she must be paid the full salary amount for that workweek.

Employers must also ensure that all legal posters and other general notifications are in the appropriate locations, such as the area where employment applications are typically received and processed, along with other conspicuous places. Additionally, employers should make certain that all government records, such as injury and illness logs and complete payroll reports, are being maintained with accuracy. Employers that have received citations in the past should closely review previous findings, as repeat violators will be subjected to increased scrutiny.

### **What To Do If You Are Audited**

Once an employer knows the DOL plans to investigate it, the employer should immediately take action. Employers should remember to be careful as to what information they divulge and should clarify what information and/or documents are being sought. It is also best to answer questions without revealing more information than necessary. Employers should appoint specific employees to interface with DOL personnel. Legal counsel should provide, throughout the process, information and guidance to the appointed employees regarding the employer's rights during such investigations.

When the government investigator arrives on site, the employer should always ask to see the investigator's credentials and verify their authority. If the visit is unannounced and the investigator does not have a warrant, the employer may refuse to allow the investigator on site. This may be

necessary, if, for example, legal counsel and/or the appointed employees are needed but not present. However, even when asserting its rights, an employer and its employees should always act in a cordial and professional manner toward DOL personnel.

Prior to any worksite visit, it is important for the employer to ascertain the reason and scope of the DOL's investigation so it may properly respond while protecting its interests. For example, an investigator may be interested in only one category of workers, and if so, the employer should not produce records or information regarding workers outside of that particular category if possible. During an investigation, the employer should also keep a detailed activity record that includes a list of documents viewed and questions asked by the investigator.

At the conclusion of the investigation, the DOL will conduct a closing conference. At this time, the investigator will review his/her preliminary findings and concerns with the employer. During the closing conference, the employer should listen carefully and request clarification if necessary to understand the DOL's perception of the situation. Employers should also remember to consult with legal counsel before, during and after the closing conference to determine the best course of further action.

### **Conclusion**

DOL investigations can result in hefty citations and even criminal sanctions. All employers in the Southwest, especially those within the fracking, construction and hospitality industries, should be on high alert and begin preparation for investigations, as they may well receive a visit from the DOL in the not-too-distant future.

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