Are you ready for an investigation by the Department of Labor? The most vital thing any employer can do to prepare for an audit is to ensure continuous compliance with the Fair Labor Standards Act and other wage and hour laws. Preventative measures including a comprehensive wage and hour program, self-audits, meticulous recordkeeping, and employee training go a long way in ensuring that the DOL investigation process is as painless as possible. By regularly following a few steps, an employer can ensure compliance with the FLSA and make a DOL audit less disruptive.

The Wage and Hour Division (“WHD”) of the Department of Labor (“DOL”) enforces the provisions of the Fair Labor Standards Act (“FLSA”). The FLSA establishes minimum wage, overtime pay, recordkeeping, and other standards affecting employees in the private sector and in federal, state, and local governments. The WHD may also ensure compliance with: 1) the Family and Medical Leave Act; 2) the Migrant and Seasonal Agricultural Worker Protection Act; 3) field sanitation standards under OSHA; 4) the Employee Polygraph Protection Act; 5) Davis-Bacon and McNamara-O’Hara Service Contract acts; 6) and garnishment provisions under the Consumer Credit Protection Act.

However, the DOL has increasingly focused on its auditing and enforcement powers under the FLSA. As such, it is critical for your corporate clients to prepare for, and receive the proper guidance, with respect to such investigations.

The DOL has the authority to conduct workplace inspections and bring enforcement actions against employers who violate the provisions of the FLSA and other related wage and payment statutes. A DOL inspector may give advanced notice of an on-site inspection, but the inspector can also make an unexpected appearance. In that case, if the employer does not feel prepared, the employer may consider refusing to allow the DOL investigator on site without a search warrant. However, it is recommended to request a 72-hour period to comply with any investigative demand. Because an investigator has the power to subpoena witnesses and documentary evidence related to the investigation, it is best to be prepared for an unannounced visit and assist in coordinating the details of the inspection. An employer should ensure that interviews and inspections take place at reasonable times and do
not unreasonably interfere with the company’s business. The employer should actively participate in the investigation by attending all meetings and conferences, escorting the inspector through the facility, and taking detailed notes.

The WHD investigator may want to inspect payroll and tax records, review written policies and procedures, interview employees, and even conduct surveillance and collect evidence. The investigator is simply reviewing the company’s records and procedures and observing employees to look for wage and hour violations. The WHD has been persistent in its auditing of independent contractors to determine whether they are properly classified.

The best way for an employer to prepare for a potential DOL audit is to establish a wage and hour program within the company to ensure continuous compliance with the FLSA and other state and federal wage and hour laws. Preventative measures, self-audits, and relentless recordkeeping are truly the best preparation for a DOL investigation. The most important preventative measure to ensure FLSA compliance is properly classifying exempt and nonexempt employees. This classification can impact minimum wage, overtime pay, and other payment scenarios. For example, nonexempt employees must be paid for all hours worked, including pre and post-shift work and when work is done during meal breaks. By way of further example, in general the salary of an exempt employee cannot be deducted due to the quality or quantity of work. Because the rules regarding wages and hours hinge on the employee’s status, it is vital for an employer to properly classify its employees.

The exempt/nonexempt status is a matter of law and cannot be modified by an employment agreement. Section 13(a)(1) of the FLSA exempts employees employed as bona fide executive, administrative, professional, or outside sales employees, as well as certain computer employees. These classifications are determined by the employee’s actual job duties, not job title. In addition, to qualify as exempt, an employee must be paid on a salary basis at not less than $455 per week. Particular attention should be paid to the executive, administrative, and professional exemptions. An employer should examine all written job descriptions to ensure that they accurately reflect the actual work done by that position, such that it justifies any applicable exemption.

Several recent cases highlight the importance of proper classification of exempt/nonexempt employees. For example, as recently as April 2013, sixteen subordinates of a rental car company agreed to pay millions of dollars to resolve more than 3,000 claims alleging that it failed to pay its assistant rental managers overtime wages. The settlement is the culmination of many years of litigation challenging the company’s classification of its regional assistant rental managers as exempt from overtime regulations under the FLSA. It is estimated that the settlement provided each of the more than 3,900 current and former managers about $4 for every week they worked for one of the subsidiaries.

Employers should also be careful in assuming that its “independent contractors” are exempt. The United States Supreme Court has outlined a six-factor test to determine whether independent contractors may be treated as exempt: (1) the extent to which the worker’s services are an integral part of the employer’s business, (2) the permanency of the relationship, (3) the amount of the worker’s investment in facilities and equipment, (4) the nature and degree of control by the principal, (5) the worker’s opportunities for profit and loss, and (6) the level of skill required in performing the job. An employer’s ultimate resolution of this test can have large monetary consequences if challenged.

In another April 2013 settlement, a company reached a resolution with a certified class of delivery drivers who claimed the courier misclassified them as independent contractors in violation of Pennsylvania’s Wage Payment and Collection law. The drivers claimed they were deprived of benefits to which they would have been entitled as employees under the law, including compensation for all hours actually worked, overtime pay, protection from unauthorized deductions, and workers’ compensation benefits. The parties settled for a reported $700,000.

Once employees are properly classified and a comprehensive wage and hour program is established, the employer should look into common violations of the FLSA. Some examples include: 1) granting time off in lieu of overtime pay; 2) failing to compute overtime on a weekly basis; 3) making improper deductions for part-day absences from exempt employees’ salaries; docking pay for small infractions of company policy; 4) automatically deducting pay for meal breaks when a non-exempt employee fails to clock in or out and 5) preventing employees from taking breaks in work areas. It is recommended that the employer conduct an independent audit annually to ensure satellite offices are complying with company policy and the FLSA, and not creating policies which they would have been entitled as employees under the law, including compensation for all hours actually worked, overtime pay, protection from unauthorized deductions, and workers’ compensation benefits.

Violations of the FLSA can be significant. Employers should train supervisors and administrators on the FLSA. Preventative measures will decrease anxiety and minimize exposure when an audit is announced.