
INTRODUCTION TO FULL INVESTIGATION AND LITIGATION (FIL) TRAINING

Our goal is to improve our ability to complete quality, full investigations that will convince employers that they have no choice but to change their violative behavior, or failing that, to provide a winning litigation case to the SOL. If we are successful, the results will be found in increased compliance with the laws we enforce – OUTCOME A.

This block of training is about learning from our experiences -- successes and failures -- so that we can more effectively use one of our "six tools," full investigations. It will provide guidance on:

- When full investigations may be appropriate;
- How to replicate innovative investigative approaches and legal tools various offices have successfully used;
- How to report and communicate our findings to insure that we can convince an employer – or failing that, a judge – to take the steps needed to insure current and future compliance; and,
- The advantages of early contact with the SOL.

This training is **NOT** intended to limit the latitude of or change existing procedures by which that the District Office and senior investigator have to select the appropriate compliance tools to address the problem presented. It does **NOT** signal a mandate or a desire to move away from the other enforcement techniques we have developed and used to our advantage. We simply could not do so and expect to effectively serve our many customers.

Rather, this training is designed to improve the organization's ability to decide when to use this technique and to successfully conduct full investigations when this is the best way to secure compliance in a case.

This training is also designed to share some of the best investigation practices from all over the country, and provide you with a forum to discuss your own investigative methods and share best practices with the class.

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INTERVIEWS

THE IMPORTANCE OF GOOD INTERVIEWS

Learning points:

- *The importance of complete interview statements in deciding whether WH has a good case and whether it is worthy of litigation*
- *The interview statements must support the actions taken on a case*
- *Interviews should answer the five "W"s: Who, What, Where, When, and Why*

I. PURPOSE AND OBJECTIVE OF INTERVIEWS

Interviews are our most effective, and therefore our most important, investigative tool. There are no substitutes for good interviews. Interviews are used to determine whether there are violations and the scope of any violations found. Interviews generally provide the primary documentation for the conclusions drawn by the investigator.

Interviews are used to:

- Support or refute coverage and/or exemptions;
- Prove or disprove allegations of violations;
- Support or refute the payroll records;
- Determine whether there are violations in areas not addressed by the complainant;
- Provide documentation for conclusions reached by the investigator;
- Assist in establishing willfulness and identifying the persons responsible for the violations;
- Address any other disputed issues in the case; and,

- Provide the necessary information to allow a reviewer to decide whether to go forward with the case.

II. DETERMINING WHAT INFORMATION TO DEVELOP THROUGH INTERVIEWS

Learning points:

- *Decide what issues are in dispute before beginning interviews*
- *Develop or use a guide or form questions to cover disputed issues*

A. Preparation and organization

Prepare by determining what information is needed through employee interviews. It may help to review the complaint and other material and think of what needs to be developed through interviews.

Develop a plan for the interview process, including determining whom to interview and how many interviews to take.

Know what questions you want to ask. As in initial conferences, come to the employee interview having familiarized yourself to some extent with the particular industry. Senior investigators in your office can help.

If coverage or employer/employee relationships are at issue, interviews must be more detailed.

If addressing exemption issues, carefully prepare and tailor the questions in advance. In large exemption cases, it is helpful to interview a few employees initially to learn about the industry, the internal processes/procedures, and the details of the position. With this information, you can prepare a more detailed list of interview questions. (See 541 **Interview Guide** at the end of this section.)

Contact RSOL through proper channels when questions arise concerning the kind and amount of information needed from interviews in order to resolve the issues presented.

B. Whom to interview

Learning points:

- ***Identify the people from whom interview statements are most important***
- ***Representative statements are useful to assist in determining status of compliance and to estimate back wages***

1. Determining whom to interview

- Interview the complainant(s); use these interviews to assist in identifying others to interview.
- If the complainant is a current employee, be careful not to treat him/her differently when you are interviewing. For example, if the firm is small, and you are interviewing everyone, be sure to spend a few minutes with the complainant so it will appear that you interviewed him/her as well.
- Use job descriptions and/or records to identify employees who appear to be most familiar with the disputed issues.
- Cover all shifts, work schedules and locations if applicable.
- Try to get representative statements, i.e., witnesses who can talk about other employees (by name and periods of employment) with whom they worked.
- Try to interview former employees, especially if current employees are reluctant to talk.

2. Determining a "representative sample"

- There are no hard-and-fast rules on how many employees to interview. With a small number of affected employees (10 or less), it is reasonable to interview all of them. With a large number of employees (100 or more), interview about 20%.
- Interview enough employees so that the employer will not be able to single out an individual and expose him/her as the person who gave adverse information against the employer.
- Get interviewed employees to talk about other employees, by name, with whom they work. If there are different shifts, try to get

employees to talk about the hours of work for other people they can name from their shifts.

- If there are different locations or isolated areas where people work, try to get employees to talk about the hours of work for other people they can name from their areas.

III. METHODS OF INTERVIEWS

Learning points:

- *Develop a style that puts the employee at ease*
- *Pick the best place and time for the interview*
- *Personal Interviews (face-to-face) are best*

A. Investigator Techniques

The success or failure of the interview will depend on the attitude and comfort level of the person being interviewed. Develop a manner and style that puts employees at ease. Try to start with a courteous, friendly, yet businesslike attitude toward the employee.

In introducing the interview, don't over express your authority, e.g.: "I have the authority to interview you..." or "You must speak with me..." Instead, try statements like, "It's a regular part of our investigation to interview employees." Maintain a professional manner and remain objective.

Explain the purpose of the interview, such as: "I am an Investigator. I am conducting an investigation to determine if this company is in compliance with Federal labor laws. These laws include minimum wage, overtime, record keeping, and child labor regulations. As a part of my investigation, I examine time cards, time sheets, payrolls, and similar records, and I interview employees. Any information you and I discuss will be kept confidential to the maximum extent possible under law. I would like to talk with you about what you do, the hours you work, and how you are paid."

Develop a style that puts an employee at ease and facilitates the free flow of pertinent information. If an employee is obviously uncomfortable

or reticent to speak with you, try briefly to reflect the anxious employee's concerns (without evaluating these concerns) and then reassure the employee.

Develop methods of keeping the interview going and on point, even with employees who digress or ramble on and with employees who seem hostile to the government.

Maintain control of the interview. Give the employee some freedom to digress or to become somewhat disorganized, but keep the process on track.

Maintain contact with the employee. Use the mail or phone to keep updated on employment status, change of address, status of investigations, etc.

Don't speak disparagingly about the employer (or other employees) during the interview. If the employee makes nasty or adverse remarks about the employer, simply acknowledge the employee's attitude without getting drawn into one side or the other.

B. Where and When to Interview

1. Establishment interviews:

Explain to the employer our authority for interviews, the necessity for interviews, and the confidentiality of interviews. Do as much as you can to prevent interfering with the employee's duties and to avoid interrupting the employer's business operation. Don't interview an employee during a peak period or when the process may interfere with the safe performance of his/her job..

Try not to allow the employer to delay you in beginning employee interviews. Give assurance that you will not unduly disrupt the operation of business.

When at the employer's place of business, conduct the interview in a location that is separate from the employer and other workers. Try to get a room or isolated area where you and the employee can sit down.

2. Interviews off the establishment premises

Be sure that you are picking reasonable times and places.

The local Wage-Hour office is good, but another nearby government office is a reasonable alternative. If you are going to an employee's home, be sure you have directions and are comfortable traveling to that location. Set appointments at a time when it will be least disruptive to the employee's personal schedule. Avoid weekends or meal periods. You may agree to meet at a local restaurant, library, or other public place.

3. Telephone Interviews

Be well prepared, to make the interview go smoothly and quickly. Verify that the employee can give you some time; if not, find out a better time to call. Don't call early or late and avoid calls on holidays, Sundays, or other religious days.

C. Face-to-Face, Telephone, and Mail Interviews

Personal face-to-face interviews are the best method. This allows you to develop a more personal understanding and evaluation of the employee. It also allows the employee to read over and sign the statement.

Telephone interviews are acceptable. It is often helpful to follow-up with a written statement mailed to the employee for correction and signature. Some of these statements will never be returned.

Mail interviews are the least desirable. They may be most useful for documenting a pattern of violations or to confirm information provided in other interviews. These interviews may also be useful when you are seeking information about alleged violations of a large employer with significant personnel turnover. In these instances, mailing out a quantity of interviews to former employees may yield useful information.

IV. DOCUMENTATION - WHAT TO INCLUDE IN THE INTERVIEW AND TO PUT IN THE WRITTEN STATEMENT

Learning points:

- *Consistency*
- *Completeness*

A. Making a record of the interview

Signed interview statements are best. These interview statements should be written in ink, in the first person, with any changes initialed by the employee. Wording of the statement should be understandable to the employee and reflect the facts that were brought out in the interview.

Let the employee read and sign the statement. Verification of the accuracy of interviews is important. End the statement with, "I have read the above and it is true and correct." Or use the "under penalty of perjury" statement near the signature line. It is advisable to discuss the latter with your DD and/or RSOL.

Whether or not you get a signed statement, all interview statements and the investigator's notes of interviews **must** be included in the file.

1. **Promise of confidentiality:**

Use the language on confidentiality of statements and emphasize the seriousness with which DOL regards this pledge of confidentiality. If the employee has no objection to our using his name, obtain written verification of this. Obtaining name use authorization should be an exception to the normal practice of insuring confidentiality.

2. **Language:**

It is best to take the statement in the language in which the employee is fluent. If you interview in a language other than English, the statement should be written in that language. If you use a translator, state this at the beginning of the interview. Both the original and translated statements should be included in the file.

Interviews should attempt to capture the expressions, idioms and vernacular used by the person being interviewed.

B. Contents of the interview

1. **Preliminary cautions**

- Do not begin the interview with leading questions. The more information provided directly by the employee, the more

persuasive the interview. Leading questions are useful in the proper circumstance.

- Follow up on vague answers
- Don't be too technical in employee interviews. Avoid the use of acronyms or Wage-Hour jargon, e.g., FLSA, ADV, CMPs, OT, "the Act," 541, 13(b)(1), etc.
- Try to use the company's or industry's language/lingo when preparing your questions and when explaining your findings to the employer, but be sure that your terms are defined and understood.
- As you write the interview statement, use separate paragraphs for different subjects.
- Don't discuss back wages before or during the interview.
- Determine what to do when an employee asks for a copy of the interview statement. Guidelines may vary regionally. Generally, an employee can have a copy of his/her statement, if requested prior to signing the statement. Once the interview has been signed, it is a file document and must be requested through the Freedom of Information Act. Please note that we will not be giving a copy to the employer, regardless of whether or not it has been signed.
- Obtain an alternative address (friend, neighbor, relative)
- If an important employee is not interviewed put an explanation in the file as to why.
- Ask the employee to read the statement or volunteer to read it to him/her after it is written. You may have to make changes if the employee is not satisfied with its accuracy. Have the employee initial any changes.
- If an employee refuses to sign the statement, put an explanation at the end of the statement.

If you have to read the interview statement at the end of the interview, include a line for the individual to sign stating "This statement has been read to me by _____."

2. What to ask

- The questions asked should generally be sufficient to substantiate violations, compute violations, and establish eligibility for exemptions and coverage.
- Questions should elicit answers that are, for example, detailed enough to do computations for the employee being interviewed based solely on the interview statement.
- Interviews must also have enough information to substantiate each conclusion drawn in the narrative. The investigator should, therefore, think about the information that will be necessary to complete the narrative while preparing for and conducting the interviews.
- Ask all of the questions relevant to the issues presented. If an exemption has a four-part test, ask questions related to each part of the test, even when the answers to the first part of the test appear to settle the issue. Consider that employees may be exempt under a combination of exemptions.
- Avoid questions that call for a conclusion and follow-up to clarify statements, i.e., don't just ask "Do you exercise discretion". Rather, ask the types of questions that allow you to reach the conclusion. For example, "What are your duties?", "Do you order supplies?"; "Do you determine from whom to order supplies?"; "Do you determine how much to pay for supplies?"; "Do you deal directly with the supplier?"
- For specific questions, see the **Interview Guide**.

V. EVALUATION OF WITNESSES

Learning points:

- *Evaluate the demeanor, articulateness, self-confidence, and other characteristics of each witness*

- ***A rating system is okay, but it must be understandable and consistent***

In a separate document (at beginning of B-exhibits or in narrative), evaluate the demeanor, articulateness, self-confidence, and other appropriate characteristics of each witness. This will help reviewers and RSOL determine which employees will be the best witnesses.

The evaluation document should contain the following information:

- Name/address/phone/age
- Exhibit number
- Occupation
- Method of payment
- Violations and periods of violation in weeks
- Evaluation of witness (i.e. maturity, memory, honesty)
- Availability of witness
- Names of other employees about whom they can provide other information.

(See following sample Witness Chart)

The witness evaluation serves as a source of information to refresh the memory of the WHI as well as to assist RSOL in determining if an employee should be called as a witness.

Employee Personal Interview Statement

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

EXHIBIT 1



This report is authorized by Section 11 of the Fair Labor Standards Act and other Wage Hour laws. While you are not required to respond, your cooperation is needed for the Wage Hour Division to make a determination of compliance under the applicable Act(s). Your identity will be kept confidential to the maximum extent possible under existing law.

9-27-2007

(Date)

Castan

Mr.
Miss
Mrs.
Ms.

I, _____, of _____

(State)

(Zip code)

(Telephone number)

(Driver's license number - Do not request if number is same as Social Security number)

over 18 years of age, (was/have been) employed by:

(Establishment)

(Location of establishment)

for the approximate period from 1996

to present
(If still employed state "present")

as CCO #3 (Occupation or description of duties)

Statement:

I am paid on a salary of approx \$46,000 per year. I am scheduled 7:00am to 5:30 with a 1/2 hour lunch - (4-ten's (10 hour days)). I come in at 7:00am but I never leave before 6:00pm - we do late night transports and we do late night field work, I usually eat at my desk while I work. I average between 45 and 50 hours per week which averages out to approx 47 1/2 hours per week.

I now have 43 cases - the average is between 38 to 45 cases. I work with RMA and RMB offenders. I spend my work seeing offenders, writing reports, violation reports, chronos, and some field work. I update OOP's and the work has redundancies in various other systems that we also have to update. We also do all the UA's - offenders come in twice a month.

It is not reasonable for the agency to expect us to get the work done in a 40 hour week. The agency keeps adding expectations and new deadlines and it is difficult to complete it all. over JT

(If additional space is needed continue on reverse)

I have read the above and it is true to the best of my knowledge.

Witness: Rh. Sandgert