



COMPLIANCE WEBINAR

Department of Labor Audits: A Roadmap to Surviving

February 8, 2024



Today's Speaker



Housekeeping

- Participant audio & video are disabled.
- Post questions using the Q&A function at any time.
- This session is being recorded.
- You will receive the slides and recording via e-mail within 24 hours.

Overview of FLSA Audit Protocols:

- How does it start?
- Counsel?
- What records?
 - Difference between wage and hour audit and a plan audit. Also, responsible for FMLA audits.
- On-site?
- What if there is a mistake or finding of a violation against the employer?
- Liability?



How Does It Start?

- Ideally the employer does an audit once a year
 - Consider involving labor and employment counsel to try to keep the audit results privileged.
 - Not just looking at accuracy of payroll
 - Looking at job descriptions, duties tests and classifications – especially for new jobs (exempt v. nonexempt)
 - Looking at deductions
 - Reviewing policies
 - Differences between state and Federal regulations – especially with remote workers (it's not the state you're in – it's the state they are in)
 - Overtime calculations
 - "Rounding"
 - Independent contractor v. employee



Outside Audits

- Federal Department of Labor (“DOL”) similar for Pennsylvania Department of Labor and Industry (“DLI”)
 - Almost always employee driven
 - Sometimes random (particularly in industries with low wage earners – hospitality, janitorial, healthcare workers, temporary workers)
 - You won’t know – DOL keeps complaints/reason confidential
 - If you suspect, you can’t retaliate



The Letter

- Generally receive a letter from an investigator.
- Often makes a request for certain documents
- Extremely short turn around window
 - Prevents “creation” or “re-creation” of records
 - Expectation is all records and policies should be readily available and correct
 - Can obtain short extensions
 - Counsel can tell you investigator’s likelihood to grant extension, length of extension, “style,” etc.
 - What if you know you have a mistake at this point?
- Who responds?
 - Counsel
 - Senior Management/Owner (they can be individually liable)
- Voluntary compliance?
- Are there criminal issues (tax)? Common issue: paying “under the table”
- Sharing of information among agencies

Set the Parameters

- Contact auditor – introduce employer contact
 - Courtesy will get you further than indignation
- If not clear from letter, find out what the main issue is (exempt v. nonexempt, overtime, independent contractors v. employees, child labor)
- Watch open-ended requests. Set date parameters. Statute of limitations range is from two to three years.
- Record what records you are providing (consider what is known as bates labeling or similar labeling.)
 - Retain originals (and copy of labeled records)
- Arrange employee interviews or document reviews
 - Quiet (non-customer) area; employer may not attend
 - No retaliation
 - May be a clue to issue

Summary/Violations:

- Generally the employer will receive some type of summary; list of violations
- Reconsider counsel before you try to negotiate with DOL and, yes, generally you can negotiate but negotiations are often based on legal arguments – e.g. there is a dispute about the duties test for an allegedly nonexempt employee who the DOL believes was misclassified as exempt; dispute as to independent contractor v. employee status. Employer must be well-versed in something like the duties test to successfully negotiate – competent labor and employment counsel will be.
- Settlement/resolution documentation
 - Do not want to resolve DOL investigation only to be sued by employees for same issues



Plan Audits:

- DOL is also in charge of plan audits
- Health and welfare
- Plan documents
- Administration
- Nondiscrimination testing
- DOL has self-compliance tools for health plans
- Fiduciary violations have a mandatory 20% penalty

FMLA Audits

- Policy
- Application of policy
- Consistency




Liability:

- Two to three years – statute of limitations
- In Pennsylvania – individual liability for owner/senior management/Board
- Back wages, interest, penalties
 - Penalty examples: \$10,000 per child for child labor law violations; approximately \$2,000 for minimum wage and overtime violations (typically calculated per employee)



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Thank You