

HUMAN RESOURCE ASSOCIATES

HR Consultants to Management

PERSONNEL NOTEBOOK

For Your Most Important Resource

SURVIVING THE DOL AUDIT

They're coming! The Department of Labor (DOL) armed with a load of new rules and over 8,000 new employees (and 1,200 more coming in 2013) is focusing on new targets. It's a rare week when our HR Hot-Line doesn't get a call from a member facing a DOL audit.

Being prepared is the order of the day. Knowing what to expect and how to conduct your response can make a big difference in your company and its future.

Let's take a look at the DOL audit.

- What is a DOL audit?
- What prompts a DOL audit?
- How to prepare
- What to expect, the procedure
- The end results
- Recommendations, rights and tips

What is a DOL audit?

Although thoughts of Dostoyevsky's *Crime and Punishment* come to mind, the audit

process is more about mutually finding and correcting past mistakes and establishing future compliance. It's generally geared towards voluntary corrections and compliance. If you're well prepared the mistakes can be minimized or resolved. If mistakes are found they can be the basis for policy or procedure changes, improved operations and fewer sleepless nights about labor violations.

What prompts a DOL audit?

Yes the DOL does target certain industries at different times. Currently the focus is on industries with lower paid employees with lots of immigrants and a little short on health insurance benefits. But that's just a general overview and not many are simply random audits. Most audits are prompted by an employee complaint. However it may be a complaint from a competitor, a local union drive, an advocacy group or even an ex-employee who left you years ago. One warning flare should go up if you hear about another company in your industry that has been audited and found to be in violation of several or serious violations. DOL will follow that string through the entire industry.

How to prepare

Do a review of your weak spots now. Think of it as a practice audit. Be tough on yourself and zero in potential violations. You already know what some of them are. But here's a list of the key things they will look for.

Exempt versus Non-exempt. Are you improperly paying a salary to employees who should be paid hourly plus overtime? Look into the "Safe Harbor" policy notice. It can save you the penalties on this violation.

Independent Contractor versus employee

Is there an employee you're passing off as a contractor?

Overtime calculations

Are you paying premium pay for all hours over 40 in your work week? In some states and most government contracts it's for over 8 hours in a day.

Meals, breaks and travel time

Are employees being paid for every minute they work? Are they getting the full breaks required by law? Are they being paid for the travel time from one job to the next?

Off-the-clock-work

Are employees loading the trucks before or after punching out? Are they working a few minutes into their lunch period or break? All time doing any work must be paid.

Record keeping

This is home plate for investigators/auditors. In your business the world is greatly about productivity and profit. DOL auditors do not speak or understand that language. Their world is paper! They know it better than you do and they know where the problems will be. Do you have an accurate record of all hours worked including for salaried employees? Have employees or their supervisor documented all overtime? Have you ever docked an exempt employee for hours or days lost? Are your I-9s all in order? Are your employee's medical records separate, private and secure? Are your automated time records accurately showing all hours worked and meal taken? Are you

rounding hours on the time clocks? If so, has any employee lost time as a result? Have you ever changed a time sheet after it was turned in? 50 percent of all violations are related to time-keeping procedures.

Your employee handbook

Are all the required notifications and policies included? Equal Employment Opportunity statement, Employment at Will statement, Americans with Disabilities Act, detailed sexual harassment policy, military rights, COBRA, Work week and overtime defined? Any policies or wording that could be considered a violation? Do you forbid employees to discuss wages, benefits or working conditions? Is your Employment at Will statement too restrictive?

Find out what the regulations are for each of these concerns. Correct any violations now. If you didn't pay someone properly, identify that and pay it now. If DOL determines later that you were in violation somewhere, but you already corrected it, it may not be considered a willful violation and there may not be any penalties! It's called a good faith effort and it's invaluable.

What to expect, the procedure

The Letter-

Usually you will receive a letter from the U.S. Department of Labor, Wage and Hour Division Informing you of the many laws they enforce. The letter will notify you of their intent to investigate your establishment for compliance with the Federal Labor Standards Act (FLSA) and other laws. The date and time of the investigation will be noted, usually one to two weeks from the date of the letter.

The letter will also state that you should have available a number of documents for the previous two years including Federal Tax Identification numbers, tax records, gross sales volume *for three year*, total number of employees, copy of your your policy on certain laws ;like the Family and Medical Leave Act (FMLA), list of all employees by name address phone number and job description, work permits

for anyone under 18 years of age, payroll records and time sheets. The items may change from one company to another and they may also ask for other records during the investigation. They will also usually provide you a list or source for copies of a number of federal laws that may affect you.

As a rule they will not tell you what the complaint (if any) is about. However, companies have reported asking and being told of the nature of the suspected violation. But the investigators will never tell you who filed the complaint. Your rights and obligation will be stated.

The Investigation-

On the day of the audit the investigators have an opening conference wherein they lay out the procedures, expectations and their needs. They will ask to see records, documents and employees. They will want to interview employees in private, and sometimes visit work areas and talk to employees. They will usually, but not always, keep you informed of findings as they proceed. They will ask questions and seek clarifications, and explanations. Often they will tell you of changes you should be making.

The audit can be completed in one day (most are) but it can last much longer with additional appointments scheduled. Investigators may privately visit employees after hours away from work. Employees may even connect them to previous employees.

The course of their investigations will sometimes veer from the expected issues. Often they will spot a problem not related to their investigation and pursue it. If tax issues, safety or discrimination issues pop up, they will broaden the scope of their audit and even call in the Internal Revenue Service (IRS), the Occupational Safety and Health Administration (OSHA) or the Equal Employment Opportunity Commission (EEOC).

The end results

At the end of the investigation the DOL will ask to meet with the owners or management. At this wrap-up meeting the company will be informed of the findings. This may result in calculating back wages and discussing payment schedules. At this point the employer is expected to commit to corrective actions if violations have occurred.

Not to scare anyone, but in addition to the corrective actions, the employee may also file suit to recover back wages or damages including attorney's fees and court costs. However, with the help of a labor attorney the back wages paid can be a full and final settlement waiving any further rights to use. The Secretary of Labor may also file suit for the same.

Recommendations, rights and tips,

- Involve your labor attorney at an early stage but in most cases it's best to keep him/her in the background as investigators often see this as intimidating or indicative of violations. Follow your attorney's lead on this.
- If the short notice is an impediment to your business you can request a reasonable rescheduling. The investigators will usually allow a week or two but it's up to them.
- Designate a management employee or two to accommodate and facilitate the investigation. They should gather all requested documents and assist with scheduling employee interviews.
- Provide a private and comfortable room with water or soft drinks and coffee for them. Treat them with respect and deference.
- Provide them with only the documents they requested. Do not volunteer anything not asked for. Do not suggest new information. Be cooperative and efficient. Don't let this drag on. Work toward getting them out of your workplace quickly. And do not let them roam free around your workplace. They

should be escorted wherever they need to go.

- Let employees know the auditors/investigators are coming. You may select some people for interviews. Ask them to be cooperative and polite. Unless your attorney advises otherwise, don't coach them.
- Keep track of everyone interviewed, every document requested and every question or discussion if possible. It can help you determine the focus of the investigation.
- Cases of investigators showing up without notice have been reported. In such cases you do not need to allow the investigator to review documents at that time. You may instead ask them to schedule a time with your labor attorney.
- Employers lose a lot of cases not because they violated any regulations, but because they can't prove that they didn't!
- Current reports indicate that investigators are attempting to turn individual complaints or violations into class action cases. This means that they can charge you for violations against larger numbers of unnamed individuals that the investigators don't know and haven't even talked to. When investigators start talking about class action you will want to talk to an attorney.
- If you don't agree with the findings you have the right to appeal them. To do so, you must make a written request within 30 days after the date of notice of the findings. You must provide the reasons for disputing the determination and return it to the District Director.
- If you are required to pay penalties but are unable, you can initiate an installment arrangement but interest will continue to accrue on unpaid balances.

Forewarned is Forearmed someone said. Like repeating a fire drill, prepping for the DOL audit can save you a lot of problems.

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