



# Wednesday General Session 5

2019 DMEC ANNUAL CONFERENCE  
WASHINGTON, D.C. | AUGUST 5-8

## DOL AUDITS: WHAT EMPLOYERS NEED TO KNOW

2019 DMEC Annual Conference | Washington, D.C.  
August 5<sup>th</sup>-8<sup>th</sup>

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### DOL audits: What employers need to know



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Shareholder  
Littler Mendelson, PC



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### Agenda

- Overview of the DOL
- Complaint activity at DOL over recent years
- Common issues Identified by DOL in its audit process
- How an FMLA investigation is initiated
- Employer's strategy in responding to investigation and on-site visit



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**Most common issues identified by DOL**

- 1 Employers' inability to recognize the need for FMLA leave and then disciplining employees for an absence that should be covered by FMLA
- 2 Failing to meet notice deadlines established by the FMLA
- 3 Poorly documenting communications with employees (or no documentation at all)
- 4 Failing to properly administer medical certification, including requests for recertification more frequently than permitted
- 5 Failing to train managers



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**How a DOL investigation starts**  
How employers are selected



By complaint filed by a current/former employer **OR** Through a compliance audit initiated by DOL



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**What to expect**



- 1 Receive a letter from DOL
- 2 Request an attorney
- 3 Negotiate on-site visit
- 4 Employer response
- 5 Itemized list



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**U.S. Department of Labor**  
Wage and Hour Division  
1221 North Washington Street  
WASH DC 20512  
Phone: (202) 219-1217  
Telegrams: (202) 751-0544  
Fax: (202) 751-0547


January 17, 2019

██████████

Re: Wage & Hour Investigation

Dear Sir or Madam:

The Wage and Hour Division (WHD) of the U.S. Department of Labor is responsible for administering and enforcing a number of Federal labor laws, including the Family and Medical Leave Act of 1993 (FMLA). The FMLA applies to all public agencies, including state, local and federal employees, local educational agencies (schools), and private sector employees who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including part employees and associates of covered employees. This letter is to inform you of WHD's plan to visit your establishment on **January 24, 2019** to determine your compliance with the FMLA.



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### Employer's response to DOL

- Retain an attorney
- Attorney to contact DOL
- Respond to information request in a timely manner
  - DOL communication will include an itemized list of information requests
  - Timely gather this information, and consider if there are any objections to producing this information
- Position statement. Tell Your Side of the Story
- Consider resolution. If there are problems, now is the time to resolve them





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### Itemized list

<p>All communication, contact information and contracts with FMLA administrators used by the company, including those contracted to provide leave administration</p> <p>The company's leave policies (including all leave policies, not just those relating to the FMLA), including but not limited to an employee handbook and/or collective bargaining agreements</p> <p>The FMLA policy that is distributed to employees, with a brief explanation of how and where this guidance is provided</p> <p>A blank copy of all form(s), standard letter(s) and any other documents (such as medical release waivers) used in connection with FMLA actions</p> <p>All employees who have requested FMLA leave within the past three years. Dates FMLA leave was taken by each employee. If FMLA leave was taken in increments of less than one full day, the hours of the leave taken</p>		<p>All non-privileged records related to any grievance, arbitration or litigation involving FMLA-related claims brought by an employee</p> <p>Completed notices, certifications, requests for clarification and re-certifications related to FMLA leave requests for an employee</p> <p>Second and third opinion requests and results related to an employee</p> <p>Listing of all employee FMLA requests, approvals and denials with reasons for denials for any employee</p> <p>Documents reflecting any training provided to supervisors related to FMLA compliance</p>
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## PREPARE FOR THE ON-SITE VISIT



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### Prepare for the on-site visit

- Get paperwork and process in order
- Prepare your people
  - Identify the point person for the on-site
  - Leave management
  - Managers
  - Decide whether you offer particular employees to interview
- Check your postings



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### During the on-site visit


**Opening conference/interview**

- Counsel and point person/people in attendance
- Review of process, documents, data



**Additional interviews**

- Managers/leave management
- Individuals selected from Information provided



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## SELF-AUDIT



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### Components of self-audit

#### Low-hanging fruit

- Conduct a thorough review of your FMLA policy
- Adhere to the Employer Posting Requirements. In addition to posting your FMLA policy in your handbook, employers also must post the DOL's FMLA poster "prominently" where it can be viewed by employees and applicants
- Ensure your FMLA forms are legally compliant. Examine all existing FMLA forms to determine whether they comply with FMLA regulations
- Prepare legally compliant FMLA correspondence. Put in place and review legally compliant correspondence regarding certification, recertification, failure to provide certification, insufficient/incomplete certification, employee's return to work, second/third opinions



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### Components of self-audit

#### Second-level work



**Conduct a comprehensive audit of your FMLA practices and procedures**

- Procedure for requesting leave – what is it, who's involved and is it compliant?
- How are you calculating increments of intermittent leave?
- Are you complying with the FMLA regulations when seeking medical certification, curing certification and seeking second and third opinions?
- Are you properly designating FMLA leave and providing timely notice to employees of the designation?
- Are you seeking recertification within the time periods allowed by the regulations?
- Do you have compliant procedures for contacting an employee on leave?
- Are you following the regulations' very specific guidelines for seeking fitness-for-duty certifications from employees returning from FMLA leave?



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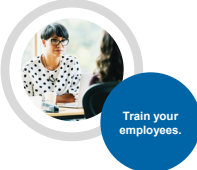
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**Components of self-audit**  
Second-level work

**Clean up your recordkeeping.** Are you maintaining all the data DOL will be looking for, and are your data accurate? (3 years, separate file)

- Employees' identifying information
- Date(s) of FMLA leaves
- FMLA hours/days/weeks taken
- Copies of employer and employee FMLA notices, certification forms, benefit documents
- Disputes about designation of FMLA leave



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**FOLLOW UP**

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