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MEMORANDUM

TO: CFFA Members

FROM: Barsamian & Moody

DATE: August 13, 2020

RE: Steps for Responding to Investigative Letters from US DOL and Other Government Agencies

INTRODUCTION

Various regulatory agencies, such as Cal/OSHA and the California Department of Labor Standards Enforcement (DLSE), have begun notifying employers of inspections designed to audit employers' compliance with the new laws and regulations related to COVID-19. Most recently, many employers have received letters from the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) notifying these employers of workplace inspections for the purpose of determining their compliance with various federal laws which the DOL is responsible for administering and enforcing. These laws include the Fair Labor Standards Act (FLSA), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and the Families First Coronavirus Response Act (FFRCA), which includes the Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLA).

In general, the letters notify the employer of a date that has been unilaterally set by the DOL investigator for an "initial conference" between the DOL investigator and a representative from the employer. In addition, the letters demand the employer produce a number of records and information, including, but not limited to, two years' worth of the company's tax records, payroll records (including time records) for all employees, a list of all owners and company officers, a list of all current and former employees *and their contact information*, the general ledger for the past two years, records related to the company's compliance with the Families First Coronavirus Response Act, and the company's employee handbook.

This Memorandum describes the steps that all employers should consider taking in responding to the DOL's letters. Further, while this Memorandum focuses on responding to DOL investigative inquiries, its principles are generally applicable to responding to other governmental investigations such as Cal/OSHA and the DLSE. If you receive an investigative letter from a governmental agency, you should immediately contact your labor and employment counsel for specific guidance. While we wish to express confidence in the information contained herein, this Memorandum is not legal advice and should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner. If you have any questions about the information in this Memorandum, you should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding your specific situation.

BACKGROUND ON DOL WORKPLACE INVESTIGATIONS

The first thing to know is that the DOL has very broad authority to conduct inspections of workplaces within its jurisdiction. Generally, the DOL has jurisdiction where an employer (a) does at least \$500,000 in business annually, **or** (b) its employees perform work that involves them in commerce between states ("interstate commerce"). For example, many agricultural employees work with crops that are shipped out of state. While not always clear, this is often sufficient for the DOL to have jurisdiction over the employer (called "enterprise coverage") or the employee ("individual coverage").

Generally, the DOL's investigations are conducted by requesting information and records from employers. However, investigators frequently request to interview a sample of employees depending on how many different types of employees exist at a target employer. It is also important to understand that the DOL has the authority to bring enforcement actions against employers for noncompliance with any of the laws that the DOL is responsible for administering. As such, employers should not disregard or discount letters or other communication from the DOL because the DOL has broad legal authority to pursue these investigations.

Of course, while federal law provides the DOL with broad investigative authority, employers should not simply "open their records" to a DOL investigator. Rather, it is important that employers prepare for any investigations, diligently assert their rights during investigations, and carefully manage the flow of information between the company and the DOL.

OUTLINE FOR RESPONDING TO DOL INVESTIGATIONS

Over the years, the attorneys at Barsamian & Moody have counseled countless employers through DOL investigations. While the current investigations seem to be focused on employer compliance with the new federal leave laws related to the COVID-19 pandemic, it is anticipated that these investigations will still follow a similar form and

function as previous DOL investigations. Accordingly, employers should expect that in addition to targeting compliance with the new FFRCA, the DOL will also generally audit compliance with the FLSA and MSPA. What follows is an outline of the steps that you should consider taking in order to prepare your company for a DOL investigation:

1. Immediately contact your legal counsel.

Upon receiving a letter from a DOL investigator, the very first thing you should do is contact your labor and employment attorney. Your attorney can help you prepare for an investigation and help you to avoid making any mistakes which could come back to bite you.

2. Request to postpone the initial conference.

The next step is for you, or preferably your attorney, to contact the investigator to request to reschedule the initial conference for a date that avoids disruption to your business operations. The DOL may not interfere with your normal business operations. As a practical matter, investigators also try to encourage employer cooperation with investigations, rather than spur their opposition. As such, many investigators are willing to postpone the initial conference for several days to ease the burden of investigations and avoid disrupting the employers' operations.

3. Immediately try to negotiate down the scope of the DOL's records request.

While the DOL has the authority to inspect employers' timekeeping, payroll, tax, and other business records, this does not mean that you should willingly provide everything that is requested by the investigator. Further, it is worth noting that while the DOL often requests that employers produce everything-under-the-sun, investigators are usually concerned with a much more limited selection of records. Therefore, in addition to requesting to reschedule the initial conference, you should consider requesting that the DOL narrow the scope of its request. You should explain that gathering all of the requested records will require a significant amount of time and may involve taking key personnel away from their primary business duties. This is another way in which you can suggest that the investigation will interfere with your business operations.

4. Designate key individual(s) to be responsible for performing certain critical functions throughout the DOL investigation.

Employers should not assume that a DOL investigation will only involve an exchange of documents and records. Rather, it is almost always the case that investigators conduct in-person or telephonic interviews with certain employees. The DOL also frequently makes use of onsite "walk-around" inspections (so make sure all of your required workplace postings are clearly posted in conspicuous places). That being

said, the next step is to designate one or more individuals to perform the following functions during the course of the investigation:

- Serve as the primary point of contact for the DOL investigator. Generally, this should be your labor and employment law counsel.
- Serve as the primary management team representative to be present during the opening and closing conferences with the DOL investigator.
- Serve as the onsite representative to escort the DOL during any onsite workplace inspections.
- Prepare management employees for interviews with the investigator.
- Oversee the production of documents to the DOL.
- Coordinate inspection activities with contractors and any related business entities.

Of course, it is also critical to develop a system for quickly notifying any designated individuals that a DOL investigator has “just shown up” at the workplace. This may involve training supervisors and key personnel to notify a point person of any unknown visitors in the workplace.

5. Prepare your management team for interviews.

Another important step is to prepare your management team for the DOL’s onsite inspection of the workplace, and specifically, for the investigator’s interviews with management personnel. Among other things, your management team will want to be well-prepared to discuss the company’s policies, procedures, and practices for complying with the federal laws which the DOL administers and enforces. This may involve providing management employees with a quick refresher on federal wage and hour laws, MSPA, and the new federal leave laws. While management is not expected to be experts on the law, they should be able to communicate with confidence about the fundamentals. A good starting place is the informational materials and “fact sheets” that the DOL often provides with their opening letter to employers.

6. Protect your rights and know the DOL’s authority during the course of the DOL’s investigation.

During the course of any investigation, employers must always seek to protect their rights. Often times, this requires knowing the extent of the DOL’s authority. While this can be a complex issue, here are some general principles to understand:

- The most important principle to remember is that the DOL’s investigation must be conducted in a reasonable manner that does not unduly interfere with your normal business operations.
- The investigator should clarify the scope and expected duration of the investigation and should make all requests for records and information in writing.
- If your point person is not available when an investigator shows up, you can request that the investigator wait a reasonable amount of time (usually not to

exceed an hour) for the designated management representative to arrive. In this regard, employers should always exercise their right to have a designated representative present when an investigator is at the workplace.

- If an investigator arrives without providing notice of the onsite visit, you may ask the investigator to return another day. Generally, investigators are required to give employers 72 hours to respond to investigative demands. However, you will also want to keep in mind that it is usually better to consent to a demand after negotiating a reasonable scope rather than force the DOL to obtain a subpoena to proceed with their investigation.
- Employers are entitled to have legal counsel or another company representative present during management interviews but those individuals are not entitled to be present for employee interviews.
- When producing records and documents, employers are generally entitled to withhold or redact information that is irrelevant to the DOL's investigation.

7. Follow best practices when producing any documents.

The final step in addressing a DOL investigation is to adhere to best practices for producing any records and information. Overall, employers should seek to carefully manage the flow of information to the DOL. Consider the following:

- Do not create documents during the course, or in response to, an investigation.
- Do not offer more records and information than the DOL is requesting.
- Do not volunteer information unless it helps to clarify information that has already been provided.
- Clearly mark all documents produced with the words "Confidential and Proprietary."
- Keep a duplicate of every record produced to the DOL.