



## WHEN THE DOL SHOWS UP UNANNOUNCED

It's an unusually busy Monday morning. You have the normal catch-up on the weekend business, but your manufacturer representative is visiting today and your sales manager wants to quit. Just when you think you have everything under control, the receptionist buzzes you that someone from the federal government is there to see you. You go to the showroom to meet Investigator W.H. Doe from the Wage and Hour Division of the Department of Labor ("DOL"). He has spent the last 20 minutes having a "friendly conversation" with your salespeople, and he informs you that he is there to conduct an investigation. He requests that you accommodate him with a private room on the premises where he can review the laundry-list of documents he wants, and conduct interviews of your staff.... Today! Your day just got much worse.

Wage and Hour Division investigations are launched for various reasons such as an employee complaint or a strategic decision within the DOL to look at businesses in your industry or businesses in your city. No matter the reason behind conducting the

investigation, the DOL can show up unannounced at any time. You probably have some questions about what to do if that happens.

1. *Does the investigator have a right to be on the premises unannounced and to conduct an investigation without a warrant or probable cause?* Your dealership is subject to The Fair Labor Standards Act (FLSA), which is the federal law that requires payment of minimum wage and premium overtime, maintenance of certain basic payroll and employment records, and limitations on working hours and types of jobs for certain underage youth. Under Section 11(a) of the FLSA, representatives from the Wage and Hour Division of the DOL are authorized to investigate and to gather data concerning wages, hours, and other employment practices, enter and inspect an employer's premises and records, and question employees to determine whether the employer

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### **NEW NLRB POSTER DELAYED UNTIL JANUARY 31, 2012**

Based on a final regulation issued by the National Labor Relations Board (NLRB), employers subject to NLRB jurisdiction (and almost all car dealers are) were required to post a new notice no later than November 14, 2011. The NLRB has delayed that until January 31, 2012.

The notice is similar to one that was previously required by the U.S. Department of Labor for federal contractors. It notifies employees that they have the right to act together to improve wages and working conditions; to form, join, and assist in a union; and to bargain collectively with their employer. It provides examples of unlawful employer and union conduct, and it provides an NLRB contact for any employee with any inquiries or concerns. The poster must be 11x17 inches.

There has been significant opposition to this requirement, including several lawsuits that have been filed.

Further information on this requirement is available at <https://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights> or you may contact the vendor who supplies your posters.

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has violated any provision of the FLSA. Congress has empowered the Secretary of the Department of Labor (aka Wage and Hour Administrator) to issue administrative subpoenas, to investigate any industry subject to the FLSA, and to look into any matter that he or she deems necessary or appropriate to determine whether any person has violated FLSA or which may aid in enforcement of FLSA. Administrative subpoenas can be issued, however the employer may question the reasonableness of a subpoena before suffering any penalties for refusing to comply with it by raising objections in a legal action in a federal District Court.

2. *Isn't an investigator's presence, unannounced and without warning or prior notification, an ambush and illegal under the law?* No. Although, generally the DOL does notify an employer prior to initiating an investigation, it is not required. The DOL has the latitude to initiate unannounced investigations, which often provides the investigator the opportunity to observe normal business operations and to gather factual information quickly. Prior notification that an investigation will be initiated typically occurs by letter, which will state the date and time scheduled for the investigation, as well as list the documents, records, and other information the investigator intends to review at the scheduled investigation.
3. *If an investigator shows up unannounced on the premises to commence an investigation, can I refuse his or her entry to the premises?* Yes. However, you should remember that the person seeking to enter your premises will also be the person conducting the investigation and determining if your company has committed any FLSA violations. The best approach is not to kick the investigator off your property and threaten that if he or she shows up again without a warrant you will call the police. For most unannounced investigations, the investigators will work with you to reschedule the investigation at a mutually convenient date and time to allow you to gather the requested documentation and information for the investigator's review. However, there are investigators who will insist on commencing the investigation immediately, which is legally allowed. You may refuse to permit the investigator's entry on the premises to conduct the investigation. With that being said, the DOL has the power to subpoena and will have

no hesitation to use that power to gain access to the premises to enforce its right to conduct an investigation. This does not suggest that you should roll over and take it. Cooperation is key. Request a mutually beneficial date and time to reschedule the investigation in order to gather the information requested.

4. *The investigator will not tell me the reason the investigation is being conducted. By law, don't I have the right to know?* Typically, the DOL does not disclose the reason for an investigation. In general, investigations are conducted for a variety of reasons, all of which pertain to the enforcement and compliance with the laws that DOL is responsible for administering and enforcing, such as the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). However, a majority of investigations are launched because a complaint has been filed with the DOL. Complaints are confidential, so the DOL will not disclose whether a complaint exists, the name of the complainant-employee, or the nature of the complaint.
5. *Should I notify my attorney?* Yes. If a DOL investigator shows up, you should be concerned about potential liability. Getting your attorney involved from the onset will allow your attorney to review the documents you will produce to the investigator to ensure compliance and/or provide an analysis of possible problems that may expose your company to a penalty. Likewise, you may want to have your attorney negotiate about what you may view as an overly broad document request, and even challenge the reasonableness of a DOL subpoena by a lawsuit in a federal District Court. Consulting your attorney early on in the investigation will help manage the investigation and can lead to early negotiations if there are issues that may expose your company to large penalties.

While unusual, investigators can show-up unannounced at any time. Cooperation is key to preserving your rights. That doesn't mean throwing open your files and making all employees available immediately. It means that you politely ask to reschedule the investigation to a mutually convenient time that allows you to gather the proper documents and notify counsel to assist you through the investigation. And if that doesn't work, you politely ask the investigator to leave and return at a mutually convenient time once you have the opportunity to consult with counsel.

## Mythbusters: Used Car Warranties

**MYTH:** When a dealership sells a used car with the dealer's warranty, the FTC buyer's guide serves as the warranty document that the customer must receive.

**THE FACTS:** A customer who buys a used car with the dealer's warranty must also receive a separate warranty document.

The FTC Used Car Rule simply requires that a dealer describe the warranty for the used car offered for sale. And if the dealer is not selling the used vehicle with its own warranty, the buyer's guide is all that must be completed. If there is no express warranty, and the dealer disclaims implied warranties, the car is sold "as is". In states where implied warranties may not be disclaimed, a dealer can still offer a car without an express warranty, but it must use a buyer's guide that the vehicle is sold with "implied warranties only." A dealer who sells a car with only the remaining manufacturer's warranty, if that still applies, may simply state that clearly on the buyer's guide.

When the dealer is offering its own express warranty, however, such as ninety day powertrain coverage or thirty day 50/50 protection, the buyer's guide is not the only document the buyer must receive. **The seller must provide a separate warranty document.**

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The federal Magnuson Moss Warranty Act requires that a warranty must be a written description of a consumer's rights in a clearly worded, single document. There is a simple answer why the buyer's guide cannot be the warranty document – the buyer's guide itself says that it isn't. The form buyer's guide states in the full or limited warranty section:

Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations.

There is of course a more complicated answer – the buyer's guide cannot function as the warranty document because, while it does or may contain some of the descriptions of coverage required by the MMWA, it does not have **all** the mandated terms. The following list of items that must be disclosed in an MMWA compliant warranty may also be on the buyer's guide.

(1)A statement whether the dealer's warranty offered is "full" or "limited." Incidentally, if you wonder which of these you should offer with your used cars you will warrant, we will make this easy. Never offer a "full" warranty. The obligations that accompany that description under federal law are more than any car dealer should accept. Always describe a used car warranty as "limited".

(2)A statement of the percentage of the repair costs that you will pay.

(3)A list of the specific systems that are covered by the warranty. If you think that "powertrain" is a sufficient description on the buyer's guide or on the warranty, think again. Each of the vehicle's components under warranty – engine, transmission, etc. – must be separately described.

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(4)A description of the duration of warranty coverage for each of the covered systems.

(5)An explanation of how a customer gets warranty service. You must include your company's name, address, telephone number and the name or title of the person to call concerning warranty service. On the back of the buyer's guide, you must describe who to see about complaints. If that is the same person to see for warranty service, that arguably would suffice under MMWA. But it is better to state who to see for warranty service in your warranty document.

(6)A list any of parts or systems that are excluded from coverage under the warranty, if it is necessary for clarification. If the battery, for example, is not covered on the same basis as other elements of the electrical system, that must be disclosed in the warranty document. That may be disclosed on the buyer's guide, for example, by describing that the warranty covers the "Electrical System (except battery)".

(7)A disclosure of all obligations that the consumer has, if any, as a condition to obtaining warranty service. The buyer's guide may meet the MMWA requirement, for example, by stating a deductible a customer must pay to get service.

So far, so good. Unfortunately, the remaining terms of a warranty mandated by the Magnusson-Moss Warranty Act are not included on the buyer's guide.

(8)Any warranty under the Magnusson-Moss Warranty Act must have this specific disclosure that does not appear on the buyer's guide: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state."

(9)While a buyer's guide does not contain the following mandated disclosure when implied warranties are limited, a warranty must: "Some

states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you."

(10)Most warrantors wish to exclude or limit consequential or incidental damages in their warranties, but this is not even addressed on the buyer's guide. A warranty document must include this language: "Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation may not apply to you."



(11)Limitations on coverage must be disclosed in a warranty. For example, you will probably want to limit a used car warranty to your customer, not someone who may buy the car from the customer two weeks later. You may also want to exclude commercial use. Those are not disclosed on a buyer's guide.

So protect your dealership against claims that you breached your obligations when you sold a used vehicle with an express dealer's warranty that did not comply with the MMWA. Use a separate written warranty with the terms required by federal law to fully protect your dealership.