

DOL audits: What to expect when you're expecting one

Wage-and-hour investigations have become more complex, according to Corey Walton, a community outreach and resource planning specialist with the U.S. Department of Labor's Wage & Hour Division. *His best advice:* Stay in touch with your investigator.

Walton, who conducted a workshop on Department of Labor (DOL) investigations at the American Payroll Association's Annual Congress, gave attendees the inside scoop on how to handle these investigations.

Walton split DOL wage-and-hour investigations into four phases:

Phase 1. This is the initial conference. At this point, it doesn't pay to ponder why a DOL investigator has knocked on your door, Walton stressed. And, he added, investigators won't tell you, either.

An employee could have come into a DOL office and complained. The investigation could be "directed," which means that the agency is focusing on a certain industry. Or it could be completely random. At this phase, the investigator will send you a letter outlining the records he or she wants to see.

Phase 2. Either have those documents available for the investigator's inspection or have a good reason why you don't. Document review kicks off Phase 2, Walton explained. The investigator will want to know how long the company has been in business, who keeps the payroll records and who understands overtime.

What the investigator is looking for: That you're calculating overtime properly, that employees are receiving at least the minimum wage and whether your records are accurate.

Worst practice: Don't stick investigators in a dusty back room that's not air conditioned. The digs don't have to be palatial, but make investigators comfortable, Walton suggested.

Phase 3. This is the interview phase. To get a good sample, Walton said that the investigator will ask to interview employees from every department. The investigator will strive to not be disruptive, so he or she may phone employees, instead.

Best practice: Alert employees that they may receive a phone call from the investigator.

Interviews of nonexempts are private, but you don't have to pay them for the time. You may sit in on interviews with exempts, since those questions tend to be about how the company is managed, and not about an exempt's individual paycheck, Walton noted.

Phase 4. Now it's time for the final conference. The investigator will review with you what he or she found, and may discuss what your potential liability may be.

Hot topics. You can help your company survive a DOL investigation by staying on top of what's hot. Walton noted these issues.

Classifications. There are two issues here. The first is whether employees are exempt or nonexempt. The second is whether workers are employees or independent contractors. Independent contractors should look and behave like independent contractors. For example, they'll have trucks with their logos on them. And you're not fooling anyone by having employees form LLCs; Walton said investigators are wise to that ploy.

Off-the-clock work. This breaks down into three categories.

1. *Pre-shift work*, when employees clock in early and are prepping their work areas, logging onto their computers or talking shop with the boss. Those are work hours, for which employees must be paid, Walton warned. Investigators are trained to sniff this out. *Best practice:* Have a policy that prohibits employees from punching in until they begin work.

2. Issues related to employees' *working time* primarily revolve around meal breaks. *What piques investigators' interest:* Meal breaks between 20 and 30 minutes long. *Why:* Long-standing DOL rules require unpaid meal breaks to be at least 30 minutes long.

3. *Post-shift work* is getting trickier, as technology advances. An employee who checks work emails on the weekend is working, Walton said. There is no blanket DOL policy regarding this type of work; investigators will likely treat this time as working time and it's the employer's burden to overcome.

Overtime. Investigators like to see employer policies that require supervisory permission before employees work overtime. But, according to Walton, you have to enforce this policy. Consistent enforcement can work to your advantage by changing the investigator's perception, if, say, there's only one employee who's claiming that he wasn't paid overtime. Walton said investigators may be more inclined to think that such an employee isn't being 100% honest.