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Solicitor of Labor Pushes Aggressive Operating Plan for 2011 and Beyond

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The Office of the Solicitor of Labor (SOL) has recently developed an Operating Plan for enforcement in 2011 and beyond. Because SOL is the legal enforcement arm of the Department of Labor (DOL or the Department), examining the Operating Plan helps employers identify enforcement trends on which SOL and DOL as a whole will focus moving forward. In addition, the Operating Plan provides a window into the priorities of each of DOL's programmatic agencies, as the Operating Plan attempts to more closely align SOL's priorities with the priorities of its client agencies. In fact, the Operating Plan discusses SOL support for a dramatic plan by the Department to shift certain whistleblower programs from the Occupational Safety and Health Administration (OSHA) to the Office of Labor-Management Standards (OLMS). When considered in the context of recent DOL actions, such as the new DOL-ABA referral partnership,[1] the Operating Plan provides insight into where DOL is heading and what employers can do to prepare for future DOL actions.

Consistent with recent statements made by DOL leadership, the detailed SOL Operating Plan recognizes that legislative changes are unlikely with the loss of the Democrats' majority in Congress and that any changes will have to come from within the Department. This LawFlash discusses both SOL's general approach as well as its specific detailed plans for the statutes and regulatory programs it enforces. In addition, this LawFlash also provides a summary of how SOL has allocated—and expects to continue to allocate—its resources to accomplish its goals.

Dramatic Changes to Whistleblower Enforcement

Over the last few years, OSHA's whistleblower enforcement programs have come under increasing fire from Congress, the Government Accounting Office (GAO), and many stakeholders with respect to a number of issues, including, for example, the administration's failure to complete investigations within the statutory or regulatory deadlines, deficiencies in training OSHA staff members to enable them to properly investigate whistleblower cases, and the excessive number of whistleblower programs with too few staff. In an effort to quell some of the criticism, DOL is planning to remove enforcement responsibility for most whistleblower programs from OSHA and place it with OLMS. OLMS, a tiny agency as compared to OSHA, historically has been responsible for DOL programs that relate to labor

[1] Read more about the referral partnership in our November 30, 2010 LawFlash, "White House Announces Joint DOL-ABA Private Attorney Referral Program for FLSA and FMLA Claims; Employers Should Be Mindful of Potential Consequences," at http://www.morganlewis.com/pubs/LEPG_LF_DOL-ABAPrivateAttorneyReferralProgram_30nov10.pdf.

unions, such as the Labor Management and Reporting Disclosure Act. The SOL's Operating Plan reveals that DOL is beginning to execute a comprehensive transfer of most of the whistleblower programs from OSHA to OLMS, although we expect that OSHA will retain authority to enforce some of the health and safety whistleblower statutes, such as the whistleblower provision in the OSH Act itself. We anticipate that the reorganization will most likely occur in late 2011. While the specific impact of this move on the enforcement of statutes such as the Sarbanes-Oxley whistleblower provisions remains to be seen, employers should expect that DOL will be increasingly aggressive in whistleblower investigations once the transfer occurs.

Overarching SOL Strategies

The Operating Plan takes a "more bang for your buck" approach to enforcement, focusing on maximizing returns from limited and almost certainly shrinking budgets and resources in DOL more generally. The planned enforcement actions under this Operating Plan are bolder, louder, and more public than we have seen in the past—including the suggestion of "shaming" employers (presumably through the press) into compliance.

Employers can take away the following general themes from the SOL's Operating Plan:

- **Watch for greater publicity of SOL activity.** One new strategy for SOL is to identify public affairs liaisons in each regional office in order to "send stronger, clearer messages to the regulated community about DOL's emphasis on litigation." In addition, SOL is attempting to coordinate its public messages concerning enforcement across regions for each of its major program areas. This effort is expected to complement agency efforts to "[d]eter through shaming."

- **Watch for early SOL intervention to strengthen later litigation.** While SOL's involvement in enforcement cases traditionally begins at the commencement of litigation, that may not be the case moving forward. SOL will endeavor to become more involved in the investigation and early prelitigation stages of DOL enforcement matters to ensure that such cases are in the best possible position moving into the litigation process. This strategy will include providing training for investigators to ensure that their questioning of witnesses and other investigative activities produce strong cases for litigation. That means that when responding to DOL generally in the more informal investigatory process, employers need to be thinking critically about how their responses will position them in possible future litigation.

- **Watch for targeted enterprise and industry enforcement.** In light of limited resources for enforcement, SOL is attempting to move its focus from company-by-company enforcement and target instead allegedly unlawful practices across industries and enterprises generally. That means that employers should be alert to industry enforcement trends, and immediately adapt their policies and procedures to match current enforcement patterns. Employers no longer have the luxury of waiting for particular industry enforcement trends to "hit" (or not) at their workplace, nor can they assume that enforcement will be limited to one facility.

- **Watch for cases that are pursued in more than one region.** As part of the Department's ongoing efforts over the last five years to try to address violations on a companywide basis, SOL will try to litigate cases at multiple worksites across regions in an effort to highlight significant violations of the laws it enforces. SOL believes that this "theme" litigation will send a message to the regulated community that violations of the laws it enforces will be vigorously pursued.

- **Watch for test cases to challenge established law.** Given that Congress is no longer controlled by a Democratic majority, employers may see SOL take on "test cases" to challenge, via the judicial process, standing interpretations of existing law and regulations that DOL and SOL identify as "impeding" workers' rights.

- **Watch for greater use of injunctive relief.** DOL believes that many employers view fines as merely a "cost of doing business." As a result, DOL is preparing to increase the number of cases in which it seeks injunctive relief.

- **Watch for an increase in the number of amicus briefs filed by SOL.** SOL plans to increase the number of amicus briefs it files throughout its various program areas. Unlike the prior administration, which filed amicus briefs on behalf of both plaintiffs and defendants, the amicus briefs filed by the Obama administration have been decidedly one sided, almost universally in support of plaintiffs. In many cases, courts have refused to defer to positions SOL has taken in amicus briefs because they exceeded DOL's authority.[2]

- **Watch for a more active regulatory agenda.** While historically SOL has not used much of its resources to support DOL's regulatory process, employers may see SOL take a more visible role in the process, attempting to help move the regulatory initiatives of the Obama administration through the system as quickly as possible. (DOL's regulatory agenda for 2011 should be issued in the next few weeks.)

Allocation of Resources by Agency

The SOL Operating Plan lays out a "specific percentage of resources" that will be devoted to each client agency in fiscal year 2011. According to the Operating Plan, SOL believes that setting out specific fixed allocations by agency will allow the agencies "to make more nuanced and informed decisions about pursuing cases that fall within articulated priorities and those that do not." In establishing "resource allocation agreements" with the client agencies, SOL used the average percentage of resources devoted to each client in the previous three years as a benchmark. During that time period, slightly more than 20% of SOL's resources went to OSHA, nearly 15% to the Mine Safety and Health Administration (MSHA), approximately 12.5% to the Wage and Hour Division (WHD), almost 12% to the Employee Benefits Security Administration (EBSA), and between 2% and 3% each to the Office of Federal Contract Compliance Programs (OFCCP) and OLMS. The Operating Plan further states that these baseline percentages may be changed to more closely reflect DOL's overall priorities for 2011.

Additionally, the Operating Plan notes that SOL historically spends about 75% of its resources on litigation, 20% on legal advice, and less than 5% on regulation. Given the aggressive regulatory agenda expected over the next two years, we expect that a higher percentage of resources will be devoted to regulation.

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[2] See, for example, our September 15, 2010 LawFlash, "Third Circuit Affirms That NutriSystem's Call Center Sales Associates Are Exempt Under the FLSA," at http://www.morganlewis.com/pubs/LEPG_NutrisystemSalesAssociates_LF_15sept10.pdf.

Wage and Hour Division

The primary focus of the SOL-WHD partnership is to help DOL take advantage of several existing, but infrequently used, litigation tools to seek maximum impact in enforcement proceedings under the Fair Labor Standards Act (FLSA). For example, SOL plans to do the following:

- Help WHD seek liquidated damages in the investigatory process as part of administrative settlements in what SOL terms the "liquidated damages pilot project."
- Develop protocols for seeking warrants and subpoenas during the investigatory process.
- Examine how to use the FLSA's "hot goods" provision (which allows WHD to restrain the shipment of goods until an employer voluntarily corrects violations under the FLSA) and other disgorgement remedies.
- Target key cases for criminal prosecution.
- Purse joint state-federal enforcement targeting misclassification.
- Target at least one employer per quarter for enterprisewide or injunctive relief.

Simply put, employers can expect that DOL will be more aggressive—and more creative—in its investigations and enforcement actions. Indeed, when it is considered in connection with the recently announced DOL-ABA referral partnership, the enforcement focus of the Operations Plan should cause employers to seriously and carefully consider their responses to every WHD audit and investigation.

Occupational Safety and Health Administration

SOL has set aggressive priorities to help OSHA's enforcement efforts moving forward. The SOL-OSHA partnership in 2011 aims to expand upon many of the practices undertaken in recent years, including (1) identifying and pursuing opportunities for decisions or settlements that enhance enterprisewide compliance, (2) providing legal advice and support to OSHA's whistleblower protection program, and (3) supporting OSHA's Severe Violators Enforcement Program (SVEP) by providing legal advice early in inspections and in litigating contested cases.

In addition, SOL has embarked on a process to identify what it believes is "wrongly-decided, adverse precedent" and then to develop litigation strategies to systematically attempt to overturn the adverse precedent. In a somewhat related move, SOL, along with OSHA and MSHA, has established a "Penalty Reduction Task Force," whose goal is to attempt to remove the discretion and authority currently possessed by OSHA administrative law judges (ALJs) and the OSHA Review Commission to establish penalties; specifically, the task force will seek "to lower the rate of cases in which Administrative Law Judges and the Commission substantially reduce OSHA penalties."

These efforts by SOL to fundamentally alter the OSHA legal landscape are consistent with changes at OSHA itself. The agency, under the leadership of Dr. David Michaels, has been moving in a new direction for at least the last year. That push for change will be bolstered by SOL, according to its Operating Plan—and SOL will be an important ally for OSHA as legislative enactments, such as the Protecting America's Workers Act (PAWA), appear unlikely to be passed in the new Congress.

Additionally, in an effort to develop creative ways to force companies to reduce exposure to chemicals to levels below the regulatorily established limits, SOL plans to help OSHA develop new cases under the general duty clause where the exposure is below an OSHA permissible exposure limit (PEL). Among other specific plans for the coming year, SOL intends to do the following:

- Work with OSHA on an "Ergonomics Response Team" to identify cases and develop legal theories to address ergonomic hazards.

- Develop a strategy to litigate against companies that evade penalties and compliance by going in and out of business.

- Help OSHA complete its workplace violence directive, and identify cases that may further related enforcement goals.

- Instruct all regional OSHA counsel to aggressively support efforts to expand inspections to other corporate facilities when severe violations are identified.

In addition, SOL's Operating Plan provides insight into OSHA's top regulatory priorities for the coming year, revealing that the agency (1) expects to complete a revision to its Corporate-wide Settlement Agreement directive by the end of March 2011; (2) plans to complete a proposed rulemaking on silica, issue a final rule on electrical hazards in the construction industry, and complete the Small Business Regulatory Enforcement Fairness Act (SBREFA) process for injury and illness prevention programs standard by April 2011; and (3) plans to complete both a final rule on hazard communication standards and the SBREFA process for combustible dust by August 2011.

Finally, SOL is also anticipating and preparing for litigation of an expected challenge to (1) the crane, shipyards, and derricks standard and (2) the musculoskeletal disorder (MSD) column amendment to the recordkeeping rule.

Office of Federal Contract Compliance Programs

Although SOL has traditionally devoted only a small percentage of its resources to OFCCP, it expects to accomplish a lot with this allocation in the coming year. Initially, SOL plans to complete, by the end of 2011, a systematic review of 25 existing referrals from OFCCP. SOL is expected to prioritize a few of the cases for litigation and to either drop or "quickly" settle the remaining cases. SOL is also working to develop a "strategic investigative process" that it likens to a discovery plan to facilitate enterprisewide enforcement. Finally, SOL expects to work with OFCCP to streamline and triage its current caseload, determining whether cases are best referred to the Department of Justice (DOJ) for prosecution (where debarment is not an option), to SOL for enforcement (where debarment is an option), or to OFCCP to pursue settlement.

Employee Benefits Security Administration

Both the unstable economic recovery and the passage of healthcare reform appear to have had a heavy influence EBSA's priorities. As expected following the passage of healthcare reform, there is significant emphasis moving forward on rulemaking at EBSA. In addition to the healthcare regulations, SOL plans to assist EBSA with rulemaking in a number of areas, including developing a rule to broaden the definition of fiduciary under ERISA, with a September 2011 target date for a final rule.

On the enforcement side, SOL has set a goal of filing at least 16 amicus briefs over the next year, with a target of four amicus briefs each quarter. As part of this amicus effort, and consistent with SOL's efforts to expand liability in other program areas, SOL intends to focus on what it believes are "difficult cases that will be hard to win." SOL also plans to work with EBSA to examine how to use DOL's new cease-and-desist authority for financially distressed Multiple Employer Welfare Arrangements (MEWAs) and to develop an effective approach to enforcing the new rights created by the Patient Protection and Affordable Care Act, despite SOL's acknowledgment that the act does not provide new statutory remedies. Finally, SOL will continue to support EBSA's general enforcement priorities, which have been relatively stable over the years, with a renewed focus on reducing delinquent Form 5500 filings.

Mine Safety and Health Administration

The focus of the MSHA-SOL partnership appears to center on twin goals: (1) to help reduce backlog in MSHA cases and (2) to strengthen MSHA's approach to pattern violations. This newfound aggressiveness in MSHA, again, may be in large part a recognition that expected mine safety legislation that would give MSHA more enforcement authority is bogged down in Congress.

Similar to the priorities established for other DOL agencies, SOL's MSHA priorities relate to attempting to force changes in the law. As it is doing with OSHA, SOL is examining ways it might be able to reduce the Mine Safety and Health Review Commission's (MSHRC's) authority to establish penalties. It is also working to identify and challenge what it believes is wrongly decided adverse precedent. SOL is also working closely with MSHA to "challenge" the MSHRC's definition of a "significant and substantial" violation, which MSHA believes encourages employers to contest violations at a higher rate than they otherwise would. SOL is also working to develop "holistic settlements" to enhance enterprisewide compliance. As part of this effort, SOL is seeking to develop a theory to clarify—and presumably expand—the term "operator."

SOL is working with MSHA to pursue at least one injunctive action against a violator by March 2011, and to help MSHA prepare a number of new rules related to safety and health programs, preshift and other examinations, respirable silica, and underground mine proximity systems. SOL also plans to tackle operators with a pattern of violations, assisting MSHA with both a rulemaking by January 2011 and a task force to specifically identify patterns and strategies for how best to deal with them.

Other Initiatives

The Operating Plan also contains a number of additional initiatives for the remaining DOL agencies. Of greatest relevance to most employers are the following plans:

- SOL will work with OLMS to (1) launch a pilot program to pursue litigation to compel filing of reports; (2) help OLMS complete a rulemaking to expand persuader reporting; (3) attempt to resolve questions with DOJ on overcoming adverse precedent that SOL believes has limited OLMS's ability to enforce Form LM-21, which must be filed by consultants to employers; and (4) help OLMS "[r]einstate a robust enforcement policy related to the LM-21."

- SOL will partner with the Veterans Employment and Training Service (VETS) to enhance enforcement under the Uniformed Service Employment and Reemployment Rights Act (USERRA) by (1) exchanging information regularly on USERRA litigation matters with the Justice Department's Civil Rights Division and the Office of Special Counsel and (2) providing litigation-oriented instruction to USERRA investigators at regional training sessions and on an

as-needed individual basis on issues relevant to case investigations and litigation.

Practical Suggestions for Employers

Employers should be aware that the SOL's Operating Plan suggests stepped-up, more aggressive enforcement and an ever-increasing regulatory agenda moving forward. The loss of the Democratic majority in Congress will not likely slow DOL's current efforts at reform in the workplace. Indeed, DOL appears to be stepping up its activity following the recent elections, and the primary battleground appears to be shifting from Congress to the regulatory agencies and, in some cases, to the courtroom. Employers that undergo audits or investigations must be mindful of the new approaches the Department is taking, including its efforts to extend the law and expand local investigations into much larger corporatewide investigations. Additionally, employers under investigation should expect that the agencies are actively looking for test cases to challenge a number of existing legal theories and will seek publicity for enforcement actions whenever possible.

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