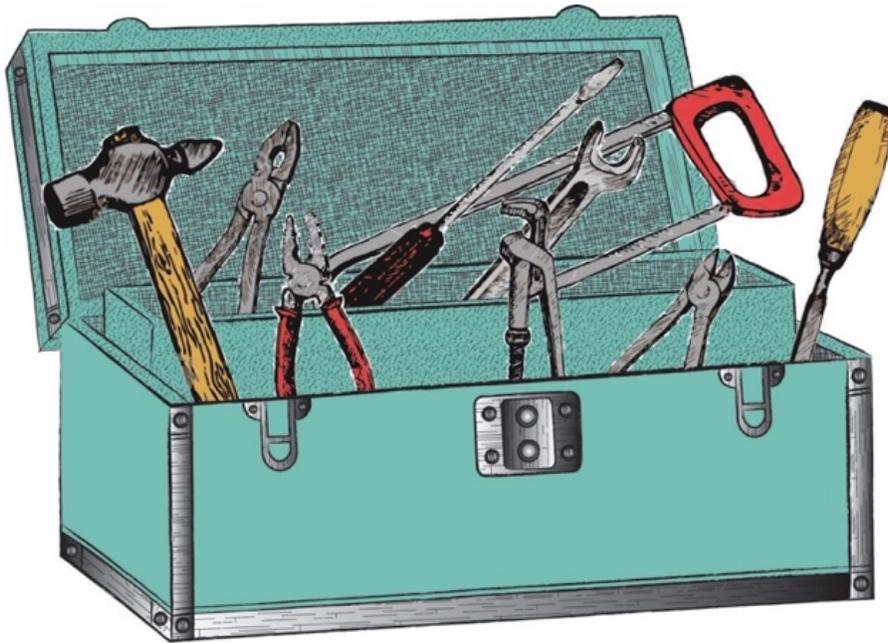


The Labor Standards Enforcement Toolbox



Tool 2: Investigations

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RUTGERS
School of Management and Labor Relations
Center for Innovation in Worker Organization

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Policy solutions that work for low-income people

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INTRODUCTION

A labor standards investigation is an inquiry by an independent enforcement agency into one or more employers' compliance with labor standards laws. Investigations can be complaint-based, or proactively initiated as part of the agency's strategic enforcement priorities. Investigations can be company-wide, focused on a subset of workers, or an inquiry into allegations only as they pertain to a complainant.

The ultimate goal of a labor standards investigation is to obtain documentary and testimonial evidence to answer four fundamental questions:

- 1) *Did a violation occur?*
- 2) *Who was impacted by the violation?*
- 3) *What are impacted employees owed in back wages, interest, and other damages?*
- 4) *How could this investigation contribute to improving overall compliance among businesses in this industry?*

Investigations can be conducted by mail, email, telephone, in person, or some combination of these methods. Onsite investigations are more resource-intensive, but are needed when investigations involve highly vulnerable employees, or there is reason to believe the employer is hiding, falsifying, or misrepresenting evidence. Mail, email, and telephone are useful methods for more straightforward investigations that are lesser priorities for the agency, but on their own, are generally not sufficient against bad faith employers who falsify, hide, or destroy records.

PRE-INVESTIGATION TECHNIQUES

INTAKE

Intake is the agency's opportunity in complaint-based investigations to obtain information to ensure the complaint meets the agency's criteria for initiating an investigation. Robust information at intake is also needed to prioritize the complaint so that the agency can better focus its resources on the most egregious, impactful, and high-risk complaints. Complaints can then be triaged, or sorted based on their priority, so that the agency can employ enforcement tools that use fewer resources for low priority complaints, saving capacity for high priority complaints and proactive enforcement. By investing resources at the intake stage, the agency will ultimately be more effective as it will have the information it needs to properly prioritize and triage complaints, which are key aspects of strategic enforcement.

Investigators should speak with complainants as part of the intake process, using an interpreter when needed. Speaking with the complainant is the most effective way to obtain holistic information about employees' working conditions and allows investigators to build rapport from the outset. Talking to the complainant also provides the best opportunity to identify different sources of evidence to corroborate the claim. For company-wide investigations, investigators should interview multiple employees during intake to better assess the legitimacy and the scope of the allegations. By interviewing employees prior to initiating the investigation, investigators can obtain testimonial evidence before the employer knows of the investigation, which is particularly important when dealing with employees highly vulnerable to retaliation.

IDENTIFYING THE EMPLOYER

Information obtained from the complainant will help to identify the employer, but employees commonly do not know the legal name of the employer or the address to which investigative documents must be served. For example, the employer may have multiple locations or worksites but the complainant may only work at and be familiar with one location; or, the employer's headquarters or legal address may be at a location where work is not performed, and so is unknown to employees. It is the agency's job to independently research and confirm this information. Databases maintained by states' secretaries of state and state and local business license agencies are the best sources to obtain entities' legal names, addresses, registered agents, and governing persons.

EMPLOYEE INTERVIEWS, INVESTIGATIONS, AND COMMUNITY ORGANIZATIONS

Enforcement agencies that work with trusted community partners will be most successful in getting candid information from workers that are highly vulnerable and/or face language or cultural barriers that may dissuade them from speaking to a government agency.

From intake through compliance monitoring, working with organizations workers trust will help investigators obtain candid information from employees. By vouching for the agency, the community organization lends its reputational credibility to the agency, resulting in more vulnerable workers coming forward to share information.

The organization can also use its resources, relationships, and networks to:

- *Find workers*
- *Allay fears by acting as the trusted messenger*
- *Provide information about the agency's practices and policies regarding retaliation protections and not asking about or collecting immigration information*
- *Explain potential benefits of cooperating in an investigation for the individual and the entire workforce*
- *Work with the employee to choose an interview location and time in which the employee will best be able to provide comprehensive information*
- *Accompany the employee at the interview to provide interpretation and/or representation¹*

While working with an organization on every low or mid priority investigation is likely not feasible, for the highest priority investigations, investigators should determine from the outset if an organization has contacts with employees in the industry, geographic area, or worker population that could support the employees and assist with the investigation.

The most successful agency/community relationships are the ones in which parties openly share information about the investigation, respond to each other in a timely manner, and include each other in key conversations like settlement discussions. To that end, agencies and CBOs should discuss and agree upon expectations around the amount of communicating and involvement they will have when working together on an investigation.

Working with community also requires trust and respect, as well as an understanding by agency staff that “the full potential for enforcement cannot be achieved without including workers and worker organizations.”² By valuing community’s unique expertise and networks, and demonstrating their commitment to transparency and open communication, agencies can create and grow co-enforcement relationships with community organizations, and in doing so improve enforcement.

RECONNAISSANCE AND SITE VISITS

Reconnaissance is a preliminary inspection by investigators of the location where work is performed. Reconnaissance can occur as a pre-investigative step to gather information to determine whether to initiate an investigation, or after the investigation is ongoing. The primary goal is to obtain evidence of the number of employees working for the employer, and to establish hours worked. To conduct reconnaissance, investigators observe the worksite to record the number of employees and the times they enter and leave a workplace. This is most effective when done during peak work hours. While resource-intensive, this type of surveillance is useful in situations in which employees have indicated the employer is likely to falsify payroll records or intimidate workers into providing no or inaccurate information about hours worked.

A site visit or onsite investigation is where one or more investigators go to the place of business to obtain information. Unannounced site visits in which employers do not have the opportunity to coach employees or alter records are the most effective, especially when dealing with an employer who may be a bad actor.

Site visits conducted early in investigations help investigators collect as much information as possible as early as possible, which can save the agency time and resources. Site visits are useful for observing work being performed, recording how many employees work at once, and obtaining records without a delay or giving the employer time to forge them.

For example, in January 2018, California Labor Commissioner's Office issued a citation totaling \$7,137,036 against six adult care facilities owned by the same company. The investigation was opened after the California Labor Commissioner's Office community partner, the Pilipino Workers Center (PWC), received information from highly vulnerable employees indicating they worked 24-hours a day, six days per week, and were paid less than \$3 per hour. The information PWC gathered and relayed to the California Labor Commissioner's Office helped investigators create an effective investigative plan, which included an unannounced site visit during which investigators were able to make copies of the employer's documents. The investigation ultimately established minimum wage, overtime, and meal and rest break violations occurring over three years, which affected 149 former and current employees.³

Site visits can also be used to interview employees. While onsite interviews are not always ideal, as employees are more likely to be afraid of retaliation or assume the investigator is associated with the employer, onsite interviews do give the investigator an opportunity to interview a large number of employees. In some investigations, onsite interviews may be the only way an investigator will be able to speak with

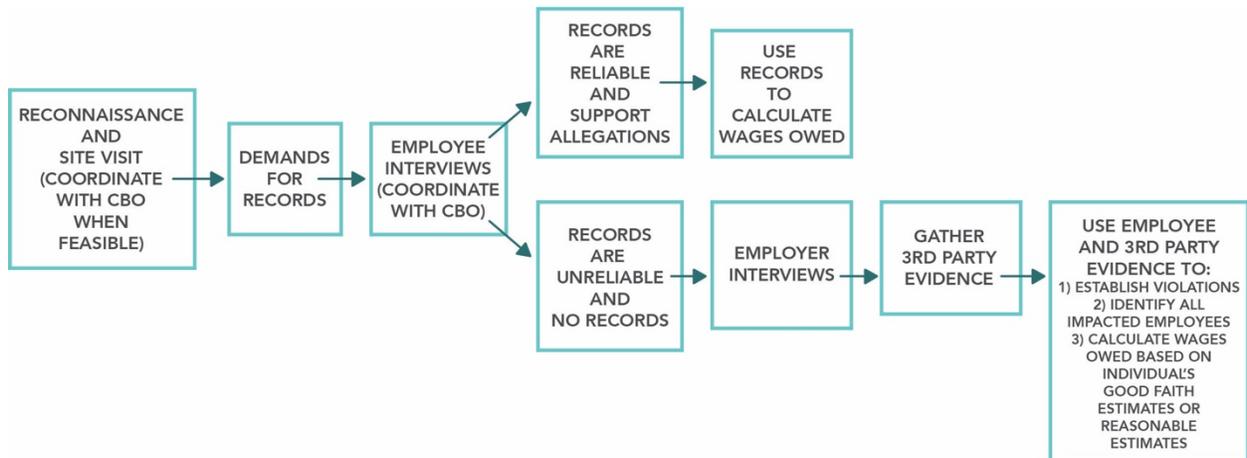
employees. Also, when the site visit is unannounced, the employer is unlikely to have had the opportunity to threaten or coach workers prior to the interviews.

Before conducting onsite interviews, investigators should work with a community organization to try to schedule offsite interviews; or, if that is not feasible, try to call employees during off hours to request interviews. If the investigator must interview employees onsite, they should take the following steps to encourage cooperation and candor:

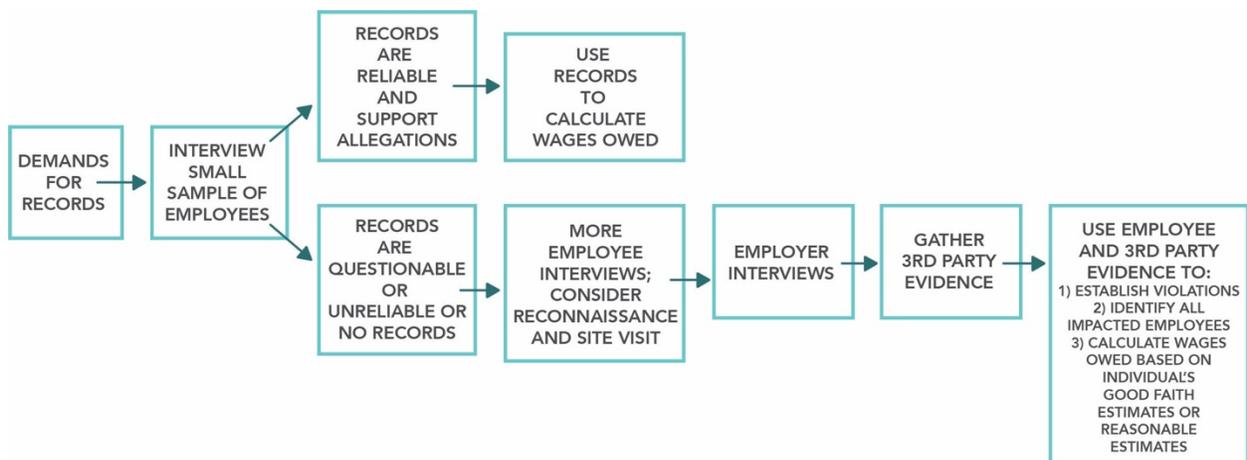
- 1. Do not alert the employer in advance of the site visit*
- 2. Be prepared as to how they will approach employees about being interviewed*
- 3. Provide an explanation as to the investigation, the agency, the purpose of the interview, and the investigator's role*
- 4. Never let the employer choose the employee interviewees*
- 5. Be prepared with interpretative services*
- 6. Interview employees in a place where management cannot hear or see the interview*
- 7. Interview a sufficient number of employees so the employer cannot identify which witnesses provided information*

Site visits are resource intensive, so while every investigation will likely not require a site visit, they should be used for high priority investigations, especially those involving bad faith employers, employers with vulnerable workers, or employers who refuse to cooperate in the investigation. Using the agency's strategic enforcement priorities, investigators can best determine in which investigations more resource-intensive techniques like reconnaissance and site visits should be employed.⁴

STRATEGIC ENFORCEMENT: HIGH PRIORITY INVESTIGATION



STRATEGIC ENFORCEMENT: LOW TO MIDDLE PRIORITY INVESTIGATION



DEMAND FOR RECORDS

Those investigations that do not begin with a site visit are generally initiated when the agency serves a demand for records (also known as a request for information) on an

employer. Agencies should tailor these demands based on the information received at intake, or, for directed investigations, on what the agency knows about the industry and the employer's role within it. Over-inclusive demands create an unnecessary burden on employers and the agency, and decrease the likelihood the employer will respond to the demand with all the information requested.⁵ Additionally, especially when investigating smaller employers, demands should be written in non-legalistic, accessible language, and translated as necessary.

Investigators should contact employers by phone or in person immediately before or after serving the documents initiating the investigation to explain the scope of investigation and the investigative process, and answer the employer's questions. It is also helpful to walk the employer through the demand for records and for the employer to verbally agree to submit documents by the date required by the demand. This initial conversation with the employer facilitates rapport-building and gives the investigator an initial sense of the employer's credibility. Investigators should document this interaction in a case note or memorandum to the file.

Common documents requested in the initial demand for documents include:

- Name, last known address, phone number, job title, rate/s of pay, and dates of employment for each employee
- Timecards and timesheets
- Paystubs, registers or receipts for payment of wages, including cash
- Tip statements or any tracking of tips, when applicable
- Itemized list of any direct or indirect deductions from wages
- Employee handbook, policies, or written descriptions of conditions of employment
- Copies of the employer's most recent four quarters of completed tax returns to determine employer size
- Name and contact information for the employer
- Federal tax identification
- Employer's industry
- Gross annual revenue
- Business structure
- Number of employees
- Employer's seven-day workweek

As the investigation progresses, investigators will likely need to make follow-up demands for records and information depending on what they learn from evidence obtained from prior demands and interviews.⁶

SPOTTING INACCURATE OR FALSIFIED RECORDS

Obtaining information from employees is critical in determining whether employers' documents are inaccurate or falsified. To spot inaccurate or falsified payroll documents:

1. Compare paystubs or other payroll documents provided by employees with documents submitted by the employer from the same pay period. If they are different, the employer may have falsified the documents.
2. Compare employees' records of their hours worked with those provided by the employer. If the employer's documents show fewer hours worked, they may be inaccurate or falsified.
3. Ask employees if the employer keeps two sets of records and if all employees are paid in the same way. Different records or methods of payments may mean the employer has a set of fraudulent accounting records, or that some employees are working "off the books," and the employer may be omitting them from their payroll documents.
4. Ask employees how many people work for the employer. If the number is substantially greater than the number of employees in the employer's records, the employer's records may be inaccurate or falsified.
5. Ask employees about and research the number of hours per week the employer is operating. If the employer's documents indicate the hours worked by employees is fewer than the hours of operation, the documents may be inaccurate or falsified.
6. Show paystubs submitted by the employer to employees and ask if they look the same as the ones they receive from the employer. If employees indicate a discrepancy, the employer's documents may be inaccurate or falsified.
7. Ask hourly employees about their schedules from week-to-week. If employee interviews indicate they have fluctuating schedules but their paystubs show the same hours worked every pay period, the employer's records may be inaccurate or falsified.

RECORD REVIEW/ AUDIT

Upon receiving the requested information, investigators should follow these steps:

Step 1: Note any documents that were requested and not produced.

Step 2: Thoroughly review all employee handbooks, employer policies, contracts, and descriptions of conditions of employment, noting evidence pertaining to the allegations, as well as compliance with other laws the agency enforces.

Step 3: Compare documents to determine if there are inconsistencies; specifically, the employer's tax returns, reported number of employees, and employees' names and contact information.

Step 4: Review the employer's reported business structure (ensuring consistency with the paying entity on employees' paystubs) for evidence of integrated enterprises, joint employment, or a franchise relationship.

Step 5: Review time records and paystubs to determine whether the records indicate there are violations and if the records appear accurate. This review will also help the investigator formulate interview questions and identify employees to interview. This step is the most time consuming of the record review and requires painstaking attention to detail, but the following questions can help guide the process:

Q: Are documents internally consistent in hours worked and paid?

- **Technique:** For a small subset of employees, calculate clock-in and clock-outs times to ensure the accuracy of the daily totals reported in the time records. If accurate, ensure the daily totals add up to the total hours per pay period, and then compare the time worked per pay period as recorded in the time records and the hours paid per the paystub. If not accurate, compare your calculations of time worked per pay period and hours paid.
- **Example:** Employee A's time records show they clocked in and out on Monday at 8:05am and 2:35pm, on Tuesday at 7:30am and 3:45pm, on Friday at 1:20pm and 9:35pm, and Saturday at 11:30am and 10:15pm. The weekly total on the time records shows Employee A worked 32.5 hours, which is the number of hours paid per the paystub. However, the investigator's calculations show the employee worked 33.75 hours, and was thus *underpaid by 1.25 hours*.

Q: Do worker or third party interviews or evidence indicate the employer underreported employees or hours worked?

- Technique: Using information obtained at intake and/or third party sources, determine hours of operation, the number and size of each location, and volume of business to determine whether the reported number of employees and their hours worked per the employer's records are reasonably sufficient.
- Example: Employer X is an entity with one restaurant. At intake, you learn employees generally get to work one hour before the restaurant opens and stay one hour after it closes. The complainant was unsure how many people work at a given time. You use Yelp to find the restaurant's hours, which are 11:00am to 10:00pm, Monday through Sunday. You see photographs of the restaurant showing 25 tables and a bar, and reviews indicating the restaurant is popular and almost always packed with customers. You calculate the total amount of employee hours worked per week per Employer X's time records, and find it is 265 hours. This number is impossibly low as it does not account for even three employees working 13 hours per day, 7 days a week, and more employees would likely be needed given the size and volume of business.

Q: Do the paystubs show employees were paid at least the minimum wage?

- Look out: Employers may hide minimum wage and overtime violations by paying some or all hourly employees a set amount each pay period regardless of hours worked, while issuing paychecks showing employees worked the same hours every week so it appears wages were paid in accordance with minimum wage and overtime laws.
- Technique: After identifying employees who make the same amount every pay period, look for employees who have paystubs but no time records as employers often do not track hours for employees they pay a set amount. Also, compare employees' pay records from one year to the next. Where the employee makes the same amount each pay period, and the total amount paid stays the same from one year to the next, but the number of hours worked per pay period is decreased (to account for minimum wage requirements), the employer may be paying a set amount regardless of hours worked or a promise of an hourly rate.
- Example: The minimum wage in 2017 is \$13 and \$14 in 2018. Employee's paystubs for the last three months of 2017 show the employee worked 30 hours per pay period and was paid \$390. In 2018, the employee's paystubs show they were still paid \$390, but their hourly rate was increased to \$14 and hours worked decreased to working 27.85 hour per pay period. This may be evidence the employer is paying a set amount, which could be indicative of a minimum wage or overtime violation (depending on hours worked), and/or a violation of a promise to pay an established hourly rate.

Q: Do the paystubs show the employees were paid overtime?

- Look out: Employers' pay periods and seven-day workweeks may be different, making it harder to determine if employees worked more than 40 hours per week.
- Technique: Identify a subset of employees who tend to work the most hours per pay period. Calculate the number of hours worked per week using the employer's 7-day workweek and time records. For any weeks in which employees worked more than 40 hours, check the paystubs to determine if they were paid overtime.
- Example: The employer's 7-day workweek runs Sunday to Saturday, and pay periods are the 1st - 15th, and 16th - last day of the month. Paystubs for Employee A show they were paid for 96 regular hours for the May 1st - May 15, 2018 pay period, working 40 hours from 1st to the 5th, 40 hours from 6th through the 12th and 16 hours from the 13th through 15th. Three workweeks overlap with this pay period: April 29 - May 5; May 6 - 12; and May 13 - 19. Employee A worked a total of 16 hours on April 29 and 30, and 32 hours from May 16-19, bringing the workweek totals for the 1st and 3rd workweek to 56 hours and 48 hours, respectively. Employee A should have been paid a total of 24 overtime hours.

Q: Do time records account for required breaks?

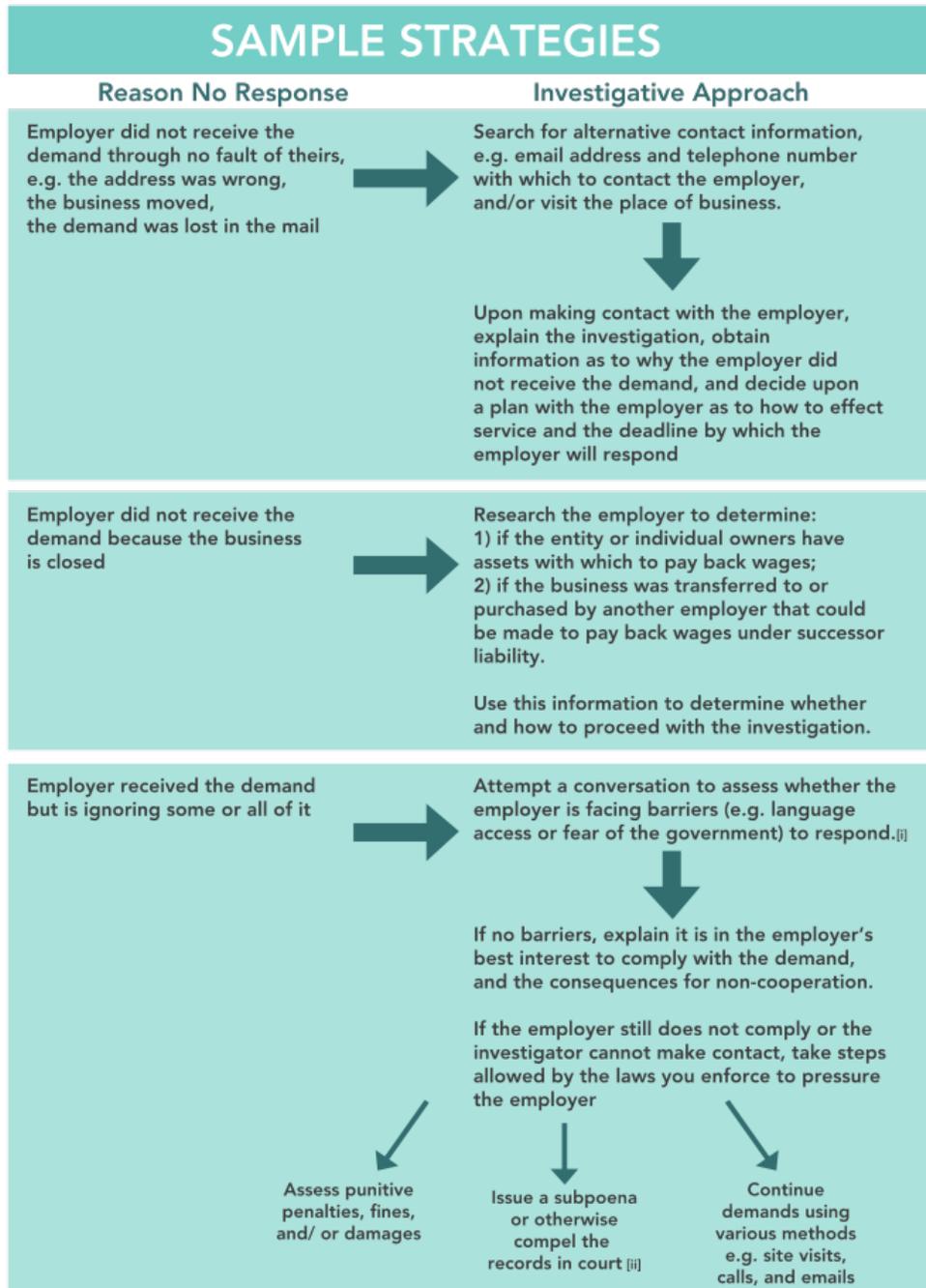
- Technique: Determine if the employer has a system for tracking employees' breaks. Where the employer does not track employees' required breaks, evidence of breaks will be limited to employees' records, and employee, employer, and third party interviews.
- Example: State law requires one 10 minute rest break for every four hours worked. The employer's timeclock records show employees clock in and out for 30 minute unpaid lunch breaks, but they do not clock in or out or otherwise record when they take rest breaks.

The record review is a vital step, but cannot be the only step in determining whether records are accurate. In answering the above questions, it may become clear to the investigator that the records are unreliable and potentially falsified. However, even if the record review results in no red flags, the investigator cannot be sure of the records' accuracy until they interview employees and compare their testimony with the employer's records.

STRATEGIES FOR WHEN EMPLOYERS DO NOT RESPOND

Some employers will not or will only partially respond to demands for records. When this occurs, investigators should consider: 1) what are the possible reasons the

employer did not respond; and 2) which approach is best suited to address the employer’s reasons. Using this framework, investigators should determine how to proceed with the investigation.



In some investigations, no strategy will successfully compel the records. When the employer refuses to cooperate with the investigation, or fails to keep or provide adequate records, the agency should use information obtained during the

investigation through other means to determine whether a violation occurred and how much employees are owed.

When an employer fails to cooperate in an investigation, obtaining enough information to determine whether the employer violated the law is often straightforward. Investigators must first know and understand the burden of proof required by law to establish a violation. The most common burden of proof under labor standards laws is *preponderance of the evidence*, which means more likely to be true than not. When one or more employees provide credible evidence of a violation, and the employer fails to provide information to rebut this evidence, the preponderance standard is met. In some jurisdictions, when an employer fails to maintain or submit payroll documents to enforcement agencies, the law allows for an adverse inference or rebuttable presumption against the employer.⁷ Such legal provisions can be helpful leverage to pressure an employer into cooperating with an investigation and can save investigators resources in establishing a violation when employers refuse to cooperate.

EXAMPLES OF EMPLOYEE AND THIRD PARTY EVIDENCE

Robust labor standards investigations, especially those involving high risk industries, require gathering evidence from employees and third parties. While employee evidence may be sufficient to prove a violation in the absence of employer evidence, the case is strongest and most likely to withstand appeals and litigation when it is corroborated by multiple workers, documentary evidence, and evidence obtained from third parties.

Employee Evidence

- 1) Employee interviews – *Their own and their coworkers' hours worked, employment relationship, promise to pay, etc.*
- 2) Paystubs, checks, receipts, or bank deposit records – *Amounts paid*
- 3) Schedules – *Hours worked*
- 4) Text messages or emails – *Evidencing an employment relationship and/or times employees started and stopped working*
- 5) Employee handbook or policy – *Written policies on wages, tips, breaks, vacation or holiday pay, paid sick leave, etc.*
- 6) Employees' personal records – *Hours worked*
- 7) Photographs of the jobsite – *Worksite info, number of employees, evidence of employment relationship, etc.*

Third Party Evidence

- 1) Agencies
 - a. Liquor Board - *Business's ownership and corporate structure*
 - b. Unemployment Insurance Agencies – *Average number of employees per quarter, wages paid per quarter, and owners' additional contact information*
- 2) Witnesses
 - a. Roommates, neighbors, bus drivers, parking lot attendants, or security guards – *Time employees went to or arrived at work, took breaks, and/or left work or arrived at home*
- 3) Credit card processing companies - *Information about credit card revenue, or tips paid by credit card*
- 4) Websites
 - a. Craigslist – *Job ads showing daily or hourly rates that do not include overtime or are below the minimum wage, and email address and credit card used to make posting*
 - b. Facebook – *Hours of operation and contact information for owners*
 - c. Yelp – *Hours of operation, capacity of establishment, number of employees working at a given time, names of managers or employees, and photos of the business*
 - d. Reference USA – *Gross annual revenue, corporate structure, and connections with other entities*
 - e. PACER – *Confirm employer filed for bankruptcy*
 - f. State secretary of state website – *Entities' legal names, addresses, registered agents, and governing persons*
 - g. State and local business license database – *Entities' legal names, addresses, and governing persons (available info may vary by jurisdiction)*

INTERVIEWS

The number and scope of interviews will vary depending on the nature of the investigation. Where reliable documentary evidence is scarce, investigators will need to rely more on interviews to determine whether a violation occurred and what back wages and other damages are due. As discussed above, interviews are also necessary to ensure the accuracy of the employer's documentary evidence. Investigators should tailor their interview strategies for each investigation based on the allegations, the employer's arguments or admissions, and the documentary evidence obtained.⁸

Determining Who to Interview

Employees

Employee interviews are a critical aspect of any investigation. Information obtained from employees may be the only means for determining whether employers' records are reliable, and whether there are violations not accounted for by the records. For example, employees are the primary source for finding violations including no rest or meal breaks, work performed off the clock, employees misclassified as independent contractors or overtime exempt, and employees not accounted for by payroll.

Investigators should interview employees who may have information relevant to the allegations, including employees who were directly impacted by the allegations or who have knowledge regarding other people who may have suffered violations.

Employers

To determine which employer witnesses to interview, investigators should consider the allegations and use the information obtained during intake and employee interviews to determine which people could have knowledge of relevant facts. Examples include the person who hires workers, who sets their schedule, who supervises their work, who disciplines them, as well as human resources staff, the business owners, and the employer's payroll staff or accountant. If the employer admits to the violation/s and wants to settle the matter, employer interviews will likely not be necessary, unless there is a question of back wages and damages owed to the employees that cannot be answered by payroll documents or employee interviews.

Preparing for an Interview

Preparing for an interview is key. An ill-prepared investigator can hamper the effectiveness of an interview, and potentially the entire investigation. Employer witnesses may interpret a lack of preparation as agency incompetence, and an

employee witness may be reluctant to participate if they feel the investigator is not treating the investigation as a serious matter.

Investigators should know the goal of the interview and prepare a list of interview questions or issues to cover before each interview. The questions should be informed by the documentary and testimonial evidence already obtained, as well as any information the investigator has regarding the witness, including their job title, schedule, rate of pay, and dates of employment. Interview questions should also aim to clarify evidentiary inconsistencies and to provide context otherwise missing from documentary evidence.

Location of the Interview

The location of an employee interview can influence how much information the witness provides. Work with a community organization when possible to organize the time and location of employee interviews. If not feasible, ask the employee where and when they will feel the most comfortable being interviewed. Allow community organizations to be present during interviews, and ensure interpretive services are available when interviewing employees who are unable to or uncomfortable communicating in English. This will reduce fear of retaliation and ensure adequate time to respond to questions, which will facilitate more candid sharing about working conditions.

Rapport Building

Building rapport with both employee and employer witnesses is one of the most important aspects of successful interviews. Understanding what motivates and hinders employer and employee cooperation will help investigators adapt their strategies and more effectively obtain information.

Maintaining rapport requires open and timely communication. If employees feel like they are being ignored, they may not continue to assist in the investigation, and employers may feel like they do not need to comply with deadlines or respond to investigators if their communications are going unanswered or the response is much delayed. Thus, to preserve rapport, investigators should aim to return all emails and phone calls to employees and employers within two business days.

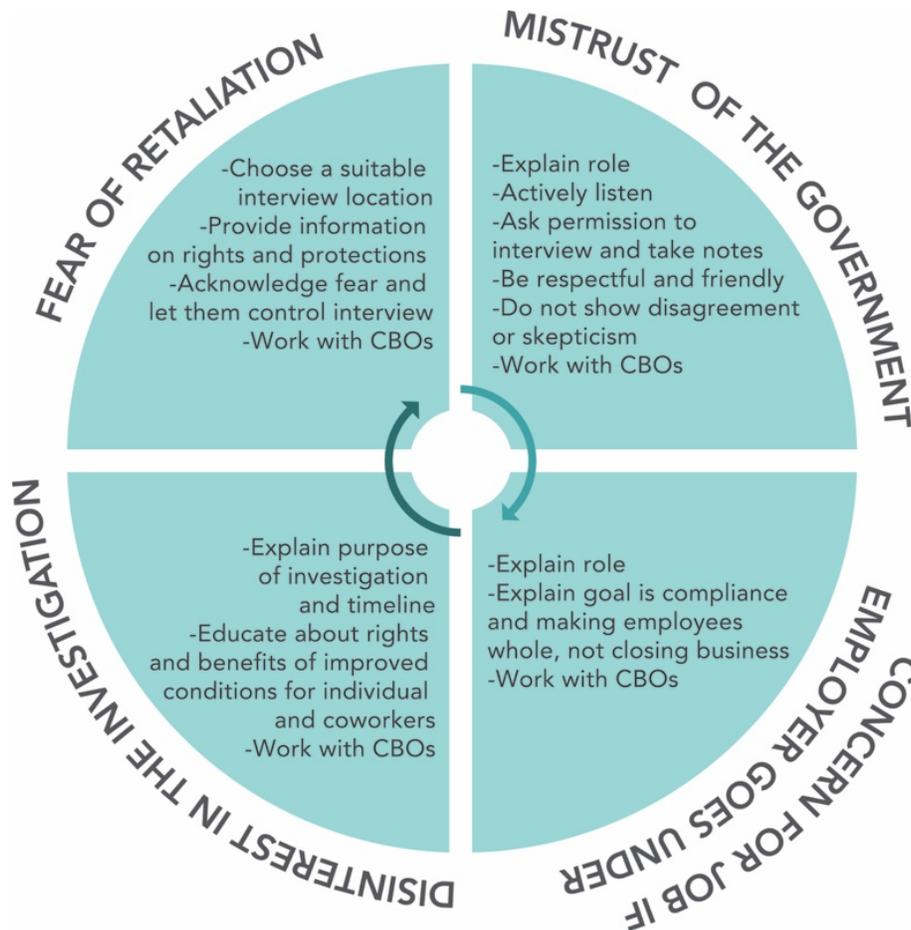
| Employee Interview Dos and Don'ts | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Do | Don't |
| <ul style="list-style-type: none"> ✓ Work with CBOs ✓ Choose an appropriate time and location ✓ Use simple language and be prepared to provide interpretation, if necessary ✓ Speak in a friendly tone ✓ Maintain open body language ✓ Make witnesses feel as comfortable as possible ✓ Explain retaliation protections ✓ Explain immigration status protections ✓ Explain your role and the purpose of the interview ✓ Offer confidentiality protections, if available ✓ Ask questions to clarify evidentiary inconsistencies ✓ Assess and note the witness's credibility | <ul style="list-style-type: none"> X Ask for information related to the witness's immigration status X Ask questions in an aggressive or intimidating manner X Use jargon or legal terms X Give any indication you doubt the information the witness is providing or their credibility X Be unprepared |

Employees

It is common for employees to feel reluctant to participate in an enforcement interview. Such feelings often stem from the employee's fear that the employer will retaliate against them, or mistrust of the government because of concerns of their immigration status or experiences in their home countries with government officials who abused their power. Employees may also be hesitant to speak up because they are uncertain about the consequences of the interview and are concerned about what an investigation will mean for their job. Highly vulnerable employees may be afraid if their employers are shut down or go out of business they will not be able to find another job, and so may be hesitant to provide incriminating information about their employer. Other employees may be disinterested in participating in an interview

because they do not think the investigation will change working conditions, they will receive back wages, or they will be believed.

Employee Reluctance and Interview Strategies to Address It⁹



Understanding and addressing employees' fears will help investigators provide information to help put employees at ease, increasing the likelihood they will provide candid information. Additionally, partnering with community organizations who have relationships with worker communities and who can organize worker interviews or vouch for the agency will help the investigator gain employees' trust, saving resources and leading to more effective investigations.

YANK SING: THE POWER OF CO-ENFORCEMENT AND ON-SITE INVESTIGATIONS

In 2013, employees of Yank Sing, a popular dim sum restaurant in San Francisco, reported widespread violations to the Chinese Progressive Association (CPA). Together, CPA and its collaborative partner, the San Francisco Office of Labor Standards Enforcement (OLSE) joined forces with the California Labor Commissioner's Office and the Asian Law Caucus (ALC) to jointly conduct the investigation.

At the beginning of the investigation, not a single worker would speak with investigators. With the help of their community partners, OLSE investigators met with employees at the offices of the community organizations to conduct the intake interviews, and learned that while payroll records showed employees worked 40 hours per week, employee testimony indicated they worked unpaid overtime hours. Because OLSE and the California Labor Commissioner's Office knew hours worked were going to be disputed, and the employer's records were potentially unreliable, the agencies and community organizations conducted reconnaissance to understand the layout of the restaurant, including the exits. They then used this information to conduct surveillance, with agency or community organization staff posted at all of the exits taking notes and photographs to document when employees entered and exited the restaurant.

Each partner brought unique resources and expertise to the table. CPA conducted house visits and one-on-one meetings with front and back of the house employees to develop relationships and persuade workers to come forward. ALC provided legal support, organized bilingual volunteers to help with intake interviews, negotiated the workplace change agreement, and organized and supported worker meetings with CPA. The two agencies took the lead on investigating, compelling and auditing records, and calculating back wages.

By leveraging their complementary capabilities and combined resources, together the partnership convinced the owners to settle the case. Yank Sing agreed to pay \$4 million in back wages and damages to 286 employees, and to institute a workplace change agreement that included rights above those required by law, including wage increases for kitchen workers, paid holidays, an increase in paid time off and sick leave, work schedules provided with more notice, recognition of seniority, a progressive discipline policy, and eight hours of worker rights training on paid time.

To hear from a worker about their perspective of this case, watch this [video](#) created by the Asian Law Caucus.

Prior to an interview, the investigator should provide a comprehensive introduction tailored to address the employee's fears and concerns. During the introduction and throughout the interview, the investigator should maintain an affable tone and open body language, while practicing active listening.

The interview introduction should include:

- *Who the investigator is and their role;*
- *What the agency does;*
- *The purpose of the interview;*
- *Why the investigator is contacting the interviewee;*
- *Retaliation protections for employees who participate in investigations;*
- *Confidentiality protections, if applicable under your laws;*
- *The employee's right to have another person, including a worker advocate, present during interview;*
- *How the investigator will be recording the employee's answers (after receiving permission to record); and*
- *Any additional steps after the interview and a realistic timeline for when those steps will occur.*

SAMPLE INTRODUCTION FOR EMPLOYEE INTERVIEWS

My name is [NAME], I am an investigator with [AGENCY], whose job it is to ensure employers comply with [LAW]. This law protects employees' rights to [EXPLAIN RIGHTS]. My job as an investigator is to gather facts and evidence to determine whether your employer violated [LAW], and to remedy violations by making sure employers pay employees what they are owed. As an investigator, I am objective and independent, which means I do not represent or advocate for either party.

I am contacting you to request to interview you. I received your contact information from [EMPLOYEE/EMPLOYER/COMMUNITY ORGANIZATION] because you may have information relevant to this investigation.

You should know you are protected from retaliation. This means it is against the law for your employer to take an action that harms you because you gave me information. Also, you have the right to request confidentiality, which means [CONFIDENTIALITY PROTECTIONS]. You may also request someone else be present for the interview, including a family member, friend, lawyer, or worker advocate.

Would you be willing to answer a few questions to help me obtain information about whether [EMPLOYER] is in compliance with [LAW]?

Would you like to request someone else be with you during the interview?

Is it okay if I take notes while you talk?

I am going to ask you questions, and I'll be typing your answers. After the interview, I will put your answers into an interview statement, which I will send to you. When you receive it, please read it, sign it, and send it back to me.

Do you have any questions before we get started? If at any time during the interview you have a question, please let me know.

Employers

Like employees, it is common for employer witnesses to be nervous during interviews. For small employers, their fears may overlap with those discussed above for workers, especially with respect to mistrust of the government. Owners may also be concerned about liability and their business being shut down, upset about the resources it takes to respond to investigations, or unaware of the laws and unsure if they violated them. Managers and supervisors may be concerned they will lose their jobs because of a decision they made or action they took.

Like employee interviews, the investigator should provide employer witnesses with an introduction to themselves and the agency, as well as a brief explanation of the investigation, the purpose of the interview, and the interview process. When interviewing managers or supervisors, the investigator should also go over retaliation protections. This introduction is a key opportunity for the investigator to build rapport with the witness, and to demonstrate they are not the witness's adversary, but rather a factfinder who wants to hear from all sides.

Employer witnesses are much more likely than employees to be represented by an attorney. When the employer is represented, the investigator should set and enforce expectations regarding the attorney's role in the interview before it starts. The introduction should include boundary setting, and the investigator should ask the attorney to agree to follow the interview protocol in front of the witness. If the attorney breaks with the protocol, the investigator should pause the interview to point out the breach and remind the attorney about the agreement they made.

Generally, employer witnesses can be compelled to participate in interviews. However, an obstructive employer witness will be far less helpful than one who is willing to openly provide information, so investigators will need to employ different tools to obtain useful information.

Most employer witnesses are most likely to provide information when they do not perceive the investigator as adversarial. Indeed, many employer witnesses will respond best to friendliness and compassion, especially when dealing with small employers, or when the violation was inadvertent or due to ignorance of the law. Recognizing and showing empathy for the challenges business owners and managers face (without excusing violations), while using a friendly tone and open body language, can increase the witness's willingness to candidly share information.

However, some employer witnesses respond better to a more severe interview style. When an employer witness exhibits disdain for the investigator or is evasive in their answers despite the investigator's attempts to be amiable, the investigator should become sterner in their tone and questioning. By shifting to a more serious demeanor, the witness may better appreciate the significance of the interview and be more willing to provide satisfactory responses to the investigator's questions.

Sample Intro for Employer Interviews

My name is [NAME], I am an investigator with [AGENCY], whose job it is to ensure employers comply with [LAW]. My job as an investigator is to gather facts and evidence to determine whether you are in compliance with [LAW]. As an investigator, I am objective and independent, which means I do not represent or advocate for either party.

The purpose of this interview is for me to gather information relevant to this investigation.

You should know you are protected from retaliation. This means it is against the law for anyone to take an action that harms you because you gave me information.

I am going to ask you questions, and I'll be [TYPING/RECORDING] your answers.

To attorney: Please hold all of your questions and comments until after I have finished asking my questions. At that time, you will have the opportunity to ask follow-up or clarifying questions. Okay?

To witness: After [ATTORNEY] and I have finished asking questions, I will put your answers to both of our questions into an interview statement, which I will send to [ATTORNEY], who will get it to you. When you receive it, please read it, sign it, and have [ATTORNEY] send it back to me.

Do you have any questions before we get started? If at any time during the interview you have a question, please let me know.

Response to attorney who interrupts during interview: [ATTORNEY], as we agreed before we started this interview, you will hold all comments and questions until I am done with my questions. Please respect our agreement.

The minority of employer witnesses will not provide any meaningful information. The witness may either refuse to answer, or, more commonly, maintain they do not know or do not remember the answers to the investigator's questions. Employer witnesses may respond this way because they have been coached, or because they feel it is in their

best interest to provide as little information as possible. After friendliness and sternness fail, investigators should explain the consequences of failing to cooperate in an investigation, including potential penalties and fines and, if available, the agency's subpoena power to compel witness testimony. If the witness continues to refuse to answer the questions, the investigator should take this into account when assessing the witness's credibility and look for other sources to provide the information they were seeking from the obstructionist witness.¹⁰

MEMORIALIZING THE INTERVIEW

Accurately and contemporaneously memorializing interviews is a crucial part of the investigation. Investigators will need to rely on information from the interviews to make determinations. Likewise, if the case is appealed or otherwise litigated, the memorialization of the interviews will likely be key evidence, and unreliable interview records could undermine the success of the case in court. There are different methods for memorializing interviews, and each has its advantages and drawbacks.

Audio Recordings

Recording the interview is the most unimpeachable method for memorializing an interview. If there is a dispute about what the witness said, the recording will almost always irrefutably resolve it. However, depending on the jurisdiction, audio recordings may require the consent of the witness. Likewise, if the witness has requested confidentiality, audio recordings can expose their identity, as the recording can be compelled in discovery, and the witness may be identified by the sound of their voice. Another potential downside is recording the interview may make the witness feel more apprehensive, which could inhibit them, resulting in a less productive interview.

Interview Statement

An interview statement is the compilation of verbatim, contemporaneous notes of the witness's responses to interview questions, written in the first person. Interview statements should include the date of the interview, the name of the witness, who is conducting the interview, the method of interview (e.g. by phone or in person), and who is present. An interview statement that is signed by the witness under the penalty of perjury is compelling evidence. Obstacles to interview statements arise when witnesses contend that parts of the statement do not accurately reflect what the witness said, which becomes especially problematic if they assert they did not make key admissions. Additionally, some witnesses will not sign and return the statement.¹¹ Unless the witness has persuasive evidence to rebut the validity of the investigator's

contemporaneous interview notes, the interview statement will likely maintain its evidentiary value.

Interview Summary

An interview summary is similar to an interview statement, in that it is based on contemporaneous notes of the witness's responses to interview questions. Interview summaries differ in that they are written in the third person, and are summaries of interviews rather than verbatim accounts. Interview statements should include investigators' contemporaneous impressions of the witnesses and their credibility.¹²

Interview summaries are helpful when speaking with a witness who has requested confidentiality as they can help conceal the identity of the witness. Investigators can omit identifying details about the witness, like the witness's name and gender pronouns. Additionally, interview summaries are useful for short interviews with numerous witnesses, especially when those witnesses are asked similar questions. Interview summaries are strong evidence when multiple witnesses report the same or substantially similar information.

CALCULATING BACK WAGES

Once a violation has been established, the investigator must determine which employees are owed back wages and how much they are owed. Ascertaining back wages owed for an entire workforce can be difficult when investigators do not have access to reliable payroll records.

Where no reliable records exist for a small business, investigators may be able to interview every employee to calculate individual remedies based on each person's interview.¹³ Where that is not possible, investigators will need to interview enough employees to obtain sufficient information to make reasonable estimates of back wages and interest due.

The U.S. Supreme Court created a burden shifting framework for cases under the FLSA to be used when employers violate their duty to keep proper records.¹⁴ The Supreme Court held that once the employee has proved they performed work and the employee's estimate of hours worked is "just and reasonable" the burden then "shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence."¹⁵ This burden shifting analysis may be a useful legal tool for investigators when calculating back wages in lieu of employer-provided payroll records as it may allow for reasonable estimates and the use of representative

evidence to calculate back wages owed.¹⁶ Alternatively, some jurisdictions have laws that explicitly allow enforcement agencies to use information collected from employees and other means to determine back wages owed when the employer does not keep or provide payroll records.¹⁷

APPENDIX

Sample Employee Interview Questions

Background Information

1. *What is your name?*
2. *What is your primary language? Would an interpreter be helpful for this conversation?*
3. *What is your email, telephone, and mailing address?*
4. *Who is your employer?*
5. *What is your job?*
6. *Can you briefly explain your job duties?*
7. *When did you start working for this employer?*
8. *Who hired you?*
9. *What is their position?*
10. *Are they still employed by the employer?*
11. *Do you still work for this employer?*
12. *If not, why do you no longer work for this employer?*
13. *Do you know the employer's address?*
14. *Is this where you work?*
15. *Are there other locations?*
16. *Do you always work at the same location?*
17. *Do you know how many employees work for the employer at the location where you work?*
 - a. *How many worldwide (or in U.S. or your jurisdiction, depending on the laws the agency enforces)*
18. *Are you a member of a union?*
 - a. *If yes, what is the name and contact information for your union representative?*

Minimum Wage

1. *How are you paid (e.g. hourly, salary, piece rate, commission, tips, other)?*
 - a. *Hourly – How much do you make per hour?*
 - b. *Salary – What is your salary? Do you make extra money if you work more than 40 hours per week (i.e. are you overtime exempt)?*
 - c. *Piece rate – What is the piece rate policy? How much do you make in a normal week?*
 - d. *Commission – What is the commission policy? Do you earn a combination of commission and wages, or just commission? How much do you make on average per week?*
 - e. *Tips – What is the tip policy? Do you earn tips combined with wages? Is there a tip pool? How is the money in the tip pool divided? How much do you make on average in tips per week? And in wages?*
 - f. *Other – Please explain.*
2. *Has your rate of pay changed since working for the employer?*
 - a. *When?*
 - b. *How much did you make previously?*
3. *How often are you paid?*
 - a. *On which days?*
 - b. *Are you paid on time?*

Wage Theft

1. How many hours do you work per week?
2. Is your schedule usually the same each week?
3. What is the name of the person who sets your schedule?
 - a. What is their position?
4. Describe your typical schedule, including days of the week you worked, time you arrive at work, and time you leave.
 - a. Do you get breaks?
 - b. When, and for how long?
 - c. Are you paid for these breaks?
5. What do you do when you arrive at work?
 - a. Do you clock-in immediately?
 - b. If not:
 - i. What do you do before you clock-in?
 - ii. Why do you not clock-in before performing those duties?
 - iii. Did someone ask you not to clock-in before you start working?
 - iv. Who, and what is their job?
 - v. Does this occur every shift, or occasionally?
 - vi. How often?
 - vii. Do other employees also not clock-in before they start working?
 1. Would you be able to give me their name/s and contact information so that I can speak with them as part of this investigation?
 2. If you are not comfortable giving me their information, could you give them my contact information and ask them to call me?
6. When do you clock-out?
 - a. If there is a discrepancy in the time the employee left work, ask:
 - i. What do you do after you clock-out but before you leave?
 - ii. Why do you clock-out before performing those duties?
 - iii. Did someone ask you to clock-out before you finished working?
 - iv. Who, and what is their job?
 - v. Does this occur every shift, or occasionally?
 1. How often?
 2. Do other employees also clock-out before they finish working?
 - a. Would you be able to give me their name/s and contact information so that I can speak with them as part of this investigation?

- b. If you are not comfortable giving me their information, could you give them my contact information and ask them to call me?
7. How do you record your time, e.g. timeclock or timesheet?
- a. Are there written instructions explaining how time is to be recorded?
 - i. Do you have a copy you could send me?
 - b. Were the hours you worked properly reflected by the timeclock or timesheet?
 - c. Did you have your own record of hours worked?
 - i. If so, would it be possible to get a copy of it?
8. Are you paid by check, cash, or direct deposit?
9. Have you been paid for all of the hours you have worked?
- a. If not, for which hours have you not been paid?
 - b. How often did nonpayment occur?
10. Do you ever work more 40 hours per week?
- a. If so, do you get paid more for hours over 40 per week?
 - b. How much?
11. Does anyone you work with work more than 40 hours per week?
- a. Do you know if they are paid more for those hours?
 - b. Would you be able to give me their name/s and contact information so that I can speak with them as part of this investigation?
 - c. If you are not comfortable giving me their information, could you give them my contact information and ask them to call me?
12. Do the owner/s or manager/s take tips from the tip pool?

Retaliation

1. Has anyone threatened or intimidated you, or taken any other harmful actions against you to keep you from participating in this investigation, or for [PROTECTED RIGHTS], which are rights protected by the law?

Other Sources of Evidence

1. Who is your manager?
 - a. What is their position?
 - b. Do you have their contact information?
2. Does anyone besides the manager supervise your work?
 - a. What is their name/s and position/s?
 - b. Do you have their contact information?
3. Do you know who the owner/s of the business is?
 - a. Do you have their contact information?
4. Do you have any paystubs, bank records, or other documents showing payment from the employer?
5. Do you have any employer policies or handbooks, or an employment contract?
 - a. Would you be willing to send those to me as evidence?
6. Do you know if any of your coworkers make less than [MINIMUM WAGE]?
 - a. Would you be able to give me their name/s and contact information so that I can speak with them as part of this investigation?
 - b. If you are not comfortable giving me their information, could you give them my contact information and ask them to call me?
7. Are there any other people who have witnessed [ALLEGATIONS] to whom I could speak?
 - a. What are their name/s and contact information? **OR** Would you please give them my contact information and ask them to contact me?

Endnotes

¹ See Janice Fine, "Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Had Failed?" (2017) 364; <http://journals.sagepub.com/doi/pdf/10.1177/0032329217702603>.

² *Ibid.*, 366.

³ See, State of CA, Dep't of Industrial Relations, "California Labor Commissioner Cites Owner of Six Residential Care Facilities in Los Angeles Over \$7 Million for Wage Theft," News Release, No. 2018-03 (2018) <https://www.dir.ca.gov/DIRNews/2018/2018-03.pdf>.

⁴ Note, some allegations are so minimal they will require an enforcement action that falls short of an investigation. For example, for nonpayment of a last paycheck, the issue may be resolved with a letter of phone call. While it is important for to have enforcement tools for low priority cases that uses few resources, such actions are outside the scope this document.

⁵ This includes how far back to go when requesting information. For example, if the investigator has evidence the violation was ongoing for three years, the investigator may want to ask for six months of records first, and then request older records after they have reviewed the first production. In reviewing a sampling of the records, the investigator may determine only a subset of employees was impacted by the violation, allowing for a narrower follow-up request, which will be less burdensome for the employer and will save the agency significant resources with the record review. Of course, if the investigator has reason to believe the employer will alter or destroy records requested at a later date, they should adjust their strategy accordingly.

⁶ It is important to track the demands for records and interviews investigators make, including the dates they were made, as well as whether and when employers responded to them. This information may be necessary if the case goes to court, is appealed, or to meet legal requirements for penalties, e.g. penalties for willfully impeding the investigation.

⁷ For example, Seattle’s labor standards ordinances include a rebuttable presumption of a violation when the employer does not keep records as required by the law. See e.g. SMC 14.20.030(B): “If an employer fails to retain adequate records required under subsection 14.20.030.A, there shall be a presumption, rebuttable by clear and convincing evidence, that the employer violated this Chapter 14.20 for the periods and for each employee for whom records were not retained,” https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.20WATICORE.

⁸ For an excellent and comprehensive guide to worker interviews, see Worker Rights Consortium, “Effective Worker Interview Techniques,” (2012), <https://www.clasp.org/sites/default/files/publications/2017/08/Effective-Worker-Interview-Techniques-Labor-Commissioner-July-2012.pdf>.

⁹ This chart and the “Employee Interview Dos and Don’ts” table on the preceding page were informed by *Ibid.* viii, p. 13 – 17.

¹⁰ For example, former managers no longer employed by the employer can be great witnesses as they are not afraid of losing their jobs for reporting the truth about the employer’s practices.

¹¹ Interview statements should include a provision indicating if the witness fails to sign and return the statement, the agency will assume the witness agrees the statement is true and accurate.

¹² Sample: the witness was at first hesitant to answer my questions, but became more open as the interview progressed. The witness easily recalled the information I requested, and, while guarded, I found them credible.

¹³ Under state and local laws that take on the same construction as the FLSA, where employers do not maintain accurate records, employees' good faith estimate of their hours worked may be sufficient to prove hours worked. See e.g., *O'Brien v. Ed Donnelly Enterprises, Inc.* 575 F.3d 567 (6th Cir. 2009), holding, "When an employer keeps inaccurate or inadequate records, for a FLSA plaintiff to show what his or her damages were, a FLSA plaintiff does not need to prove every minute of uncompensated work. Rather, she can estimate her damages, shifting the burden to the employer."

¹⁴ For states and local agencies enforcing laws that are substantially similar to the Fair Labor Standards Act, and where there is no contrary legislative intent, state and local laws may take on the same construction as the FLSA. Before relying on such an argument, however, the agency should work with its legal advisors to ensure the argument's viability in the agency's jurisdiction.

¹⁵ *Tyson Foods, Inc. v. Bouaphakeo Et Al.* 577 U.S. (2016) confirming *Anderson v. Mt. Clemens* at 328 U.S. 685, 687-88. (1946). The Court went on to explain, "When employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work...the remedial nature of the [FLSA] and the great public policy which it embodies...militates against making the burden of proving uncompensated work an impossible hurdle for the employee. Instead of punishing the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."

¹⁶ When using this approach, investigators should be careful to ensure representative evidence is statistically adequate and all estimates are based on plausible assumptions. For a comprehensive discussion of determining hours worked in the absence of employer records, see J. Derek Braziel, Beth A. Ross, G. Edward Anderson, Ph.D., "[How to Measure and Prove Damages in Wage and Hour Cases](http://www.welchcon.com/images/PDF/201411ABAHowtoMeasureandProveDamages.pdf)," *ABA Section of Labor and Employment Law*, pgs. 9 – 25. (2014), <http://www.welchcon.com/images/PDF/201411ABAHowtoMeasureandProveDamages.pdf>.

¹⁷ For example, see Minnesota law [MS § 177.27\(3\)](https://www.revisor.mn.gov/statutes/?id=177.27), which states, "If the records maintained by the employer do not provide sufficient information to determine the exact amount of back wages due an employee, the commissioner may make a determination of wages due based on available evidence and mediate a settlement with the employer." <https://www.revisor.mn.gov/statutes/?id=177.27>.