

PUBLICATION

The Inside Scoop: Top 10 Employer Mistakes According to the Solicitor of Labor

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Meeting in our nation's capital and having a strong public policy group have some definite perks, such as getting the inside scoop on employment law trends directly from the Department of Labor's Solicitor. During a recent Baker Donelson meeting in Washington, D.C., Solicitor Patricia Smith accepted our invitation to speak to our Labor & Employment group and shared with us her top ten mistakes that employers make.

1. Not Cooperating With A Department of Labor (DOL) Investigation. Solicitor Smith discussed the DOL's recent successes in utilizing various enforcement tools such as subpoenas and injunctions when employers do not cooperate with DOL investigations. While some employers seem to think if they ignore the notices the DOL will go away, she assured us that this was not the case.

2. Retaliating Against Employees Who Cooperate With DOL. The DOL has taken a firm stance against employers when they retaliate against employees who participate or cooperate in DOL investigations. The DOL has frequently sought and received court intervention (such as temporary restraining orders) after an employer instructed employees not to cooperate with the DOL investigation or in some manner threatened or punished employees who did.

3. Treating Employees As Independent Contractors. "If it sounds too good to be true, it probably is." Solicitor Smith confirmed that the DOL is working directly with state agencies to jointly investigate and share information on wage and hour issues, and this is one of them. The DOL is focusing its enforcement efforts here due to "the rampant misclassification of employees" on such industries as the cable industry, construction (the solicitor particularly noted the misuse of LLCs to give the appearance of a separate business when, in fact, the LLC member/owner is an employee), landscaping and restaurants. The solicitor commented that often it is competitor businesses who report independent contractor violations.

4. Ignoring or Not Appreciating Overtime Laws and Standards. The DOL often finds when an employer pays a non-exempt employee a salary the employer mistakenly believes the salary covers any overtime payments owed to that employee. Baker Donelson attorneys were eager to ask about the revisions to the overtime regulations as mandated by [President Obama's March 13, 2014 presidential memorandum](#). While the solicitor could not comment on the content of the proposed revisions to the overtime exemptions, she did note that her committee was working on the drafts and that she expected them to be released for public review and comment in June 2015 with the final version to be published in July 2016.

5. Ignoring or Not Understanding the Criteria for Unpaid Interns. The DOL has set forth a six-criteria test (as outlined in [DOL Fact Sheet #71](#)) that must be applied to have unpaid interns. Overall, unpaid internships should not be to the immediate and primary advantage of the employer but more akin to vocational educational training. The solicitor highlighted recent cases by interns challenging their classification and specifically mentioned the ruling in the Black Swan movie case (*Glatt v. FoxSearchlight Pictures Inc.*). In that case, a federal court ruled that two unpaid interns who worked on the movie were employees.

6. Incorrectly Applying Tip Credit. Employees must be informed in writing and the regulations regarding proper tip pooling must be followed.

7. – 9. OSHA Violations: Abatement, Fall Protection and Transportation. Employers often wait until litigation is over to abate known OSHA violations. The solicitor stressed that failure to abate immediately upon discovery of a violation was a mistake. She also addressed employer OSHA issues in failing to provide proper **fall protection**. In 2013, 595 workers died as a result of falls and three out of every five of those falls were from heights of just 20 feet or less. OSHA requires that fall protection be provided at elevations of four feet in general industry workplaces, and six feet in the construction industry. She also cautioned employers should address **transportation safety** issues. She noted that in 2013, 30 percent of all workplace deaths resulted from workers colliding with other vehicles. Even if it's not always an OSHA issue, she suggested employers should pay attention.

10. Ignoring Compliance Information on the DOL Website. The solicitor stressed that the DOL's website provides extensive compliance information and urged employers to review the information to ensure compliance.

As solicitor, Ms. Smith oversees more than 425 DOL attorneys across the country who administer and enforce more than 180 federal labor laws. The opportunity to meet with her and ask questions was a unique opportunity and one that will benefit our clients.

For questions about these or any employment related issue, please reach out to any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Tallahassee, Florida; Atlanta, Georgia; Baton Rouge and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.