

## WHEN THE DEPARTMENT OF LABOR PAYS A VISIT

All employers know that the U.S. Department of Labor ("DOL") is the agency responsible for enforcement of the Fair Labor Standards Act – the federal law establishing minimum wage and overtime requirements for nearly every employer in the country. What you may not know is that the DOL can audit your workplace with or without notice. The audit can be completely random. More likely, a current or former employee (or a competitor or labor union) has made a complaint to the DOL, another federal agency or a state agency counterpart. The DOL may initially appear for a wage and hour audit, but while there, the agency can also audit your FMLA or I-9 practices. Major issues on the DOL's current agenda include time rounding practices, interrupted or missed meal breaks, donning and doffing, preparatory time and independent contractor and exempt employee misclassifications.

### HOW CAN YOU BE READY FOR A DOL VISIT?

There is no exhaustive preparation list, but here are some key considerations.

- Train your employees and managers and keep documentation of the training. Train employees on the proper use of the time clock, the proper process for adding missed punches, what to do if lunch is interrupted or missed and the sequence of shift start (coffee, punch in, prep and huddle – in that order). Train your managers on state and federal wage and hour laws so they know how to schedule compliant employee shifts and react to an employee's request for time correction. For example, if changing into a special uniform is integral to the job, the time spent doing so is likely considered "hours worked" and should be contemplated in the schedule. If it is not, you may have unanticipated overtime.
- Audit your payroll practices, going back two years, on a regular basis, under the confidentiality of attorney-client privilege. Your considerations should include the following.
  - If you use automatic meal period deductions, look closely at any exception reports for missed breaks. If an entire department has no missed breaks for any employee during the review period, that means each employee received his or her break every day. Is that likely? If the answer is no, you should look closer.
  - Examine your independent contractor classifications. If, for example, they work only for your organization, follow your directions, work your schedule and use your equipment and supplies, they may be "employees" who are entitled to a minimum wage and overtime premiums. Calling someone an independent contractor, even in an agreement with the worker, does not necessarily make it true.
  - By auditing regularly, you can identify issues and resolve them before the DOL pays close attention. If you have a concern, contact counsel for an opinion letter. An employer's good faith reliance on the opinion of counsel may save you from liquidated damages.
- Audit and revise your policies. When the DOL visits, detailed policies are good evidence that you had a proper process, such as a meal break policy that explains any automatic meal deductions and notifies employees of their obligation to report interruptions and missed lunches. However, if your policy is not in compliance or if employees are not familiar with the terms of the policy, that can hurt more than it can help.

### WHAT SHOULD YOU DO IF THE DOL COMES CALLING?

When you receive notice of a DOL investigation, respond promptly. Feel free to ask the auditor ahead of time what the focus of the investigation will be, what documents will be sought and which employees are most likely to be interviewed. The DOL may be willing to reschedule to ensure that your clinical leaders and human resource representatives are available during the audit and to provide you time to gather necessary documents.

Use the time leading up to audit to engage the investigator, try to understand the scope of the investigation and help your managers understand what they might expect. During the investigation, be cooperative but don't be steamrolled. The DOL has authority to interview managers and non-managers, but you should consider having a representative present at all manager interviews. The DOL has the right to a wide variety of records, but they should not be given originals. And, while they have some rights to obtain patient protected health

information, limitations under HIPAA or state law may apply. After the audit, employers generally will have a chance to correct errors in the investigator's findings and influence the final report before or during an exit conference and by providing comments.

For information about how can help you prepare for and/or survive a DOL investigation, please contact:

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