



## **CONQUERING A DEPARTMENT OF LABOR INVESTIGATION**

By Laura K. Sitar

Long term care providers throughout the country have experienced an increased number of investigations by the Department of Labor ("DOL") in the past five years. During that time the DOL has shifted its resources from primarily conducting complaint-based investigations to conducting targeted enforcement to promote compliance on behalf of workers in certain industries. In California, as elsewhere, long term care is one of the DOL's targeted industries. Investigations continue to be on the rise due to added personnel, increased funds and a sharper focus.

### **WHAT DOES THIS MEAN TO LONG TERM CARE PROVIDERS?**

This sharper focus means long term care providers of every size must know the laws that govern employment, especially the payment of wages, and remain vigilant that those laws are understood and followed. The DOL enforces federal wage laws under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), child labor laws and numerous other specialized labor laws. Under the FLSA the department enforces laws related to minimum wage, overtime pay, classification of workers as employees versus independent contractors, hours worked, record keeping, deductions and garnishments. It is the wage laws that are more often the focus of a DOL investigation.

The DOL's increased focus also means all long term care providers, no matter their size, should prepare themselves for a potential DOL investigation. Advance preparation increases the likelihood of a successful outcome. All too often employers are not prepared and negatively influence the outcome of an investigation by the doing the following:

- Failing to immediately respond to a request for an appointment by the DOL or a notice requesting documents be provided in seventy-two hours.
- Failing to prepare a game plan ahead of time with a plan regarding how to proceed once notice of an investigation has been given.
- Failing to prepare employees for interviews.
- Failing to fully understand the laws the DOL is there to enforce.
- Failing to be involved throughout the process.
- Failing to cooperate with the DOL.
- Failing to seek assistance or representation, if necessary.

## NOTICE OF AN INVESTIGATION

Most employers learn of a DOL investigation when they receive a letter from a DOL investigator requesting an appointment and seeking the production of a long list of documents. All too often, the letter is set aside to be dealt with later. It is important to determine whether the assistance of counsel is necessary and to respond to a letter from the DOL immediately. The employer or their counsel should contact the investigator immediately to set up a convenient date for an initial conference. That date should allow sufficient time to collect the necessary documents and prepare employees.

Ask the following questions of the DOL investigator to get an idea of where the investigation is going.:

- What will the focus of the investigation be so I can prepare all the information you need?
- What is the time period of records you would like to review?
- Would you like me to make any particular employees available for you to interview?

Anything that can be learned about the focus of an investigation in advance will assist the employer in responding to the investigator's questions and steering the investigation in a desirable direction.

Sometimes a DOL investigator will show up at a facility for a surprise visit. Staff should be prepared to ask the investigator to wait until the appropriate management-level person is contacted. Efforts should be made to negotiate a more convenient date and time for an initial conference and commencement of the investigation. If an immediate investigation would disrupt business, let the investigator know.

## INITIAL CONFERENCE

A management level employee should be present for the initial conference. Often, employers request the presence of their counsel, accountant or other representative as well. During the initial conference, the investigator will ask about the nature and size of the business, gross revenues and payment methods, the work week, claimed exemptions, and other general information. Additionally, the investigator will generally explain the purpose and plans for the investigation including the scope of the investigation, the groups of employees to be interviewed and the documents to be reviewed. This is the opportunity to advocate for a narrowed investigation.

The initial conference is part of the investigation and what is said in the conference counts. It is important that whoever is present representing the interests of the employer appears knowledgeable and organized. The information provided must be accurate.

## DOCUMENTS GENERALLY REQUESTED

- Names, addresses and telephone numbers of all business owners and company officers.
- Organizational chart.
- Legal name of company and all other names used.
- Records showing gross annual dollar volume for past three years.
- List of all employees with addresses and phone numbers, job titles, hourly rates/salaries, and exempt status.
- Payroll and timekeeping records for past two years, including most recently completed pay period.
- List of employees under age 18 who worked in past two years with birthdays.
- All 1099 forms issued for the past two years.
- Employers' federal tax identification number.

## INVESTIGATION AND FACT FINDING

The investigator will generally ask to talk to a number of employees, and may ask for specific employees or categories of employees to interview. Sometimes they will simply ask that a random sampling of employees be made available for interviews. If given the opportunity to select the employees to be interviewed, it just makes sense to provide employees who appear supportive of the facility. The employer or employer's representative has the right to be present for all "upper-level management" interviews. Employers should define upper-level management employees as broadly as possible.

Finally, most investigators also send questionnaires to employees, place calls and contact select employees at home. Because employers are not required to maintain the phone numbers and email addresses of their employees, there is an argument that an employer is not required to provide either to the DOL investigator.

## PREPARING EMPLOYEES FOR A DOL INTERVIEW

It is vitally important that employers prepare their employees for interviews with the investigator. That means informing employees about the process and their rights during an investigation, but **not** pressuring employees to provide inaccurate information or to be uncooperative.

Employees should be told the following: "an investigator with the Department of Labor has requested interviews with some employees to discuss payroll and employment practices at the facility as part of a Department of Labor audit. The investigator will generally outline the interview process and show you her credentials prior to beginning the interview. Most interviews last less than ½ hour. The investigator

will likely take detailed notes during the interview and ask you to sign those notes at the conclusion of the interview.”

Employees should know the following:

- Employee interviews are voluntary.
- Employees should not be intimidated because the investigator's credentials look like a police badge.
- Employees are expected to be truthful.
- Employees should listen carefully to all questions asked.
- Employees should never guess or speculate. Employees should only respond with firsthand knowledge.
- Employees should ask the investigator to rephrase confusing questions.
- Employees have the right to have a representative of the facility present during the interview, but need not request one.
- Employees have the right to decide whether they want to sign or not to sign any statement prepared by the investigator. Employees should read any statement carefully and feel comfortable making changes, if necessary, before signing.
- Employees have the right to allow the investigator to tape record the interview or request that the interview not be recorded.
- Employees may take a break or end the interview at any time.
- Employees should feel comfortable asking facility management any questions about the interview process before or after the interview.

## **FINAL CONFERENCE**

At the conclusion of a DOL investigation, the investigator will schedule a time for a final conference to meet to discuss his/her findings. Someone should be designated to take thorough notes of all the issues identified by the investigator. In some cases the employer may receive an assessment letter after the conference which outlines violations which were not discussed at the final conference. Again, good notes from the final conference are important. The employer is entitled to a copy of any computations of wages owed.

If the employer disputes a violation raised by the investigator, and the employer believes it has evidence to prove the violation did not occur, the employer should present the evidence at that time or ask for a follow up conference to provide evidence which would disprove the violation. Ultimately, either the employer will be informed that no violations have been identified or that violations have been uncovered and back-wages are owed. The employer can either agree to the payment of wages identified by the

DOL investigator or refuse to agree at which time the DOL will determine whether to file a complaint against the employer in court.

Knowing and following pertinent labor laws, especially wage laws, and preparing in advance for a Department of Labor investigation are the best means of preventing an assessment of back wages.

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About the Author:

A Shareholder at Wroten & Associates, Laura Sitar defends employment, professional negligence and elder abuse cases and provides invaluable employment related risk management services to help clients avoid litigation. She litigates cases on behalf of both individuals and companies involving all types of employment actions including harassment, discrimination, wrongful termination, retaliation and wage and hour claims. Her years with Wroten & Associates have provided her with a unique understanding of the many challenges facing long term care providers.

After a 15-year career in corporate management, where she directed the human resource function of a 2000 employee, \$100 million region, Ms. Sitar became an attorney. She began her second career in law 16+ years ago as an associate with a prestigious healthcare defense firm before joining Wroten & Associates where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, where she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in U.S. District Courts throughout California.

Ms. Sitar has participated in multiple mock elder abuse trials at the University of Southern California (USC) and has presented for the California Assisted Living Association (CALA) as well as other organizations. Ms. Sitar has written numerous articles, her most recent being titled "Engaging in the Interactive Process Required by the ADA." She is a member of the Defense Research Institute (DRI) and the California Association of Health Facilities (CAHF).

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