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Enforcement crackdown looms for hospitality industry - Take steps to minimize impact of an audit

November 18, 2010 - Front Section

The U.S. Department of Labor (DOL) has set its sights on the hospitality industry through a reinvigorated enforcement agenda starting this fall. With additional funding in the budget, the DOL has gone on a hiring spree, increasing the number of investigators by more than a third. The DOL's agenda has selected the hospitality industry, among others, as a "high risk" industry employing workers vulnerable to exploitation for minimum wage, overtime, family and medical leave, exempt employee misclassification, and H-2B visa violations. A recent American Hotel & Lodging Association bulletin stated the initiative "specifically targets every hotel, motel and resort in the United States for audits." Given this announcement, hospitality industry operators should take steps to minimize the impact of an audit, including:

- (1) determining compliance with the law and regulations;
- (2) developing a strategy for dealing with an audit; and
- (3) understanding their level of exposure.

Conducting an internal review is crucial to addressing problems before a DOL audit is initiated. Focal points for any internal review should include exempt status determinations, timekeeping practices, payroll practices, and record keeping practices. Faulty practices must be corrected to reduce the impact of existing violations and avoid repeated problems in the future. Some operators may be able to conduct an internal review themselves, but there are benefits to engaging counsel to assist in a comprehensive evaluation process. In particular, audits conducted through counsel may benefit from attorney-client confidentiality and privilege.

Employers should also be prepared with a strategy for handling a DOL investigation if one is initiated. Most investigations involve at least three phases:

- (1) An "opening conference";
- (2) Interviews of employees; and
- (3) A "Closing Conference."

The opening conference permits employers an opportunity to ask questions and help define the investigation. Employers can suggest appropriate records, inquire about using sampling as opposed to a wall-to-wall review, narrow the scope and timing of review, and explain any factors that may influence the investigation. Employers should inquire whether the investigator has a list of employees to interview. If not, it may be possible for the employer to select the employees to be interviewed. Additionally, employers should talk to employees after they have been interviewed to gain an understanding of the focus of the investigation. At the end of the investigation, the investigator will conduct a "closing conference" to review the findings and address any discovered violations. DOL investigators generally have authority to settle disputes on the spot. Accordingly, employers should be prepared to negotiate a settlement and commit to any needed corrective action.

with the investigator. Investigations that are not resolved administratively may be referred to the Office of the Solicitor for litigation, and employees will be notified of their rights to initiate private lawsuits.

DOL audits are no joke, and wage and hour mistakes can be costly. An employer that has violated the law can be required to pay all back wages, including overtime, going back for two years, and three years where a willful violation is found. Employers with violations can also face civil monetary penalties for each violation, as well as criminal fines and penalties for certain violations. Employers facing employee lawsuits may also be exposed to multiple damages and the employees' attorneys' fees.

With the DOL's new agenda, more hospitality industry operators will come under the microscope. The last thing any operator should do is passively await the outcome. Taking preventative action before the investigator shows up at the door is the best way to minimize the impact.

Michael Duffy is a member of the retail, food and hospitality employment and litigation groups at Ruberto, Israel & Weiner, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540