

POSH UPDATE

The U.S. Department of Labor Intensifies Scrutiny of Wage and Hour Violations in the Home and Health Care Industry

The U.S. Department of Labor (“**DOL**”), through its Wage and Hour Division (“**WHD**”), has been intensifying its pursuit of Fair Labor Standards Act (“**FLSA**”) violations by residential care facilities, nursing facilities, home health and home care services and other care-focused industry employers where it believes that low wages and high rates of violations are prevalent. Since launching its nationwide initiative in 2021 to reduce FLSA violations in the health care industry, the DOL has completed more than 1,600 investigations, which has led to its recovery of more than \$28.6 million in back wages and damages for nearly 25,000 workers and assessments of \$1.3 million in civil monetary damages for employers who willingly violated the law.¹

The most common FLSA violations are the failure to pay overtime and federal minimum wage, and to maintain accurate records of work hours, but there has been an uptick since 2022 of DOL lawsuits against health care facilities, nursing registries, and staffing agencies alleging FLSA violations for misclassifying employees as independent contractors resulting in unpaid overtime.²

Currently, WHD investigators are targeting the Southeast region in states like Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.³ According to the DOL⁴, from 2020 to 2022, WHD investigators identified violations in nearly 89 percent of more than 1,200 home care and nursing care investigations in the Southeast, which led to its recovery of more than \$16.2 million in back wages and liquidated damages for more than 13,000 workers, in addition to the assessment of more than \$150,000 in civil money penalties against employers.

The DOL says it hopes the increased enforcement activity and large damages outcomes will serve as a reminder to employers “to review their pay practices to ensure they comply with the law.”⁵ As such, here is what home and health care employers across the country need to know.

¹ <https://www.dol.gov/newsroom/releases/whd/whd20221116>

² <https://www.dol.gov/newsroom/releases/whd/whd20220127>, <https://www.dol.gov/newsroom/releases/whd/whd20220927>, Walsh v. Comprehensive Healthcare Mgmt. Servs., Civil Action 2:18-cv-01608 (W.D. Pa.)

³ <https://www.dol.gov/newsroom/releases/whd/whd20221103-3>

⁴ <https://www.dol.gov/newsroom/releases/whd/whd20230215>

⁵ Id.

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How to Prepare for and Handle a DOL Audit

The DOL is not required to give employers prior notice of an audit. In fact, WHD investigators often initiate unannounced investigations to observe normal business operations. As such, the best way to prepare for a DOL audit is to conduct regular and periodic internal audits of employment records and policies to ensure compliance with the FLSA. Internal audits typically include a review of exempt employee classifications, independent contractor classifications, payroll and time records, and FMLA and other leave law compliance. It is advisable to work with knowledgeable employment attorneys who can counsel employers on current wage and hour laws and best practices.

Additionally, here are some specific tips on what to do if your company becomes the subject of a DOL audit with or without notice. First and foremost, always be courteous and cooperative when engaging with the auditor. Next, verify the auditor's credentials and immediately notify legal counsel, or consider retaining a labor and employment attorney with experience handling DOL audits. Designate a company representative, either legal counsel or a senior manager, to work with the auditor. The representative should ask for specific information about the focus of the audit (e.g., overtime pay compliance, exempt vs. nonexempt classification, minimum wage compliance), the time-period for records the auditor wants to review, and the names of any employees that may be interviewed. The representative is responsible for gathering, providing, and keeping track of the documents requested and provided, and coordinating employee interviews, if requested. At the end of the audit, the representative should ask the auditor to provide a summary of the results of the investigation. If any violations are found, employers are encouraged to consult legal counsel before any settlements are agreed to with the DOL.

Our team continues to monitor and review the DOL's wage and hour enforcement activities against home and health care employers. Subscribers to the premium content on POSH can locate state compliant Minimum Wage, Overtime, Leave and other policies, as well as other [resources](#) if a DOL auditor knocks on your company's door. Please do not hesitate to reach out to us directly with questions.