



Great Lakes Fruit, Vegetable & Farm Market EXPO Michigan Greenhouse Growers EXPO

December 5-7, 2017

DeVos Place Convention Center, Grand Rapids, MI



Labor

Where: Gallery Overlook (upper level) Room A & B

Moderator: Stan Moore, Dairy & Human Resource Management Educator, MSU Extension, Bellaire, MI

- 9:00 am US DOL Investigations: Preparing for the Investigators, Asserting Your Rights
- Ann Margaret Pointer, Fisher & Phillips LLP, Atlanta, GA
 - Joshua Viau, Fisher & Phillips LLP, Atlanta, GA
 - James Michael Honeycutt, Fisher & Phillips LLP, Atlanta, GA
- 9:45 am Grower Panel on H2A -- Two growers will share their experience with H2A including H2A audits. Attorneys specializing in H2A will share best practices when going through an audit.
- Kelly Daniels, Daniels Produce, Columbus, NE
 - Lorinda Rathkowski, Great Lakes Glads, Bronson, MI
- 10:15 am US DOL Wage and Hour
- Jacob Swier, Investigator, U.S. Department of Labor, Grand Rapids, MI --
Topics to include: Major types of citations in 2016/17; Common violations and how these could be remedied; Priorities for the coming year.
- 10:45 am Youth Labor on Michigan Farms
- Stan Moore, Dairy & Human Resource Management Educator, MSU Extension, Bellaire, MI -- Summary of rules applying to youth employment on Michigan farms
- 11:00 am Session Ends

Fisher Phillips **US DOL Investigations: Preparing for the Investigators** **Best Lawyers**

Great Lakes Fruit, Vegetable, and Farm Market Expo
December 6, 2017



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Fisher Phillips Discussions here:

- Not confidential
- Not privileged
- Not technically “legal advice”
- But like website materials, we hope the information at documents will point you in the right direction.
- All discussions are strictly hypothetical; no admissions against interest.

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Fisher Phillips WHAT TRIGGERS an AUDIT?



Why Me?

- Employee complaints
- Programmed for industry and specific programs-H-2A
- Media reports
- Private litigation
- Referrals from other agencies, advocacy groups
- Random

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Fisher Phillips What Does US DOL know or think about your operation?

- Go to <https://enforcedata.dol.gov/views/search.php>
 - Among other data, learn about earlier WHD, OSHA, and OFCCP investigations
 - And laws under which violations were cited, amounts of back pay and civil money penalties assessed.
 - Laws and related regulations WHD enforces include: the FLSA, MSPA, H-2A, the Family and Medical Leave Act
 - And DOL will refer possible violations it uncovers to other agencies.
 - And DOL cooperates with outside advocates and complaint filers.
 - Consider a FOIA request for the earlier narrative and summary reports.

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Essential points:

- Plan in advance who will be present at the opening and closing conferences.
- Record the identity and contact information for the DOL officials.
- Keep and organize records/copies of all documents requested by and provided to the DOL investigators. Mark confidential documents, "confidential."
- Confirm your understanding in writing if the investigator does not provide you a written list of requested documents and timetable for presentation.
- Date EVERYTHING and establish to whom all documents were provided!
- Make sure somebody can't delete or overwrite records you may need.

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7



More essentials

- Whoever has first contact with the DOL – in the office or in the field must:
 - Inform the senior designated management official before any investigation is started;
 - 1 person should manage the investigation, conduct the opening conference with the DOL investigators, get and secure the credentials of the investigator(s), make copies of all documents requested and provided, and know the scope and nature of the investigation;
 - You can have two (2) managers at all stages, but it is essential that at least one person be involved from start to finish at the closing conference.

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8



More essentials cont'd

- Determine if the immediate on-site investigation, collection and presentation of records and employee interviews will unduly interfere with critical operations;
- Determine if your counsel will be retained to provide guidance during the investigation either on-site or by telephone;
- Keep in mind: if your operation is in the H-2A program, it has committed to compliance with all other Federal, state, and local laws and so DOL investigations are increasingly broad, particularly with respect to laws it enforces.

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9



Essentials cont'd

- You be reasonable; expect government representatives to be reasonable.

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10



Be sure you can locate all records later.

- It doesn't matter if your records are electronic or paper, just make sure they are permanent and not subject to automatic erasure or deletion because you have exceeded the permissible size or your e-mail are subject to deletion after a specified period.
 - The documents you provide
 - The documents the DOL asked to see
 - The records of potential violations
 - Any closeout letters
 - All records final resolutions.

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Does DOL have authority to conduct an investigation?

- Yes, DOL has FLSA, MSPA, OSHA, H-2A and other investigation authority by statute.
- H-2A investigations require employers to allow investigators to enter and inspect land, housing, vehicles, housing and records pursuant to 29 CFR 501.6. See Supplemental Materials, p. 18.
- Investigators will typically want to interview workers privately.
- You have a right to continue to operate your business and avoid shutdown of operations.
- DOL expects you to be able to provide basic records within 72 hours of a request.

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12



Employee interviews

- Where should employee interviews be held: in the fields or in housing - in connection with meal breaks and/or at the beginning or end of the workday?
- Employer representatives may participate in and be present for management employee interviews insofar as the government is not investigating the status, such as the FLSA overtime status, of the managerial employees.

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13



Documents DOL may want that you may not have to provide

- DOL will want to establish FLSA coverage and that the employer engages in interstate commerce.
 - Did the enterprise have an annual gross volume of sales made or business done of not under \$500,000.
- Rather than provide your farm's tax returns, you may offer to stipulate to coverage under MSPA and the FLSA.

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14



Is DOL entitled to know your customers?

- The real issue is are your employees engaged in interstate commerce?
- Are the employees engaged in the production of goods for commerce or in handling, selling or otherwise working on goods or materials that have moved in or are produced for interstate commerce?
- Problem could be that DOL asserts bad violations, issues a press release naming your customers and is wrong on the law or facts.
- Justice Department, in criminal press releases, acknowledges people and companies are innocent until proven guilty. DOL has not been so careful.

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15



Stipulations

- You should be able to stipulate to at least the dollar volume to establish coverage without disclosing your tax returns and that your employees are engaged in interstate commerce without having to disclose who the customers of your farm are.

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16



Does DOL have authority to conduct an investigation? cont'd

- DOL often asks for tax returns and names of customers, but DOL has never cited authority for such disclosures to us.
- We have convinced investigators to check with their offices or otherwise agree that stipulations serve in lieu of such potentially confidential business information.
- As to copies of financial, personnel and other documents you allow DOL to see and make copies of, mark sensitive, proprietary, confidential documents: "Proprietary, Confidential Business Records Not Subject to Disclosure under FOIA" as appropriate.

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17



Does DOL have authority to conduct an investigation? cont'd

- If you do decide to disclose the identities of your customers and that is confidential competitive information, mark documents providing such information accordingly.

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18



What about relationships with investigators? Sometime investigators don't know the law.

- Some investigators, like other humans, are bullies.
- If somebody tells you that an H-2A employer *must* "cooperate with any [DOL] employee] who is conducting an investigation, ask the investigator to show you authority for specific information in light of your willingness to stipulate to facts the investigator claims to be.
- There's a line between being cooperative and being walked on.
- H-2A employers have promised to cooperate in connection with DOL investigations in order to obtain certification.

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Does DOL have authority to conduct an investigation? cont'd

- On one hand you don't want a fight or an unnecessary fight or a bad attitude, but you don't want to be walked on either.
- The person who manages DOL investigations for your farm should be someone who has good judgment and a working knowledge of FLSA, MSPA, H-2A, OSHA (including worker training and recordkeeping requirements), FMLA (if applicable) and your processes and procedures, including your EEO and No Harassment policy. For a sample of the latter, see the Supplemental Materials on pages 25-27.
- Recent case: investigator was unfamiliar with WH Opinion Letter 533 pertaining to "hours worked" when H-2 workers are relieved of all work but must wait a brief time to be driven to their housing. Investigator thought such time was compensable hours worked.

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20



The person your farm places in charge of an investigation:

- Should have read the applicable regulations and know the forms and other documents your farm uses that demonstrate compliance.
- That person should know that the required state and local posters are posted and have compliance checklists at hand for inspection compliance verification in advance of investigations if possible:
 - Have at hand at least the following:
 - Housing checklists for OSHA or ETA requirements (or other state or local requirements), as applicable. Have a regular inspection process for confirming continued compliance of housing and have a problem reporting procedure for residents so you can avoid penalties for ordinary wear and tear if somebody knocked at a screen last night.

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Are you ready for an investigation?

- Don't wait for a county or state investigator or DOL to give you a checklist of what the problems are midseason - make your own regular investigations/inspections to stay in compliance avoid penalties under *Joan of Arc* principles.
- FLSA basic record requirements are in the Supplemental Materials, page 6; MSPA page 7; H-2A page 7.
- MSPA and H-2A violation checklists are the Supplemental Materials, pages 9 - 11.
- For both MSPA and H-2A pay particular attention to pay and hours worked records and insure full payment for all hours worked of both H-2A and U.S. workers in corresponding employment.
- Note that many, but not all, of the most critical operational and job condition H-2A requirements are in the Supplemental Materials, pages 33-43.

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21



Are you ready for an investigation? cont'd

- All H-2A employers are subject to MSPA as to their U.S. workers insofar as they employ US workers in "corresponding employment."
- No H-2A employer may deny employment to a U.S. worker who wants such employment or treat either category differently because of the person's immigration status, with a very narrow exception that U.S. workers may displace H-2A workers – and your Job Order documents should put H-2A workers on notice.
- The H-2A job order plus the MSPA WH-516 requirements should be part of your H-2A compliance package. Note that the detail in WH-516 item 6 on worker comp is not part of the ETA 790 Job Order form and so the ETA 790 must be supplemented or provide the worker comp information separately.

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21



Are you ready for an investigation? cont'd

- MSPA paystub and H-2A pay requirements are not like regular FLSA requirements.
- H-2A employers are being fined for failing to include all detail in the 655.122 (i),(j) and (k) regulations in records and pay stubs, including hours offered up to and above the daily hourly basis of the three-quarter guarantee. See Supplemental Materials, pages 36-39. MSPA requirements are at 29 CFR 500.80.
- Note the foreign language requirements applicable under MSPA must be met with respect to US workers.

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21



Does DOL have authority to conduct an investigation? cont'd

- Housing terms and conditions under MSPA require information contained in WH-521 and a certificate of occupancy normally as in WH-520. Your Job Order probably should include special housing use and conduct rules, as well as, on the job work rules.
- Ideally, you look at improvements and adopt better, more comprehensive rules, as appropriate. Study what others do.
- Verify all OSHA and EPA worker protection training and other OSHA training such as, safe tractor operation training required each year.
- Verify and update your "hazcom" program and training.
- Verify OSHA recordkeeping compliance.

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23



Trends:

- We are seeing Wage-Hour investigators examine the basics of Family and Medical Leave Act (FMLA) coverage and compliance.
- FMLA adopts the same broad definition of "employer" that is part of the FLSA and MSPA.
- Expect your regular payroll workforce to be combined with that of any crew leader(s).

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24



Does DOL have authority to conduct an investigation? cont'd

- Check out our booklet on FMLA at <https://www.fisherphillips.com/assets/htmldocuments/FMLA%202014.pdf>
- Under FMLA there are written policy requirements, poster requirements and forms that must be provided to employees and responses that must be handled in accordance with regulations that have strict time limits.
- FMLA and other laws specifically or practically replace forms and disclosures in the language of the workforce.

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25



Beware

- Interviews.
- Requests that you or another manager immediately sign an interview summary that an investigator wrote up on the fly.
- At the very least take time to review overnight what is in the written summary.
- Be sure you or the managers involved understand the significance of the words being used. The words may be legal terminology that may have special meanings in the context of the laws. We go to law school to learn what some of these words mean; and sometimes judges change what words mean.
- Be sure you mean to say what you sign.

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26



Beware cont'd

- If you or another employee is asked to sign a statement, be sure you get an ironclad commitment that you will be provided a copy of the statement *on the spot— not when the investigator is back at the office*. Even wait to sign the document until you are near a photocopier. We have seen people burned; don't let yourself be burned.
- The same may be true with respect to any other documents that you provide to DOL. Once a document is in the DOL files, it is virtually impossible to get even a copy of your own records.

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27



Documents you may be handed--

- What do you do if you are handed a document to authenticate or explain?
 - Take your time.
 - Be sure!
 - Is the document complete or only partial?
 - Get a copy of that document to keep so you will have a record of what you have examined, talked about and committed to the investigator.
 - Be truthful but don't agree to what you don't know or don't understand.
 - "I don't know" and "I'll have to check" may be the proper answers.

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28



Employee interviews: where, when and for how long?

- Where may investigators go?
- Do not agree to sacrifice food safety requirements for immediate in field interviews.
- Is it possible to take the workers to the side of the field one at a time, or to allow workers time for private interviews at the end of the meal period or at the beginning or end of the workday or in employer-provided housing?

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11



More about employee interviews and complaints:

- You can tell the worker that he or she may ask for any document that he is asked to examine, that he is not required to sign anything, and that he can require that the investigator provide him or her a copy of any document he or she is willing to sign.
 - Tell the employee to tell the truth to any question he knows the answer.
 - Obviously, you may not threaten subtly or directly any worker regarding what the worker says or has said.
- If a worker says he has a complaint or that he has made a complaint about any claimed violation on your farm, that complaint, and that worker with respect to that action, is most likely protected from any discipline.
- Tread carefully even if you think the employee is lying and most likely you will want counsel in the matter.
- DOL will strongly consider debarment if workers claim to have been threatened or asked to sign false documents.
- While legal claims can be settled, the regulations indicate individual workers and employers may not enter into agreements in which workers waive rights, and some waivers must have DOL or Judicial approval.
- But an employee who has made even a legitimate complaint must perform his or her job and work with reasonable effort.
- Be sure you have adequate work rules so you can require reasonable work conduct.

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12



Appeals Procedures

- Generally, the appeal must be received by the government official(s) as specified in the Notice of fine or violation within 30 days of the date of the Notice: You want to make sure you have raised all possible defenses.
- Generally, you may want to provide and obtain further information through a personal or telephone meeting with the appropriate government official. It is possible that claimed violations can be rescinded and civil money penalties, which are now much higher than they were before August 1, can be sometimes reduced.

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13



Final Questions and Thank You!



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14

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