

Minimizing Risks and Ensuring Compliance

A Guide to Navigating Government Audits

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Agenda

- What can we do before a government agency knocks on our door?
- What can we expect generally during an agency investigation?
- What should be at top of mind during a DOL Wage and Hour investigation?
- What should be at top of mind following an accident or injury and/or generally related to OSHA investigations?
- What should be at top of mind during a USCIS investigation?

Audit Your Practices First

- Companies can take the information learned from these slides and create their own audit process to determine whether, if an agency performed an investigation today, there would be adverse findings.
- If you already know there are going to be significant issues in compliance, consider engaging counsel to be a part of the audit.
- Be prepared to make the changes to come into compliance as a result of the internal audit, if the company does not have the ability to make those changes it should consider either: 1) not performing the audit; or 2) doing it completely under attorney-client privilege to preserve confidentiality.

Agency Investigations Generally

- Understanding the Process
- Understanding the Risk
- Understanding Proactive Steps Employers Can Take Now
- Treat the investigators with respect, but understand that they are not representing you—their goal is to identify failures and issue citations as a result of those failures.
- Make sure you have a team member (at each location) who is prepared to act as the liaison should an investigator arrive on site.
- Have a contact sheet/FAQ available for that team member to refer to upon the initial arrival of the investigator.
- Know when to bring in counsel.

The DOL- What kinds of audits?

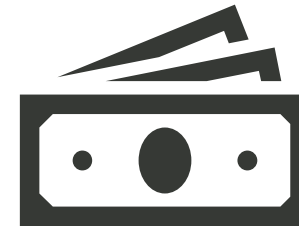


DOL performs multiple forms of audits

OSHA

Wage and Hour

- Fine Print Agreements



Increase in Wage and Hour audits recently

State DOL

Federal DOL

The DOL (Wage and Hour & OSHA)– Scope and Timing

DOL has broad authority, but they cannot investigate all aspects of the organization

- Random
- Based on a complaint
- Targeted industry

Could be a surprise visit/unannounced

- Make sure managers know how to respond appropriately

Scheduled Visit

- Contact counsel to discuss and take these investigations seriously

The DOL (Wage and Hour)- What Are They Looking For?



Payment of minimum wage and overtime to all nonexempt employees;



Proper classification of employees as exempt or nonexempt;



Misclassification of independent contractors who properly should be classified and compensated as employees;



The payment and calculation of overtime pay;



Ensuring that nonexempt employees are paid for all compensable time;



Off-the-clock work;



Unlawful wage deductions

The DOL (Wage and Hour)- Understanding Exposure Before You Respond

Do you have the documents that you are supposed to have?

Do you have policies/procedures in place concerning wage and hour matters?

- Clocking in and out
- Tipping policies/tip pooling policies
- Break waiver policies
- Underage employee work hours
- Onboarding/offboarding

The DOL (Wage and Hour) – Investigation Process

The Opening Conference



This sets the tone for the investigation itself

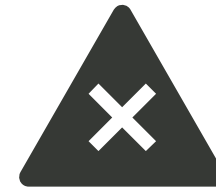


Make a good impression

Work to understand what their primary focus and concerns are

Describe the business

Communicate the desire to follow the law and resolve any issues promptly while simultaneously treating employees fairly



Explain anything that may cause delays

Change in payroll providers, etc.

The DOL (Wage and Hour & OSHA) – Investigation Process

Witness Interviews/Witness Contact Information



- Employers must provide employee contact information
- Employers cannot retaliate against employees for participating in the process
- Employers cannot restrict employees from talking to the DOL
- Employers are not entitled to sit in or be present during the interviews, unless the interview is of a member of the management team

The DOL (Wage and Hour & OSHA) – Investigation Process

Production of Documents

- If you own multiple entities, keep documents separate
- Keep track of documents requested and documents produced
- Do not provide documents that are not requested
- If a document includes trade secrets or confidential information, mark confidential
- Produce the documents in an organized fashion that presents the information in the most favorable light



The DOL (Wage and Hour) – Investigation Process

Closing Conferences

- If one is scheduled, counsel should be in attendance

DOL will set forth investigator's findings which may include back wage calculations and civil monetary penalties

- Employers should take careful detailed notes to understand the scope of findings
- Be prepared to show evidence of compliance if you dispute the investigator's findings
- DOL will likely propose settlement terms if violations have been identified

If no settlement, next steps:

- Investigative finding
- Lawsuit, initiated by DOL
- Lawsuit, initiated by employees

OSHA – Investigation Process

OSHA arrives at the facility

- Often occurs after you have informed OSHA of an accident or injury.
- If/when unexpected, consider asking for a warrant, but more likely consent to inspection after negotiating reasonable scope and conditions of inspection.

OSHA – Investigative Process

Opening Conference

- Inspect credentials
- Determine the reason for/scope of the inspection
- Prepare the worksite
- Ask the compliance officer to wait if designated employees are not on the premises

OSHA – Investigative Process

Review of records

- OSHA Form 300 Illness & Injury Log
- Form 301 Incident Reports
- Form 300A Summary of Work-Related Injuries and Illnesses
- Internal safety audits
- Workers' compensation documents
- Work policies or rules related to health and safety

OSHA – Investigative Process

Investigation

- Right to accompany the compliance officer (Employer representative, employee representative, if applicable, union representative)
- Plain view doctrine
- Confidentiality concerns with photo or video
- Equipment – no obligation to demonstrate the operation of equipment that is not otherwise being used. The compliance officer does have the right to ask when the machinery will be operated and may come back to view the operation at a later date.

OSHA – Investigative Process

Employee Interviews

- Hourly, non-supervisory interviews can be conducted in private. These employees have the right to have a representative sit in with them (ex. union rep, or fellow non-supervisory employee). These interviews may be recorded but will not be shared with the employer unless it is offered in front of an ALJ at trial.
- Supervisory or management employee interviewees have the right to have counsel or company representative present. The employer can create their own recording of the interview.

OSHA – Investigative Process

Closing Conference

- What was found during the inspection
- What citations may be issued as a result of the inspection
- How the compliance officer believes the employer might correct any alleged violation.

OSHA- Best Practices

- Be prepared and have a plan (including dedicated response team)
- Inspect yourself
- Seek employee participation in safety programs and policies
- Focus on cleanliness

I-9 – The Investigation Process

Initiation

- I-9 compliance is enforced by ICE. However, any DHS agent acting under subpoena power can inspect an employer's I-9 Forms.
- ICE may issue a Notice of Inspection to employers for any reason, including a random Form I-9 audit.
- Audits may be initiated by complaints, ICE's own initiative or a referral from another government agency.
- The Employer must be provided at least three business days notice if an agency is looking to inspect Form I-9s
- Employers must notify ICE if the forms are kept in a different location that was identified in the Notice of Inspection

I-9 – The Investigation Process

Scope of Form I-9 Inspections

- ICE will check to make sure
 - A Form I-9 exists for each person hired by the employer after 11/6/1986
 - Forms were timely and properly completed
 - Whether the documents presented by employees were authentic
 - Employer's e-verify participation
 - How the employer handles social security no-match letters and the employees identified in the letters

I-9 – the Audit Process

I-9 Audit Dispositions

- ICE will issue a notice of the results, which may include employer's available actions such as becoming compliant with IRCA, responding to ICE's determinations regarding worker documents and violations
- Notice of Suspect Documents
- Notice of Discrepancies
- Notice of Technical or Procedural Failures Warning Notice
- Notice of Intent to Fine

I-9 – Best Practices

- Thoroughly review I-9 forms to make sure they are complete and include the correct information.
- Identify a manager to oversee the I-9 process and periodically conduct an internal audit of the documents to make sure they are appropriately completed.
- Train and retrain employees responsible for completing I-9 documents.
- Create standard operating procedures to complete the document, make copies of identification and if using E-Verify follow standard work instructions for every case aligned to system prompts.
- Create a template or calendar to timely review documents that may need to be re-examined over the course of employment

QUESTIONS?

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