

## Gavel to Gavel: Surviving crackdown

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By **Kristin Simpson**

The crackdown has begun, and this time they're calling in the reinforcements.

Over the last two years, the U.S. Department of Labor has added 350 new investigators to its staff. Yet despite this tremendous increase in boots on the ground, the DOL is still unable to investigate and address all the complaints filed by workers. In an unprecedented collaboration with the American Bar Association, the DOL has implemented the Bridge to Justice Program, which connects workers with private attorneys through a local referral service. While the goal of this collaboration is to help workers enforce rights under the Fair Labor Standard Act, or FLSA, and the Family and Medical Leave Act, or FMLA, and help clear the backlog of complaints, the program presents significant new hurdles and hassles for employers seeking to defend themselves.



To begin with, an employer will not receive any type of notification when a worker's claim is referred to a private attorney. However, an employer will know that such a letter has been sent if it receives a communication from the DOL that the case has been closed and remains unresolved at the time of its closure. After the private attorney referral and after an informal request by the attorney or employee, the DOL will release (on an expedited basis) any documents or information the employee provided to the agency and the DOL's computation of damages or back pay owed to the worker. Importantly, the DOL will not release this same information to the employer without a formal request. Accordingly, once the employer receives the letter from the DOL that the case was closed without resolution, the employer will need to quickly file a written Freedom of Information Act, or FOIA, request to determine whether information has been provided to an employee or her counsel and to obtain the same information the employee received without a FOIA request.

Bridge to Justice increases the risk to employers. This program will likely increase private overtime and minimum-wage litigation as it assists employees who may not have pursued a lawsuit without the referral. Additionally, because

workers will have ready access to some information without the need for formal requests, employers need to be careful about what information they provide to the DOL. For example, employers should mark as "Confidential and Proprietary Commercial Information" all financial and other proprietary business information provided to the DOL. If the employee files a FOIA request for the employer's documents marked "Confidential and Proprietary Commercial Information," the DOL must provide the employer with notice and the opportunity to object to the disclosure. Employers should have a process in place for a designated company representative to promptly review and respond to the notice.

Because of the increased chance of an audit and private lawsuits, employers should consider performing a self-audit before the DOL comes knocking. Check time records to see if all employees are properly documenting their time and to see if payroll records match up with time records. Review all salaried employees to ensure they are properly classified as exempt from overtime requirements. If your company relies on other FLSA exceptions for overtime or minimum wage, examine job descriptions and job duties. Review written employment policies and the day-to-day implementation of these policies. A successful self-audit will identify any potential problems and determine the appropriate solution. The audit should also identify necessary documentation to prove compliance with applicable laws. Fixing problems before they are spotted by the DOL will go a long way in surviving any DOL audits or private lawsuits that arise.

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