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WHAT HAPPENS IN AN FLSA INVESTIGATION?

The federal Fair Labor Standards Act is the principal wage-hour law of general application. The U.S. Secretary of Labor has authority to enforce the FLSA and does so in part through the efforts of the Labor Department's Wage and Hour Division. The Division has broad investigative powers; the parameters of what an employer is or is not required to do or to allow are not always clear; and line-in-the-sand stances by employers are often unnecessary and unwise.

Investigations are typically sparked by a current or former employee's complaint. However, the Division may also investigate without a complaint, such as by reviewing the compliance status of one or more employers or industries in a particular area or even across the nation. Investigators may among other things enter and inspect workplaces; review and transcribe records; interview employees; and even require employers to compile information.

An investigation's purpose is to gather information permitting the Division to decide whether an employer is complying with the FLSA. If the investigator finds violations, he or she then seeks the employer's assurance that compliance will be achieved and determines whether and in what amounts back wages are necessary to remedy any minimum-wage or overtime violations. There can also be substantial monetary penalties and even lawsuits or criminal prosecutions.

An employer must make certain information available and might have to take other steps in connection with an investigation. However, many things can be done to increase the chances of minimizing or eliminating potential exposure. Senior management should immediately be advised of the very first contact by an investigator. Management should then quickly evaluate the situation, develop a strategy for responding, and control events to the extent possible. Prompt, effective planning at the beginning can be the difference between the a relatively painless experience versus a disaster.

The Division has alternative investigative approaches at its disposal, from a full investigation on one hand to more-limited proceedings on the other. Which it uses normally depends upon the Division's assessment of factors such as whether the potential violations are sufficiently serious and widespread to warrant a full-fledged investment of its limited resources. Management should assume that a full investigation is intended unless and until the investigator indicates otherwise. This material deals with issues management often faces in a full-fledged investigation.

Most investigations extend back two years from the investigator's first contact. If an investigator talks in terms of a longer timeframe, the employer probably faces a serious situation. For instance, a three-year limitations period can be asserted if a violation is "willful", meaning that the employer knew it was in violation or acted in reckless disregard for whether a violation existed.

A. GETTING THINGS UNDER CONTROL

Investigators often call or write for an initial appointment (except in some special cases, such as investigations of agricultural employers). Less commonly, investigators appear without any advance notice to insist upon conducting an inspection right away. In whatever way the first contact comes, usually management should not agree to an immediate inspection and should instead secure time to study the situation and plan a strategy. It is normally possible to delay things for a week or so simply by explaining that business considerations require a postponement.

For example, often the demands of other pressing matters must be met; or the necessary records are being used for internal purposes or are otherwise unavailable; or the required personnel are presently tied up with other responsibilities. However, some assurance of the employer's cooperation, and a definite date for moving forward, will generally be necessary to secure a delay without starting off on the wrong foot.

Some investigators request voluminous data for purposes of assisting them in establishing violations prior to their on-site work. Management and counsel should therefore carefully review both any such request and the information which is likely to be produced by complying with it. It might be possible to convince the investigator that some or all of the requested information is not relevant, that more-limited information is acceptable, *etc*. In the alternative, carefully planning how information is to be presented can sometimes prevent the investigator from prolonging the investigation or from forming an erroneous impression that violations exist.

Management should make sure that required posters are displayed and are not obscured. If the employer has undergone a Fisher & Phillips compliance review, management should determine whether there are any un-implemented recommendations. *Under no circumstances should you either allow the investigator to know about or see any such reports or tell the investigator of any violations that were found in any such inspections without first conferring with counsel.* If management concludes that steps should be taken to effect compliance, this too should be discussed with counsel before any actions are actually implemented.

B. PLANNING FOR AND PARTICIPATING IN THE INVESTIGATION

❑ At the first face-to-face contact, management should review the investigator's credentials and should secure his or her business card and/or complete contact information. Management should also ask questions to get as much information as possible about areas of concern. However, ordinarily this is not the best time to mount a defense.

❑ An employee with sound judgment should be assigned to work with the investigator. This person should keep a detailed list of all records examined, everyone interviewed by the investigator, and all questions asked and comments made by the investigator. Such questions and comments can reveal the investigator's objectives, preconceived notions, mistaken factual or legal views, *etc.*

This liaison should maintain a cooperative and pleasant demeanor but should neither patronize nor be overly friendly to the investigator. The liaison should not become involved in doing the investigator's work, such as transcribing information, copying records, or computing wages, unless management has decided that this will be part of its strategy (as is sometimes the case). The liaison's conversation with the investigator should be kept to a minimum. The investigator's reasonable requests for pertinent information generally should be promptly accommodated, but the liaison need not be at the investigator's beck-and-call.

The liaison should not volunteer information about the employer's records, procedures, or policies; officers' or owners' corporate or personal financial arrangements; other business interests of the employer's principals; the contracts, clients, or customers served by the employer; or about anything else, for that matter. The liaison should make no effort to "sell" the employer's position with respect to any pay plan, compensation method, or practice that the investigator questions.

❑ The investigator should be advised that the designated employee is being assigned to work with him or her during the course of the investigation, and that, in seeking records or making inquiries about them, the investigator is to go through the designated employee only. Ordinarily, only information that the investigator requests should be provided, and even then only if it is pertinent. If there is doubt about what to provide, check with counsel.

❑ The investigator should be placed in a private office or in another area that is reasonably separated from employees, especially those with access to records. The best location is a reasonably comfortable one in an area where management's liaison can monitor the investigator. This facilitates keeping a record of the investigator's activities.

The investigator should not be allowed to wander around the premises unescorted or to go through file cabinets or personnel files. Check with counsel if the investigator asks for a tour of the establishment.

❑ Employees should not be permitted to eat meals at their regular work areas during the investigation if there is a possibility that the investigator will be able to see them. The fact that employees do this can result in an allegation that they were not afforded *bona fide* duty-free meal periods and are due back-wages for those periods.

❑ The investigator is entitled to examine payroll and time records containing items specified in the recordkeeping regulations (29 C.F.R. Part 516). The investigator is also entitled to examine primary sales records, such as sales invoices and sales journals, to determine FLSA coverage and to assess possible exemption ramifications based upon the status of one or more establishments. However, it might be possible to avoid having to disclose some information, such as when it is clear that there is FLSA coverage.

Ordinarily, it is preferable not to photocopy records or documents for the investigator. Investigators are instructed not to take away original records unless it is absolutely essential and even then only with the employer's consent. Management might explain its concern that confidentiality, privacy, and the need to protect sensitive business information lead it not to provide copies of records or to allow original records to leave the premises. Check with counsel if these matters become points of contention.

❑ The investigator has a right to interview current and former employees about things like the work they perform(ed), their hours of work, and their pay. However, investigators typically do not interview current employees on an employer's time or premises if the employer objects. Whether to allow on-premises interviews is an important decision to be made with counsel's assistance, preferably prior to the investigation's beginning.

Properly handled on-premises interviews should reveal which employees the investigator talked to and how long each discussion lasted; might limit the length of the interviews (most investigators accept an obligation to expedite interviews conducted on the employer's premises); and could affect who is interviewed. The investigator should be advised that employees will be made available one-at-a-time upon request.

When the investigator asks to speak to an employee, management's liaison should bring the employee to the place of the interview. Interviews should not take place at the employee's work station or within sight of other employees, if this can be avoided.

Of course, management will want to explain to the interviewee who the investigator is; that management is cooperating in the investigation; that the employee is free to decide whether or not to talk to the investigator; and that, if he or she participates, the investigator should of course be told the truth. The employee should also be advised that (a) the investigator might ask for a signed statement at the interview's end; (b) the employee is not *required* to sign a statement if he or she does not want to; and (c) if a statement is signed, the employee should carefully review it for accuracy before signing it, should insist upon any changes necessary to make it accurate and complete, and should ask for a copy of the signed statement for his or her own records.

If an interviewee reports that the investigator asked about other employees, explore this further and document the facts in detail. If an employee indicates that the investigator commented on his or her pay rate or level, suggested that the investigator could get the employee money, said or implied that the employer owes the employee money, or made statements about how employees are treated (especially one suggesting investigator bias or predisposition against the employer), this should also be documented in detail as soon as possible.

If management decides not to allow workplace interviews, this should be communicated to the investigator in a respectful, thoughtful way. For instance, management might feel that the press of business is simply too great to permit pulling employees away from their duties and should therefore convey this to the investigator. The investigator's alternatives include contacting employees at their homes, getting in touch with them to arrange to meet elsewhere when they are off-duty, or waiting in a public area to try to talk to them before or after work.

C. CONCLUDING THE INVESTIGATIVE PHASE

Sometimes, the investigator will have asked the employer for explanations of any alleged violations as the investigation progressed. On other occasions, the investigator completes the investigation before discussing all "findings". Even if the investigator discusses alleged violations along the way, normally management should simply make notes of this and should defer explanations to a later stage.

At the conclusion of the investigation, usually the investigator will schedule a meeting with management. The investigator then describes any alleged violations, asks for the employer's response(s), and seeks management's assurances that it will comply in the future with the Division's interpretations of how the FLSA applies. In addition, normally the investigator will ask for management's commitments regarding the payment of any back wages due based on the investigator's "findings".

It is highly important to take this opportunity to question the investigator in detail as to the basis for his or her claims, to commit the investigator to all favorable findings of fact and compliance determinations, and to secure information from the investigator for use in the employer's further defense (including in the event of litigation, in which the Labor Department's litigation arm, the Office of the Solicitor, often seeks to prevent access to information of this kind). Management should not make any on-the-spot commitments with respect to the payment of back wages, the existence of any violations, or any possible compliance plans prior to management's reviewing the situation with counsel. Investigators sometimes assert violations and immediately ask management to compute the amount of back wages that would be due as if the investigator's assertions were correct. An employer should not agree to make such computations without first consulting counsel.

Investigators generally do not provide a written report of their findings. Even when no violations are asserted, it might be wise to prepare a carefully-worded letter to the investigator to confirm the favorable findings.

D. ADMINISTRATIVE SETTLEMENT OR LITIGATION

When FLSA violations are found, but (i) the employer has given acceptable assurances that it will comply in the future; and (ii) the violations have been determined not to be of a nature requiring litigation, the investigator usually will ask the employer to pay back wages under the Division's supervision. In investigations involving many employees, management will often be asked to compute the amount due to each employee for the investigator's approval. An investigator might also ask the employer to sign one or more documents in which the employer agrees to pay back wages; *one should not sign any such document(s) without the advice of counsel.*

If management agrees to pay back wages, it should seek official U.S. Labor Department "receipt forms" for this purpose. A person who accepts payment and voluntarily signs one of these forms under the Division's supervision gives up his or her right to bring or join a private FLSA lawsuit as to the timeframe covered by the receipt. Otherwise, a recipient might accept the payment insisted upon by the Division but then later contend that he or she is due even more. One should not rely upon an investigator's statement that a cancelled check accomplishes the same thing as a receipt form. This is debatable and could leave the employer vulnerable to expensive litigation.

Even if back-pay issues are amicably resolved with the investigator and payments are made, there is still a possibility that civil money penalties might be asserted if there are (i) child-labor violations; or (ii) "willful" or "repeated" minimum-wage or overtime violations. Where child-labor violations are concerned, the maximum penalty is $11,000 for each employee who was the subject of such a violation ($50,000 if the violation led to serious injury or death, subject to doubling for "repeated" or "willful" violations). The maximum penalty for "willful" or "repeated" minimum-wage or overtime violations is $1,100 for each infraction.

A finding that a violation is "repeated" can be based upon any kind of minimum-wage or overtime violation, whether or not similar to a former one. Such a finding might also be predicated upon a prior violation at other locations maintained by the employer or even based upon the histories of affiliates, a parent company, and so on.

An investigator might mention the possibility of such penalties to an employer during an investigation or at the closing conference. However, it is also possible that the employer's first notice of any penalties will come through an assessment letter from the Division. Short, strictly-observed time limits control how long an employer has to challenge the penalties, so it is *essential* to consult counsel promptly as soon as such a letter is received.

If the Division believes that the nature of the investigation findings requires litigation, or if no agreement on compliance or the payment of back wages is reached, ordinarily an investigative report will be submitted to the Solicitor's Regional Office with the recommendation that a lawsuit be filed. If the Solicitor's Office accepts the recommendation, the lawsuit will likely ask at a minimum for back wages (perhaps for more than two years), for an equal amount as "liquidated damages", and for an injunction to require compliance with the FLSA's minimum-wage and overtime requirements. An employer should take every reasonable step to avoid having an investigation end up like this and should not press an FLSA matter to this stage, unless management is truly prepared to litigate.

Another of the Division's alternatives is to tell employees about their right to bring an FLSA lawsuit (although employees can sue under the FLSA even without first having made a complaint to the Division or to any other agency). The Division might even direct an employee to an American Bar Association lawyer-referral service. Current or former employees who prevail in their own lawsuit are also entitled to an award of "reasonable" attorney's fees, which can equal or even exceed the amount awarded to the individuals themselves. It is also possible for one person or a few people to file a "collective" FLSA lawsuit. These supposedly representative plaintiffs will then seek a court order requiring the employer to disclose names and addresses of other "similarly situated" current or former employees so that notices can be sent inviting other plaintiffs to join the lawsuit. In recent years, this has become one of the fastest-growing areas of employment litigation.

CONCLUSION

Ultimately, there is no single "best" way to handle an FLSA investigation. Each one must be dealt with on a situation-by-situation basis in light of the particular facts and circumstances presented at the time. For example, in some instances it might be advisable not to take one or more of the actions discussed in this material, or to address things at different times or in a different order, or to adopt a different stance on one investigative aspect or another, or to vary from these suggestions in any number of other respects.

Of course, the most-effective way to deal with wage-hour issues is through *prevention and compliance*. Employers should ask questions and get competent advice; should train supervisory personnel on wage-hour matters; and should periodically conduct reviews to identify and correct potential violations. This might be done as part of a program of periodic compliance audits; or when pay practices are questioned by employees or outsiders; or when making pay-related changes; or when instituting new compensation procedures. It is best not to seek advice directly from the Division; as with the IRS, the Division's answers might not be complete or correct and do not necessarily bind the Division. Furthermore, a record might be made of management's inquiry for later use in trying to establish that a violation was "willful" or that an employer has not acted in good faith.

State wage-and-hour laws might be both more stringent and more vigorously enforced even than the FLSA. Also, the investigative authority and procedures of a state or local enforcement agency might preclude some of the alternatives which are available where the U.S. Wage and Hour Division is concerned. Moreover, investigative procedures are somewhat different under certain laws relating to federal contractors and subcontractors and to federally-funded contracts. When an employer learns about a wage-hour-related investigative contact, management should immediately find out whether the investigator represents the U.S. Wage and Hour Division, as opposed to a state or local agency, and whether the FLSA is the law involved.