



What To Do When The Department Of Labor Knocks On Your Door?

ANLA recently has received an increasing number of reports of members being investigated by the Department of Labor (DOL) for wage and hour and other possible violations. Many members have asked how best to handle this stressful situation. This article provides practical advice to guide ANLA members who are facing or who may face an investigation from DOL.¹

What Is An Audit And Why Is It Important?

The best solution to the problems arising from a DOL investigation is to conduct a rigorous self-audit of compliance with DOL-enforced laws or to engage an outside consultant for that purpose before DOL begins an investigation. An audit involves a review of written employment policies, record retention, employment postings, and how the written policies are actually implemented on a day-to-day basis. A good audit will identify problems, propose solutions, and identify how to document and prove compliance with the applicable laws.

What Laws May DOL Investigate?

DOL has authority to investigate potential violations of a wide-range of laws. These including the Fair Labor Standards Act, the Occupational Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, federal contractor compliance with federal anti-discrimination laws, the Immigration and Nationality Act (I-9 review), and myriad other laws. DOL investigations begin with a complaint or are part of an enforcement program focused on particular types of employers. In addition, DOL will often re-investigate employers that have been found to have violated employment laws in the past.

Because DOL cannot investigate compliance with every law and regulation in every investigation, DOL will usually focus on specific laws that it believes employers often violate. By ensuring compliance with these laws, an employer increases the chance that it will survive the investigation without enforcement action. Although enforcement priorities can and do change, a summary of the enforcement areas that DOL seems to be focusing on currently follows and steps that should be taken to increase the chances of avoiding enforcement action.

Fair Labor Standards Act (FLSA)

¹ This memorandum was prepared by ANLA's employment and immigration law consultant, Monte Lake of Siff & Lake, LLP in Washington, D.C. This brief, non-technical description of the applicable law is intended only for general information. It should not be considered a substitute for fact-specific legal and consulting advice related to the specific circumstances of a company's business situation and any investigative activity that may have occurred or is occurring.

The single most significant area in which ANLA members are seeing investigations is wage and hour and payroll compliance. DOL will look for violations in a number of areas: amount of pay, pay rate, tracking hours correctly, and record-keeping. In short, are the workers being paid correctly? The most important of these issues are: (1) are the employees getting credit for all hours worked? and (2) are the employees entitled to overtime getting it? A good compliance audit will review these areas in particular and others as well. Although a good audit will be more detailed, several major issues are:

Timekeeping

- How does the employer record employees' hours? Is a time clock or some other objective system used or does a supervisor simply write the total hours down in a daily process? Is the system accurate? Is all time that counts as "hours worked" under the law counted? Is time that is not "hours worked" under the law excluded? Are lunch and other rest breaks being handled properly? Are the employer's timekeeping policies understood by the employees? Are the employer's timekeeping policies actually followed in practice?
- How long does the employer keep employees' time records? Is the employer keeping all required records? Can the employer produce those records quickly in response to a demand from a DOL investigator?

Overtime

- Has the employer identified all overtime exempt employees correctly? Does the employer ensure that its employees that it treats as exempt agricultural employees work only with its own product? Can the employer prove that these exempt employees do not work with others' products? Does the employer have an explicit and consistently enforced overtime policy requiring pre-approval with discipline imposed for unapproved overtime? Does the employer have current position descriptions that accurately reflect the current duties of each person for the purpose of establishing a "white collar" or sales exemption? Does the employer have a policy for periodically reviewing and revising these descriptions and comparing the descriptions with actual job duties?

Recordkeeping/Workplace Rights

- Does the employer have a record retention policy? Does it keep necessary records for the time required by the FLSA? Does the employer train its staff in recordkeeping procedures so that all the legally-required information is compiled?
- Does the employer have posted all legally required employment posters in a place where workers are likely to see them? Are the posters in English and in Spanish? Does the employer have proof that the posters have actually been posted continuously?

While an effective audit will look into many other issues and no audit can guarantee that an investigation will go smoothly, ensuring compliance in connection with these and related issues is likely to help a great deal if the focus is wage and hour compliance.

OSHA

Just as with wage and hour issues, DOL focuses on several major issues in the area of occupational health and safety.

Hazard Protection

- Has the employer identified all recognized hazards causing or likely to cause death or serious injury to employees? Has the employer ensured that medical personnel are available for consultation on matters of workplace health? Are supervisors or other employees adequately trained to provide first aid?

Posting, reporting, recording and retaining requirements

- Have employees been informed of safety regulations and are posters displayed conspicuously? Can the employer prove that the posters were displayed? Has the employer reported all workplace fatalities or injuries leading to the hospitalization of 3 or more employees in a timely manner? Are all logs of occupational injuries kept up-to-date? Has the employer posted an annual summary of the occupational injuries in a timely manner? Are all records of occupational injuries being retained for the correct length of time? Does the employer have material safety data sheets (MSDS) as required? Are the MSDSs easily accessible in the event of an emergency or for day-to-day use?

Housing

- Are the OSHA housing standards applicable to employer-provided housing? If so, has the employer met OSHA standards developed for site” shelter; water supply; toilet facilities; lighting; sewage and refuse disposal; laundry, hand washing and bathing facilities; construction and operation of kitchens; dining halls and feeding facilities; insect and rodent control; first aid; fire; and reporting of communicable diseases?

By dealing with and demonstrating compliance the major issues, it is more likely that DOL will either make no negative findings or exercise its discretion favorably if alleged violations are found. A good audit by a qualified person well before DOL knocks makes a DOL investigation much more manageable.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

MSPA imposes a number of obligations upon employers and farm labor contractors (FLC) that employ migrant and seasonal workers. Following are some of them:

- (1) Are all FLCs used by the employer registered? Does the employer have a procedure for checking certificates of registration with the federal and state governments?
- (2) Contractors must furnish to agricultural employers or other contractors copies of all payroll information. Recipient must maintain records from contractor.

- (3) Records must be kept for three years.
- (4) Did the employer or FLC provide the required disclosures of the terms and conditions of employment at the time of recruitment? Can the employer prove that documents were provided if DOL demands proof?
- (5) Workers must get a written disclosure statement of payroll-related information at the time of payment during each pay period.
- (6) If the employer uses a FLC, is the employer a “joint employer” with its FLC so that it is responsible for the contractor’s wrongdoing?
- (7) Has the employer and/or labor contractor used or caused a vehicle to be used to transport a migrant or seasonal worker? If so, has the employer or contractor ensured that each vehicle and driver complies with applicable federal and state safety standards and license requirements.
- (8) Does each vehicle have sufficient insurance and liability coverage?
- (9) Does all housing meet federal and state health and safety standards? Is the certificate of occupancy posted at all times?
- (10) Was the MSPA rights poster placed in a conspicuous place?

What Triggers An Investigation?

DOL’s investigative process can begin through a complaint from a disgruntled employee (or his or her lawyer), through a “directed” investigation (often in connection with a policy initiative targeting certain types of businesses and/or compliance issues), through random selection, or as a follow-up to previous enforcement activity. Although an investigation can be disruptive and stressful, it does not necessarily mean that DOL will take enforcement action, even if possible violations are found. Much depends on the investigator and how responsive he or she thinks the employer is.

Dealing With An Investigator

DOL investigators range from the competent and professional to the biased and hostile. It would be a mistake to assume automatically that an investigator is hostile. Instead, a company should assume that the investigator wants to be fair and to honestly resolve the complaint. A company should, of course, be appropriately cautious and professional, but by assuming the worst, it may inadvertently bring out the worst in an investigator who otherwise may have been objective.

It is therefore important upon first contact to identify someone who will work with the DOL investigator. This person will serve as the point of contact between other management and DOL and be responsible for responding to DOL’s legitimate demands. It will be helpful if this person is bilingual, but that is not necessary. It will also be helpful if this person is good at establishing rapport with others and has an even temperament.

Once the point of contact has been identified, he or she needs to learn what DOL can demand, where that information is, and to know how to get it quickly. The point of contact should also learn what DOL may not demand and be able to politely say “no,” when appropriate. Finally, the liaison should have enough authority to be able to make decisions without substantial delays for decision-making by others and to communicate to the investigator that the company takes this issue seriously enough to assign a senior official to assist.

Initial Contact

The first notice of the investigation will usually be the appearance of the investigator at the company’s offices asking to speak with management. The company should take several steps in a professional and courteous manner:

- Introduce the company point of contact for this kind of investigation.
- Ensure that the DOL investigator is who he or she claims to be and document this information. In addition to the investigator’s name, ask what field office is conducting the investigation and ask for the investigator’s government identification.
- Ask if there are complaints of legal violations. At this point, just seek the basic information so that it can be determined what information is relevant to the allegation and what is not. Typically, the investigation will focus on the laws summarized above and the documents sought should be relevant to those laws.
- Discuss the scope of investigation and what the investigator’s expectations are. Although the company can and should say “no” to certain requests, such an overview would be helpful. Do not commit to any particular action at this point; committing to be helpful is enough.

DOL Communications With Employees And Document Review

Investigators gather information through interviews and through documents. The guidelines are relatively straightforward:

- Technically speaking, the investigator may speak to the company’s non-managerial employees only during non-work time. Whether to make employees available during working hours will be a judgment call for management. Management personnel do not have a right to be present during interviews with employees.
- The investigator may also interview management employees. Other management personnel have the right to be present during interviews of management. During any such interview, it is important to remember to be very accurate, to neither volunteer information nor speculate, and to remember that anything a manager says may be used against the company. It is important to take thorough notes of

any substantive conversations with the investigator, including any statement made by a manager.

- The investigator may review and copy relevant documents.
- It is important for the company to note, and retain a separate copy of, any document the investigator requested and/or reviewed. This will help the company defend itself if DOL issues a notice of violation.

The Unprofessional Investigator

Although many investigators conduct themselves professionally, some will not. In dealing with an unprofessional investigator, it is important to ensure that all interactions with the investigator are witnessed by a third person and documented for content and demeanor. Also, remember that the investigator's authority is the same whether he or she is professional or not. Comply with all legitimate requests promptly and decide whether to comply with others on a case-by-case basis. While it may be more difficult to deal with an unprofessional investigator, it is never helpful to respond in kind. If an investigator's conduct is wholly unprofessional, you should contact the company attorney for advice.

What Is The Outcome?

Just as investigations begin in different ways, they also end in different ways. It is possible that the company will not hear at all from DOL after the investigation. It is possible that the company will receive a telephone call from DOL describing alleged violations or it may receive a written letter providing notice of alleged violations and seeking both back pay and civil money penalties. In either event, the company should contact legal counsel about the next steps. Once the company has had time to review the allegations, a settlement conference with the investigator and often his or her supervisor will take place. After this, the company will have to decide whether to settle the matter or to pursue a hearing before an administrative law judge. It is also possible that the investigation could result in a lawsuit brought in the name of the Secretary of Labor.

Conclusion

ANLA members have experienced an increase in DOL its enforcement activity and with that increase comes more encounters with DOL investigators. Companies that have undergone a self-audit before the DOL visit should be well-positioned to avoid or defend against any alleged claim of violations. Responding to a DOL investigation with an awareness of the company's rights and responsibilities can make the process less disruptive and distracting. It can also help the company to defend itself in the event that DOL issues a notice of violation. The key is to document what is done, document what is said, and to approach the investigation calmly and professionally. When that does not work, the company attorney should be brought in to assist in protecting the company. Taking these simple steps may help resolve close cases without further enforcement action and, failing that, position the company well to respond to any formal allegations from the DOL.