



Responding to Wage & Hour Investigations: Advice for Nursery & Landscape Employers

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Christopher J .Schulte¹

State-of-Play

AmericanHort offers the following guidance for its members regarding U.S. Department of Labor (“DOL”) investigations by the Wage & Hour Division (“WHD”). In recent months, there has been a marked increase in WHD investigations, particularly in the nursery and landscape industry, and recent public announcements by Labor Secretary Acosta signal further increases in the degree of DOL scrutiny of H-2A and H-2B employers, in particular. This guidance is meant to offer general advice so that you can be prepared for the inevitable WHD audit of your business, understand your rights and responsibilities under the law, and make the entire audit process as painless as possible.

As with all compliance matters, ongoing staff training and proper recordkeeping practices offer your best defense to a government investigation. If you have procedures that need to be improved, it is far better (and less expensive) to discover them on your own before having a government investigator tell you about it. And if you are already meeting your requirements under the law and can demonstrate that to the investigator, you have nothing to fear and can send them on their way to someone else’s business. Employment laws are complex – especially those for the H-2A and H-2B programs – and compliance cannot be achieved by accident or solely by good faith. Active involvement with groups like AmericanHort, reaching out to legal counsel or other professionals, and staying current on developments in the industry will put you far ahead of the pack and vastly increase your odds of not just surviving an audit, but having a satisfied and productive workforce and living free of fear of audits.

Dealing with a DOL Investigator

¹ This memo was prepared by Chris Schulte, of the law firm of CJ Lake, LLC, who serves as AmericanHort outside employment law counsel. The following summary is intended to provide general guidance regarding Department of Labor worksite investigations. The reader should recognize that every investigation has its own unique circumstances and if one is uncertain as to what his/her rights and responsibilities are, help from an expert or lawyer should be sought.

A DOL investigator may contact you in advance to schedule an on-site visit of your business or simply show up and ask permission to conduct an audit. Even where a visit has been scheduled, employers have reported seeing DOL investigators taking pictures or beginning the investigation prior to the agreed-upon date. An unannounced audit may occur at an inconvenient time and in such case, you should attempt to arrange for a mutually convenient time. You should anticipate such an occurrence by having a designated company representative who has a basic understanding of DOL's authority and the company's rights in the event that it is audited.

You have a right to require the purported DOL official to prove his/her status by providing a badge or other official identification. The scope of investigation and DOL's objectives should be discussed at the outset of the visit. The company's representative during the audit should be courteous and avoid losing his/her temper, even if the investigator is rude or overbearing. The company's goal should be to cooperate and demonstrate a company culture that values legal compliance. Because investigators often have considerable discretion, it is important to put your best foot forward. In cases of extreme unprofessional conduct by a representative of DOL, however, you should contact the investigator's supervisor to register a complaint.

If the investigator asks questions for which you are unsure of the answer or just questions that appear outside the scope of their authority to investigate, step back and tell the investigator that you need to check your records or consult with your bookkeeper or your attorney. The investigator may try to rush you or insist that an answer or providing documents is necessary within a short timeframe, but these investigations take as long as they take, and accuracy is the most important thing.

The Typical DOL Audit

Typically, the investigator will ask to review personnel records that relate to DOL's jurisdiction and has the authority to do so. While records often are reviewed at the worksite, DOL may ask to take them off-site, in which case you should make copies or keep an inventory of what is taken. In addition, the investigator typically will ask to tour the worksite to look at fields, housing, field sanitation facilities, and vehicles. DOL investigators have the authority to do so. Normally, the investigator will seek to interview employees and managers regarding the company's employment policies and practices. DOL investigators have the authority to interview employees at employer's convenience and separate from management representatives. The employer must make a practical judgment on how to accommodate DOL—during work hours or during non-work hours. A representative of management has a right to be present when management or supervisory employees are interviewed, but is not allowed to be present during interviews of other employees. While payroll records, time cards, and similar documents are fair game for a WHD investigator to review, you are not required to provide copies of your Form I-9s prepared for newly-hired employees, nor most tax documents. WHD investigators have recently been requesting profit-and-loss statements for employers, copies of tax returns for the company, and/or lists of customers/suppliers, all in order to establish FLSA coverage. If the business' gross annual sales exceed \$500,000, you can "stipulate to coverage" under the FLSA. Not all, but most, WHD investigators will accept this and move on without insisting on the tax/sales information.

What is DOL's Focus in an Audit of an Agricultural Employer?

DOL has jurisdiction over a number of labor and employment laws. In a typical audit of an agricultural employer, DOL will focus on the Fair Labor Standards Act (FLSA – minimum wage, overtime, and child labor), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), farm labor housing health and safety standards, OSHA/Field Sanitation, and H-2 program compliance. They do not have authority to enforce (directly) immigration laws nor state labor or employment laws. Following is a brief discussion of the issues that DOL will be looking at in each of these areas of the law.

FLSA

DOL typically audits payroll records to determine whether employees are paid the minimum wage for all hours worked. Attention will be paid to payroll deductions, loans and advances to workers to determine whether the worker authorized them and, in the case of loans, whether their repayment through a payroll deduction reduces the amount earned in a pay period below the minimum wage. DOL also will look to see time cards or other evidence showing when workers begin and end the day, as well as lunch breaks. The FLSA requires that records be kept for a minimum of 3 years.²

While agricultural employment generally is exempt from the requirement that workers be paid overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek, the exemption can be lost. During the course of an audit, the investigator will interview employees to determine whether the crops of other growers are handled during a workweek and whether the grower packs crops for other growers. In such circumstances, workers handling crops produced by others are entitled to overtime during each pay period in which they handle such product. The question of how long a nursery must hold and care for plants started by another greenhouse before they are considered a “grower” exempt from OT requirements rather than a “wholesaler” required to pay 1.5x wages to any employee handling the “outside” plants in a given week is not defined, but the subject of multiple lawsuits and disagreement between employers and WHD. Generally speaking, however, if the plants are watered, pruned, fertilized, or otherwise tended to such that they are transformed in size or maturity, the agricultural overtime exemption will apply.

MSPA

² The FLSA requires that payroll records contain the following information: full name of employee; home address, including zip code; sex and occupation in which employed; identification of each employee; time of day and day of week on which workweek begins; hours worked each workday and total hours worked in the workweek; basis on which wages are paid; total daily or weekly earnings; total additions to or deductions from wages; total wages paid each pay period; and date of payment and pay period covered.

MSPA governs the employment of migrant (having a permanent home located far enough from the worksite that the employee must stay overnight nearby) and seasonal (employed for part of the year only, tied to growing cycles usually) farm workers, as well as the activities of farm labor contractors (FLCs). If a farmer uses an FLC, DOL will seek proof that the FLC was properly registered for all services it provides the farmer, such as recruitment, housing and transportation. The investigator will interview employees to determine the extent to which an FLC operates independently of the farmer or whether it is a joint employer—making the FLC and farmer jointly liable for any violations.

If the employer or its FLC recruits migrant workers, DOL will ask to see copies of the written disclosure (Form WH 516) of terms and conditions of employment that are required to be given to migrant workers at the time of recruitment and whether the required employment law posters (in English and the language the workers read and speak) are posted in a conspicuous place at the worksite. If the farmer owns or controls farm labor housing, DOL may inspect it to see if it complies with OSHA or ETA housing standards and whether the proper housing disclosures (Form WH 521) have been made. This is a particular focus of DOL investigators at present. If workers are charged rent for housing, DOL will look to see if the terms and conditions of the housing were provided the worker and the worker authorized any deductions from wages for the housing.

MSPA also governs vehicle safety, worker driver's licenses, and vehicular insurance requirements. An investigator will look for documentation related to all of the above requirements. Similar to the FLSA, MSPA requires that the required records be kept a minimum of 3 years. MSPA requires the retention of the same payroll information as the FLSA, but in addition, requires the employer's identification number (EIN) and address to be printed on the employee's pay stub.

OSHA Field Sanitation Standards

During an audit, the DOL investigator may inspect the farm to determine compliance with OSHA's field sanitation standards that apply to agricultural establishments where 11 or more workers are engaged on any given day in hand-labor operations in the field. The employer must provide 1 toilet facility for each 20 employees or fraction thereof located at the closest point to vehicular access. The standard does not apply where employees are working 3 hours or less in a day. In addition, potable drinking water and hand-washing facilities must be in close proximity to toilet facilities, all of which must be maintained in a sanitary manner. Employees must be given notice of the location of toilets and water and be informed of good hygiene practices.

H-2 Program Compliance

A growing percentage of agricultural employers use the temporary and seasonal alien agricultural worker program, called H-2A. The parallel non-agricultural program is used primarily by landscaping employers, the H-2B program. Those who participate in the complex H-2 programs will almost invariably be audited with more frequency than those that do not use either program. DOL conducts "letter" audits and on-site audits of H-2 employers. In letter audits, DOL

asks for extensive documentary information but does not visit the employer's facility. In on-site audits, DOL will conduct an audit as described in this memo, in addition to seeking information that is specific to the H-2 program.

In an H-2 audit, DOL typically requests the following information for the preceding 3 years: proof of newspaper advertising; proof of contact with former U.S. workers; proof of workers' compensation insurance coverage; records of each worker's earnings; copies of job orders and application for temporary labor certification; and associations must document their status as an employer or agent. During an audit, the investigator will interview U.S. workers to see if they are performing some of the duties of the H-2A workers (called corresponding employment) and, if so, will check the employer's records to ensure that the U.S. workers are being paid the same wages and benefits (such as free housing) and being provided the same terms and conditions of employment as H-2A workers.³ DOL also will check to see if the U.S. workers in corresponding employment are given a copy of the H-2A worker contract on the first day of work.

When Will You Know the Results of the Audit?

There is no consistent answer to this question, as DOL handles each situation differently. In some cases, employers may never hear back from DOL regarding the results of the audit. In many others, DOL will contact the employer many months later and in others after a few weeks. Often, the investigator will call the employer or return to the employer's office with an oral demand for back pay and or civil money penalties and give the employer a limited time in which to accept or reject the offer. In these informal circumstances, DOL often is willing to reduce its initial wage and penalty demands. DOL may offer the employer a settlement agreement with respect to any damages or penalties. In such circumstances, the employer should consider seeking legal counsel with respect to DOL's demand and before signing a settlement agreement. It is important for the employer not to submit to DOL time pressures before making a decision.

The WHD investigator will typically try to pressure the employer into signing a document conceding that the back wages are owed and properly calculated, without telling the employer what the civil money penalties ("CMPs") will be. One tactic is to tell the employer that declining to sign will be recorded as a "refusal to cooperate" with the investigation or demonstrates a lack of willingness toward future compliance – all of which might result in increased CMPs. There have been too many cases where an employer faced relatively low-dollar back wage claims and signed the form, only to learn that the Department was assessing thousands and thousands of dollars of CMPs after they had already admitted liability. If WHD insists on withholding the CMP calculations, you are perfectly within your rights to say that you are 100% committed to future compliance (as you have already been in the past), and completely willing to cooperate with the investigator, but if they are unwilling to provide you with the full amount of their claims against you and your business, you cannot in good faith sign something without that information.

³ Congress has blocked the Department of Labor from using any funds to enforce the "corresponding employment" provisions of the H-2B rules since the latest rules were introduced in 2015. Technically, however, the H-2B corresponding employment rules are still "on the books," so H-2B employers still need to be aware of the rules' requirements.

DOL may send you a written notice of violations and request back wages and/or CMPs for alleged violations. If you receive a formal notice of deficiencies or violations (a “determination letter”), you have a right to appeal and have a hearing before an Administrative Law Judge. You **must** exercise your right to appeal within 30 days of the date of the determination letter. Once you have requested a hearing, there will be additional opportunities to informally resolve the matter with representatives of the Solicitor of Labor’s office prior to the hearing date. Hearings often are not scheduled for many months after a request. Relatively few cases end up before an Administrative Law Judge (“ALJ”) and filing the hearing request simply keeps the door open to discuss settlement. If a hearing request is not filed within 30 days of the date of the Notice of Determination, then that Notice becomes a final order of the Secretary of Labor, and there is no opportunity to discuss settlement or challenge the amounts claimed. The best practice is to file the hearing request, if only to preserve your rights and to seek a settlement on more favorable terms. Particularly with CMPs but occasionally with back wages, the WHD district office or the attorney for the Department will agree to reduce the amounts claimed and/or agree to a payment schedule over time.

What Should an Employer Do in Anticipation of an Audit?

Assume that you will be audited and take precautionary steps in anticipation of such an event. The best thing an employer can do is conduct a self-audit. What is a self-audit? This is a process where an employer reviews its employment policies, procedures, recordkeeping and retention practices to determine whether they comply with the legal requirements that pertain to agricultural employers. A successful self-audit requires that the employer know the applicable legal requirements and approach its own business in the same manner that a DOL investigator would. By self-auditing, an employer allows itself to correct mistakes or omissions prior to being audited by the government, thereby eliminating or mitigating potential fines and damages.

There are other “best practices” to reduce the stress of an audit. Discussing document practices and regulatory requirements (especially those involving the H-2 programs) with your office staff and supervisors will foster a culture of compliance. Having a single designated point-person to interact with WHD and, just as important, ensuring that all staff know to refer WHD investigators to that person is essential. Involvement with AmericanHort and employer-specific groups will also help track current enforcement trends and the development of best practices by other employers – everything from hearing that WHD (or ICE) is ramping up investigations of nurseries in your area to another employer’s suggestion to use different colored paper for the various disclosures required to be made to your H-2 workers so that they are more likely to recall receiving them when first hired. But above all else, self-audits are absolutely essential – you are always better off learning of any gaps in compliance or other HR issues before an investigator does, giving you an opportunity to remedy situations before they become costly.

What Should a Self-Audit Tell You?

- Whether you are keeping and retaining all of the required records in a manner that complies with the law.

- Whether all of the employees handling records are doing so in a consistent manner.
- Whether you are keeping records not required by law that will further evidence compliance with the law, such as photos of posted posters at appropriate locations.
- Whether employees responsible for implementing your employment policies and for legal compliance are doing their job.
- Whether company policies are being consistently applied to all workers, enabling a refutation of discrimination claims.
- Whether employees responsible for employment practices are regularly trained and updated on new legal requirements.

What Are the Benefits of a Self-Audit?

- You will know what your legal obligations are and whether you are in compliance.
- You will be ready should DOL notify you that it is going to conduct an audit.
- Your records will be complete, accurate and retained for the proper period of time and evidence compliance.
- If interviewed by DOL, your management employees will know the law, the company's practices, and make statements that help, not hurt the company.
- If audited by DOL, few, if any, substantial problems should be found.
- Your employment practices, recordkeeping, and compliance training practices will demonstrate to DOL that there is a culture of compliance within your company. This goes a long way in minimizing your potential liability when the investigator has discretion.
- If sued by an employee, all of the above practices will benefit the company in litigation if it has to produce records in discovery. It is less likely that the case will proceed.

Conclusion

These rules are complex and ever-changing, and compliance does not happen by accident. Knowledge and vigilance are your best defenses. Self-audits, ongoing staff training, and having a strong team of outside professionals available to you can keep an inconvenient audit from becoming a disastrous audit. AmericanHort is here to help you – acting as your “eyes and ears” in Washington, DC and, through its network of members from coast-to-coast, in your community. My office is available to offer one-on-one legal consultation as a free benefit to Premium members, and we work closely with the Washington, DC-based AmericanHort advocacy team to provide guidance like this to all members. Establishing a culture of compliance, including self-audits and training, will reduce the stress when a DOL investigator knocks on your door. If you are not sure what the rules require of you: ask, learn, and change practices to match what's required, knowing that the rules do change from time to time. If you are confident that you are already following the rules: be able to prove it through consistent and thorough document practices. If you are following the rules and can demonstrate that, you will have nothing to fear from audits.