

Focus | Labor & Employment Law

When DOL Knocks on Company Doors: Open With an Action Plan

BY JILL J. WEINBERG

As current headlines have shown, many companies have paid out millions of dollars in judgments or settlements for overtime violations under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* In such lawsuits, in addition to recovering unpaid overtime for up to three years, plaintiffs often can recover liquidated damages for willful violations. Further, the FLSA mandates that the employer pay the prevailing plaintiffs' attorneys' fees.

Often such lawsuits are triggered with a U.S. Department of Labor investigation. The DOL's Wage and Hour Division interprets and enforces the FLSA's requirements concerning overtime, minimum wage and child labor in the private and public sectors. The possibility of an investigation will only increase given Labor Secretary Solis's recent announcement that the DOL is hiring 150 additional investigators to ramp up enforcement of the FLSA.

A clear action plan before a DOL investigation can avoid protracted litigation and expensive damage awards. As further explained below, an action

plan should include: (1) Strategy sessions and a self-audit with an attorney; (2) Review of I-9 forms, payroll and timekeeping records, personnel policies and job descriptions; (3) Management meetings on how to approach the DOL investigation; and (4) Implementing damage control.

How the DOL Chooses a Company for an Investigation

The DOL may knock on a company's door due to a specific complaint or a general audit of a targeted industry.

If a disgruntled worker filed a complaint, the worker's identity is protected during the DOL's investigation by law. Often, however, an employer can, through the process of elimination identify the complainant. Such sleuthing efforts may help determine the specific violation the DOL is investigating. For instance, if a cable company recently fired an installer who was contract labor and he worked 60 hours each week, that worker may have been misclassified. The DOL may be investigating to see if he should have been treated as an employee under the FLSA

and been paid overtime.

The Action Plan

Generally, a DOL letter will set a specific meeting time and will list various records for review. The DOL may also want to interview employees. The meeting date, however, may be rescheduled by company request. Doing so will allow time for an action plan to begin.

First, before meeting with the DOL, a management strategy session should occur with an attorney who is experienced with FLSA compliance. During the self-audit, the attorney may decide to interview employees who are responsible for processing time records and paychecks. The attorney will need to know how work time is recorded, how hourly rates and overtime are calculated and why certain employees are classified as exempt from overtime. Also, the job duties of salaried employees will need to be examined to determine if they were properly classified as exempt. Further inquiry may be needed to assess if workers have been properly classified as independent contractors not entitled to overtime.

Second, various documents such as I-9 forms, payroll and timekeeping records, personnel policies and job descriptions will need to be reviewed for accuracy and completeness.

Third, management meetings should occur on how to proceed before and during the investigation. Among other issues, management needs to understand what the DOL investigator may be investigating (such as employees being forced to work off the clock).

They will need to be advised not to retaliate against any employees who participate in the investigation or who they suspect may have complained to the DOL. Management will need to also understand the company's payroll practices and timekeeping procedures. Since managers/supervisors act as agents of the company, their statements to the DOL investigator may create liability exposure. For this reason, the company's attorney should prepare them and be present for any DOL interviews.

Finally, a company should assess potential liability and implement damage control. After the self-audit, certain exemptions under the FLSA may apply to minimize or completely bar back pay liability. It is imperative to know before the DOL investigation that such exemptions apply so that they can be raised during the DOL investigation. If violations are uncovered in the self-audit, the employer should calculate back pay exposure and consider resolving the problems after the DOL audit is concluded. Frequently, due to legitimate offsets (*i.e.*, paid lunch breaks), an employer's calculations may be lower than the DOL's calculations. In such cases, there may be room for reducing back wages paid in a DOL settlement. Beware: under the FLSA, only DOL-supervised or court-approved settlements and releases are valid. **HN**

Jill J. Weinberg is Board Certified in Labor and Employment Law and focuses her practice exclusively on employment, business and FLSA matters. She established the Weinberg Law Firm in North Texas. She can be reached at jill@wlfirm.com.

