

Worksite Enforcement: What to do When (and Before) Federal Agencies Come Knocking

Kara E. Stockdale, moderator
Allison D. Balus
Amy Erlbacher-Anderson
Randy J. Stevenson

Legal advice is often highly dependent on the facts unique to each situation. As such, the content of this presentation is not legal advice and is provided for general information purposes only. No attorney-client relationship is created by the use of this content. Any opinions that I express herein are my own and do not necessarily represent the opinions of Baird Holm LLP.

Wage and Hour – In Advance

- Regular wage and hour internal audits of:
 - Independent contractor and employee classification
 - Time-keeping systems
 - Unpaid meal periods (especially if auto-deducted)
 - Required postings
 - Recordkeeping policies and procedures

Wage and Hour – in Advance

- Consider more than just FLSA:
 - Migrant and Seasonal Agricultural Worker Protection Act
 - Federal contractor rules – Davis-Bacon Act, McNamara-O'Hara Service Contract Act
 - Consumer Credit Protection Act
 - Family and Medical Leave Act

Wage and Hour – Audit Time

- May or may not receive advance notice
- Appropriate employer personnel should:
 - Verify investigator's credentials
 - Request investigator to return on another day
 - Notify essential personnel
 - Ask about the scope and clarify requests
 - Be cooperative but assertive

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Wage and Hour – Audit Time

- Contact counsel immediately
- Attend opening conference
- Be responsive but do not volunteer information
- Be an active participant
- Request daily close-out meetings
- Prepare witnesses
- Participate in closing conference

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Immigration and Employment Verification – Who and What?

- ICE
 - Form I-9s
 - Unauthorized employees
- Immigrant and Employee Rights Section ("IER")
 - Discrimination, document abuse
- E-Verify
 - Desk audit, irregularities

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Immigration and Employment Verification – Who and What?

- Fraud Detection and National Security Directorate (“FDNS”)
 - Nonimmigrant visa employee site visits
- Department of Labor
 - Public Access Files, H-2A/B, and PERM Audit Files
- Wage and Hour Division
 - Form I-9s, wage payment, repayment agreements

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Immigration and Employment Verification – ICE Audits

- In person, with subpoena and without advance notice
- At least three days are given to respond – USE THEM
- Additional information is often requested
- Retain a copy of everything provided

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Immigration and Employment Verification - ICE

- May call or just show up to ask for information about suspected unauthorized employee
 - Consult with legal counsel before speaking to ICE
 - Typically ICE will agree to more discreet conversation

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Immigration and Employment Verification - FDNS

- May be unannounced
- Request to speak with sponsored nonimmigrant employee
- Confirm accuracy of documentation employer submitted to sponsor employee
- Consult legal counsel in advance of providing response or substantive conversations with FDNS

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Before OSHA Calls

- General Preparation
 - Safety and health program/discipline
 - Train employees/document training
 - Regular safety meetings
- Designate a "Walk-Around Team"
 - Team leaders/train them
 - Search warrant issue – require or not?
 - "Government Inspections" policy

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Before OSHA Calls (cont.)

- Equip the Walkaround Team
 - Video/other monitoring equipment
- Pre-Inspection Audits
 - Internal, external, and consultation program
 - Attorney-client privilege and attorney work product rule issues

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Response Upon OSHA's Arrival

- Remain calm
- Invoke any search warrant requirement
- Consider granting "limited consent"
 - Remember the "plain view" doctrine
- Use of an outside employer representative (e.g., legal counsel)
- The less said, the better

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Response Upon OSHA's Arrival (cont.)

- Gather evidence/take notes
- Do not allow unreasonable disruption of operations
- Abatement during an Inspection
- Employee interviews
 - Non-Supervisory
 - Prepare/Debrief
 - Supervisory
 - Prepare/Participate

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW

Questions?

Kara E. Stockdale
402.636.8269

kstockdale@bairdholm.com

Allison D. Balus
402.636.8254

abalus@bairdholm.com

Amy L. Erlbacher-Anderson
402.636.8335

aanderson@bairdholm.com

R.J. (Randy) Stevenson
402.636.8226

rstevenson@bairdholm.com

© 2022 BAIRD HOLM LLP

BH | BAIRD HOLM[®]
ATTORNEYS AT LAW
