



Episode 21: “What to Do When the DOL Is Knocking at Your Door: Audits Under Federal Law, Part 1”

Speakers: Ari Kwiatkowski and Ben Wilkinson,
Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey everyone, welcome to “What to do When the DOL Comes Knocking at Your Door.” This is a multi-part series where we tell you what you need to know about audits by the United States Department of Labor and the New York State Department of Labor. I am thrilled that our guest for the next couple episodes is Ben Wilkinson. Ben is counsel in our Albany office. He has a wide range of experience in counseling employers on labor and employment matters. And he is also a member of our health care practice area. So I am really excited to mention or to welcome Ben to join us. Ben, good morning.

[Ben Wilkinson]: Good morning. Thanks for having me, Ari.

[Ari]: Of course. Happy to have you. So I had mentioned this to Ben when we were offline, but as our listeners know, I usually subject our guests to telling us something fun or interesting about themselves. Obviously, I’ve worked with Ben for a couple of years, so I can attest that I’m sure he has many interesting facts. But Ben, I’m going to put you on the hot seat. What do you want to share with our listeners that’s interesting about you today?

[Ben]: So when I was in middle school, I made a go at trying to be a child actor...where I was signed with the talent agency in San Francisco, I was from the West Coast. And so we took some acting classes, took some headshots. There’s some really embarrassing VHS tapes of me doing commercial copy somewhere. Thankfully, it didn’t go very far. And here I am. Instead, I chose I chose a much more fulfilling and probably stable career. So I’m grateful for that.

[Ari]: So I think of like all of our interesting facts, I would definitely put that up there. And I want to see this copy that exist somewhere.

[Ben]: Yes, I do still have the head shots, so I can maybe provide you with that.

[Ari]: I like it. Maybe we’ll use that as a means to market this podcast.

[Ben]: Yes.

[Ari]: A little child head shot. Well, thanks, Ben. Appreciate you indulging me and sharing something interesting about yourself. So you know, kind of let’s get into it. Let’s dig in. As I mentioned a few minutes ago, today, we’re going to be talking what you need to know about United States Department of Labor audits. Ben has handled several of these for clients of the firm across all of our offices. And he’s a great resource to talk about this. So, Ben, thanks again for joining and let’s get into it.

[Ben]: Okay.

[Ari]: So this is a really basic question, Ben, but I think it's important. I think our listeners want to hear it. And just for our listeners, when we were preparing for this episode, Ben and I were talking about what we wanted to talk about. And Ben said, I think we need to demystify this process for our listeners and our employers. And I thought that was a great way to phrase it. So Ben, on that note, can you just tell us briefly what is the US DOL or Department of Labor and what laws do they enforce?

[Ben]: Sure. So the United States Department of Labor is a federal agency that is empowered under the federal law to oversee the enforcement and compliance of the Fair Labor Standards Act, among several other labor laws. So you hear the Fair Labor Standards Act. It's referred to as the FLSA for shorthand, and that is the law that says that...it's a federal law that says that the minimum wage for hourly workers has to be a minimum of \$7.25 per hour. So, you know, a number of states have increased to, have higher minimum wages than that. But the federal government wants to make sure that as a threshold you as an employer are complying with that mandate. And so within the United States Department of Labor, that's the umbrella agency, but there are a number of other agencies within the Department of Labor that sometimes people don't understand that it's everything to do with labor, even it's not as intuitive as you might think. So the multiple agencies that we kind of are most familiar with are the Occupational Safety Health Administration, OSHA with safety issues. A lot of that was in the news throughout COVID.

[Ari]: Right.

[Ben]: And the Office of Inspector General of the OIG. But for the purposes of this podcast and this discussion, the Wage and Hour Division or WHD is really the big one. And as the name sounds, Wage and Hour Division, that's the agency within DOL that will start audits and investigations of employers to make sure that those employers are paying their employees properly, which really means they're meeting the minimum wage. Their time, they're tracking their hours properly and in compliance with the law, which really means contemporaneously with their work and that they are paying overtime, which is time and a half for hours in excess of 40 as a basic rule. And so the Wage and Hour Division is one that you're most likely as an employer to come in contact with of all of those agencies within the DOL.

[Ari]: Great. That's very helpful. Thanks for that kind of introduction, Ben. And I know we're going to get into the specifics of what an audit is and what happens during an audit. But can you just tell us generally what are the different types of audits and what exactly are we talking about here?

[Ben]: Yeah. So Wage and Hour Division. I'm going to use WHD and DOL kind of interchangeably because I think that's pretty much what we're talking about today. So they're going to be looking at if they're paying employees, if employers are paying employees correctly under the FLSA. So they can also look at more specific issues within the FLSA, because within the FLSA, there's a minimum wage. There's overtime requirements. There's also requirements about child labor and whether... there's certain rules that for employing individuals under 18 and certain requirements that have to be met. There's also even more specific issues. The one we've dealt with recently is Section 14C of the FLSA, which has to do with paying what's called sub-minimum wage, where workers who have disabilities, if they're working as part of a habilitative program, they will be, are permitted employers, I'm sorry, those habilitative programs are allowed to pay those workers with disabilities a lower minimum wage and you need to meet certain criteria in order to do so. And so that's a very specific issue that Wage and Hour of the DOL will come in and look to see if you're making sure to ...you're meeting those requirements.

[Ari]: Yeah. Oh, sorry. I was just going to say, I'm glad you mentioned that Ben, because I think that's been an issue that's come up a little bit more frequently in recent years.

[Ben]: Right. So some of this is trend driven. So the number of investigations that Wage and Hour will

commence have to do with kind of what's happening in the workforce, what's happening kind of on a trend basis. So that particular law that allows sub-minimum wage with this current administration has come under fire a little bit in terms of whether we should change that or whether Congress should adjust that, should get rid of that. And so with that comes a push to kind of see if people... if employers that fall within that rule are abiding by the requirements. Some of the other issues that US DOL will look at have to do with bringing foreign workers into the country, so H-1B and H-2B compliance. So that's a program that allows the seasonal worker just really generally allows seasonal workers to come in from foreign countries where it's harder to get... there's a labor shortage of US workers. And there's a number of requirements employers have to go through in order to qualify for that. And then once those individuals are working for for the employer in the country, there's a number of requirements after that. So that also falls within the purview of Wage and Hour Division and the United States Department of Labor, even though people think, oh, that has to do with immigration, it must be something, an outside source, but it's really handled by the US DOL. Also, like we kind of mentioned OSHA that's another type of investigation or type of audit that the US DOL will come in, looking at kind of safety issues. And, you know, obviously with a lot of it, with COVID the last couple of years that has come up a lot where OSHA comes in and says, okay, what are you doing to address COVID-related problems? And the requirements can depend on the setting of the employer. So if it's a health care employer or if it's a manufacturing employer or if it's a retail employer, that may all be different.

[Ari]: Right. No, that makes total sense, Ben. And I think this is a perfect segue. And you've kind of anticipated my next question, which was in your experience, does the DOL target any particular industries? I know you talked about the sub-minimum wage issue, but in your experience, are there other industries for clients who are in those industries, things that they should be aware of?

[Ben]: Right. So the answer to that is that we do see that sometimes, yes. Where it's particular industries that are targeted and we see a push by virtue of just the sheer number of investigations into similar employers where they are examining certain industries that maybe don't have the best reputation in paying employees adequately under the law. And sometimes those are employers with large numbers of hourly employees that are earning at or near minimum wage and we see that in health care, particularly in home health care, like food service, manufacturing, agriculture. So those industries are naturally more likely to be examined. And then also, if there's negative press surrounding a particular type of employer in which there are similar employers within that industry, and they all kind of do something the same way. And if one of those employers is found to be not complying with the wage and hour laws, then it's much likely, much more likely that a neighbor who's doing the same thing in the same industry is also going to be investigated or reviewed. It's kind of a little bit of a guilt by association, but if there's certain industry practices or industry standards that the US DOL does not feel are complying with the law, then it's much more likely that they're going to expand their investigations on kind of an industry-wide basis.

[Ari]: Right. That's a really good point. So I guess if you're an employer and you see you know, whether you come across an article or we tell you or, you know, another source tells you, you know, the DOL seems to be kind of up in arms to some extent about this particular issue in a particular industry. And you're in that industry, you probably ought to pay attention.

[Ben]: Right? Your ears should go up, the spidey sense should be tingling. Yeah, you might be next. You know, also, we see it sometimes by geographic area where, you know, certain locations that have similar industries, you know, everyone in a particular location is also examined. So that's something else. If you hear that, you know, the business down the street or the employer down the street is being subject to an audit and then the other person on the other side of you on the street is also being audited—I mean, that's a very simplistic example—but, you know, it could be that there's a kind of push for your area to get to make sure that there's compliance.

[Ari]: That makes sense. So let's kind of take it right from the beginning. Ben, how does an employer typically

become subject to an audit?

[Ben]: OK. So that's either because of two scenarios. One is that there's a specific complaint from an employee that there's a practice the employer is using that violates the FLSA. And so that often initiates several investigations or audits. And keep in mind we're using the term "investigation" and "audit" kind of interchangeably.

[Ari]: Right.

[Ben]: Yeah. but the employee complaint, everyone needs to keep this in mind. The employee complaints are confidential. The name of the worker, they could be current. They could be a former worker. The US DOL is never going to tell you who that person is at this investigation stage. And whether there was a complaint at all will also not be disclosed. And DOL investigators are very mindful of this and they're not going to budge on that issue. And so sometimes I get employers that are very frustrated saying who's giving them this information? It's not right. It's not correct. And I understand that. And it's frustrating to be accused of something and not being able to kind of confront the accuser.

[Ari]: Right.

[Ben]: But the way that the FLSA is set up and the laws that empower Wage and Hour Division to do these types of investigations do not require them to provide where the source is and, you know, if you think about it, that does make sense because there's a fear of retaliation or repercussions for those employees.

[Ari]: Right, right. Yep.

[Ben]: And the idea is that not protecting those individuals would lead to some sort of chilling effect in the future for a potentially valid complaints.

[Ari]: Right.

[Ben]: Right. So that's employee-specific complaints. And the complaints might be something like we don't clock in, our hours are made up after the fact, or we don't clock in and out, or you know, no matter what I work, I could work 50, 60 hours a week, I only get 40 hours a week. You know, those are hot button things Wage and Hour is really looking at, looking for they want to see some sort of systemic issue that they can then go investigate and correct. So the second way that you can be subject to an audit is basically by an industry examination, industry-specific examination. So whether we're talking about that guilty by association if you're a manufacturing or you're in home health care and you know, there's a concern that certain home health care providers are not complying with Wage and Hour in a certain way, multiple home health care providers might be subject to an investigation. Personally, I've been involved in several audits and investigations of horse trainers. So those are thoroughbred horse trainers that operate in Long Island and or in Albany, so, close to Saratoga Springs, where there's another racetrack. And there were a few investigations several years ago that revealed some issues with compliance. And so now multiple horse trainers are going through the audit process by Wage and Hour Division. It's the same set of investigators out of the Westbury, Long Island office. This is a very specific example, but it's easy to crystallize it. So it's the same set of investigators. There's the same concepts, there's the same the same timekeeping practices that are being scrutinized, the same kind of, what we're referring to is like "industry standards" or the way that things have been done and that are being scrutinized by Wage and Hour Division. So that might not be that there was a specific complaint by one horse trainer, but because the horse trainer in the next barn over was also subject to an audit, they want to check them on next door to see if everything's good on that front.

[Ari]: Right. So that ties back to what you were saying earlier about a particular industry, particular geographic location, and how you could be subject to an audit that way. So my next question for you, Ben, is, does the US DOL provide an employer with notice of an audit and what does that notice look like?

[Ben]: So, the US DOL, can sometimes reach out ahead of time to an employer, but oftentimes the investigator can just show up to the employer's location unannounced.

[Ari]: Right. Right. Which is kind of scary if you're an employer.

[Ben]: Yes. There's some investigator here. What do I do? Right, so you know, as we always say, call counsel but because it can really help to eliminate miscommunications. That's a huge issue I've seen is that the investigator will try to explain the process and the types of records they might be requesting or they might want to review that day. But there is a giant potential for miscommunication because the investigator is coming into it with maybe some preconceived notions. They're thinking that they know something about your business and your operations. And so if you have a representative who's kind of serving as the go-between then that can be very helpful for kind of clearing up and educating the investigator. That's a lot of what happens from the beginning of the investigation forward. So like we said before, the key thing to remember is Wage and Hour Division will not disclose the reason that they're commencing an investigation—they're not required to under the law. And so I always tell employers, let that part go. You're not going to figure that out. And it can be a difficult pill to swallow type of thing. But you know, the other thing to keep in mind they don't...they will show up unannounced and they may ask to see records on the spot, tight then and there. And you know, it's important to understand what they're requesting, get anything in writing. They will provide usually a letter after the fact saying we're looking at this particular investigation period, this two-year or three-year period, and we want to see all of these records. And the second you get that, under the law, there is a timeframe, a time clock that starts where they technically are entitled to them within I think it's seven days. So it's really important not to sit on that obviously.

[Ari]: Right.

[Ben]: But the overall takeaway is that the investigator has a lot of leeway and latitude under the law to conduct an investigation in the way that they see fit. So whether that's giving notice, whether it's not whether it's showing up unannounced, whether it's requesting records on the spot, whether it's giving you time to put together your payroll records or time cards, you know, it really depends on the way the investigator wants to run their investigation. And it is imperative to just...to be as cooperative as possible, which I think I'm definitely going to talk about more later. But it's resisting the fact that you are subject to an investigation is never going to be helpful, but you got to move past that part rather quickly, which, you know, I understand and we understand we see this all the time, but the fact that you're subject to investigation is now a reality. And now we've got to work on figuring out how to cooperate and get what's needed and explain how you are compliant and then hopefully move past it.

[Ari]: Yes, I think that's really good advice, Ben. And so I think this is actually a good time for us to break and maybe pick up next week. Before we do, is there anything you want to add or anything that maybe we didn't talk about today? Well, while we're setting the stage for what an audit entails and how it employers should respond to the audit.

[Ben]: Yeah, I think if you like I said before, I think if you get the... if you get an auditor coming to your employer, your place of your workplace, then you want to understand immediately what they are asking for. And I really implore anyone to...maybe it's an accounting professional, maybe it's counsel, to have an another set of eyes to assist you with understanding what they are requesting and how long you have to deliver that.

[Ari]: Right.

[Ben]: And like I said, the number of miscommunication issues where a month later, the investigator we get involved, the investigator says oh, we've been waiting on these records for months and the employer, our client didn't know about that. And so it helps to have somebody kind of steering the ship and to be taking that off of you as the employer. You know, we can't change some of the practices if there's issues, but it's important to minimize it by communicating as best as possible with the investigator.

[Ari]: Absolutely. Totally understand. And I think it's good advice. And obviously to our listeners, we know it's easy for us to say you have to let certain things go. But we do understand

[Ben]: Right.

[Ari]: And I think that's, you know, communication really is key, Ben, so thanks for that. To our listeners, Ben and I will be back next week where we will tell you what you need to know about what happens during an audit, how to respond, and a couple of other insights from Ben. So thanks so much for tuning in. We'll see you next week.

[Ari]: The Labor Employment Podcast is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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