



Episode 22: “What to Do When the DOL Is Knocking at Your Door: Audits Under Federal Law, Part 2”

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 guys, welcome back to “What to Do When the DOL is Knocking at Your Door.” This is part two of our multi-episode segment where we tell you what you need to know about DOL audits. I am thrilled to welcome back Ben Wilkinson. Ben talked with us last week about really some helpful background and context as to how a US DOL audit may come about. And today, we’re going to get into and really dig into what happens during the audit and what as an employer you should do. So, Ben, welcome.

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

[Ari]: Yes, happy to have you back. Ben, you know the drill. Since you were here last week, I’m going to subject you to telling us something interesting about yourself. And as I mentioned last week I’m sure you have a plethora of interesting facts to tell us. So I’m going to turn it over to you and put you in the hot seat again to tell us something about yourself.

[Ben]: OK, so last week I talked about how I was a failed child actor. And then so another interesting fact is that my mother is from New Zealand, and so I have dual citizenship in New Zealand, though I haven’t been since I was 10 years old, so...but I can still go if I need to make a run, make a break for it.

[Ari]: That’s very different than the failed-child-actor fact, but interesting nonetheless. So thanks for sharing. So let’s dig in, Ben. As I mentioned a few minutes ago, last week, we really talked about what the DOL is, what laws they enforce and kind of set the stage for talking about what happens during an audit. Before we jump into that, I just wanted to make sure this point was clear. How does an employer get notice or be aware, become aware that they’re being subject to an audit?

[Ben]: So, yeah, we kind of talked about this a little bit last week, but the main thing is that it can happen either by a reach-out from the investigator. But for the most part, it starts by an investigator showing up unannounced in a workplace. And they will identify himself or herself and they’ll present their credentials and they’ll explain the investigation process, what’s going to take place and the types of records they’re looking for. And, you know, the key thing is, you know, some of those employers feel violated by that, they say, how can this person just come to my workplace? The Fair Labor Standards Act permits them by law to enter and inspect the employer’s premises and records. It’s kind of like an unspoken thing that employers, if they’re going to be operating, they subject themselves to the potential visit from the DOL. It’s kind of like just a piece of doing business...and so that’s something that they’re empowered to do. And so while it can feel extremely uncomfortable, you know, like I said in our last episode, it’s a good idea to call counsel or another trusted adviser of some sort, but that the investigator is permitted to do that. And so it’s a matter of then cooperating with them after that happens.

[Ari]: OK. Yeah, I think that’s important for you to point out, Ben, because I think we did touch on this last

week. But, you know, it can just be really daunting or scary for an employer to just have a US DOL investigator show up at your door.

[Ben]: Right. And the important thing, I think, when that happens is to ask questions to get as best an understanding as possible as to what they're looking for or what they need and if possible, to ask for time to put together any records or to give them a list of employees or whatever they're asking for. You know, kill them with kindness is what I always say. We want to be as cooperative as possible. Don't set it up to be an adversarial relationship from the very beginning, from the initiation. You know, try to establish that you're going to cooperate, that there is nothing to hide because in your eyes, you're compliant with the wage and hour laws.

[Ari]: Right.

[Ben]: And that will serve you well going forward.

[Ari]: Yeah. I think that's just like good life advice.

[Ben]: Yeah, that too.

[Ari]: So, Ben, let's talk a little bit about the audit itself. So it's my understanding that really the initial phase is the investigation phase, right?

[Ben]: Yeah.

[Ari]: Can you tell us really what that entails?

[Ben]: Yeah. So the investigation phase, there's a couple of things that happen in it. So the first thing is that the US DOL investigator will want to examine records to make sure that you fall under the FLSA, the Fair Labor Standards Act. So like in our last episode, we talked about what are the laws that the US DOL was enforcing. That's the Fair Labor Standards Act, the minimum wage of \$7.25, that minimum wage is being met, the hours are being tracked, and that overtime is being paid. And New York's requirements is another layer on top of that. But for the most part, the US DOL cares about the federal laws that they want to be enforcing. And so they have to figure out first if the Fair Labor Standards Act applies because it doesn't apply to every employer, especially smaller employers.

[Ari]: Right.

[Ben]: And so the US DOL might come in thinking that the FLSA does apply. And then as part of their investigation, this investigation phase they need to make sure that they have the proof of that, the records of that. And like I mentioned before, they are empowered under the law to request these certain records. So the FLSA applies just as a little bit of background, where the employer has an annual dollar volume of sales or business of at least \$500,000.

[Ari]: Right.

[Ben]: And then it also applies where the work is regularly involving commerce between states, what we refer to as interstate commerce. And there's no dollar threshold associated with that qualification. So an example if somebody who works in a factory or in manufacturing that they produce goods that are shipped out of state. So that employer, regardless of dollar volume, is going to be subject to the FLSA.

[Ari]: And that's a pretty low threshold really to hit...if you think about it, if you're in manufacturing or if you're in an industry where you're doing a lot of business out-of-state.

[Ben]: Right. It's also very, that the DOL will try to interpret as broadly as possible. They want as many people to fall, as many entities to fall under their purview as possible because then they can enforce and make sure that they have jurisdiction to make employers comply.

[Ari]: Right. So what so what information would the investigator request to make that determination?

[Ben]: Yeah. So they're going to request tax returns for the most part. And that's where they're going to see the annual dollar volume. And, you know, they'll also request kind of information on kind of what the business does. But for the most part, you know, they will try to check that box off by just hitting that \$500,000 threshold and not having to get into a factual analysis or discussion about interstate commerce. And so they'll ask for the last couple of years of tax returns to see what the business has been doing financially.

[Ari]: That makes sense.

[Ben]: Right. And they will keep those records confidential. And, you know, they know that that sort of thing is sensitive to a lot of employers and those sort of financial records and that they're asking to kind of see your books. And so they understand that they have to protect those at the same time.

[Ari]: That makes sense. So, Ben, just for our listeners, when the DOL investigator comes knocking at your door and you're a business or an employer, is the expectation that you're providing the information immediately or how does that work with providing the information they are requesting?

[Ben]: Yes, so sometimes they will ask to look at the records right then and there, but other times investigators will be willing to say, OK, well, if you want to put them together, put for the last year or so, payroll, we understand you have a lot of employees. You know, it's not readily available or it's at a different location. It's offsite, it's with our bookkeeper. It's, you know, ADP has it or whoever, then they can be more accommodating. And especially with COVID, you know, we saw less in-person pop-ups just because of the distancing issues and more kind of email communication from DOL. But the...so in addition to the issue of whether you fall under the threshold, the other giant issue that we've kind of been talking about but haven't explicitly stated is that they're going to want to examine all of your payroll records and time records...and they're going to probably want to make copies of those and then they're going to kind of go through them with a fine-tooth comb.

[Ari]: Right. But it also, I would think it would depend on the type of audit with respect to what records you would be producing.

[Ben]: Right. So if we're talking about Wage and Hour Division, and there's a concern about minimum wage or overtime on their part and that employees are not being paid properly under either of those two components then they're going to want to see, OK, give us time records for all of these employees for this past year or two years. And they're going to want to see if it's you know, an electronic clock in and clock out. If it's a bio, there's some sort of bio scan aspect of a thumb print. How reliable are those clocking in, clocking out and the more that they ask those questions, the more you kind of get a sense of either the assumptions that they're proceeding under or maybe the basis of the complaint. Right. And that, you know, show us all the paystubs, you know, and sometimes employers, you know, haven't been giving pay stubs or they aren't keeping a contemporaneous time records. And that in and of itself, that request shows a lack of compliance. But then if you have those records, they're going to examine the validity of them and see make sure that they're as accurate as possible, because what they're doing is they're comparing them against whatever statements they're getting from employees. And so that's the other component is that they're going to want to interview employees in private without you as employer, which is, again, a difficult pill to swallow. But it's something that they're allowed to

do under the FLSA. And so they want to use those interviews to verify the accuracy of the time records to understand the duties of the employees and decide whether any kind of overtime exemptions may apply if they're like an exempt employee, the manager meets that standard. And, you know, the interviews are normally conducted in that first phase when they when they arrive at the employer and sometimes, you know, they may reach out to past employees if they've moved on since or, you know, or conduct those interviews by phone. But it's really a lot of times it's when they're at their workplace.

[Ari]: Right. Yeah. OK, so Ben, the investigator shows up and comes knocking at your door, you know, asks to see some records, maybe interview some employees. What else would be part of this investigatory phase?

[Ben]: So after they get that initial set of documents from you, they've interviewed the employees they've probably made a determination that FLSA applies or they may not really tell you that they're going to proceed with the investigation, which is in and of itself an implication that they've made that decision. Right. Then at this point, there can be significant back and forth with the investigator as they may have questions regarding, like I said, the validity or accuracy of the records, you know, questions about your time keeping procedures.

[Ben]: You know, they want you to explain different, maybe if they see a discrepancy or they see a difference between a time card and what's on the pay stub, if the hours don't match you know, and who is this person? Why? What were they doing? You know, if you have exempt employees where you're not paying them overtime, they want to understand what those people's duties are. And they will give you an opportunity to have some back and forth with them. If it's a more unique industry, where it's not like run of the mill, like with the horse training example I gave last week, you know, that's not, it's not as readily understandable and readily ascertainable as to how that business is operating, how employees are coming and going and what they're doing on a daily basis. Right, it's not a retail establishment to an office environment. Where we kind of, as laypeople, understand and the investigators are you know, they do this and they do this work on a regular basis and they see a variety of work environments, but they don't all understand how something maybe a unique business operates. And so there's an opportunity to kind of educate them as to how your business operates. Sometimes I have found within it when you have an attorney representing you and it's the go between you and the investigator, there is more opportunity for back and forth. But even if you don't have an attorney, they will sometimes have follow-up questions and want to learn more. Something else to keep in mind is that, say you gave two years of payroll records to the US DOL. Well, they have to go through—those could be thousands of agents, right? They have to go through that. It's an investigator. You know, they may have some assistance, but at the end of the day, it is the federal government. And they are you know, there's a level of resources where, you know, there might be a limitation on that. And so they can go dark. And the investigation virtually in almost every investigation I've been a part of, there's a period of time in which the investigator goes dark for a period of time and they're working on other investigations. It's not really a reflection, in my experience, on where your investigation is going. It just means maybe something popped up that was really...needed their attention and they had to go give their attention to that. But just because they go dark for a couple of months and then they come back to you and say, oh, we actually need some more information on this one person's duties. And, you know, I would need to understand what this type of person, how you were keeping track of their time. This group of employees...just because they had been gone for a while doesn't mean that they don't still have the power of the FLSA behind them; that means you have to give him that information and that you have to engage with them, especially with additional requests for records that fall within their purview of the FLSA. So it can be extremely frustrating. This is kind of like the real life, how this plays out. It can be extremely frustrating when, if I'm representing you and I say the investigator wants these records, can you provide them? We give them to them. And then two months later I say, oh, hey, they have follow-up questions. It's like, well, where have they been? What have they been doing? It is extremely frustrating. And it's almost like you have to reintroduce them to it sometimes. That's just a difficulty of these types

of investigations. But usually your counsel can absorb most of that for you and kind of help to be your advocate in addressing those issues and kind of saying, can we move this along. Or, what's the status? Where have you been kind of thing, and not have you as the employer kind of going at the investigator, and instead having your counsel kind of do that in a modified, kind of a tactical way.

[Ari]: Yes. So, Ben, you mentioned that, you know, sometimes having, you know, having counsel usually facilitates that back and forth. It's my understanding that during this investigatory phase or toward the end of it, there is a potential for resolution a lot of the time. Is that your experience as well. And can you tell our listeners a little bit about that and then what happens if you cannot reach a resolution with the deal?

[Ben]: Right. So when the investigator collects all your records and they've gone through everything and they've done their interviews like we talked about in cases where they do not believe that the records are accurate and that there is some sort of back wage, whether it's minimum wage, whether it's overtime, they can sometimes do a recalculation of employee wages by looking at payroll and estimating the number of hours what they believe were truly worked versus what was on their time card, because they don't believe or there's the validity of the time cards, they're questioning the accuracy. Maybe it's just an estimation as the number of hours it's not clocked in at eight, left at five, it's they worked eight hours. And so that is going to automatically lead to a little bit suspicion from the investigator as to, is this really when they were coming and going? And also if the time records are always the same every single day, there's no minutes, there's no differentiation week to week. That also might lead to some suspicion in comparison with what the interview statements they're getting from employees. So they will use that information to decide on hours that they maybe believe were truly worked and then charge you as the employer the difference, the back wages.

[Ari]: Right.

[Ben]: And they ultimately will, if they find that there are back-wage issues and this is just one...I'm using the example of the timekeeping issue, but it could be like a shaving off of overtime issue if they see a difference between the time cards and time records and the pay stubs not matching up. That's a whole different issue where there's some sort of manipulation. They're going to think going between the two. And so if they believe that there are back wages owed, they will give you the calculation. Sometimes it's in a giant spreadsheet and they will show you this is how many employees these things are covered by this because by then you've given them a number of records related to the employees that you have, and this is a number of employees, and this is what each one of them are owed. And you need to pay US DOL this amount of money so that then we can distribute it to those employees. And that's what they would like, they will make every effort to try to resolve that at this investigation phase, and they refer to it resolving it "administratively" because at this point we're not in court, it's just an investigator talking to you over the phone or by email. There's no lawsuit that's been commenced. And it's referred to as administratively, but that's at the conclusion of their investigation. There will also be a conference, a final conference where they will sit down with you and now it's over the phone and they'll go through all their findings and say, this is kind of where we're at. This is what this is what we think is owed. And sometimes if you don't have counsel, it can be extremely confusing. And all you hear is large numbers and you don't understand where they came from. So it's really important to have that...somebody explaining it to you and to also check their work, to check DOL's work. And sometimes they make incorrect assumptions, they make incorrect calculations. No, they're doing their best, but they're not perfect. And they make errors and we find them all the time. And it's not nefarious for the most part; it's just human error or misunderstanding.

[Ari]: Right.

[Ben]: So that's how if you're able to resolve, you're able to come to a number and say, OK, I understand maybe we should have complied with the law better here, we can improve this, then you would make

a monetary payment to settle it. The other thing that usually is a component of that is that there is a compliance aspect. They want to make sure, DOL wants to make sure that whatever issues they may have found that you have remedied them and that we provide proof that they were remedied. So like I've sent them pictures of newly installed time clocks and that's...they need something to justify kind of leaving it where it is and ensuring that going forward, you're not going to commit the same alleged violations.

[Ari]: OK, I think that's a great overview, Ben. So we talked about the investigation and kind of what happens at the end of it. What if you as an employer or business can't resolve the audit after the investigation phase? What are kind of next steps?

[Ben]: So if you can't resolve it, then the Wage and Hour Division of US DOL will ultimately want to pursue it. If you can't resolve it, you're not willing to pay that the offered amount that they want or that they're requesting, then they will commence a lawsuit against you in district court, in federal court, on behalf of the employees stating that you committed a number of back wage, a number of wage and hour violations, that there are back wages owed, and they will seek every sort of penalty that's available to them under the law.

[Ari]: And you anticipated my next question, which was going to be, can you tell us if that happens, what are some of the penalties that employers can face?

[Ben]: Yes. So if there's an overtime issue or there's a back wage issue, then obviously that's a component of the monetary penalty that you may face. If you were paying the wrong minimum wage or you weren't tracking the hours.

[Ari]: Right.

[Ben]: But then on top of that, there's what's called "liquidated damages" and "civil money penalties" and both are sort of seen as additional amounts that serve as deterrence for future violations. And liquidated damages are basically a multiplier of the amount of back wages that were owed to a particular employee. So if the employee was owed \$1,000, liquidated damages at 100% of that is another thousand dollars, so that person would be receiving \$2,000. It's sort of a little bit of a recognition of...if they should have received that those funds, those who have those wages three years ago, four years ago, when this was maybe it started, then, you know, there's a certain value to them that they are deserved of getting it now, like all these years later, that makes up for it. It's not a perfect equation, though, in my opinion, and sometimes it doesn't have to be 100%, sometimes it'll be 50%, sometimes 25%. But even in the settlement phase, Wage and Hour Division will sometimes request that they tack on liquidated damages of a certain percentage on top of your settlement, on top of what they think of the back wages. And at that point it's frustrating because they haven't proved anything that would allow them to get liquidated damages but in order to resolve the matter, instead of going to litigation, you're willing to kind of take that calculated or you willing to avoid that calculated risk.

[Ari]: It sounds like, Ben, penalties can really add up quickly if you're dealing with issues with more than one employee. And it's more like a systemic issue, with payroll or whatever, it really can add up quickly. But one of the things I wanted to ask you, because I don't think I asked you in the context of trying to resolve it, in your experience and I know it's you usually communicating with the DOL on behalf of clients. Are they willing to work with you? Are they willing to kind of find a compromise? Or is it mostly just this is what we think is owed...pay it.

[Ben]: Yes, it depends on the personality of the investigator honestly, in my experience, it has been that the demeanors and the level of cooperation or level of negotiation varies by person. I think also it has to do with sometimes whether the investigator trusts the attorney that they're working with and that they think that they can trust what they're going to say and that it's not just, not stalling, you're not just

delaying things. You're not just kind of making their life more difficult if you have a particular question or you have a particular point. And so I really pride myself on trying to establish positive relationships with the investigators, not in the sense that you're kind of giving away the whole thing. But you're right. I mean, obviously, that's not what we're trying to do, but that you have enough of a positive relationship where if I say, you know, this employer really didn't do that, I think you need to check where that info is coming from. Then they're going to say, OK, well, because it's Ben, because it's Barclay Damon, OK, fine. But that's not my experience how every investigator works, just because an investigator talk to an attorney that's not my experience across the board. I've come into situations where we kind of come to clean up after an investigation is already started. Maybe there's different attorney involved. And you can tell that the relationship with the investigators is very tense because it's kind of been a very resistant, non-collaborative, non-cooperative run so far. And so I always find that they will be cooperative with you if you are, like I said, I think I said the last episode, killing with kindness. But the other thing to think about is that the investigator, if you cannot settle the matter with them, if we can't settle the matter with the investigator and the higher-ups within the Wage and Hour Division, this is getting real nitty gritty. They do send it to their solicitor's office of the DOL, which is the attorneys that represent Wage and Hour if they were to go to court. And that's a separate set of individuals that Wage and Hour Division is their client and they're trying to help those employees be paid properly. That's the whole name of the game for the government in this context, but at the same time, those attorneys have to prove the violations the investigator is alleging. And so they have to look at the proof and feel confident about that. And that's another set, another place where you might be able to find common ground with the solicitor's office. It doesn't always happen, but it's another kind of set of people to interact with.

[Ari]: Right I think that makes sense Ben and that's good to point out because that's really more like an attorney-to-attorney conversation, appreciating...both sides appreciating what needs to be proven legally.

[Ben]: Right. Right. So if they were to go and that's the thing, it's like people say, well, why don't I just go to litigation? Well, it's because then they're going to seek every penalty that they can possibly

[Ari]: Very good point...

[Ben]: They are going to try to get as much liquidated damages as much civil penalties, which are penalties that go directly to the government for mostly willful violations of the FLSA or repeated violations, if you've been found or agreed that you violated the FLSA before and so they self to prove everything, they have to show that this was a systemic issue. But at the same time, there's a giant risk that they are going to try to go for as many penalties as possible on as much as a systemic, widespread basis. And that's not to say that, you know, we never contest in litigation, but it's just got to be, you know, a calculated and an educated assessment of the risk.

[Ari]: Thanks. So I think that's great, Ben. I think that was a really great overview of US DOL audits and the process and you've given us some really great practical, real-life tidbits and experience. For our listeners, next week we're going to talk about audits by the New York State Department of Labor. So, as a kind of primer, Ben, I know you do that work as well. Can you just tell us a little bit about the interplay between US DOL and New York State DOL audits and how those kind of react with each other?

[Ben]: Ben: Yeah, so oftentimes people think, oh, the Department of Labor, one of them came into my workplace. They audit us before, so as another one comes in, we're good. That's not always true. There might be specific objectives that are creations of New York state law that the US DOL does not necessarily care about, not concerned about, and they're not may not even be aware of...like intricacies with what we like spread of hours, meal breaks, uniform credits, things like that that are specific to New York state law. New York DOL is going to maybe have an interest in those for US DOL is not. So just because you maybe got a clean bill of health from one does not mean you got it from the other. And just because you paid maybe back wages to one does not mean the other is not going to still have an issue.

So it's really important to understand the basis for either of those audits and how they work together. And sometimes I've had clients that are subject to both at the same time and usually, yeah, it's really... You know that there's some eyes on you at that point.

[Ari]: Right.

[Ben]: But the name of the game is to really understand the focus and the scope of each one of them and having counsel to explain to you what, what is covered by each one.

[Ari]: Well, Ben, thanks again for joining us. This has been great. I've learned a lot, I'm sure our listeners have learned a lot. As I mentioned, next week Rosemary Enright will be joining us again to talk about New York State Department of Labor audits. If you're listening, you definitely don't want to miss it, Ben, thanks so much again for joining, any final last words before we sign off?

[Ben]: No, thank you so much Ari, this was a blast.

[Ari]: Thanks so much.

[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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