

Don't Be Caught Off Guard: Navigating an FLSA Audit

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The mail has arrived, and it contains an unpleasant surprise: the United States Department of Labor is coming to visit. Next week. The letter from the DOL investigator indicates that your organization has been selected for a “compliance review” to examine your compliance with the Fair Labor Standards Act (“FLSA”). It further requests that copies of various payroll records be made available to the investigator when he or she arrives. What now?

The U.S. Department of Labor is responsible for enforcing the FLSA and other federal employment laws. A DOL audit can be commenced by the Department at its own initiative or in response to a complaint from an employee or former employee. A DOL investigator will not, however, tell the employer whether a complaint was filed or who filed it (and in the event the employer finds out who filed a complaint through other means, the FLSA protects complaining employees from retaliation). Because the statute of limitations for non-willful violations of the FLSA is two years, the investigation will typically be limited to the past two years, although that period is extended to three years where a violation is deemed to be willful.

Although many employers receive a letter shortly before an investigation starts, DOL investigators can also arrive at a workplace without any advance notice. As soon as it learns that an FLSA audit is going to take place, the employer should immediately contact its legal counsel to review the types of records that have been requested and any issues that have been identified. If a problem exists, it is best to identify the issue as soon as possible in order to begin evaluating the potential liability or developing explanations. In addition, the employer should confirm that the current version of the Department of Labor’s “Employee Rights under the Fair Labor Standards Act” is posted, along with other employment-related postings, in areas accessible to the employees in each of its departments. There is nothing like starting the audit off on the wrong foot by ignoring the most visible sign of your compliance.

Care should be taken to limit, to the extent possible, the investigation to the matters identified in the initial letter from the Department of Labor. Remember - the investigator is under no obligation to limit the investigation to the topics initially identified (or the subject of the complaint, if any), and investigations can quickly expand in scope to encompass a wide range of wage and hour issues across the entire organization. So the best strategy for avoiding this outcome is to promptly provide the investigator with records he or she is requesting, as long as they are not documents covered by the attorney-client privilege or otherwise shielded from disclosure. Questions regarding whether a particular record should be made available to the DOL investigator should be immediately raised with your organization’s legal counsel. Typically the investigator will request basic information regarding the employer, the workforce and employee time and payroll records that the DOL has a clear legal right to obtain. When the requested records are the type that the investigator has the right to request and review, failure to cooperate will only delay the resolution of the investigation and suggest to the investigator that the employer has something to hide.

At the same time, the employer's response need not be limited to only the types of records identified in the investigator's request. On occasion it may be appropriate to provide additional information such as a collective bargaining agreement for union-represented employees or an explanation of a payroll practice that will assist the investigator in properly interpreting the requested information. The employer should not, however, provide unrequested information relating to other employees or other issues not covered in the Department of Labor's request. Doing so will not only be unhelpful, it could open doors to other avenues of investigation that would otherwise remain closed.

A Department of Labor FLSA audit typically begins with the initial visit by the investigator. After meeting with the employer's representatives, the investigator will likely spend the day reviewing time and payroll records and interviewing employees. The employer is entitled to have legal counsel present for interviews with management-level employees, but the investigator is free to interview non-management employees in private and without the employer's attorney or any other management representatives being present. It is best to provide the investigator with a quiet conference room or office in which to review records and speak with employees. Employees should not be encouraged to drop in and chat with the investigator, but rather should be summoned at the request of the investigator. It is not uncommon for investigators to spend several days reviewing records, interviewing employees and requesting additional information.

At the conclusion of the investigation, the investigator will meet with the employer's representatives at a final conference to discuss the results of the investigation. Where violations of the FLSA have been identified, the employer will be given an opportunity to respond by providing additional information it believes to be relevant to the issue in question. If violations are found, the employer is also generally given an opportunity to correct the problems by voluntarily paying back wages. Where the alleged violations, if any, involve small amounts and are clear cut, it is advisable to pay the amounts that the DOL claims are owed. There is a benefit to the employer in doing so, as an employee's acceptance of a back wages payment made in compliance with a DOL investigation acts as a waiver of other FLSA claims an employee could potentially have. On the other hand, where the amount alleged to be due is sizeable or the employer believes that the DOL is mistaken in its analysis, the employer should provide its explanation and identify its grounds for disagreeing with the investigator. This approach should be used only where the employer has a strong defense to the alleged violations. The employees can file suit to collect amounts alleged to be owed under the FLSA, and in recent years class action FLSA litigation on behalf of multiple employees has become increasingly common. Successful plaintiffs are able to collect attorney's fees, court costs and liquidated damages in addition to back wages. In addition, the Department of Labor itself may file suit seeking back wages on behalf of employees and can also obtain an equal amount in liquidated damages. Fines and even criminal penalties can also be imposed.

Once an investigation starts, the employer is playing defense in a game that has already been played. Whether or not the FLSA has been violated will be determined by reviewing records of events that took place over the course of the preceding two or three years.

Accordingly, by the time the employer finds out that an investigator is coming to its workplace to conduct an audit, it is generally too late to do much to correct problems.

The best defense to a Department of Labor FLSA audit is to take proactive steps to ensure FLSA compliance long before an audit occurs. An employer cannot wait until an investigation has been commenced to review its compliance with the FLSA's posting and other requirements, but rather must do so on a regular basis. FLSA violations identified by DOL investigators frequently relate to improper classification of FLSA exempt employees, failure to pay for all hours worked, failure to maintain complete records of time worked (including accurate records regarding breaks and starting and stopping times) or failure to properly pay overtime. For these hot button issues, employers should consider taking the following steps.

- An employer should regularly review the status of employees classified as FLSA exempt employees to ensure that the employees meet the requirements for exempt status. This means looking at the actual job duties performed not the job title or relying simply on the written job description.
- Care should be taken to ensure that improper deductions are not made from exempt employee wages and that a complaint procedure is in place that enables employees to challenge deductions that they believe to be improper. The failure to have such a Safe Harbor policy in place could result in losing the exemption if you have made an improper deduction, even if it was inadvertent.
- For non-exempt employees, the employer should ensure that detailed and complete records are kept of hours worked, including breaks, and that employees are in fact paid for all hours worked.
- The employer must prohibit "off the clock" work or unauthorized overtime. Under the FLSA, if an employer knows or should have known that the employee was performing work, it is obligated to pay for the time worked. Accordingly, any unauthorized overtime or off the clock work should be dealt with promptly as a serious disciplinary issue (as opposed to a reason to denying payment for the time worked, which will only increase the risk of FLSA liability).
- Another common problem area is the proper calculation of the overtime rate, which must take into account additional amounts received by the employee such as longevity bonuses. This is one of the easiest problems to identify in advance of an audit simply by reviewing your policies with the payroll office.
- For public sector employers, the accumulation of compensatory time off can be the biggest stumbling block. Comp time needs to be accounted for in the same manner as overtime, since it is simply a substitute for a required overtime payment. If you allow comp time to be accumulated for non-FLSA reasons (for hours not in excess of 40 hours in a workweek), you need to make sure that your time records adequately distinguish between these types of accumulations so there is no confusion about the rate at which the comp time accumulates. In addition, safeguards must be in place to ensure that employees do not accumulate more than the statutory maximums.
- If the organization employs individuals below the age of 18, numerous additional requirements apply regarding maximum hours that can be worked, types of jobs that can be performed and records that must be kept.

It is never pleasant to receive word that the Department of Labor is investigating your employment practices. Taking steps to ensure that your organization is in compliance with the FLSA now will not only decrease the risk that a DOL investigator will find violations in the future, it can reduce the chances of such an investigation by identifying and correcting problems before employees become disgruntled over perceived wage and hour law violations and file complaints.