



Episode 23: “What to Do When the DOL Comes Knocking at Your Door, Part 3: NYS Audits”

Speakers: Ari Kwiatkowski and Rosemary Enright,
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 back to “What to do When the DOL is Knocking at Your Door, Part 3: New York State Department of Labor Audits.” This is our third episode in a series of episodes where we tell you basically the ins and outs of what, as an employer, you need to know about Department of Labor audits, both at the federal and state level. So today, I am thrilled to announce that Rosemary Enright is back with us. If you listen to the podcast, you probably know Rosemary is the practice group leader for the firm’s Labor and Employment Practice group, which means that she heads off of the group of attorneys that we have at the firm that practice labor and employment across the state, and in Massachusetts and Connecticut as well. So, Rosemary, with that introduction, welcome back.

[Rosemary Enright]: It’s good to be back, Ari. I’m glad I made the cut.

[Ari]: Yes! We’re glad to have you or I’m glad to have you, I should say. But you know, you know the drill, Ro, since you’re kind of a repeat guest on the podcast. The first thing I ask our guests after I give my introduction is for them to share a fun or interesting fact about themselves. And I think we have a bit of a theme going with you, and you always share a really good, interesting travel story. So to our listeners, I know that Rosemary is basically like a jet-setter and she’s always traveling here, there, and everywhere. Maybe not in the pandemic, but she has great travel stories. So, Rosemary, hit us with an interesting “Rosemary” travel story.

[Rosemary]: Well, so, you know, all my other travel stories were outside the country, so we’re going to stay in the country this time.

[Ari]: Very pandemic-forward.

[Rosemary]: Right! That’s exactly right. So several years ago, I don’t even know how many years ago it was, you know, I don’t know, maybe 10 or something like that. I was out with friends and we were talking and they were reminiscing about a cross-country road trip they had done. And I said, you know, I have never driven cross-country. And they were shocked. They said, how could you have never done that? Like, I’m going to do it. And so we literally spent nine weeks....We started in Washington, D.C. So I was living there at the time. And we did the southern route, and we drove all through the south. And we ultimately stopped in San Francisco, which I’d been to a million times—I think most people know I was with Oracle for 16 years, I had an office out there. But we did the whole southern route nine weeks, almost 10,000 miles, Ari. And if anyone were to look at our journey, it was this, like all over. It was, you know, oh my gosh, we forgot there’s a pie place, you know, and so it was a whole mix of kitsch. So we saw the biggest ball of twine. We saw the golden peanut down in Georgia. You know, the Jolly Green Giant. I mean, we did all of that, but we also did, you know, kind of educational and historical stuff. So we went to the Civil Rights Museum down in Memphis, and the Rock and Soul Museum in Memphis. And so lots, of course,

so it was a whole mix of things, but it was a lot of fun and I would highly recommend it. And if anybody's looking for the tips on kitsch or Americana you know, give me a ring.

[Ari]: Yeah. Well, actually, it's funny, Rosemary, because for once I can actually say that I have a similar travel experience.

[Rosemary]: There we go!

[Ari]: Not something you and I ever talked about. But before I started my career as an attorney, in that sweet spot period of time where you take the bar exam and then you have like a month before you have to start working, my husband and I did the same, and we drove from Buffalo to San Diego, the north way there. And on the way back, we did more of the southern route. But you know, we did it in like two and a half weeks because we didn't have nine weeks, unfortunately. But I have to say, not that this is a travel podcast, if you're listening and you have never driven a cross-country or even gone out West or seen any of the national parks, because that was like a big focus of what we saw on our road trip. Like 10 out of 10 would recommend have to do it. It's so,...I love going abroad just as much as anybody else. But there really are some amazing things to see here.

[Rosemary]: I agree. I couldn't agree more, Ari, seriously. I mean, there are just some amazing, amazing places. And, you know, people diss, you know, if you've got anybody from North Dakota listening all right...

[Ari]: I love North Dakota. And I went there!

[Rosemary]: I did, too. And people diss North Dakota and South Dakota, they're awesome. We did our thing, we ended up spending, were supposed to be there like two days and we spent a week, because it's beautiful.

[Ari]: So I'm kind of the same. Like, we booked hotels as we went. We kind of, you know, we saw like a sign for Badlands National Park. We're like, let's go. It was awesome. So anyway, maybe we can have a side travel-related podcast, but let's give the people, you know what they want to hear and jump into the New York State Department of Labor audit topic. So, Rosemary, you know, to our listeners, if you listened to the first couple episodes of the segment, Ben Wilkinson and I really went through the nitty-gritty as we like to say. One of the first things I asked Ben, Rosemary, was what is the US Department of Labor and what laws do they enforce? So I want to kind of pivot and just point that question in your direction for New York State. Just briefly, what is the New York State DOL and what laws do they enforce?

[Rosemary]: So the New York State Department of Labor, now there's multiple divisions within it. And so let's just focus on one, and that will be Labor Standards. Okay. So let's just talk for purposes of this podcast. So Labor Standards enforces, as the name implies, New York labor laws. So what do we mean by labor laws? Well, you and I know, Ari, but for our listeners, just in case, your meal periods right? So, you know, they enforce the meal period requirements, uniform maintenance, travel time, overtime, you know, so and another way to think of it is basically anything that has to do with the various wage orders. Now, if somebody's sitting out there and they're thinking, I don't know what a wage order is, give us a call because you seriously need to know that.

[Ari]: Need to know.

[Rosemary]: That's the truth, though, isn't it, Ari? I mean, New York state has a miscellaneous wage order, and it talks about all of the relevant labor laws that, you know, you're responsible to comply with. And there's one for hospitality and that. So basically anything to do with those wage orders, anything to do with the New York labor laws. Right. And Labor Standards they enforce....you know, I'm sure Ben told you there's a certain cutoff, certain types of companies, you know, size in

that they investigate or they audit or work with in New York State. It's any employer in New York State.

[Ari]: Yeah. And I think that's a very important distinction because those requirements are those things that you have to satisfy or an investigator at the federal level is looking to see that you qualify for really don't apply under state audit. So if you have employees, you could be subject to an audit in New York.

[Rosemary]: That's right. I mean, you can have you know, you have one or two employees. You're subject, doesn't matter. So what they want is the small little mom and pop, you know, restaurant or dry cleaner or something like that. No, you're subject to it. You could be subject to an investigation or audit by the New York State Department of Labor.

[Ari]: That's a really good point. So just high-level, Ro, one of the things I wanted to ask you, just for our listeners, the benefit of our listeners, are just generally what is an audit and are there different types of audits or different types of things that the Department of Labor is looking at when they're performing an audit?

[Rosemary]: I don't know if I'd say there's different types of audits per se. So I mean, there's always an investigator and they're going to come out and look at your records, but they're looking at different types of things. So depending on, you know, why they're there. And we'll talk about that in a minute, but depending on why they're there is going to determine the types of records they're going to ask for, whether or not they're going to interview employees, whether or not they're going to come on site or just do it all electronically. But basically, an audit is an audit is an audit in New York State.

[Ari]: I like that. So, Rosemary, that's a great point. I wanted to ask you, because I think—if you're an employer in New York and you're listening or you own a business in New York and you have employees, you're listening—how do I become subject to an audit? So if you're an employer, how do you become subject to an audit? How are you notified? What are the types of issues that come up?

[Rosemary]: Right. So you become the subject in one of two ways. The first is somebody complains. Right. So it may be one of your employees. Right? They may go to the Department of Labor. And for those of you, if you just go out and put in the New York State Department of Labor, you'll see there's a place where you can just file a complaint. All right, and so, you know, that happened a lot with COVID. But they can just go out and file a complaint or they can pick up the phone and call. So it can be an employee voicing a concern, a complaint. We've had a couple instances where it was not an employee but it was someone who happened to be in a place of business, observed something and made a complaint. So it's a complaint or it's you know, you, unfortunately, unlike the lottery, when you're like YAAAY my number came up! In this case, you know, they do random audits, right so they do random audits. And you know, a great example of that is in the health care space, specifically those with home care health agencies. Right now, those are...I don't want to use the word target because that makes it sound really negative. But they're the subject of quite a few audits right now. And it's not based on complaints. It's...there was an initial complaint for one particular home health care agency. They went in. We'll start to look at the records and thought, huh, we should start looking at some of these others. And now many of them have been subject to audits. So it's kind of that random, you know, it comes up, as I said, either your number because we all know, you know, the Department of Labor, everybody's registered in the state of New York now. But it can also be because they are doing that. They've got an area of focus.

[Ari]: Right. Now and Ben talked a little bit about that, too, Rosemary. But that's a great point, Ro, and Ben talked a lot about that with respect to the horse-training industry, because I think on the federal side, of things, audits were, as you said, I don't want to say targeted, toward that industry, but that the reality

was it was happening a lot in that particular industry. So, Rosemary, one of the things I wanted to ask you, and I asked Ben this on the federal side, but when New York State is performing an audit, or the DOL is performing an audit in New York if you're an employer, how do you become aware that you're the subject of an audit?

[Rosemary]: So the...it's stressful no matter how you find out. But I do want to say...I personally think when you get the letter in the mail, that's far less stressful. So typically, you'll receive something in the mail. But I have had two of my clients, my employers where literally the Department of Labor, the investigator walked in with his ID and a badge saying, I'm with the New York State Department of Labor. We've got a complaint. I'm here to interview your employees. So, I mean, that is like, what? Yeah. Yeah. Your blood pressure goes through the roof, Ari. So typically, it's a letter. You get a letter in the mail that you're the subject of an investigation and they'll contact us and then you're off to the races.

[Ari]: So thanks, Rosemary. That's helpful. You know, it seems like this whole notion that an investigator just shows up at your door is a little bit more common, you know, under the federal side of things or when the US DOL is performing an audit. But it can still happen in New York. So I think it's important for us to point out. So just high-level, Ro, can you talk about what happens during the audit and what is the audit process, basically, when an audit is being conducted by the New York State Department of Labor.

[Rosemary]: Sure. And, you know, I think the first question is, Ari, and I know, that always comes up is, so did somebody complain? Why are you here? They're not going to tell you. They don't tell you. Now, often, you know, as you get into the audit, you're able to kind of glean. Oh, this was clearly a complaint that came in. But that's the first thing that comes to mind. You have to fight that urge. Well, what happened? Who complained? What did they say? Mean it's not helpful. It's not.

[Ari]: That was counsel that Ben gave last week as well, because I think it is a hard pill to swallow when you have somebody showing up or sending you a letter and saying, I need all this information and you really aren't probably going to find out why.

[Rosemary]: Yeah. It's very, you know, and everybody, you know....and then what happens is I've had a lot of employers say, you know what, I think it's Ari. I've noticed Ari has been acting funny and, you know, and then all of a sudden. And then...

[Ari]: ...that's a whole other issue. A whole other can of worms...

[Rosemary]: That's right. And then it's like, leave Ari alone, all right? Just leave Ari alone. We don't want to get hit with a retaliation claim now in addition to...

[Ari]: ...and it wasn't Ari!

[Rosemary]: That's right. It wasn't Ari. But anyway, so you get this letter in the mail. So let's go with the more common way this happens. All right. So you get a letter in the mail. And the other thing, the first thing you think is because they're going to ask you for a laundry list, right? So it's probably going to be all your employment records for the past three years and your payroll records. And this and that. And the question is, can they ask for that? Absolutely, all right. They can ask for that, and you are required to produce it now. So it'll come in this letter or come in and they'll have a whole host of documents that they're asking you for. And there will typically be a deadline and it will be an unreasonable deadline. Because, you know, they go back three years. And that's the other question. How long can they go back? Rosemary, they're asking me for two years. It seems ridiculous. Agreed.

[Ari]: The answer is it's not, though maybe ridiculous. It might be, but it is. They're within their rights to ask

for it.

[Rosemary]: That's exactly right. And in fact, if you go and you read the labor law that says they can actually go back—everybody breathe deeply—six years.

[Ari]: Right.

[Rosemary]: Which is a lot. So they don't typically do that. They typically go back three years. And what'll happen is if they're going through the records, if it looks like maybe they had been the subject of an audit or investigation in the past for this or a similar type situation or a complaint. If it was a complaint, they're going to go back six years because they're going to think this is done intentionally.

[Ari]: Right.

[Rosemary]: Right. But typically, it's just three years. You've got the document request and you've got to comply. And as we said, you know, often it is going to be an unreasonable timeframe. And what I will say to you is the key with all of this is compliance and treating them with respect. Not that any of our listeners would be disrespectful...

[Ari]: Right.

[Rosemary]: ...but it is scary and it is frustrating. And you may call and the Department of Labor, each of those investigators is handling, you know, 50, 60, 70 of these. Yes. And they have deadlines and they've got all these documents that are coming in, and it's you're calling and you're being difficult, or you're refusing to turn something over, or you're only giving part of it that that is not going to endear you to them. So compliance. Respect. And they will, nine times out of 10, give you an extension. I have never had an investigator say to me, no, we're not going to give you a month to do this, or two months, because, again, things happen. People are on vacation. It might be during the holidays. So you work with them. But at the end of the day, whatever they're asking for, you have to you have to turn over. Now, and what I'd say is and Ben may have said this as you're going through and you're collecting all of this data, you're looking at your documents, you should be looking at them because, you know, for example, if there's a question like this, show us your records that show confirming or indicating the meal periods or the times, the breaks that your people get. All right. Ding, ding, ding. That's a flag. This is probably a complaint, and somebody said you're not properly paying them.

[Ari]: Exactly.

[Rosemary]: Yeah. And so look through those documents and pause and think, are we doing this right? And if you realize that, whoops, we were making a mistake. All right. You immediately get into compliance and everybody says, well, doesn't that make us look like we're guilty?

[Ari]: Right.

[Rosemary]: Well, you made a mistake. And so that is going to help you with the Department of Labor they're going to look favorably on you saying, you know what, we didn't know; it was an honest mistake.

[Ari]: We didn't know and then when we found out, we took prompt action to correct it instead of just kind of letting it fester.

[Rosemary]: Right. Or waiting for you to come back and say to us, this is wrong.

[Ari]: Right.

[Rosemary]: And the other thing is, quite frankly, Ari, it cuts off your damages. Right. So when I say damages, what you may owe your employees. And so because some of these audits I had one that went on for 18 months you know, and so that's just, you know, dollars and dollars just racking up, you know.

[Ari]: Exactly

[Rosemary]: So you want to try to stop that. So basically you get the letter in the mail, you pick up the phone, you acknowledge that you've got it. You ask for the extension of time. And then you start putting the documents together and you comply. All right. And so you submit what you have to submit and you know, and you see where that goes. Now, there's more we could talk about this, as most of you know, Ari, and I could go on for hours about this...

[Ari]: For days!

[Rosemary]: Yes, it's true. It's true. But, you know, but I'll stop and, you know, I'll stop there because, you know, let's say you've put everything in and actually I'm going to talk a little bit more, Ari, and feel free to just cut me off or chime in. But so let's say you put all the documents in, then what you get from the Department of Labor—similar to the heart attack, when they come in with the badge, now you get the letter and it's like when you applied to colleges thin, not good, thick... good. So in this case, it's the opposite thick, not good...

[Ari]: Thin, great. It's nice.

[Rosemary]: Thin is you're in compliance right now. You get that thick, you get that thick envelope. Look out. And the reason it's thick is because they're going to include in their...what they refer to as a "recapitulation document." And it's going to list every single employee on there and what they are allegedly owed. Right. So they're going to, the Department of Labor is going to do an audit and they're going to come up with it and you're going to die because it's going to be some insane number right? Yeah, exactly.

[Ari]: Amount. And that's actually perfect, Rosemary, because one of the last things I wanted to ask you about was settlement. So you're the subject of an audit you've put together your documents, submitted what you need to submit. You complied with the deadline. You probably had an attorney helping you. Is there opportunity for settlement or in your experience, are investigators or is the department looking to really work it out?

[Rosemary]: It's a great question. And my answer is it depends on what you mean by settlement. Everybody asks, Okay, well, now I see this number, you know, \$210,000, real number people that's actually a real number that one of my clients got hit with. And they're like, well, can we negotiate with them? Because there's always room to negotiate. And the answer is "kind of." So remember we said at the beginning: the Department of Labor is enforcing all of the labor laws, all right? And it has to do typically with wages, meal periods, uniform maintenance, you know, all of those types of things. It's all money. It's all wages. The Department of Labor cannot negotiate away an individual's earned wages. Right. They're not going to do that. It's this isn't...Oh, I'm going to write you a check and you're going to sign a release. These are wages allegedly owed and they're going to make you pay them. All right. But when you get that recapitulation and assuming you're you know, you're working with counsel, what your counsel will do is go through and say, all right, let's point out all the mistakes. All the reasons that this one's wrong, and that one's wrong, or why their interpretation of the records, you know what they think they saw, what they think they read, is wrong. And so I'll tell you that \$210,000 number. I told you we got that down to

under \$100,000 because again, it's this kind of settlement, Ari, we went back and said, wait a second, you don't understand how our business works. And so, we as counsel, spent a lot of time communicating with the Department of Labor investigator. And in this particular instance, it was a gentleman, and his supervisor drafted a lot of letters, laying everything out, citing the different laws and that, and got the number brought down. So if by settlement we mean, you know, is there room for you to say, hey, wait a second, you're wrong and look at this and that? Absolutely. And, you know what, you're crazy if you don't.

[Ari]: Right! I mean, you should.

[Rosemary]: Yeah, you're crazy if you don't push back and say, wait a second, this isn't right. And here's why it's not right. So just because the Department of Labor gives you that recapitulation doesn't mean that you have to agree to it.

[Ari]: Yes. All great points, Ro. So I think, you know, I think this has been a great high level view of New York State Department of Labor audits. Before we close for today. So is there anything else that you want to share or any pieces of advice we maybe didn't go over that you think would be valuable for our listeners to hear?

[Rosemary]: You know, a couple of points and I think, Ari and I have said this in other podcasts, remember, if something isn't written down, it never happened, right? Everything's got to be documented.

[Ari]: So true.

[Rosemary]: So you should be, and everybody in New York State knows that our employees are entitled to a 30-minute uninterrupted meal period. And you may say, well, I let my employees take their meal period. But you know what? If they're not writing down, if they're not punching in or punching out or using that hand scan or whatever it is, and you have no records, at some point you may unfortunately be subject to a random audit or possibly a complaint. And when the Department of Labor comes in, they're going to look at everything and they're going to ask for the records that show your meal periods, for example, and you don't have anything written down. And you say, well, but this is how we do it. Right. Doesn't matter, it's not written down, so any of these labor laws that you know that we need to comply with, make sure that you've got documentation to support it, because as I said, if it's not written down, it didn't happen. And just as the US Department of Labor will interview employees, so does the New York State Department of Labor.

[Ari]: Yes.

[Rosemary]: We can't be present. You can't be present. And so they're going to sit down and they're anonymous. And who knows what's going to be said. And that's why you need that documentation. So that would be my biggest takeaway.

[Ari]: Yes. It's very important. And I'm glad you brought that up, Rosemary. And thank you so much for joining us. I think this has been great. And this is actually perfect because to our listeners next week, Ben Wilkinson is back and he's going to tell us, for a bonus episode, and Ben is going to go over the top five ways you can prepare for an audit. And I think, Rosemary, what you just said is definitely on that list. So with that, I really appreciate it. Thanks again so much for joining us, Ro, you're great as always.

[Rosemary]: Well, thanks for having me Ari. I hope you'll have me back.

[Ari]: Oh, you'll be back. Absolutely. And to our listeners, thanks so much. We'll see you next week.

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

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