

WHAT TO EXPECT WHEN YOU'RE NOT EXPECTING: HOW TO HANDLE UNPLANNED VISITS FROM FEDERAL AGENCIES

Publication
Feb 1, 2016

The unannounced arrival of an investigator from a federal agency is an unwelcome business interruption which can be a drain on productive time and arouse collective anxiety in your business environment. Effective management of the investigation from the very beginning is critical to achieving the best possible outcome, no matter which agency comes calling.

This article outlines best practices for handling, from start to finish, unplanned investigations involving two of the federal government agencies most active in employer audits: the U.S. Department of Labor (USDOL) and the Department of Homeland Security (DHS).

Labor Pains: The Department Of Labor

The USDOL might show up on your doorstep for an investigation to assess your compliance with the Fair Labor Standards Act, the federal wage and hour law. Investigations generally arise from a current or former employee's complaint, but they may also stem from an internal USDOL initiative targeting businesses in specific industries.

Planned Visits

Sometimes the USDOL investigator will initiate an audit by transmitting a scheduling letter announcing a date and time of arrival to review documents. The letter will

Service Focus

Counseling and Advice

Immigration

Wage and Hour

Workplace Safety

typically request a list of current and former employees for the past two years, along with various payroll records to determine whether these employees were properly compensated. This will include an examination of overtime pay, exempt status, and paycheck deductions.

You are also often asked for documents to demonstrate compliance with rules on record retention, minors in the workplace, independent contractor classification, and perhaps even the Family Medical Leave Act.

Surprise Inspections

On other occasions, however, an investigator from USDOL may arrive without any advance notice, requesting documents and employee interviews. As a general rule, you should not agree to an immediate inspection and should instead request additional time to plan strategy. It is normally possible to delay the investigation for a week or so simply by explaining that business considerations warrant time to gather information.

We suggest that you try to agree with the investigator on a date certain to return and a time estimate for the visit. If the investigator does not have a written document outlining the scope of the information requested, ask for a list of the information the investigator would like to review at the appointed time, which can be sent by email.

Handling Employee Interviews

If the investigator asks to interview employees, you should prepare in advance by selecting strong employees from a cross-section of departments. Prepare a list and schedule of employees for the investigator to interview, budgeting approximately 20 minutes per employee.

You should set aside a private space for the interviews to minimize business disruptions. This allows the investigator access to sufficient information, but simultaneously allows you to somewhat control the situation and reduce business interruptions.

Day Of Investigation

Before the investigator arrives, check for required postings to be certain that they are current and in a visible location. You should prepare a clean, document-free, private space for the investigator to review documents and interview employees. Perhaps most importantly, you should designate an individual to work with the investigator to make sure the investigation process is organized and efficient.

When the investigator arrives, have the requested documents organized and ready for review, making sure that you keep a copy of every document you provide. Have your point person accompany the investigator should they request a tour of your facility, as the investigator may want to look at your required postings, the location of your time clocks, and other relevant aspects of your premises.

Pay particular attention to whether the investigator attempts to broaden the geographical scope of the investigation to facilities beyond the one which is currently the subject of review. Typically, the USDOL investigator seeking to pursue an expanded inquiry will explore the interconnectedness among your business entities by asking whether facilities share employees, managerial leadership, and ownership interests. Plan for your designated representative to be the only authorized individual to answer these inquiries on behalf of the company.

Icy Cold Reception: Immigration And Customs Enforcement

An investigator from Immigration and Customs Enforcement (ICE), the DHS investigative arm, may be another unexpected visitor. This investigator will be reviewing your compliance with the requirements of the Immigration Reform & Control Act of 1986. An ICE investigator will typically arrive with a Notice of Inspection seeking to review I-9 employment eligibility forms for current employees. The time to reply is short – usually just three business days. However, the investigator may be agreeable to a short extension for legitimate business reasons.

What Will The Investigator Look For?

A typical compliance review consists of an investigator verifying that your I-9 forms have been properly completed. This typically includes a review of your documents to ensure that they are timely completed within three days of the date of hire, they are correctly and entirely filled out, and that the associated documents establishing identity and employment eligibility are legitimate.

What To Expect After An ICE Investigation

The I-9 form review process may take as little as two weeks or as long as a year. Once the review is complete, ICE will inform you of the results. The best news you can hope for would be a letter indicating that you are in compliance. If only minor violations were found, ICE may issue you a notice of technical or procedural failure indicating certain mistakes on forms, and you will have 10 business days to correct them.

If more substantive violations were found, ICE may issue you a warning notice without assessing a monetary penalty. However, if the agency determines that you have knowingly hired individuals not authorized to work in the United States, it may issue you a notice of intent to fine (typically \$500 to \$700 per I-9 form). If this occurs, you should consult with counsel to request a hearing before a federal administrative law judge within 30 days, and your lawyer may be able to negotiate a reduction of the fine.

ICE may also issue you a notice of suspect documents regarding an employee's authorization to work, advising you of potential penalties if you continue to employ that individual. In such a case, you will be given an opportunity to provide additional documentation to show authorization to work. Similarly, the agency may issue a notice of discrepancy indicating that work eligibility cannot be determined for a certain employee, with an opportunity for that worker to provide documentation showing employment eligibility or face termination from employment.

What Can You Do Today To Prepare For Tomorrow?

There are two main steps you can take today to minimize the chances of an unwanted knock on your door tomorrow: educate your key workers, and conduct internal audits.

Educate Your Employees On Compliance Issues

Many potential compliance problems can be avoided with clear procedures and training given to those workers expected to follow them. No matter which substantive area a federal government investigator may seek to review, you will be in a better position if you have prepared response protocol and educated your employees in advance on your policies.

That way, even if an investigator arrives without notice, you have designated steps in place and employees will not panic. This will avoid the problem of having unauthorized or uninformed workers providing contemporaneous and uncoordinated responses to inquiries, and should prevent an investigator from pulling unsuspecting employees away from work for interviews.

As noted above, one of the most important steps you can take is designating an employee with sound judgment and in a leadership role to lead your response from the first instance of an unplanned arrival. Make sure that employees know to call that point person to manage face-to-face interactions, prepare any records, and provide verbal or written representations made on behalf of the company. That designee should be trained to ask for credentials from the investigator, request a business card for follow-up, and seek additional time to prepare requested information.

With respect to immigration-related documents, you should ensure proper training for your personnel responsible for the completion of I-9 forms. You might also consider an electronic I-9 system to automate the process and minimize opportunities for technical human error. On a related note, even if state or federal law does not require it for your company, consider

using the federal internet-based E-Verify system to confirm employment eligibility.

Schedule And Perform Periodic Internal Audits

Finally, you should consider the enormous benefit of setting aside time to review compliance issues periodically, well before a federal investigator arrives to begin looking at your records. You should keep copies of documents verifying identity and employment eligibility when completing I-9 forms so that technical corrections may be made without having to go back to your workers.

It is a valuable use of time to periodically review your time clock records, not only to track tardiness for attendance purposes, but also to check against pay records to ensure the accuracy of non-exempt employees' compensation for all hours worked at the appropriate rate. You may consider engaging counsel to review a sampling of documents for common problems or even for suggestions on changes to process.

Time spent on these proactive measures is time saved in opportunity costs and lost productivity should the government one day come calling.

For more information, contact the author at WHyland@fisherphillips.com or 502.561.3990.