

“HI, I AM FROM THE DEPARTMENT OF LABOR AND I WANT TO SEE YOUR PAY RECORDS”

31st Annual Employment Law Conference

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TOPICS TO BE COVERED

- How to properly classify the difficult to classify employee.
- How to respond when a DOL investigator knocks on your door.
- How to prepare for a DOL investigation.
- What you are required to produce to a DOL investigator.
- What to expect during a DOL investigation.
- What kind of penalties the DOL can impose.
- Is there anything I can do to avoid a DOL investigation?

FAIR LABOR STANDARDS ACT (FLSA)

General Rule:

Under federal law, employers must pay at least minimum wage and overtime at the rate of one and one-half (1 ½) times the “regular rate” of pay for each “hour worked” in excess of forty (40) hours in a seven-day workweek unless the employee is exempt from the minimum wage or overtime pay provisions or both.

FAIR LABOR STANDARDS ACT (FLSA)

White-Collar Exemptions:

The white-collar exemptions are those exemptions from the FLSA's minimum wage and overtime pay requirements for the so-called "white-collar" occupations:

- Executives;
- Administrative;
- Professional;
- Computer employees;
- Outside sales employees.

ADMINISTRATIVE EXEMPTION

To qualify for the administrative exemption all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate of not less than \$455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

ADMINISTRATIVE EXEMPTION – PRIMARY DUTY

“Primary Duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.

ADMINISTRATIVE EXEMPTION – DIRECTLY RELATES TO MANAGEMENT OR GENERAL BUSINESS OPERATIONS

To meet this standard an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from selling products in a retail or service establishment or working on a manufacturing production line.

Examples: Qualifying work in a functional area like tax, finance, accounting, budgeting, auditing, quality control, purchasing, procurement, advertising, personnel management, human resources, and similar activities.

ADMINISTRATIVE EXEMPTION – DISCRETION AND INDEPENDENT JUDGMENT

In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.

Factors to consider: does the employee have authority to formulate, affect, interpret or implement management policies or operating practices; does the employee carry out major assignments in conducting the operation of the business; does the employee's work affect business operations to a substantial degree; does the employee have authority to commit the employer in matters that have a significant financial impact, etc.

ADMINISTRATIVE EXEMPTION – MATTERS OF SIGNIFICANCE

“Matters of Significance” refers to the level of importance or consequence of the work performed. The administrative exemption is designed for relatively high level employees whose main job is to keep the business running.

SETTING THE STAGE – THE COMPANY

AutoSup, Inc. is an automobile supplier located in Michigan, Ohio and Indiana. Founded in 1954, AutoSup is a family owned supplier of Original Equipment Manufacturer (OEM) and after market automobile parts. The company has three distribution centers and 10 stores throughout the region. AutoSup employs four associate buyers to procure all necessary products and materials.

SETTING THE STAGE – THE BUYERS

- Job Description (copy in your materials).
- The Buyers are paid \$750-\$1,000 per week.
- The Buyers are classified as exempt employees.
- The Company does not maintain time records for the Buyers.

SETTING THE STAGE – THE TWO BUYERS

- Sluggo – Reports to work at 7:30 AM and leaves around 5:30 PM every day, five days a week. Sluggo sometimes works through lunch and also sometimes works from home. Sluggo places orders for supplies and materials that are needed to run the business. He uses a list of approved vendors when placing the orders. He does not negotiate price with vendors.
- Champion – Champion also places orders for supplies and materials that are needed to run the business. Champion also starts with the list of approved vendors but chooses the vendor after determining who has the best price and fastest delivery date. Champion negotiates with vendors for price and has a say in which vendors are placed on the approved list.

THE DOL LETTER

AutoSup receives a letter from the Department of Labor (DOL) Wage and Hour Division advising the company that the DOL will conduct an investigation to determine the Company's "level of compliance with the Fair Labor Standards Act (FLSA) and other acts"

- Does AutoSup have any options, i.e. the date, location, documents to produce, refusal, etc.?
- Assuming that the DOL insists upon conducting the investigation on site, what does AutoSup need to do to prepare?
- What should AutoSup expect on the day of the investigation?

THE DOL INVESTIGATION

Preliminary Inspection Issues and Opening Conference

- What can AutoSup do to help ensure that the process proceeds smoothly?
 - Clarify the scope of the investigation.
 - Ask the DOL to return on another day (DOL must give 72 hours for employer to respond) or seek to have the requested materials delivered to the DOL instead of onsite investigation.
 - Exercise right to have designated representative present when the DOL is onsite.
 - Verify the credentials of the DOL investigator.
 - Consenting to the investigation instead of requiring a subpoena is usually advantageous.

THE OPENING CONFERENCE (SCENE 1)

The DOL Investigation



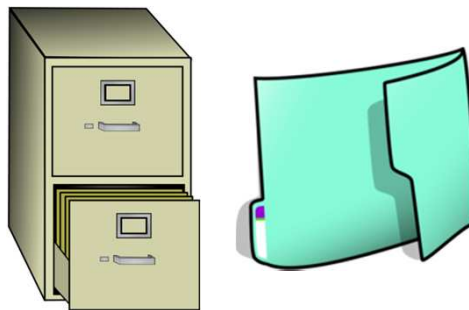
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THE DOL INVESTIGATION – OPENING CONFERENCE

- During the opening conference DOL owes several duties to the employer:
 - Describe the intended scope and duration of the inspection.
 - Delivering the DOL's first request for documents and information if not already provided.
- Best Practices during opening conference:
 - Ask for clarification on all points if DOL does not volunteer all information outlined above.
 - Describe document production protocol.
 - Discuss protocol for arranging employee interviews.
 - Keep track of length of time for each interview.
 - Manage audit to a rapid conclusion.

THE DOL INVESTIGATION – DOCUMENT PRODUCTION

- Do not give more than requested or leave documents or information in plain sight.
- Do not volunteer information.
- Make and keep duplicates of every record produced to the DOL.
- Track all documents produced with a document control log (label the documents by number for tracking and mark all “Confidential and Proprietary”).
- Question the request to produce trade secret or confidential business information.



THE DOL INVESTIGATION – THE INTERVIEWS

During inspection interviews the investigator may:

- Demand privacy for hourly employee interviews (be aware that management level employees don't have the right to a private interview so you can insist that counsel or another high level management official attend and take notes);
- Take handwritten notes;
- Ask to record the interviews;
- Ask witnesses to write statements or review and sign narrative statements or investigator's notes;
- Ask questions about documents that have been produced during the inspection.

THE DOL INVESTIGATION – THE INTERVIEWS

Employer's role in the Employee Interview Process:

- Must never retaliate against employees for agreeing to be interviewed or because of anything they say to the DOL;
- Can object to impromptu, onsite interviews that last more than five minutes on the grounds that they are interfering with business operations;
- No right to participate in non-exempt employee interviews;
- Do have the right and should participate in all management interviews;
- Can request alternative times/locations for interviews so they don't interfere with business;
- Can and should prepare all employees for their interviews.

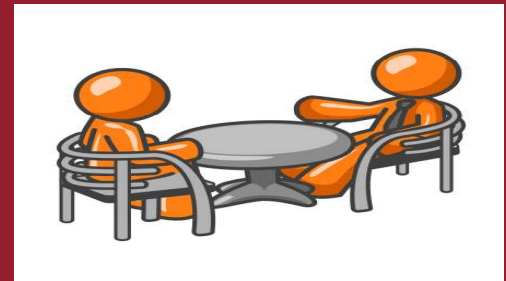
THE DOL INVESTIGATION – THE INTERVIEWS

Prepare all employees scheduled for interviews:

- Consider designating wage and hour counsel to prepare employees;
- Explain what to expect;
- Encourage honesty;
- No coercion;
- No coaching;
- Let employee know interview is voluntary;
- Review interview rights: representation, not to be video taped or recorded, not to write out or sign statements or notes, demand a copy of the statement if there is one, examine documents, breaks.

THE INTERVIEWS (SCENES 2 AND 3)

The DOL Investigation



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TAKE AWAYS FROM THE INTERVIEWS

- Does the job description match the actual duties of the employees?
- Is Sluggo held accountable to perform consistent with the job description?
- What are the key differences between how Sluggo and Champion perform the job?

TAKE AWAYS FROM THE INTERVIEWS

- What “work time” during Sluggo’s typical work day will likely trigger additional pay and overtime pay?
- Must the training time be counted as time worked?
- Do the longevity bonus payments trigger any additional overtime pay concerns?
- Any concerns about unlawful retaliation?

CLOSING CONFERENCE

- A closing conference is generally held after the close of the investigation, which may be weeks after the close of the onsite inspection (some investigators may have a wrap up conference at the end of the onsite inspection and if there are minor violations may address them at that time; sometimes findings will be issued by mail)
 - At the closing conference, the investigator will generally:
 - Communicate the findings;
 - Explain your post-audit rights;
 - Explain actions necessary for compliance.
 - During the conference you should:
 - Listen and take notes, avoid agreeing with any observations or stated violations, provide list of any corrections you have already made, **MAKE NO PROMISES or ADMISSIONS**, ask about penalty amounts, request time to respond (provide supplemental information to correct factual errors).

POST-AUDIT CONSIDERATIONS

After receiving the DOL's finding you may:

- Pay the amount without question (rarely the best option);
- Resolve disputed findings and negotiate reduced amounts at an informal mediation/settlement conference with the DOL (best option);
- Contest the findings and negotiate a formal settlement with the DOL;
- Contest the findings, prepare a defense and proceed to court.

NOTE: If you plan to contest findings, consult counsel to explore the accuracy of the findings, the accuracy of the penalties and your exposure.

TAKE AWAYS FROM THE PRESENTATION

- The DOL is actively investigating wage and hour issues and conducting inspections like the one presented today.
- Misclassification of employees is a hot button item for the DOL and many employers make classification errors, especially with reference to exemptions like the Administrative Exemption.
- Best practices:
 - Self evaluation, internal audit or audit by counsel of exempt positions;
 - Accurate time records for non-exempt employees;
 - Implement and enforce overtime policies;
 - Proper I-9 practices (an I-9 audit is also advisable);
 - Have procedures in place if there is an investigation and educate management with reference to the procedures.

QUESTIONS?

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Thank You



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Note: This presentation/document is not a substitute for or intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.