

Breakfast **Bites**[®]

**PAY NOW OR PAY LATER:
HOW TO RESPOND TO A WAGE AND HOUR
AUDIT AND AVOID VIOLATIONS**

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Overview

- How Department of Labor audits start, what is requested, and what to expect.
- Common wage and hour violations and penalties owed.
- How to conduct an internal audit and resolve violations proactively.
- Updates on recent Supreme Court decisions that implicate human resources.

NOTICE OF THE AUDIT



UNITED STATES DEPARTMENT OF LABOR
Wage and Hour Division
Troy District Office
5700 Crooks, Suite 310
Troy, MI 48098
(517) 225-8795



March 3, 2023



Transmitted via: Electronically via Email

RE: Wage and Hour Division Investigation

Dear



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 **March 10, 2023, at 10:00 a.m.** to determine your compliance with the FLSA. The enclosed pamphlet briefly describes the FLSA.

OUTLINE OF AUDIT'S PARAMETERS

I will visit your establishment on **March 10, 2023, at 10:00 a.m.** to determine such compliance. The normal procedure is to hold an opening conference with a representative of the company, review certain records covering a two-year period, interview a representative number of employees, and hold a closing conference to discuss the results of the investigation. In order to conduct the investigation with as little disruption to your business operations as possible, please have available for inspection on the above date, all documents providing the following information for the last two years, ending with your last completed payroll:

RECORDS REQUESTED

1. Legal name of the company and all other names used by the company (e.g., “Doing Business As” names).
2. Names, addresses, email addresses, and telephone numbers of all business owners and company officers (e.g., President, Treasurer, Secretary, Board of Directors and other Corporate Officers) along with a company organizational chart if you have one.
3. Records demonstrating your gross annual dollar volume of sales. Please provide these records for the past three years. This information is included on your year end tax statements, e.g., Tax Form 1120, Tax Form 940.
4. A list of all current and former employees employed during the period **February 15, 2021, to February 15, 2023**, along with their address, email address, telephone number (mobile and landline), hourly rate or salary, job title, shift, and whether you consider that employee exempt from overtime pay.
5. Payroll and time records for the past **February 15, 2021, to February 15, 2023**, including a copy of the most recently completed payroll. Please provide this information broken down on a weekly basis.
6. Birth dates for all employees under age 18 who worked from **February 15, 2021, to February 15, 2023**.
7. 1099 Forms and contract documents for any independent contractors, subcontractors or day laborers at this establishment from **February 15, 2021, to February 15, 2023**.
8. Federal Employer Identification Number (FEIN).

EFFICIENCIES

We request that you make all of the listed documents available on the designated meeting date pursuant to the authority contained in Section 11(a) and (c) of the FLSA and in Title 29, Code of Federal Regulations, Part 516.

WHD prefers that you submit all records electronically through the WHD Portal.

Portal Access Information

Link: <https://webapps.dol.gov/eup>

Case ID: 1978079

Zip Code: 48009

Documents should be uploaded into the WHD Portal on or before March 10, 2023.

FINES AND PENALTIES

2023 Statistics:

\$274 million in back wages,
down from \$322 million in 2019

\$1,297 per affected employee,
up from \$1,025 in 2019

DOL hired an additional
100 investigators in 2022.

\$274M
In back wages

\$1297
Per affected
employee

RECENT TRENDS IN ENFORCEMENT

Nationally:

Focus on medical staffing agencies and nursing homes.

One company in Virginia classified workers as “independent contractors” and, therefore, did not pay overtime. After a bench trial, the court awarded over **\$9 million** in back wages and liquidated damages for failure to pay overtime and maintain adequate records. This includes nearly \$2 million in wages that should have been paid in the period between the end of the trial and the entry of the court’s decision.

RECENT TRENDS IN ENFORCEMENT

In Michigan:

Less aggressive and focus is on hospitality industry.

Case in Grand Rapids seeking \$150,000 for improper record keeping and tip sharing. Case in Troy involving \$48,000 fine for violating child labor laws.

Frustrating case against two Ann Arbor restaurants for not paying cooks overtime during COVID. Decision to allow cooks to work at both restaurants if the cooks wanted and believed they were not the same “employer.” When DOL disagreed, restaurant agreed to pay backpay. DOL would not accept offer because they wanted liquidated damages. Case is still pending.

DOL FINES

In addition to backpay and liquidated damages, employers can be assessed fines. These are minimums *per* violation:

- Minimum wage and overtime: \$2,541
- Recordkeeping: \$1,084
- Child Labor: \$15,629 (higher for willful)



INTERNAL AUDIT

First step in an internal audit is to **make sure your policies and practices are still lawful.**

Both state law and federal regulations change constantly and significantly.

Michigan's paid time off and minimum wage laws.

DOL regulations on "exempt" employees.



INTERNAL AUDIT

Second step is to review **employee classifications** and **independent contractors**.

Are the job descriptions accurate, and do the workers actually do the tasks in the job description?



INTERNAL AUDIT

Third step is to review **overtime** and **rate of pay calculations.**



INTERNAL AUDIT

Final step is to review **record keeping**.



SUPREME COURT UPDATE

Loper Bright Enterprises v. Raimondo – What was Chevron deference and are we glad it is dead?

Starbucks Corp. v. McKinney – Unanimous court finds NLRB must be treated like any other litigant.

Muldrow v. City of St. Louis – Employee claiming discrimination must show “some” but not significant harm.

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THANK YOU



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