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Labor and Employment Law: Prepare For A DOL Payroll And Employment Practices Investigation (7/06)

By Nicholas J. D'Ambrosio, Jr., *Capital District Business Review*, June 30-July 6, 2006

Employers who are subjected to an investigation by the U.S. Department of Labor often do not know what to expect. The following is a synopsis of the DOL investigation process so employers can understand and prepare for a government audit of their payroll and employment practices.

The DOL frequently conducts an investigation based on a complaint submitted to the department's local wage and hour office by a present or former employee. If the complaint alleges a minor issue of labor law compliance, the investigator may merely telephone the employer and explain the relevant law. If the employer agrees to assume responsibility for back wages or other payments, the investigator will close the investigation.

In other instances, the DOL may ask the employer to perform a self-audit where, with the assistance of legal counsel, the employer reviews its records to identify any violations of the Fair Labor Standards Act and presents its findings to the investigator. If the employer and the investigator agree on a remedial course of action, the DOL will close its investigation.

If the DOL and the employer cannot resolve the issue at the initial stage, or the allegation is more serious, the DOL will commence an investigation.

Generally, a DOL investigation consists of a four-stage process: the initial interview, examination of records, employee interviews, and the closing conference.

1. The initial interview

Scheduling: The DOL may send the employer a letter to schedule an appointment within one to two weeks. The DOL will generally accommodate requests to postpone the interview for a short period of time. A DOL investigator may also show up unannounced.

Preparing: The employer should review its policies and records pertaining to overtime pay, salaries and recordkeeping. In addition, the employer should determine which company representatives will attend the initial interview to show the DOL that it takes such investigations very seriously and that it is fully committed to complying with the investigation and the investigator's requests.

Interviewing: The DOL investigator will explain the purpose of the investigation as well as the investigation process. During the interview, the investigator will gather the employer's payroll information as well as the names of those whom the employer claims are exempt from the FLSA's overtime requirements. The employer should use the initial interview as an opportunity to inform the investigator of its background, history, mission and employee relations to emphasize the employer's commitment to its work force. If the investigator requests a tour, the employer should make sure that a knowledgeable officer is available to accompany the investigator and answer any questions, while minimizing the disruption to employees.

2. Examination of records

Types of records for review: The DOL investigator may examine any record that the employer is required to keep under the FLSA. The employer should only provide the investigator with the documents he or she specifically requests and should make a knowledgeable person available to review the records with the investigator.

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Can the investigator take records?: Unless it is absolutely essential, the investigator will not remove the records from the place of business. If the investigator wants to remove documents, he or she may only do so with the employer's consent. The employer should clearly mark any page that contains confidential information, commercial information or trade secrets. The employer should provide the investigator with a separate statement providing that release of the confidential documents would irreparably harm the company's competitiveness.

3. Employee interviews

Purpose of employee interviews: The investigator interviews employees to test the accuracy of the records, confirm or disprove alleged violations, gather information on additional violations and test the validity of the claimed exemptions.

Employer's role regarding employee interviews: The employer should select a representative to schedule employee interviews in a manner that causes the least disruption to the workplace. After completion of an interview, the investigator will likely ask the employee to sign a summary of the interview prepared by the investigator. The employer should inform such employees that they are under no legal obligation to sign the statement and that the employee should not sign any statement without reviewing it for accuracy. The employee is entitled to a copy of the signed statement.

4. The closing conference

Employer action before the closing conference: The employer should submit a statement of its position prior to the closing conference to the investigator together with a legal brief in support of the employer's position.

Substance of the closing conference: The investigator will inform the employer of the findings, and will discuss payment of back wages and future compliance. At the close of the investigation, the investigator will seek voluntary compliance from the employer. If the employer is unwilling to comply and chooses to request a review of the findings, the DOL investigator's report will be forwarded to the district director for appropriate action. If the amount in controversy is more than \$5,000, the DOL will engage in additional negotiations with the employer. If the amount is less than \$5,000, the DOL only has second-level negotiations on a discretionary basis. If no resolution is reached, either the aggrieved employee or the DOL (on the employee's behalf) may bring suit against the employer for violations of the Fair Labor Standards Act.

To minimize legal exposure and disruption to business, employers should make preparation for a DOL investigation an ongoing effort.

Note: This article first appeared in the June 30-July 6, 2006 edition of the *Capital District Business Review*, which is published weekly in Albany, New York.

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