



How to Survive a Department of Labor Audit

One of the most disturbing letters that an organization may ever receive is a letter from a Department of Labor (DOL) stating that your company has been selected to be audited. When you get this letter, the worst thing that you can do is ignore it and wait for the DOL investigator to show up at your door. The DOL usually gives you a very short window, usually one (1) to two (2) weeks, between receipt of the letter and when the audit is scheduled. In order for an organization to survive such an audit, it is critical to use this time to your advantage.

As experts in assisting employers before the Department of Labor and other federal and state agencies, SESCO provides the following insight into labor law audits and how your company can survive this very frightening and potentially costly process.

What Causes A Department of Labor Wage-Hour Investigation

"Why am I being investigated?" More and more employers are asking this question. There are several possible answers. A Department of Labor Wage-Hour investigation will take place for one or a combination of the following reasons:

- A complaint filed by a former or present employee who feels he/she was paid improperly.
- A complaint of alleged non-compliance from competitors, labor unions, and other federal and state agencies. The organization or person filing a complaint is held in strict confidence. Rarely will you ever know who *"turned you in"*. An investigation is scheduled if it appears warranted by the Wage-Hour Division.
- You may have a competitor who believes that your establishment is not paying the required minimum wage and overtime pay. His complaint to the Wage-Hour Division goes something like this: *"You make me comply with the law; make my competitor comply also."*
- A labor union makes complaints to the Wage-Hour Division on behalf of employees they represent. Unions also file complaints against non-union firms where they have tried to unionize and have been unable to do so.
- Follow-up investigation since you were last investigated to see you are complying with the latest personnel, accounting, and recordkeeping requirements. They will check to be sure any violations found during the first investigation have been corrected. Investigations are scheduled to find out if you are complying with an earlier consent or court injunction agreement requiring certain Wage-Hour compliance and conduct.
- Particular industry investigations -- the Wage-Hour Division may be investigating you because you are in a particular industry and they are trying to find the extent of compliance

of employers in that industry with the particular Wage-Hour accounting and recordkeeping requirements.

Why A Compliance Investigation Is "Serious Business"

Most investigations end up with the employer being found in violation of some Wage-Hour accounting or personnel requirement. Department of Labor officials report that an overwhelming majority of employers against whom they have computed back wages, levied fines, and injunctions, actually believed they were in compliance with the complex Wage-Hour personnel and accounting regulations. The Federal Wage-Hour Division and their one thousand plus investigating staff of compliance officers have now computed over one billion dollars in back wages due employees. No industry is safe from an investigation. No employer subject to the regulations can be considered "*safe*".

Unfavorable newspaper publicity, penalties ranging from the payment of back wages over a two-and-three-year period, with fines of up to \$10,000, imprisonment up to six months, and permanent federal courts injunctions against future violations make Federal Wage-Hour investigations a serious matter.

The above enforcement policies and penalties can be very costly in dollars as well as extremely detrimental to employee morale and goodwill. The personnel unrest will not only affect those employees directly involved with "*alleged back wages due*", but also affect employees company-wide. Poor employee morale results from an investigation where back wages have been computed and employees interviewed.

How You Are Notified Of a Pending Investigation

As a general practice, the Wage-Hour investigator feels **No** obligation to give you advance notice of an investigation. Usually you will be notified of his intent to make an investigation by his personal presence at your office or at one of your establishments. You may also receive a telephone call from the investigator advising you that an investigation will be made. He/she will suggest a time when he/she can be there. If you are going to be out of town or your payroll department is tied up on that particular date, most investigators will normally work with you in arranging a more convenient time for your business. However, there is no use to keep delaying the investigation since investigators will sooner or later come in with or without your consent. Once you have been notified, arrange for the presence of the investigator at a time when it is most convenient for your payroll clerk or bookkeeper. You should also notify your Wage-Hour consultant immediately of the pending investigation so that they can stand by and offer you additional recommendations as the need arises.

Authority of Wage-Hour Compliance Officers

Authorized compliance officers of the Federal Wage-Hour and Public Contracts Divisions have plenty of authority to conduct these investigations. The Federal Wage-Hour laws give investigators the power to investigate and gather data on your wages, hours, working conditions, and other employment practices. They may enter your establishment and inspect any and all

payroll and personnel records, transcribe records, and interview as many employees as they feel necessary. The purpose is to find out whether an employer has violated any accounting or recordkeeping requirements.

Their extremely broad authority gives a Wage-Hour investigator virtually carte blanche authority to enter your establishment, talk to your employees, and look at any records the investigator may feel are appropriate to find out whether you are in compliance with all of the personnel and payroll accounting requirements. This is an important reason for maintaining clear, complete, and accurate personnel and payroll records.

Vulnerability Areas to Be Investigated By Compliance Officers

- Improper minimum wage and overtime payments
- Hours of work that have not been recorded or paid properly
- Improperly compensating employees on a straight salary method of payment
- Working employees who fail to meet the minimum age requirements
- Falsification of personnel, payroll or time-keeping records
- Possible grounds for charges of discrimination between the sexes on equal pay for equal work
- Possible grounds for discrimination charges because of discriminatory personnel and wage and salary policies affecting employees over the age of 40
- Improper payroll deductions on garnishees, tools, uniforms, and company merchandise

Within these broad categories, there are a host of loopholes and vulnerability areas that the investigator will be checking with a fine-tooth comb.

Important Questions to Ask Yourself

If a Federal Wage-Hour investigator conducted an investigation of your organization today, would you be in full compliance?

If your employees were interviewed by an investigator, what would they tell him/her?

Are you absolutely certain your present pay methods, personnel policies, and payroll records meet all the latest requirements of the Federal Wage-Hour Division?

WHAT TO DO BEFORE THE INVESTIGATOR ARRIVES

Have A Professionally Conducted Wage-Hour Accounting Compliance Audit

Whether you are complying 100% with all aspects of the accounting and recordkeeping requirements depends upon your particular situation as well as the current interpretation of the

Federal Wage-Hour Administrator and his enforcement policies. SESCO recommends an immediate in depth Wage-Hour accounting compliance audit be conducted to determine your current status under Federal Wage-Hour enforcement policy. It is recommended that all areas of non-compliance involving methods of payment, compensable work time, personnel records, compensable payroll records, payroll deductions and all other areas be corrected as soon as possible using professional guidelines on how to meet these requirements.

It is far better for an investigator to observe "*good faith intention*" by observing that past mistakes are being corrected even though he/she may observe a period during the preceding two years in which you were not meeting all the requirements. One basic reason for a professional Wage-Hour Accounting Audit rests with your being able to initiate a record of compliance. If you're fortunate enough to avoid an investigation for the next two years, you will have saved yourself many thousands of dollars in that you self-corrected your areas of non-compliance.

It is recommended that job descriptions be completed on any "*gray*" employee classifications which you claim to be exempt from overtime pay before an investigation. It is also recommended that a "*letter of understanding*" outlining basic accounting tests, job duties, and responsibilities be acknowledged by salaried employees whom the investigator may look upon as occupying "*borderline*" positions with reference to the "*white collar*" salary classification. This will eliminate any confusion that may exist in the mind of an employee with regard to his "*job duties*" when questioned by a Federal Wage-Hour compliance investigator.

Communicate and Instruct Key People

SESCO recommends that before any Federal Wage-Hour compliance investigation takes place that time be taken to instruct key personnel on "*what they should and should not do when the Wage-Hour investigator arrives.*" For example, SESCO recommends that you instruct your receptionist or secretary, office or business manager, and payroll supervisor on certain guidelines they should follow should you be faced with a Federal Wage-Hour investigation. SESCO's staff recommendations under the heading "***What To Do During The Wage-Hour Investigation***" would be very appropriate to go over with these key people. These recommendations can save you a great deal of money, doubt, uncertainty, confusion, and help you approach a future investigation with confidence.

Locate and Review Pertinent Personnel-Payroll Records

Along with the previous recommendation on having a professionally-conducted Wage-Hour accounting audit, it is equally important to have a complete analysis and review of all present personnel and payroll accounting records subject to the scrutiny of a Federal Wage-Hour investigator. You should make certain that all required personnel and recordkeeping information is available and current on your records as specified by the Federal Wage-Hour Division. Furthermore, you should make certain in advance that you are meeting the present two-and-three-year retention requirements on the specified personnel and payroll records.

Needless to say, your payroll and personnel records should be centrally located in a neat order and available for inspection whenever the investigator asks for them. It is to your advantage to

avoid having an investigator go on a "*hunting expedition*" in determining what he/she is looking for in this particular area or recordkeeping.

Prepare Audit Work Area for Investigator

Look ahead and plan for a convenient location in your facilities for the investigator to perform his audit work. If possible, try to make a separate room available to the investigator where he/she can look at the requested records by him/herself. He/she then can be "*isolated*" from most employees. This tends to minimize the "*grapevine*" talking among your personnel and he/she will find it less easy to interrogate just anybody about a questionable area he/she may uncover.

WHAT DO TO DURING THE WAGE-HOUR INVESTIGATION

Ask For the Investigator's Credentials

When the investigator arrives and introduces him/herself, be certain he/she has the proper identification and credentials. All investigators are required to carry and show their federal credentials. It is an identification card containing his name, address, assignment location, along with his picture and signature. If he/she does not volunteer this to you, be sure to request it, and if his credentials and identification don't match, you should not permit any investigation to take place.

Request that the individual posing as an investigator leave. Let him/her know that once his credentials and identification are in order, he/she may return and perform an authorized investigation. This same recommendation applies to any investigator who does not have his proper credentials with him/her.

Communicate Investigator's Presence to Top Management

Do not permit any Federal Wage-Hour investigator to perform any type of investigation, look at any records or interview any employee until permission has been granted from the head of the organization or his designated representative. The investigator can be requested to leave his card and to call back at a more convenient time if you or your designated manager is not available to assist him/her. Feel free to let the investigator know if his timing is not convenient to you nor to your payroll department. But you should have a good reason. Give him/her an alternative date when it would be more convenient for him/her to return and begin his investigation. It is wise to accommodate the investigator. Regardless of how you may feel about the Wage-Hour regulations or federal investigators, no useful purpose can be gained by dragging your feet or making it difficult for any investigator.

Treat Investigator with Courtesy and Give Him/Her a Suitable Place to Work

Try to create a reasonably friendly climate. Let the investigator know that you and your employees will cooperate with him/her in every possible way. During this first conference,

arrangements will be made as to a place where he/she can sit down at a desk and inspect your personnel and payroll records. He/she will also explain to you that it will be necessary to interview various employees. You can expect many borderline questions to arise during his investigation. There is no point in creating any animosity or antagonistic feeling because of discourtesies.

But employers should not be fooled by outward appearances. A good working guideline we recommend is for you to assume that the investigator is not normally inclined toward management. Furthermore, it is natural for the investigator to want to find violations. In his eyes, the importance of his work increases in direct proportion to violations he/she finds. Nevertheless, it is recommended that the investigator be treated with courtesy. You should conduct yourself in a manner that will indicate you have nothing to hide and that you do desire to comply. A record of cooperation may be helpful later in avoiding or defending against an injunction suit by the Secretary of Labor.

Choose a Competent Office Employee To Assist

The person you select should reflect a pleasant attitude. She should have patience and show a willingness to cooperate in helping the investigator obtain the proper records he/she needs and other personnel data he/she may request during his investigation.

The investigator will want to see those records which reflect the number of hours worked and the appropriate payroll records. Records of sales volume or business done may also be required to determine the extent of your annual dollar volume of business for purposes of finding out whether you come within the Wage-Hour coverage tests.

All records given to the investigator are to be treated confidentially by him/her.

You are not required to allow the investigator to remove records from your office or your premises. He/she may remove your records from your establishment only with your consent. If you do consent, make sure that he/she carefully identifies each record and that he/she gives you a receipt for them. Unless it is a most unusual situation, it is recommended that permission not be granted any investigator to take your records off your premises. There is no requirement that an investigator be permitted to make a Xerox or Thermofax copy of your records.

How to Deal With Requested Employee Interviews

A Wage-Hour investigator has the authority to interview any employees and to take a statement from them about their job duties, responsibilities, hours of work, and other details concerning their wages and working conditions. Employers are not permitted to be present during these interviews. There is no right granted to have a copy of any employee's statement given to the investigator. The investigator's interviews with employees are for the purpose of verifying the accuracy of your payroll and time records, to better understand the employees' duties and exemption status, and to develop information not available in your records.

Employee interviews are conducted in private and are considered confidential. Investigators normally will not interview all employees, only take a representative sampling. Interviews are usually conducted in your establishment and with your permission. If you do not grant permission to the investigator to interview employees during working hours, the investigator will usually contact these employees at their homes.

SESCO recommends that you permit these employee interviews to take place on your premises. There is nothing wrong with requesting these interviews be held immediately before and after the employees' scheduled shift or work schedule. Most investigators will try to comply with your request to avoid as much lengthy interruption as possible.

Wage-Hour investigators usually interview all "*borderline*" salaried personnel and find out whether they have the proper authority and responsibility to meet the additional accounting tests for the various "*white collar*" salary exemptions from overtime. At this point, it is usually too late to go to the employees that you have been worried about and "*instruct*" them in what to say to the investigator.

In the first place, it isn't fair to place your employees in an embarrassing situation. If your employees are not in the habit of making false or misleading statements, they certainly wouldn't want to do so when questioned by an investigator. Most employees will be "*rattled*" when interviewed by an investigator. If he/she "*detects*" in your employee that he/she is being misled or given false information, both the employee and your organization could be in possible "*deep trouble*" if perjury or falsification of information can be proven by the investigator.

It is recommended that you request from the investigator the names of those employees he/she wishes to interview. It is your privilege to schedule interviews at the most convenient time to avoid disrupting your organization excessively. Once you have the employees' names to be interviewed, we recommend that a member of management escort them to the office where the interview is to take place. This enables you to talk to the employee and explain what is happening before the Wage-Hour interview can take place.

You should let the employee know that he/she should "*tell the truth*" to the best of his ability. He/she should also be told that this investigation is "*routine*" and does not mean your organization has violated any rule or done anything wrong. If the employee to be interviewed has been paid on a salary, then the investigator will be trying to verify his responsibilities and the amount of time he/she devotes to non-supervisory or non-administrative duties. It is recommended that you caution the employee, before the interview, not to minimize his responsibilities in talking with the investigator.

You should also inform the employee that he/she is not required to sign any statement prepared by the investigator unless he/she really wants to do so. Should he/she sign a statement, tell him/her to be absolutely certain to read it carefully and if it is not correct to make it so before signing it. In addition, the employee should be told that he/she has a right to a copy of his signed statement and that he/she should request a copy "*as a condition*" for signing. The Wage-Hour Division will not furnish employers with copies of any signed statements by their employees.

Cooperate but Don't Volunteer Facts or Records Not Specifically Requested

It's always best to answer only those questions directly asked by the investigator. Cooperate with the investigator and furnish him/her with exactly what he/she requests in terms of personnel, payroll, and time records. You must not refuse any requested records. Remember, the investigator can subpoena any records needed to complete the investigation. However, don't give him/her more than he/she specifically requests. If you have concern with any present payroll policy, method of payment of any employee or job descriptions, check them out in advance with your SESCO Wage-Hour consultant. Don't wait until the investigator gets to your office to begin making changes. By then it is too late. A good rule is to supply the investigator with exactly what he/she requests but do not volunteer anything.

WHAT TO DO AFTER THE WAGE-HOUR INVESTIGATION

Find Out How You Stand -- Listen -- Take Good Notes

It is the general practice of federal investigators to hold a conference with you, your office manager, and your Wage-Hour consultant or accountant after he/she completes his investigation. Listen closely to all of his opinions made at this meeting. Take good notes during this meeting. If he/she says you are in violation in some area, find out exactly the reason for his findings. Ask him/her what he/she expects you to do to correct the violations. Obtain all information you can from him/her. "*Feel free*" to ask any questions, clarify and find out the reasons behind his claiming your non-compliance. Ask the investigator to document his findings in any Wage-Hour "*interpretive*" bulletin he/she can provide you. Have him/her underscore the pertinent sections.

If You Are Found In Violation, Pledge Future Wage-Hour Compliance

If the investigator tells you that you are not in compliance and that you owe back wages to employees, ask him/her to give you the names of the employees involved, the amounts allegedly due them, and the basis for his computations. The investigator will provide you this information on a "*computation*" sheet, entitled "***Summary of Back Wages Due***". Some investigations will not compute back wages themselves but will outline the procedures for you to follow and ask that you make these computations yourself. This is tending to be a new enforcement policy of the Wage-Hour Division. But no matter who computes the alleged wages due, be certain you tell the investigator that you will need to review the computations and the reason for them with your Wage-Hour consultant.

At this point, the investigator will want to find out your intentions for future compliance. Assuming that you (1) clearly understand the reason for your alleged discrepancies, and (2) you are convinced that your payroll or personnel procedures have not been in compliance with the latest federal regulations, then it is recommended that you pledge future compliance with the accounting requirements to the best of your ability. If you have any doubt at all as to where you stand, **tell the investigator that you will give his recommendations and suggestions careful consideration, but you need to discuss his findings and recommendations with your Wage-Hour consultant.**

HOW TO SAY "NO"

Review Findings Before Agreeing To Pay Back Wages

If he/she tries to pressure you into writing a check for the back wages at that moment, politely decline. Let him/her know that you will get back in touch with him/her after you have had a chance to review the whole matter of his investigation which took X number of days or X number of hours with your management group. This will take a little time. Thank him/her for his assistance. Again, pledge to him/her **your desire to comply in the future with the federal Wage-Hour accounting requirements to the best of your ability. Don't let yourself be rushed into agreeing with the investigator on his findings. Investigators are not infallible and often make mistakes in computations of back wages as well as in their collection of data and information from employee interviews. Take time and review the total results of the investigation with competent professional help.**

Call Your SESCO Wage-Hour Consultant

Provide him/her with all details concerning the investigator's findings and recommendations. He/she may wish to meet with the investigator and review his findings in depth before giving you recommendations on the proper steps to take in the immediate future.

If You Are Found In Wage-Hour Compliance, Document Results

If the investigator concludes that your methods of payment, payroll computations, personnel policies, and records are in compliance with the latest requirements, you should document this for your future protection. What happens if a different investigator comes back two years later and disagrees? If the investigator gives you a clean bill of health, nail him/her down on specifics. Ask to verify the exemption status of any employee you have been concerned about. Have him/her verify that your overtime computation procedures on bonuses are meeting the Wage-Hour requirements. **ASK THE QUESTIONS ONLY AFTER HE/SHE HAS TOLD YOU THAT ALL YOUR PAYROLL PROCEDURES ARE SATISFACTORY.**

If he/she gives you an affirmative answer to each of your questionable areas, request that he/she give you a letter stating that he/she did find you in compliance as a result of his investigation. Normally, most investigators will decline, telling you that they are not authorized to put the results of a compliance investigation in a letter since it's not their practice to do so. If you are fortunate enough to get such a letter, make several copies and file it for safe keeping.

Write the Investigator

As soon as the investigator leaves your office, sit down and dictate or write out the results of your concluding conference with him/her. Document his decision where he/she held all your present salaried employees to be exempt from overtime as well as any other "gray" situations you have been concerned about. Then, write the investigator a letter and put in it the highlights of his conference with you. Restate his position that you were found to be in compliance such as: *"During your final conference with me and my office manager, we were glad to learn that*

you concluded our company was in complete compliance with all the Wage-Hour accounting and personnel recordkeeping requirements." Repeat what he/she told you. At the end of your letter to him/her, let the investigator know that: *"As a result of your findings during the investigation, it is our intention to continue our present, existing methods of payment, payroll computations, and recordkeeping so that we may continue to remain in compliance with the latest Federal Wage-Hour accounting and recordkeeping requirements."* Your SESCO Consultant will help draft this "position" letter for you.

You should not expect to receive an answer from the investigator to your letter. You have at least protected yourself in the future should another investigation take place by a different investigator. If you should be challenged in the future by a change in the position of the Wage-Hour Division or by a different attitude of a new investigator, you will at least have a copy of this letter on file to use in your defense.

Correct Your Wage-Hour Violations

After you verify the accuracy of the findings and recommendations of the Federal Wage-Hour investigator with your SESCO Wage-Hour consultant then you should begin correcting any mistakes immediately so you can gain full accounting compliance.

Have A Semi-Annual Wage-Hour Accounting Compliance Audit

SESCO recommends periodic professional auditing of your personnel and payroll procedures, methods of payment, and payroll computations. This is the best approach to keeping informed of changes in the enforcement and investigative policies of the Wage-Hour Division, with the goal of staying in compliance with the complex accounting requirements.

Wage-Hour accounting has rapidly become a highly specialized field in which constant study and attention must be maintained in order to keep up with the ever-changing enforcement policies of the Labor Department. You can be meeting the requirements one week, and then the enforcement policies can change and immediately you begin accumulating financial liabilities the following week.

SESCO has served management for more than four decades in developing wage and salary programs, and personnel and payroll record systems that meet the Federal Wage-Hour Division's personnel and accounting requirements. Since 1945, no SESCO client has ever been fined by the Department of Labor for a single Wage-Hour violation.

We can provide you with the peace of mind from knowing you have absolutely nothing to fear from a thorough federal investigation of your payroll, time records, personnel practices, and employee interviews.

Penalties for Violations

The teeth of enforcement of the law are injunctions, shipping bans, safeguards for employee informants, liability for attorneys' fees, court costs, and possible damages in wage suites filed by employees, and possible criminal penalties.

You can be legally restrained from future violations. In lawsuits, employees can recover minimum and overtime wages owed, plus damages in an amount equal to the back wage recovery.

Fines for willful violations may be \$1,100 for each violation and for criminal violations may be \$10,000 for each violation, plus six (6) months in jail.



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