

# If the Government Comes Knocking: Investigations, Audits & Best Practices for Your Organization

March 2014



# Responding to Government Investigations



## Preparation is Key

- Prepare for the unexpected and have a plan in place
- Designate a Government Response Team or a Point Person
- Initiate a Document Retention Policy



# Responding to Government Subpoenas

- Forward a copy of the subpoena and any supporting documents to legal counsel; await specific instructions
- To the extent possible, identify the documents being requested by the subpoena and their location(s)
- Determine who within the organization has knowledge or custody of the documents or the subject matter of the subpoena
- Suspend any document destruction policies that could affect the documents
- Issue a “litigation hold” to custodians and other concerned employees, along with specific instructions not to destroy, overwrite, or alter the relevant documents in any way, regardless of the documents’ location(s) or the manner in which they are stored



# Responding to Government Search Warrants or Raids

- Have a designated Point Person in place who can be responsible for handling search warrants
  - Ask the government agents to wait until the point person arrives
  - If they will not wait, do not attempt to stop them or interfere with the search in any way, but object to it
- Forward a copy of the search warrant and any supporting documents to legal counsel; await specific instructions
- In the meantime, identify the lead investigator and obtain the business cards of all government agents present. If you cannot obtain the agents' business cards, record the agents' names, titles, agencies, and telephone numbers
- Monitor the search and make a record of all the locations the agents visit, as well as any materials copied or seized during the search
- Under no circumstances can you instruct employees not to speak with the agents



## Responding to Requests for Interviews

- Ask for Government Identification
- Remain polite and courteous but exercise caution
- You have the right to decline the interview or to request Counsel to be present
- Inform Supervisor or Counsel about the Request for Interview



# Responding to Audits by the Department of Labor



# DOL Investigations and Lawsuits: A Nationwide Foodservice Initiative

- Georgia (2013): DOL files suit against Wang's Partner Inc. d/b/a Hibachi Grill & Supreme Buffet, and its owner, Shu Wang, to recover allegedly unpaid wages and damages. DOL seeking \$1,997,726 in back wages and liquidated damages for 84 employees.
- New Mexico (2013): DOL files suit against St. James Tearoom Inc. and its owners, Mary Alice and Daniel Higbie, following an investigation suggesting violations of the Fair Labor Standards Act. Lawsuit seeks to recover unpaid minimum wages, overtime pay and liquidated damages totaling over \$300,000.
- New York (2013): Grand Saga Restaurant Inc. and Xaga Sushi Restaurant Inc., both doing business as Xaga Sushi, will pay more than \$288,000 in back wages, liquidated damages, and civil money penalties to 70 workers as part of a Consent Judgment entered by the DOL.
- New York (2013): DOL secured a consent judgment ordering Mythos Restaurant and its owners, Peter and Paul Theodoropoulos, to pay a total of \$329,000 in back wages and liquidated damages to 21 restaurant workers.
- California (2013): Noodle manufacturer and distributor Rama Food Manufacture Corp. and officers Karen Trang Ving and Jonathan Ving ordered to pay 36 current and former employees a total of over \$208,000 in back wages, liquidated damages, and civil money penalties.





## 2 Types of Investigations, 2 Types of Questions

### Category 1:

- Have you paid the required contributions and/or maintained the required types of coverage on behalf of all of your employees?

### Category 2:

- Are you paying your employees correctly?



## Category 1 Investigators

- New York State Workers Compensation Board (DOL)
- New York State Unemployment Insurance Bureau (DOL)
- New York State Disability Benefits Bureau (DOL/WCB)



## Category 2 “Wage and Hour” Investigation Inquiries

### *Are you paying your employees correctly?*

- Are you paying your employees at least the minimum wage for all of the hours they work?
- Are you paying your employees overtime for the hours they work above 40 hours in a given workweek?



# Step One

# Hire Me



## **Step Two: Strategy and Decision-Making**

***A. Gather, review, and analyze relevant documents.***



# Fair Labor Standards Act Recordkeeping Regulations (29 CFR § 516.2)

Every employer shall maintain and preserve payroll or other records containing the following information and data:

- Employee's full name, home address, and date of birth (if under 19);
- Sex and occupation in which employed;
- Time of day and day of week on which the employee's workweek begins;
- Regular hourly rate of pay for any workweek in which overtime compensation is due under applicable law;
- Monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis;
- Amount and nature of each payment which may be excluded from the "regular rate;"
- Actual hours worked each workday and total hours worked each workweek;
- Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;
- Total premium pay for overtime hours;
- Total additions to, or deductions from, wages paid each pay period;
- Total wages paid each pay period; and
- Date of payment and the pay period covered by payment.



New York State Department of Labor Andrew M. Cuomo, Governor

Colleen C. Gardner, Commissioner

February 5, 2013

RE :

Dear Employer:

In accordance with Section 575 of the Unemployment Insurance (UI) Law, the NYS Department of Labor (DOL) conducts audits of employers to ensure compliance with the Law. This helps to protect the integrity of the Unemployment Insurance Trust Fund. **Your account has been selected for an Examination. Please call me at 212-775-3790 OR 212-510-2844 by Friday , February 15, 2013, to schedule an appointment.**

The Unemployment Insurance Division Auditor will visit your place of business and meet with you to discuss the purpose of the audit. The auditor will give you a general overview of the audit process and examine the following books and records, from **01/01/2010 to present.**

General Ledger, supporting ledgers and journals	Federal Income Tax Returns
<b>Payroll records</b> such as Individual Earnings Records, Payroll Journals, Payroll Books and Summaries	Copies of Federal and State payroll tax returns such as <b>Forms 941's, 940's, NYS-45, NYS-45-ATT, W-2's, W-3's</b>
Disbursement records such as the <b>check register</b> , cancelled checks, bank statements, check stubs, <b>cash book, disbursements journal</b> , petty cash journal, or any other record that shows payments made by cash and/or check.	Records pertaining to services by individuals such as Forms 1096's and <b>1099's, contractor agreements, invoices</b> , certificates of insurance
Founding documents such as Corporate minute book, certificate of incorporation (if incorporated), Partnership agreement (if a partnership), DBA certificate, etc.	Current Workers' Compensation policy
Records relating to the value of other remuneration such as meals, tips, lodging, automobiles, etc.	UI poster that shows registration with NYS DOL for UI
	Sales records such as a sales journal and sales tax returns

At this initial meeting (or using the enclosed form), you may authorize the auditor to contact your designated representative for information regarding your account. However, the auditor may still need to speak with you and/or visit your site at times during the audit to resolve any issues encountered during the course of the audit. Regardless of this designation, we will notify you (and your representative, if you designate one) of the audit results.

Sincerely,

## Step Two: Strategy and Decision-Making

### ***B. Identify concerns: Where are your areas of exposure?***

- Contractors vs. Employees
- Payments in cash
- Absence of records
- Failure to pay overtime
- Exemption issues





## Step Two: Strategy and Decision-Making

### *C. Devise Your Strategy*

- “Positions” to be taken
- How should issues be presented?
- Which issues should be raised, and when?
- Which documents will be disclosed?
- Are “sample sets” an option?
- Narrow scope of investigation
  - Date range
  - Employee categories
  - Number of locations
  - Number of entities
- How to address absence of records?
- Who will communicate with the DOL?



## Step Two: Strategy and Decision-Making

### *D. Submitting materials to, and meeting with, the DOL*

- In what form will materials be provided to the DOL?
- Where will materials be reviewed?
- Meeting attendees?



## Step Three: Getting to the Finish Line

- DOL Findings
  
- Negotiating a resolution
  
- Agreement or ...
  - Escalate within the agency?
  - Written appeal?
  - Hearing?
  - Litigation?



# Best Practices to Prevent Fraud



# External Audits

- External audits can be helpful in ensuring that financial controls and fraud prevention measures are being followed and are effective
- The standard audit, however, is not designed and should not be relied upon to detect fraud
- The Association of Certified Fraud Examiners reports that less than 10% of frauds are discovered as a result of an audit by an independent accounting firm
- Auditors generally only have a responsibility to give “reasonable” assurance that no material misstatements in financial statements have been made
- While auditors are required to approach the audit with a skeptical attitude and must not overly rely on client representations (SAS 99), auditors do not have an absolute responsibility for the detection of fraud
- Specific fraud audits are available and are encouraged when there is any suspicion of fraud. When fraud audits are conducted, the auditors give greater scrutiny to certain items and another auditor within the firm will often take a second look at the audit to decrease the chance that anything was missed
- It is also a good idea to have auditors review and test your financial controls to ensure that appropriate controls are in place and working



# Control Measures to Consider #1

## Segregation of Duties

- One individual should not be responsible for an entire financial transaction
- Money Coming In: No single individual should be responsible for receiving, depositing, recording and reconciling the receipt of funds
- Money Going Out: No one person should be responsible for authorizing payments, disbursing funds, and reconciling bank statements
- If the organization does not have enough staff on hand to segregate these duties, a board director or officer should reconcile the bank and credit card statements
- Require employees who hold financial positions to take an uninterrupted vacation for two weeks – do not let them work from vacation – This permits transactions to clear properly in their absence. If you have an employee who refuses to go on vacation – that could signal a problem



# Control Measures to Consider #2

## Require Backup Documentation

- All check and cash disbursements must be accompanied by an invoice showing that the payment is justified
- If possible, the invoices or disbursement request should be authorized by a manager who will not be signing the check
- Only pay from original invoices



# Control Measures to Consider #3

## Double Signatures & Authorizations

- Multiple layers of approval will make it far more difficult for embezzlers to steal from your organization.
- For expenditures over a pre-determined amount, require two signatures on every check and two authorizations on every cash disbursement.
- Consider having an officer or director be the second signatory or provide authorization for smaller organizations.
- With credit cards, require prior written approval for costs estimated to exceed a certain amount.
- The person using the credit card cannot be the same person approving its use.
- Have a board member or officer review the credit card statements and expense reports of the Executive Director, CFO, CEO, etc.





# Control Measures to Consider #4

## Never Pre-sign Checks

- Many nonprofits do this if the executive director is going on vacation
- Keep blank checks and signature stamps locked up



# Control Measures to Consider #5

## Employee Training

- Regular (e.g., annual, quarterly) discussion of organizational policies and procedures
  - Rotate topics that are of particular risk to your organization



# Control Measures to Consider #6

## Conduct Background Checks

- **Background checks on new employees and volunteers are important. Many organizations skip this basic step**
- **The Association of Certified Fraud Examiners reports that 7% of embezzlers have been convicted of a previous crime**
- **Background checks can reveal undisclosed criminal records and prior instances of fraud, allowing you to avoid a bad hire in the first place**
- **They are also fairly inexpensive, and should be made a part of your hiring process**



## Control Measures to Consider #7, #8, #9

### 7. Fair Bidding Process

- All contracts should be subject to at least three bids, and approved by a manager uninvolved in the transaction.
- Large contracts should be reviewed and voted on by the board.

### 8. Fixed Asset Inventories

- Conduct a fixed asset inventory review at least once per year to ensure that no equipment (computers, printers, etc.) is missing.
- Record the serial numbers of the equipment and consider engraving an identifying mark on each item in case of theft.

### 9. Audits and Board Level Oversight

- Regular audits will not catch every instance of fraud, however, they are critical to prevent fraud and there should be board level review, if not oversight, of the audit.



# Control Measures to Consider #10

## Encourage Whistleblowers

- Provide a means of anonymous communication.
- Employees may not report theft or mismanagement if they believe their job is in jeopardy.
- Employees must have a manner in which to contact a board member in the event something needs to be reported, and they do not feel comfortable reporting to management.
- Board members must be prepared to take these reports seriously, keep the reporting employee protected and contact legal counsel.



# Questions?



# Contact Us

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