

White House Announces Joint DOL-ABA Private Attorney Referral Program for FLSA and FMLA Claims; Employers Should Be Mindful of Potential Consequences

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On November 19, Vice President Joseph Biden announced a joint initiative between the Department of Labor (DOL or the Department) and the American Bar Association (ABA) to assist plaintiffs in obtaining legal counsel for claims under the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). Under the program, which the ABA described as the “first-ever federal agency, private bar collaboration,” the DOL will provide a referral to a private lawyer in situations where the DOL’s Wage and Hour Division decides not to pursue a claim. In addition, as described below, the DOL intends to inform employees about the DOL’s initial determinations regarding back wages owed. The program is part of the Obama administration’s Middle Class Task Force initiative.

Details on the Referral Program

The new DOL-ABA program begins on December 13, 2010. Under the program, the DOL will provide workers with a toll-free telephone number that will connect them to a newly created ABA-approved attorney referral system. The national toll-free number will, in turn, advise workers of the ABA lawyer referral information service in their area. The ABA intends to coordinate referrals through state and local bar referral agencies, which will provide workers with contacts for private lawyers in their area.

According to the ABA, the referral program will comply with the ABA’s model ethics rules and require “consumer safeguards” such as verification of an attorney’s bar membership, proof of malpractice insurance or financial responsibility, and screening to ensure that lawyers participating in the referral program have “sufficient experience” in litigating FLSA or FMLA claims.

We expect that the information on this new DOL-ABA program will be included in the standard letter informing workers that the DOL is declining to pursue their claim. According to the DOL’s press release, the DOL’s Wage and Hour Division also intends to provide the complainant in writing “the Wage and Hour Division’s determination regarding the violations at issue and back wages owed.” Moreover, the DOL has developed what it calls “a special process” for complainants and their attorneys to “quickly obtain certain relevant case information and documents when available.”

The Unique Nature of the Program and Tips for Employers

Although this initiative is the first of its kind between a federal agency and a private bar association, its announcement is not unexpected when considering that one of the DOL’s stated strategies since the

Obama administration took office is to achieve compliance through referrals to outside entities. Nevertheless, this new program raises a number of issues that employers must consider in responding to DOL investigations.

Employers should recognize the initiative’s potential to increase both single-plaintiff and collective action litigation in situations where the DOL declines to bring a case but where private lawyers may now do so as a result of the referral program. In addition, of great concern is that the DOL intends to inform complainants of its initial determinations of violations and back wages in cases in which it will not pursue a claim. In most cases, this will occur when the Wage and Hour Division has (1) not made a final determination concerning liability and back wages because it is declining to pursue the claim; (2) not conducted a thorough, full investigation, as the DOL would if it intended to pursue the case on its own; and (3) never coordinated with the DOL’s Solicitor’s Office on whether a claim could be successfully pursued in litigation. Moreover, because the DOL generally protects the identity of complainants, employers may have difficulty obtaining an unredacted copy of the DOL’s purported “findings,” although such documents should be discoverable in any subsequent private litigation.

In addition, because of the initiative’s investigatory material “sharing” component, employers must closely monitor what is stated and provided to the DOL in an effort to resolve a case at the administrative level. Employers should ensure that any information provided to the DOL includes, as appropriate, an express disclaimer that the information may be confidential and protected from disclosure under the Freedom of Information Act. Employers should also be aware of the potential for the DOL to use the prospect of private litigation as incentive for settlement with the Department. In fact, the DOL itself indicated that the written summary of the violations and back wages “will be very useful for attorneys who may take the case.”

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