WHAT TO EXPECT AND HOW TO PREPARE

DEPARTMENT OF LABOR (DOL) INVESTIGATIONS AND AUDITS OF AGRICULTURAL AND GREEN INDUSTRY EMPLOYERS, INCLUDING H-2 PROGRAM EMPLOYERS

Prepared for the American Nursery & Landscape Association (ANLA)
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Background — DOL Targeting Agricultural and Green Industry Employers

On June 16, 2010, U.S. Secretary of Labor Solis issued a press release acknowledging a report by Farm Worker Justice Fund and Oxfam entitled "Weeding out Abuses: Recommendations for a Law-abiding Farm Labor System," which among other things, alleged that "for too long the federal government has not taken the steps necessary to empower and protect these workers." Secretary Solis' release states: "While I'm very proud of what the Obama administration has accomplished on behalf of farmworkers in the last year, I look forward to continuing to work with the farmworker community on ways to protect the wages, [and] safety and health of this important part of America's labor force." Additionally Secretary Solis and others have produced a series of public service videos, in both English and Spanish, for DOL offering anonymity to undocumented workers who call tip-lines to allege wage and hour violations against employers.

The June 16 press release lists the steps taken by DOL in protecting farm workers, including the addition of 250 new Wage and Hour (W&H) investigators, obtaining additional funding to enforce labor requirements under temporary visa worker programs, finalizing new H-2A regulations and stepped up enforcement of child labor laws in agriculture. New H-2B regulations are also in the works. DOL's current emphasis on enforcement of labor laws applicable to agricultural and green industry employers coincides with the recent increase of audit activity it has undertaken with regard to employers and contractors using the H-2A agricultural and H-2B non-agricultural temporary and seasonal worker programs. ANLA and NCAE have been receiving an increasing number of reports of DOL investigations and audits inside and outside of the

H-2 programs, for labor law and H-2 program violations. ANLA and NCAE members have asked how best to handle an investigation if one occurs. This memorandum provides practical advice to guide ANLA and NCAE members who are facing or who may face an investigation or audit by DOL.[1]

What Triggers An Investigation?

DOL's investigative process can begin through a complaint from a disgruntled employee (or his or her lawyer), through a "directed" investigation (often in connection with a policy initiative targeting certain types of businesses and/or compliance issues), through random selection, or as a follow-up to previous enforcement activity. As discussed above, agricultural employers, especially those that employ hand-harvest labor, are being targeted through an industry specific initiative. Although an investigation can be disruptive and stressful, it does not necessarily mean that DOL will take enforcement action, even if possible violations are found. Much depends on the investigator and how responsive he or she thinks the employer is.

What Laws May DOL Investigate?

DOL has authority to conduct audits and investigate potential violations of a wide-range of laws under its jurisdiction. For purposes of this memorandum, the terms audit and investigation, for all practical purposes, can be treated interchangeably. An audit implies a more narrowly tailored review of documents, while an investigation implies a broader reach, including coming to the worksite to review documents, talk to employees and managers, and inspect housing and vehicles.

DOL investigations encompass many federal labor laws, such as the Fair Labor Standards Act, the Occupational Safety and Health Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Immigration and Nationality Act (I-9 review), H-2 program compliance, and myriad other laws. Because DOL cannot investigate compliance with every law and regulation in every investigation, DOL will usually focus on specific laws that it believes employers often violate. This is especially true if an employer is participating in the H-2A program, which historically has attracted "white glove" inspection treatment by DOL. By monitoring its compliance with these laws, an employer increases the chances that it will survive the investigation without an enforcement action. Although enforcement priorities can and do change, following is a

[1] This memorandum was prepared by ANLA and NCAE employment and immigration law counsel, Monte Lake and Wendel Hall of Siff & Lake, LLP in Washington, D.C. This brief, non-technical description of the applicable law is intended only for general information. It should not be considered a substitute for fact-specific legal and consulting advice related to the specific circumstances of a company's business situation and any investigative activity that may have occurred or is occurring.

summary of the laws that DOL focuses on and the typical issues and problem areas about which employers must be knowledgeable.

Fair Labor Standards Act (FLSA):

Wage and hour and payroll compliance are always audit and investigation priorities. DOL will look for violations in a number of areas: amount of pay, pay rate, tracking hours correctly, and record-keeping. In short, are the workers being paid correctly? The most important of these issues are: (1) are the employees getting credit for all hours worked? and (2) are the employees entitled to overtime and getting it? A good compliance audit will review these areas in particular and others as well. Although a good audit will be more detailed, several major issues are:

Timekeeping

- How does the employer record employees' hours? Is it a time clock or some other objective system used or does a supervisor simply write the total hours down in a daily process? Is the system accurate? Is all time that counts as "hours worked" under the law counted? Is time that is not "hours worked" under the law excluded? Are lunch and other rest breaks being handled properly? Are the employer's timekeeping policies understood by the employees? Are the employer's timekeeping policies actually followed in practice?

- How long does the employer keep employees' time records? Is the employer keeping all required records? Can the employer produce those records quickly in response to a demand from a DOL investigator?

Overtime

- Has the employer identified all overtime exempt employees correctly? Does the employer ensure that the employees that it treats as exempt agricultural employees do not work with agricultural commodities produced by other farmers? Does the employer have an explicit and consistently enforced overtime policy requiring pre-approval with discipline imposed for unapproved overtime? Does the employer have current position descriptions that accurately reflect the current duties of each person for the purpose of establishing a "white collar" or sales exemption? Does the employer have a policy for periodically reviewing and revising these descriptions and comparing the descriptions with actual job duties?

Child Labor

- DOL currently is focusing on youth working in agriculture as a top departmental priority, and is using civil money penalties and the FLSA's "hot goods" provisions (seizing from farmer customers the products handled by illegal child labor) as its enforcement mechanisms to end illegal child labor. The FLSA places specific limitations on the employment of child labor, depending upon the age of the minor, whether they work in hazardous occupations or on farms where their parents are employed.

- If a minor is working in a hazardous occupation, as declared by DOL, is he/she at least 16 years old? Is the minor at least 14 years old working on a farm in a non-dangerous occupation? Is the minor employed by parents or a guardian on a farm owned or operated by the parents or guardian? Has the employer kept the specific records for each minor employed, including certificates proving age, written parental consent and the minor's place of residence?

- Does the employer have a child labor policy that is implemented by supervisors that prohibits children who the FLSA does not permit to work from working and which prohibits those ineligible to work from being at the agricultural worksite at any time, including when their presents are working? NCAE has made a model policy available to its members.

Recordkeeping/Workplace Rights

- Does the employer have a record retention policy? Does it keep necessary records for the 3 year period required by the FLSA? Does the employer train its staff in recordkeeping procedures so that all the legally-required information is compiled?

- Has the employer securely posted all legally required employment posters in a place where workers are likely to see them? Are the posters in English and in Spanish or another language common to the workers? Does the employer have proof (e.g. dated photographs) that the posters have actually been posted continuously?

Occupational Health and Safety Act (OSHA):

Just as with wage and hour issues, DOL focuses on several major issues in the area of occupational health and safety.

Hazard Protection

- Has the employer identified all recognized hazards causing or likely to cause death or serious injury to employees? Has the employer ensured that medical personnel are available for consultation on matters of workplace health? Are supervisors or other employees adequately trained to provide first aid?

Posting, reporting, recording and retaining requirements

- Have employees been informed of safety regulations and are posters displayed conspicuously and securely? Can the employer prove that the posters were displayed? Has the employer reported all workplace fatalities or injuries leading to the hospitalization of 3 or more employees in a timely manner? Are all logs of occupational injuries being retained for the correct length of time? Does the employer have material safety data sheets (MSDS) as required? Are the MSDSs easily accessible in the event of an emergency or for day-to-day use?

Housing

- Are the OSHA housing standards applicable to employer-provided housing? If so, has the employer met OSHA standards developed for site; shelter; water supply; toilet facilities; lighting; sewage and refuse disposal; laundry, hand washing and bathing facilities; construction and operation of kitchens; dining halls and feeding facilities; insect and rodent control; first aid; fire; and reporting of communicable diseases?

Migrant and Seasonal Agricultural Worker Protection Act (MSPA):

MSPA imposes a number of obligations upon employers and farm labor contractors (FLC) that employ migrant and seasonal workers. Following are some of them:

- All FLCs used by the employer must be registered. Does the employer have a procedure for checking certificates of registration with the federal and state governments?
- Contractors must furnish to agricultural employers and other contractors copies of all payroll information. Recipient must maintain records from contractor for three years.
- Records must be kept for three years.
- Did the employer or FLC provide the required disclosures of the terms and conditions of employment to migrant workers at the time of recruitment? Can the employer prove that documents were provided if DOL demands proof?

- Workers must get a written disclosure statement of payroll-related information at the time of payment during each pay period.
- If the employer uses a FLC, is the employer a "joint employer" with its FLC so that it is responsible for the contractor's wrongdoing?
- Has the employer and/or labor contractor used or caused a vehicle to be used to transport a migrant or seasonal worker? If so, has the employer or contractor ensured that each vehicle and driver complies with applicable federal and state safety standards and license requirements?
- Does each vehicle have sufficient insurance and liability coverage?
- Does all housing meet federal and state health and safety standards? Is the certificate of occupancy posted at all times?
- Was the MSPA rights poster placed in a conspicuous place in English and any other language commonly spoken by the workers?

Form I-9 (Employment Eligibility Verification) Audits:

As part of a general employment audit, DOL often will ask to review employer I-9 Forms. The Immigration Reform and Control Act gives DOL the authority to review I-9 Forms; however, it does not give it enforcement authority for any violations. Should DOL find problems with an employer's I-9 Form procedures and compliance, it may forward them to Immigration and Customs Enforcement (ICE), which has enforcement authority.

H-2A Investigations and Compliance Audits:

The H-2A section of this memorandum is more detailed than the preceding sections because the extensive new Obama Administration H-2A regulatory provisions effective March 15, 2010 (referred to in this memo as the new regulations) expand DOL's audit and enforcement authority. There have been a substantial number of H-2A investigations of agricultural employers during the past year and they are expected to expand as DOL targets agriculture with its recently expanded W&H investigative force. Note that DOL has signaled its intent to promulgate new H-2B program rules, as well. It is likely that new rules will include expanded audit and enforcement authority for that program._

While DOL's enforcement authority typically involves W&H investigators, the H-2A program is somewhat different because the Employment and Training Administration (ETA) has the authority to conduct audits, seek revocation of labor certifications that it has issued, and to seek debarment of employers from the program. W&H also has debarment authority, as well as the authority to conduct its own audits, follow up on ETA

audits, and to seek debarment. W&H is given broad authority to enter and inspect documents, premises, land, property, housing, vehicles, and records, as may be appropriate as part of an investigation.

This following discussion applies to investigations of individual employers, joint employer associations, and farm labor contractors (H-2ALCs) serving as the employer of H-2A workers. To the extent that an H-2ALC is involved, the differences in compliance requirements will be noted. It also should be noted that DOL's regulations also give it investigative and enforcement authority over agents and attorneys. Following is a summary of the type of information that W&H typically will seek as part of an H-2A audit or investigation and the compliance areas that they will target. There are two types of H-2A audits—the on-site investigation and the Notice of Audit Examination. Both are discussed below.

The Notice of Audit Examination:

The H-2A regulations issued under the Bush Administration which took effect on January 17, 2009 for the time established an audit procedure that was retained in the new Obama Administration regulations that took effect on March 15, 2010. Under the audit procedures, employers receive a letter called a "Notice of Audit Examination." A copy of a typical Notice of Audit Examination letter is available through NCAE. This process involves a mail exchange of information, at least initially, between the employer and DOL. Not all program participants are audited, rather, DOL exercises discretion in deciding which will be. The employer has no more than 30 days to respond to an audit request. DOL can share its audits findings with other government agencies, including DHS and the Department of Justice's Office of Special Counsel for Unfair Immigration-related Employment Practices. The document retention requirements in the new regulations highlight for the employer the records DOL will seek in an audit and employers must ensure that they are properly maintained.

- *Document Retention Requirements*. The document retention requirements of the new regulations require that employers maintain specific information so that program compliance can be determined during an audit or investigation. These records must be kept for a minimum of three years from the date of certification. The regulatory requirements closely track the information sought in a typical Notice of Audit Examination letter. Employers must keep the following records for purposes of an audit or on-site investigation:

    - Proof of recruitment efforts, including the job order placement, advertising, and contact with former U.S. worker employees, and any other positive recruitment efforts that were required;

- Substantiation of information included in the recruitment report, such as termination for cause of past U.S. workers or their abandonment of the job to justify not offering them a job;
- The final recruitment report, including resumes and contact information;
- Proof of worker's compensation coverage;
- Records of each worker's earnings;
- The work contract or Application for Temporary Employment Certification;
- Associations must document their status as employers or agents;
- Employers represented by attorneys or agents must provide copies of service agreements;
- If the employer is an H-2ALC (labor contractor), it must provide a copy of its MSPA certification of registration and identify the services that it is providing;
- H2A-LCs must list the name and locations of each fixed-site agricultural business to which they expect to provide workers, the expected beginning and ending dates of employment and a description of the activities the workers are to perform at each site;
- H-2ALCs must provide proof of a surety bond; and
- H-2ALCs must provide proof of compliance with housing and transportation obligations for each fixed site employer which provided housing or transportation. and to which the H-2ALC will provide workers during the period of certification, unless these obligations were met by the H-2ALC itself.

Upon providing the above-requested information to the DOL Certifying Officer (CO), the CO may request supplemental information or issue a Notice of Findings. The CO also may notify the Wage and Hour Division if it determines that a follow-up onsite investigation is warranted.

The On-Site H-2A Investigation:

The primary distinction between an on-site investigation and a Notice of Audit Examination is that the former is more "hands on" by DOL at the outset. In an on-site investigation, the investigator will come to the employer's office to interview key management personnel, review documents, tour the facility to examine housing and vehicles used to transport workers, and interview employees. DOL typically will follow up initial requests for information with additional or more refined requests. A Notice of Audit Examination is initiated by a letter to an H-2A employer requesting that specific information be mailed to DOL. It may be months before the employer hears back from

DOL with supplemental requests for information or a Notice of Findings from the audit examination.

The information listed above that employers must retain, and which typically is sought in audit notices, provides the preliminary basis for DOL to determine whether an employer is in compliance with program requirements. DOL will evaluate the documents provided by employers in response to an audit letter to determine whether the employer is complying with the major areas of the law with which DOL is concerned. Recent experience indicates the DOL will focus on the following compliance issues.

Wages and Related Issues:

Recent on-site audits of H-2A employers are similar to normal wage and hour audits in that extensive payroll records are sought. A critical component of an employer's success in showing compliance with its wage-related obligations is to maintain earnings records, as specified in the regulations. Earnings records are defined in the new regulations to include adequate and accurate records that show hours worked (including the time work started and ended each day), field tally or piece rate records, the nature of work performed, the number of hours offered each day to a worker (for purposes of determining whether they met or exceeded the ¾ guarantee), the rate of pay, both hourly and piece rate, the amount and reasons for all deductions taken from wages and the earnings per pay period. Earnings records (or the absence thereof) will be used to resolve the following issues:

- *Payment of the adverse wage rate*. Did the employer pay H-2A workers and U.S. workers in corresponding employment the adverse effect wage rate (AEWR), whether based on a piece or hourly wage rate and does the employer have a credible system of measuring the number of hours worked on a daily basis (such as a time clock as compared to a supervisor's signature on a group time sheet listing the beginning and ending time of employment on a daily basis).
- *Rates of Pay*. A new requirement in the regulations is that an employer increase the wage rate offered in the job order if DOL announces during the work contract period that the prevailing hourly or piece rate increased and is higher than the AEWR, the collective bargaining rate or the federal or state minimum wage. DOL is supposed to send employers notice if they are subject to such increased wage rates. Employers should retain copies of such notices and document compliance with the increased wage rate.
- *Three Quarter Guarantee.* Employers are required to show the hours offered in a day, as well as the hours actually worked for purposes of the three-quarter guarantee determination. Failure to meet this requirement can result

in potential ¾ guarantee exposure if the employer cannot prove that the worker was offered but declined work that would satisfy the ¾ guarantee.

- *Deductions.* An employer's job offer must specify all deductions that will be taken from the worker's paycheck and all deductions must be reasonable. The new rule defines unreasonable deductions as those that are primarily for the benefit of the employer and reduce wages in a week below the minimum wage, are undisclosed or unauthorized, or those that provide profit to the employer or affiliated persons.
- *Minimum Wage Violations Based on Improper Deductions.* The new H-2A regulations adopt the reasoning of the *Arriaga* decision that holds that in-bound transportation and subsistence costs paid by an H-2A worker from the place where the worker was recruited in the foreign country to the place of employ in the U.S. are for the benefit of the employer and are treated as a deduction from wages which cannot reduce the first week's wages below the federal minimum wage. While this position of DOL has not been universally adopted by the courts, DOL will seek to enforce it. The safest course for employers is to be prepared during an audit to either prove that they advanced such costs to the workers, directly paid for them, or reimbursed workers during the first pay period for their payment of such costs if they would otherwise result in a minimum wage violation.
- *H-2A Wage Rate Violations Based on Improper Deductions.* The new regulations consider any visa fees, recruiter costs and other payments paid by H-2A workers in the country from which they come to the U.S. as illegal deductions from the first week's H-2A wages. Similar to transportation and subsistence costs discussed above, DOL will deduct any such costs paid by H-2A workers from the first week's H-2A wages (the higher of adverse effect wage rate, prevailing hourly or piece rate or federal or state minimum wage) and hold the employer liable for the difference. Employers which pay such costs in order to avoid such liability claims should well document such payments.
- *Fee Prohibition Agreements with Foreign Recruiters and Facilitators*. The Bush and new regulations prohibit foreign recruiters and agents from charging H-2A workers fees, such as visa-related fees, administrative facilitator fees, or fees for being selected as an H-2A worker. The new regulations provide employers a defense if they can show that they have contractual agreements with recruiters or facilitators that prohibit the charging of such fees. During an audit, employers may be asked to produce a copy of any such agreements or related documents and communications.
- *Copies of Job Orders or Contracts Given to U.S. and H-2A Workers*. DOL will require proof that U.S. workers received copies of the job order or work contract on the first day they arrive for work. Employers should obtain a signed and dated acknowledgement in the language of the U.S. workers indicating that they received copies of these documents. In addition, H-2A workers must receive similar documents under the new regulations at the

consular office before departing the U.S. The preamble to the new regulations is somewhat inconsistent, suggesting that the documents must be provided at the time the workers are recruited for the job. While difficult to implement, employers should require that H-2A workers sign and date acknowledgements of the job order or work contract in their language at the point at which they are recruited or offered employment. If agents are used, this requirement should be included in their contracts and retained in the employer's records.

- *Poster Describing Workers' Rights Under the H-2A Program*. The new regulations require employers to post in common areas frequented by H-2A workers and U.S. workers in corresponding employment, a poster informing workers of their rights under the program. The poster must be in languages common to the workers. DOL investigators will ask to see the poster during an on-site investigation.
- *Joint Employer Status.* This issue is especially important for H-2ALCs who are employers of workers they provide to fixed-site agricultural businesses. In cases where there may be significant liability, DOL may seek to establish that the agricultural business (because of its "deep pockets") is the joint employer of the labor contractor's H-2A and U.S. workers in corresponding employment. The new regulations provide a definition of joint employment that does not adopt the MSPA definition. It relies upon the common law definition of agency, which focuses on the hiring party's right to control the manner and means by which work is done, looks at the skill required, source of tools used, location of the work, the discretion of the hiring party regarding when and how long to work, and whether it is part of the regular work of the hiring party. During an on-site investigation, DOL is likely to interview the H-2ALC's clients regarding the above factors to determine whether it can establish a joint employment relationship.

Preferential Treatment and Discrimination Issues:

An overriding focus in on-site investigations is on issues related to whether employers discriminate against U.S. workers (adversely affect them) in favor of H-2A workers. Following are some of the issues that arise from this investigative focus.

- *Corresponding Employment.* U.S. workers employed in H-2A occupations must be provided the same wages, benefits and working conditions as H-2A workers. They must receive the adverse effect wage rate (AEWR), transportation reimbursement, free housing and free transportation to and from their housing and the worksite. The new H-2A regulations define corresponding employment broadly and it is important that the employer distinguish, if possible, H-2A and non-H-2A occupations. Failure to do so can result in DOL viewing all jobs as in corresponding employment for which the employer would be responsible for H-2A wages and benefits. The failure to

provide U.S. workers the same wages and benefits as H-2A workers can result in substantial back pay liability. Clearly written job descriptions distinguishing H-2A and non-H-2A jobs will be helpful to an employer in an audit situation.

- *Incidental Employment*. The new regulations make clear that H-2A workers cannot perform incidental work that is outside the job description and area of intended employment contained in the job order. DOL takes the position that incidental work was not described in the job order and thus did not inform potential workers of the nature of the work that they might be performing. Performance of incidental work by H-2A workers places U.S. workers performing the same work in corresponding employment with the H-2A workers and exposes the employer to back pay liability. During an investigation, DOL investigators will interview H-2A and U.S. workers to determine their job duties to see whether they perform work in the job description and/or incidental to it. Employers must be able to document or establish through employee interviews that no incidental work was performed.
- *Terminations for Cause and Job Abandonment*. The new regulations require that H-2A employers notify DOL within two days of the termination of H-2A workers and U.S. in corresponding employment for cause or who abandon employment. DHS needs to be noticed of the same regarding H-2A workers. Abandonment is defined to mean a worker who fails to report to previously scheduled work for five consecutive days. DOL likely will seek documentation related to terminations and abandonment of employment and proof of notice given to it. DOL has taken the position under the new regulations that employers who cannot prove that they have given DOL notice are liable for the three-quarter guarantee to those workers for whom notice was not afforded to DOL, regardless of how long they worked. This can subject employers to significant back pay liability if the employer cannot document the grounds for termination, show abandonment of the job and provide the required notices.
- *Documentation Related to the Recruitment and Hiring of U.S. Referrals and Applicants (Recruitment Reports)*. The new regulations prohibit discrimination against any qualified U.S. worker, regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. U.S. applicants only may be rejected for lawful, job-related reasons. DOL focuses on U.S. referrals by state workforce agencies (SWA) and also gate applicants and hires during the H-2A recruitment and contract periods. They will want to know if the workers were hired and if not, why not. It is important that employers keep careful records that document with specificity whether a person referred to an H-2A job was interviewed telephonically or in person; was offered a job and, if not, why not. If a person did not show for a job that was offered or, if the company had an experience requirement and the person did not meet it or could not verify the experience, those facts should be documented. In addition, employers must retain any documentation related to referrals or gate hires showing up prior to completion of 50 percent of the

contract period. Once the Electronic Job Registry is operational, it will be important for employers to document their responses to inquiries through the Registry from persons inquiring about positions, regardless of how remote their location from the worksite.

- *Contact with Former Workers*. DOL will seek documentation that employers contacted workers from the previous season by letters or other means. As noted in the document retention requirements and as seen in the attached audit letter, DOL will allow the exclusion of former workers who were terminated for cause or who abandoned employment, but requires the employer to document these facts. Employers may prove their efforts through proof of letters, dated logs of workers contacted with relevant contact information or by printing out a list of former workers and showing a phone bill listing calls to their last known phone numbers.
- *Housing.* As in a MSPA audit, DOL may seek proof that the housing was inspected by local, state or federal authorities prior its occupation by H-2A and U.S. workers in corresponding employment. Similarly, to a MSPA inspection, DOL may tour the housing to determine whether it is being maintained in compliance with the applicable housing standards.
- *Transportation.* The new regulations require that employers provide H-2A workers the same transportation safety protections as are afforded U.S. workers under MSPA. Thus, during an audit an investigator may ask to see, with respect to any vehicles used to transport H-2A and U.S. workers from housing to the work-site and /or town, vehicle safety inspection documents, proof of the required insurance, as well as evidence that vehicle drivers are properly licensed.

Dealing With an Investigator:

DOL investigators range from the competent and professional to the biased and hostile. It would be a mistake to assume automatically that an investigator is hostile. Instead, a company should assume that the investigator wants to be fair and to honestly conduct an audit of the employer's employment practices. A company should, of course, be appropriately cautious and professional, but by assuming the worst, it may inadvertently bring out the worst in an investigator who otherwise may have been objective.

It is therefore important upon first contact to identify someone who will work with the DOL investigator. This person will serve as the point of contact between other management and DOL and be responsible for responding to DOL's legitimate demands. It will be helpful if this person is bilingual, but that is not necessary. It will also be helpful if this person is good at establishing rapport with others and has an even temperament.

Once the point of contact has been identified, he or she needs to learn what DOL can demand, where that information is, and to know how to get it quickly. The point of

contact should also learn what DOL may not demand and be able to politely say "no," when appropriate. Finally, the liaison should have enough authority to be able to make decisions without substantial delays for decision-making by others and to communicate to the investigator that the company takes this issue seriously enough to assign a senior official to assist.

Initial Contact:

The first notice of the investigation will usually be the appearance of the investigator at the company's offices asking to speak with management. The company should take several steps in a professional and courteous manner:

- Introduce the company point of contact for this kind of investigation.
- Ensure that the DOL investigator is who he or she claims to be and document this information. In addition to the investigator's name, ask what field office is conducting the investigation and ask for the investigator's government identification.
- Ask if there are complaints of legal violations. At this point, just seek the basic information so that it can be determined what information is relevant to the allegation and what is not. Typically, the investigation will focus on the laws summarized above and the documents sought should be relevant to those laws.
- Discuss the scope of investigation and what the investigator's expectations are. Obtain an explanation of the type of information the investigator wants to review. Do not commit to any particular action at this point; committing to be helpful is enough.

DOL Communications With Employees And Document Review:

Investigators gather information through interviews and through documents. The guidelines are relatively straightforward:

- Technically speaking, the investigator may speak to the company's non-managerial employees only during non-work time. Whether to make employees available during working hours will be a judgment call for management. Management personnel do not have a right to be present during interviews with employees.
- The investigator may also interview management employees. Other management personnel have the right to be present during interviews of management. During any such interview, it is important to provide accurate information, to neither volunteer information nor speculate, and to remember that anything a manager says may be used against the company. It is

important to take thorough notes of any substantive conversations with the investigator, including any statement made by a manager.

- If you don't know the answer to a question, don't guess. Indicate that you don't know but will get the information. If you give an incorrect answer, the investigator will use it against you.
- Do not argue with the investigator.
- The investigator may review and copy relevant documents.
- It is important for the company to note, and retain a separate copy of, any document the investigator requests to take off premises. This will help the company defend itself if DOL issues a notice of violation.

The Unprofessional Investigator:

Although many investigators conduct themselves professionally, some will not. In dealing with an unprofessional investigator, it is important to ensure that all interactions with the investigator are witnessed by a third person and documented for content and demeanor. Also, remember that the investigator's authority is the same whether he or she is professional or not. Comply with all legitimate requests promptly and decide whether to comply with others on a case-by-case basis. While it may be more difficult to deal with an unprofessional investigator, it is never helpful to respond in kind. If an investigator's conduct is wholly unprofessional, you should contact the company attorney for advice.

What Is The Outcome?

Just as investigations begin in different ways, they also end in different ways. It is possible that the company will not hear at all from DOL after the investigation. It is possible that the company will receive a telephone call from DOL describing alleged violations or it may receive a written letter providing notice of alleged violations and seeking both back pay and civil money penalties. In either event, the company should contact legal counsel about the next steps. Once the company has had time to review the allegations, a settlement conference with the investigator and often his or her supervisor will take place. After this, the company will have to decide whether to settle the matter or to pursue a hearing before an administrative law judge. It is also possible that the investigation could result in a lawsuit brought in the name of the Secretary of Labor.

How to Prepare for an Audit or Investigation—The Self-Audit And Why It Is Important:

The best way to prepare for an audit or investigation by DOL is to conduct a rigorous self-audit of compliance with DOL-enforced laws or to engage an outside consultant for that purpose prior to receiving notice of a DOL investigation. A self-audit involves the employer's review of its written employment policies, record retention, employment postings, and how the written policies are actually implemented on a day-to-day basis. It should also include a review of your housing's compliance with applicable standards, the safety condition of vehicles and the adequacy of insurance coverages. A good audit will identify problems, propose solutions, and identify how to document and prove compliance with the applicable laws described above. Thus, when DOL knocks on your door, there will be no surprises and you will be prepared.

Conclusion:

DOL clearly has made enforcement of the laws under its jurisdiction that relate to agricultural employers a priority. ANLA and NCAE members have experienced an increase in DOL enforcement activity and with that increase comes more encounters with DOL investigators. Companies that have undergone self-audit before the DOL visit should be well-positioned to avoid or defend against any alleged claim of violations. Responding to a DOL investigation with an awareness of the company's rights and responsibilities can make the process less disruptive and distracting. It can also help the company to defend itself in the event that DOL issues a notice of violation. **The key is to document what is done, document what is said, and to approach the investigation calmly and professionally.** When that does not work, the company attorney should be brought in to assist in protecting the company. Taking these simple steps may help resolve close cases without further enforcement action and, failing that, position the company well to respond to any formal allegations from the DOL.

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For More Information:

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