

## **Secretary of Labor to Eliminate the Employment Standards Administration**

**July 10, 2009**

All employers should take note of a forthcoming significant reorganization at the Department of Labor (DOL) involving the Wage and Hour Division (WHD), the Office of Labor-Management Standards (OLMS), the Office of Federal Contract Compliance Programs (OFCCP), and the Office of Workers' Compensation Programs (OWCP). The DOL recently announced that the Employment Standards Administration (ESA), the umbrella agency that is currently responsible for the management of these four agencies, will be abolished as of November 8, 2009. As a result of this action, these four subagencies will instead be reporting directly to the Office of the Secretary of Labor as stand-alone organizations. The internal announcement emphasized that the planned reorganization will "improve" the policy-making process for these agencies and "enhanc[e] the Department's responsiveness in enforcing key worker protection laws."

This move comes on the heels of Secretary of Labor Solis's recent promise to "reinvigorate" the WHD and spearhead a renewed effort to increase the enforcement of worker protection laws. The WHD has already started the process of hiring several hundred new field investigators, increasing the agency's staff by more than a third. Other DOL agencies, including OFCCP and OSHA, have also received additional resources to increase enforcement staff.

This reorganization is the first major restructuring of the administration of these agencies in close to 40 years. The ESA was established in 1971 as the Workplace Standards Administration, and was renamed the Employment Standards Administration in 1972. For the last 38 years, the ESA, currently the largest agency within the DOL, has been responsible for the management of the WHD, the OLMS, the OFCCP, and the OWCP. Under this system, it was the Assistant Secretary for the ESA, not the heads of these agencies, who had the authority to report directly to the Secretary of Labor.

The WHD is responsible for enforcing the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), and a host of other employment standards and worker protections. The OLMS enforces provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The OFCCP is responsible for enforcing the equal opportunity and affirmative action requirements of Executive Order 11246, as well as provisions of the Rehabilitation Act of 1973 and the Vietnam Veterans' Readjustment Assistance Act of 1974. The OWCP administers four major disability compensation programs providing benefits for disabilities resulting from workplace injuries.

## What This Means for Employers

Because the abolishment of the ESA eliminates a layer of bureaucracy, each of these agencies will have a closer relationship with the Secretary of Labor and the Deputy Secretary, allowing agency heads direct access to DOL's Front Office to facilitate requests for budget and other resource needs. In addition, each of these agency heads will have greater control over enforcement matters and policy decisions, as well as greater responsibility for public relations and interactions with Congress. This reorganization also provides the Secretary and the Deputy Secretary with greater control over these agencies, potentially streamlining their ability to change policy approaches, including more aggressive enforcement stances. These changes are just another indication of the DOL's new emphasis on enforcement, particularly of the FLSA and the equal opportunity and affirmative action requirements of Executive Order 11246, as well as statutes enforced by other DOL agencies, such as the occupational safety and health requirements under the OSH Act.

Importantly, the abolishment of the ESA will leave employers with one less avenue of appeal for actions taken by the ESA agencies. Previously, employers that felt aggrieved by actions taken by the ESA agencies or that were having difficulty obtaining guidance from an ESA agency (such as in the case of a request for a WHD opinion letter) could seek the assistance of the ESA's Assistant Secretary or Deputy Assistant Secretary. This avenue will no longer be available and could work to the detriment of employers.

This impending reorganization likely means that employers do not have much time to prepare for what promises to be decisive implementation of the Secretary's pro-enforcement agenda across the broad spectrum of workplace laws and regulations enforced by the DOL. While the DOL is focused on this reorganization, employers may want to review their policies and practices to determine if they are in full compliance with the laws the DOL enforces.

We will continue to watch for enforcement trends as the DOL implements the transition process over the next few months. For more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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