

How will you answer if the DOL comes knocking?

by Jodi R. Bohr

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Recently, I have seen an uptick in clients asking me to represent them in various stages of wage and hour investigations being conducted by the U.S. Department of Labor (DOL). The DOL investigates violations of wage and hour laws, including violations of minimum wage, overtime, and other requirements. In light of the pending changes to the overtime regulations, whether workers are properly classified as exempt is of particular interest. The Fair Labor Standards Act (FLSA) gives the DOL broad investigative authority, so it's critical that employers be prepared for an audit or onsite inspection. Employers should know how to assert their rights at each stage and manage the flow of information requested by the DOL.

How can employers be prepared before an investigation begins? The DOL has recently taken an enforcement-heavy position, so proper preparation before an investigation starts is key. Employers should conduct a self-audit of their employment practices to minimize exposure. First, review the job duties of independent contractors to verify that they should be paid as employees. Second, examine your written job descriptions and exempt employees' work to ensure proper classification. Third, review your timekeeping systems to ensure that employees' work hours are being properly tracked and that employees are being paid proper wages for all hours worked. Finally, examine your record retention policies and policies related to the payment of wages for compliance and proper implementation. Designate an employee to develop DOL inspection procedures and familiarize key employees with the procedures.

What prompts an investigation? A DOL investigation may be prompted by a complaint filed

with one of the agency's offices, or it may be a part of a targeted effort aimed at a specific industry or business. The DOL treats all aspects of a complaint—including the existence of a complaint—as confidential and will not disclose what prompted the investigation. Knowing that a disgruntled former employee may have filed a complaint could shed some light on the potential scope of the investigation and may assist the employer, but the DOL will not confirm suspicions.

What can we expect at the outset of an investigation? The process used in DOL investigations varies, but an investigation usually starts with a letter informing the employer that it is under investigation and asking it to produce copies of relevant documents. Often, the letter is personally delivered by the investigator, who is willing to wait while the employer gathers the requested information. Although it is best to cooperate with the investigator, you are not required to drop everything to respond to the request. Rather, the DOL generally must give employers at least 72 hours to respond.

What should we do once notified of a DOL investigation? Key employees should notify the designated inspection team leader to implement investigation procedures. If the team leader is not available, the investigator is expected to wait a reasonable amount of time for management to arrive and represent the company—typically not more than one hour. Clarify the scope of the investigation (e.g., departments or categories of employees) to ensure that the documents produced do not exceed the intended scope. Ask the investigator to return in 72 hours, or set an agreeable deadline to produce the requested information. Remember that the investigator may not interfere with normal business operations.

Bottom line

These suggestions merely skim the surface of what's necessary to prepare for a DOL investigation, but they help pave the road to a smoother process. Employers subject to a DOL audit should contact legal counsel immediately. An experienced attorney can guide you through the audit process and help reduce the risk of fines or penalties at the conclusion of the audit.

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