

NCAE ISSUE BRIEFING.

June 18, 2012

What to Expect in a U.S. Department of Labor (DOL) Audit

NCAE has received numerous Member inquiries regarding increased DOL audit activity during the past year. To respond to membership interest, we asked Monte Lake of CJ Lake, LLC to provide a memorandum that informs you about the DOL audit process and offers basic guidance on how to prepare and react once you have been notified of an audit of your employment practices falling under the jurisdiction of DOL.¹

Dealing with a DOL Investigator

A DOL investigator may contact you in advance to schedule an on-site visit of your business or may simply show up and ask permission to conduct an audit. An unannounced audit may occur at an inconvenient time and in such case, you should attempt to arrange for a mutually convenient time. You should anticipate such an occurrence by having a designated company representative who has a basic understanding of DOL's authority and the company's rights in the event that it is audited. You have a right to require the purported DOL official to prove his/her status by providing a badge or other official identification. The scope of investigation and DOL's objectives should be discussed at the outset of the visit. The company's representative during the audit should be courteous and avoid

¹ This memorandum describes circumstances that commonly occur during the course of a DOL audit. It is intended to provide only general guidance. Employers subject to an audit may face varying degrees of legal exposure depending on their particular circumstances and are advised to seek advice from a knowledgeable professional or attorney prior to undergoing an audit if they have concerns about their legal compliance.

losing his/her temper, even if the investigator is rude or overbearing. The company's goal should be to cooperate and demonstrate a company culture that values legal compliance. Because investigators often have considerable discretion, it is important to put your best foot forward. In cases of extreme unprofessional conduct by a representative of DOL, however, you should contact the investigator's supervisor to register a complaint.

The Typical DOL Audit

Typically, the investigators will ask to review personnel records that relate to DOL's jurisdiction and have the authority to do so. While records often are reviewed at the worksite, DOL may ask to take them off-site, in which case you should make copies or keep an inventory of what is taken. In addition, the investigator typically will ask to tour the worksite to look at fields, housing, field sanitation facilities and vehicles. DOL investigators have the authority to do so. Normally, the investigator will seek to interview employees and managers regarding the company's employment policies and practices. DOL investigators have the authority to interview employees at employer's convenience and separate from management representatives. The employer must make a practical judgment on how to accommodate DOL—during work hours or during non-work hours. A representative of management has a right to be present when management or supervisory employers are interviewed.

What is DOL's Focus in an Audit of an Agricultural Employer?

DOL has jurisdiction over a number of labor and employment laws. In a typical audit of an agricultural employer, DOL will focus on the Fair Labor Standards Act (FLSA) (minimum wage, overtime and child labor), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), farm labor housing health and safety standards, OSHA/Field Sanitation, I-9 Forms, and H-2A program compliance. Following is a brief discussion of the issues that DOL will be looking at in each of these areas of the law.

FLSA

DOL typically audits payroll records to determine whether employees are paid the minimum wage for all hours worked. Attention will be paid to payroll deductions, loans and advances to workers to determine whether the worker authorized them and, in the case of loans, whether their repayment through a payroll deduction

reduces the amount earned in a pay period below the minimum wage. DOL also will look to see time cards or other evidence showing when workers begin and end the day, as well as lunch breaks.

While agricultural employment generally is exempt from the requirement that workers be paid overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek, the exemption can be lost. During the course of an audit, the investigator will interview employees to determine whether the crops of other growers are handled during a workweek and whether the grower packs crops for other growers. In such circumstances, workers handling crops produced by others are entitled to overtime during each pay period in which they handle such product.

The FLSA requires that records be kept for a minimum of 3 years.²

MSPA

MSPA governs the employment of migrant and seasonal farm workers, as well as the activities of farm labor contractors (FLCs). If a farmer uses an FLC, DOL will seek proof that the FLC was properly registered for all services it provides the farmer, such as recruitment, housing and transportation. The investigator will interview employees to determine the extent to which an FLC operates independently of the farmer or whether it is a joint employer—making the FLC and farmer jointly liable for any violations.

If the employer or its FLC recruits migrant workers, DOL will ask to see copies of the written disclosure (Form WH 516) of terms and conditions of employment that are required to be given to migrant workers at the time of recruitment and whether the required employment law posters (in English and the language the workers read and speak) are posted in a conspicuous place at the worksite. If the farmer owns or controls farm labor housing, DOL may inspect it to see if it complies with

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² The FLSA requires that payroll records contain the following information: full name of employee; home address, including zip code; sex and occupation in which employed; identification of each employee; time of day and day of week on which workweek begins; hours worked each workday and total hours worked in the workweek; basis on which wages are paid; total daily or weekly earnings; total additions to or deductions from wages; total wages paid each pay period; and date of payment and pay period covered.

OSHA or ETA housing standards and whether the proper housing disclosures (Form WH- 521) have been made. This is a particular focus of DOL investigators at present. If workers are charged rent for housing, DOL will look to see if the terms and conditions of the housing were provided the worker and the worker authorized any deductions from wages for the housing.

MSPA also governs vehicle safety, worker driver's licenses, and vehicular insurance requirements. An investigator will look for documentation related to all of the above requirements. Similar to the FLSA, MSPA requires that the required records be kept a minimum of 3 years. MSPA requires the retention of the same payroll information as the FLSA, but in addition, requires the employer's identification number (EIN) and address to be printed on the employee's pay stub.

OSHA Field Sanitation Standards

During an audit, the DOL investigator may inspect the farm to determine compliance with OSHA's field sanitation standards that apply to agricultural establishments where 11 or more workers are engaged on any given day in handlabor operations in the field. The employer must provide 1 toilet facility for each 20 employees or fraction thereof located at the closest point to vehicular access. The standard does not apply where employees are working 3 hours or less in a day. In addition, potable drinking water and hand washing facilities must be in close proximity to toilet facilities, all of which must be maintained in a sanitary manner. Employees must be given notice of the location of toilets and water and be informed of good hygiene practices.

I-9 Forms

While it has not been a priority of DOL in its audits, it does have the authority to audit I-9 Forms. DOL does not have enforcement authority with respect to issues involving the employment of legally authorized workers, but it does have the authority to inspect I-9 Forms and to forward them to ICE if it believes there are problems. DOL can also forward I-9 Forms to the Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices if its believes that citizenship or national origin discrimination is occurring.

Child Labor issues

Wage and Hour investigators must check-off on their records that they investigated the worksite for possible child labor violations. NCAE has a model policy available to all Members that you may wish to consider implementing to help prevent unexpected allegations of unauthorized or unintended child labor violations.

H-2A Program Compliance

A small percentage of agricultural employers use the temporary and seasonal alien agricultural worker program, called H-2A. Those who participate in the complex H-2A program will almost invariably be audited with more frequency than those that do not use the program. DOL conducts "letter" audits and on-site audits of H-2A employers. In letter audits, DOL asks for extensive documentary information but does not visit the employer's facility. In on-site audits, DOL will conduct an audit as described in this memo, in addition to seeking information that is specific to the H-2A program.

In an H-2A audit, DOL typically requests the following information for the preceding 3 years: proof of newspaper advertising; proof of contact with former U.S. workers; proof of workers' compensation insurance coverage; records of each worker's earnings; copies of job orders and application for temporary labor certification; and associations must document their status as an employer or agent. During an audit, the investigator will interview U.S. workers to see if they are performing some of the duties of the H-2A workers (called corresponding employment) and, if so, will check the employer's records to ensure that the U.S. workers are being paid the same wages and benefits (such as free housing) and being provided the same terms and condition of employment as H-2A workers. DOL also will check to see if the U.S. workers in corresponding employment are given a copy of the H-2A worker contract on the first day of work.

When Will You Know the Results of the Audit?

There is no consistent answer to this question, as DOL handles each situation differently. In some cases, employers may never hear back from DOL regarding the results of the audit. In many others, DOL will contact the employer many months later and in others after a few weeks. Often, the investigator will call the employer or return to the employer's office with an oral demand for back pay and or civil money penalties and give the employer a limited time in which to accept or reject the offer. In these informal circumstances, DOL often is willing to reduce its initial wage and penalty demands. DOL may offer the employer a settlement

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agreement with respect to any damages or penalties. In such circumstances, the employer should consider seeking legal counsel with respect to DOL's demand and before signing a settlement agreement. It is important for the employer not to submit to DOL time pressures before making a decision.

DOL may send you a written notice of violations and request back wages and/or civil money penalties for alleged violations. If you receive a formal notice of deficiencies or violations (a "determination letter"), you have a right to appeal and have a hearing before an Administrative Law Judge. You must exercise your right to appeal within 30 days of the date of the determination letter. Once you have requested a hearing, there will be additional opportunities to informally resolve the matter with representatives of the Solicitor of Labor's office prior to the hearing date. Hearings often are not scheduled for many months after a request.

What Should an Employer Do in Anticipation of an Audit?

Assume that you will be audited and take precautionary steps in anticipation of such an event. The best thing an employer can do is conduct a self-audit. What is a self-audit? This is a process where an employer reviews its employment policies, procedures, recordkeeping and retention practices to determine whether they comply with the legal requirements that pertain to agricultural employers. A successful self-audit requires that the employer know the applicable legal requirements and approach its own business in the same manner that a DOL investigator would. By self-auditing, an employer allows itself to correct mistakes or omissions prior to being audited by the government, thereby eliminating or mitigating potential fines and damages.

What Should a Self-Audit Tell You?

- Whether you are keeping and retaining all of the required records in a manner that complies with the law.
- Whether all of the employees handling records are doing so in a consistent manner.
- Whether you are keeping records not required by law that will further evidence compliance with the law, such as photos of posted posters at appropriate locations.
- Whether employees responsible for implementing your employment policies and for legal compliance are doing their job.
- Whether company policies are being consistently applied to all workers, enabling a refutation of discrimination claims.

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• Whether employees responsible for employment practices are regularly trained and updated on new legal requirements.

What Are the Benefits of a Self-Audit?

- You will know what your legal obligations are and whether you are in compliance.
- You will be ready should DOL notify you that it is going to conduct an audit.
- Your records will be complete, accurate and retained for the proper period of time and evidence compliance.
- If interviewed by DOL, your management employees will know the law, the company's practices, and make statements that help, not hurt the company.
- If audited by DOL, few, if any, substantial problems should be found.
- Your employment practices, recordkeeping, and compliance training practices will demonstrate DOL that there is a culture of compliance within your company. This goes a long way in minimizing your potential liability when the investigator has discretion.
- If sued by an employee, all of the above practices will benefit the company in litigation if it has to produce records in discovery. It is less likely that the case will proceed.

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