

# Too Hot in the Kitchen for Restaurant With Prior Notice from the DOL of Wage Violations

## Labor & Employment Law Update

By Heather Bailey on March 10, 2016

A recent case out of the Northern District of Texas demonstrates just how important it is to listen to the Department of Labor (DOL) when they come knocking on your door. (*Solano v. Ali Baba Mediterranean Grille, Inc.*, 2016 BL 62687, N.D.Tex. No. 3:15-cv-00555, 3/2/16). Here, the DOL investigated allegations against the restaurant for failing to track time records, failing to properly pay a chef for the time he spent traveling between restaurants and improperly paying overtime on a bi-weekly basis instead of weekly. The DOL informed the restaurant of its improper pay practices, but was not sufficiently staffed for the DOL to take on the chef's case. The chef ended up suing the restaurant in federal court on his own behalf and other employees.

Generally under federal law, the look back period for a non-willful wage violation is 2 years. However, when the employer's actions are found to be willful – meaning it either knew or showed “reckless disregard” for the law – a court may look back into the employee's work history for 3 years to determine damages. The court here found that a reasonable jury could find the restaurant's violations “willful” because the DOL put it on notice that the restaurant was not properly paying this chef.

Practice Tips: Once the Department of Labor puts you on notice that you are improperly paying your employees and you do not heed its advice, it is a hard argument to win later down the road in court that you did not do so willfully. All this does is subject you to increased damages and penalties. Due to the nature and nuisances in the restaurant industry like proper roll out and administration of the tip credit and tip pools, we recommend you work with your legal counsel under the attorney client privilege to best determine how you are going to pay various categories of employees (e.g., chefs, bussers, servers, bartenders, door men and management).