

Our most recently held Integrity HR-hosted Business Briefing featured Tracy L. Moon, Jr. of Fisher & Phillips who presented a timely presentation on “*What to Do When the Government Knocks.*”

Held in both an early-morning and mid-day formats, we were able to greet around 150 clients and friends of Integrity HR, and we hope you were there! If not, we look forward to seeing you soon at our next event.

With the changes coming out of Washington, cascading throughout all levels of government and affecting all of us on many levels, we are seeing increased government inspections with a focus on enforcement rather than compliance assistance. On April 28, 2009 Secretary of Labor Hilda Solis stated, “Let me be clear; The Labor Department is back in the enforcement business.”

Today’s Landscape

The focus on enforcement translates to increased EEOC filings -- 93,277 in 2009 covering disability, religion, and national origin charges -- a record high. EEOC collected \$294 million. In wage and hour enforcement DOL collected \$185 million last year, and 23,845 complaints were filed. We’re seeing a crack-down on ‘independent contractor’ treatment of workers. And 2009 brought a 19% increase in new FLSA lawsuits.

So how can we best prepare for government investigations? Tracy Moon offers the following outline:

- Examine the specific allegations being made if applicable;
- Conduct your own internal investigation of the complaint or charge;
- Review personnel files of affected employees;
- Collect and review relevant documents and background information;
- Make a preliminary list of persons who may have knowledge of the matter, and determine what facts each knows;
- Share the preliminary investigatory plan with legal counsel;
- Review the company’s past experiences with the agency;
- Determine if an audit may be avoided;
- Determine remedial steps, if any.

Two important facts to remember:

(1) Advance planning and effort will greatly minimize your risk of government visits and employment law claims, so if you have not invested relevant and sufficient resources, please do so now;

(2) Information should be carefully controlled, with the liaison not volunteering any information about the employer’s records, procedures, policies, financial arrangements, or business interests.

ICE

In April 2009 Department of Homeland Security issued new worksite enforcement guidelines for Immigration Customs & Enforcement (ICE) with a shift in focus from the illegal foreign worker to the employer who hired that worker. This has been a serious shift, with significant consequences that beg the use of E-Verify and other compliance initiatives. Last July 652 Notices of Inspection (NOI) were issued; Notices of Intent to Fine were issued for \$2.3 million. Four months later, in November, over 1,000 NOIs were issued. The complaints are based on investigative leads, intelligence, and connection to public safety and national security.

Let's consider a real world example -- Pilgrim's Pride -- where in December 2007, 25 unauthorized workers were arrested. Then in early 2008, ICE raids at facilities in Texas, Florida, West Virginia, Arkansas, and Tennessee yielded another 338 arrests of unauthorized workers. In December 2009, the company agreed to pay a \$4.5 million fine and agrees to adopt more stringent immigration compliance practices.

Only 3-days' notice is allowed for ICE review of I-9 Forms, and you may be required to make a personal appearance to give testimony and to turn over those documents. Note that a subpoena or warrant is not required for I-9 inspections. The 3-day notice is not required for an ICE Search Warrant, however. Following a review of the search warrant, you should monitor the search but not interfere, comply with the terms of the warrant and do not resist. Notify legal counsel and management immediately, and keep track of what is seized or taken.

Immigration enforcement penalties are significant –

- Monetary penalties range from \$110 to \$1,100 per violation for I-9 substantive or uncorrected technical violations. Knowing hire or continuing to employ violations range from first violation \$375-3,200, second violation \$3,200-6,500, and subsequent violations \$4,300-16,000.
- Criminal penalties are defined as 10 years and/or \$250,000 fine for harboring, smuggling, concealing, or transporting illegal aliens for financial gain. Plus there can be criminal sanctions for conspiracy to harbor, smuggle, conceal, or transport.

EEOC

EEOC is authorized to enter and inspect employer facilities, examine and copy records, and interview employees. Such on-site investigations are used to gather information, preserve evidence, and to explore the nature of allegations related to (1) Title VII of the Civil Rights Act of 1964, (2) Americans With Disabilities Act, (3) Age Discrimination in Employment Act, and (4) Equal Pay Act. Then the EEOC can expand their scope of investigation to include additional violations discovered during the initial on-site investigation. EEOC investigations can have several outcomes: “cause” or “no cause determination” or dismissal,” litigation, or lawsuit filed by EEOC.

OSHA

OSHA inspections can be triggered by a number of factors, including a fatality, hospitalization of 3 or more people, non-formal complaints, or programmed inspections based on special or industry-targeted programs, or surveys of lost work day injuries. You will want to learn the reason for an OSHA visit and carefully manage requests for records and tours, including employee and management interviews and involvement as guided by qualified HR representatives and legal counsel. OSHA citations range from ‘de minimis’ and ‘other than serious’ to ‘serious,’ ‘willful,’ ‘repeat,’ ‘egregious,’ and ‘criminal.’

Wage & Hour

Finally, consider the Wage & Hour Investigation which may be conducted by The Wage & Hour Division without having first received any complaint, though it is generally triggered by a current or former employee who files a complaint. The Division can enter and inspect the workplace, review and transcribe records, interview employees, and require employers to compile information. Possible outcomes include paying back wages, lawsuits, civil money penalties, or criminal prosecutions.

What’s Next?

Undoubtedly the content of Tracy Moon’s presentation may raise uncomfortable questions regarding readiness, preparation, and response to circumstances when government knocks on your door. We invite you to call Integrity HR for a no-obligation review of your HR practices and for the opportunity to discuss ways we may be helpful to you in very meaningful ways. As needed, we will be pleased to work with your legal counsel or with representatives from Fisher & Phillips to help guide you at every step.

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