

DOL Leadership Taking Shape with OSHA and OFCCP Announcements

July 31, 2009

The Obama administration has chosen leaders for two key agencies at the Department of Labor (DOL). First, President Obama has chosen Professor David Michaels to be Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA). We anticipate that if confirmed, Professor Michaels will have a very ambitious regulatory agenda, including a number of health standards, rulemaking on comprehensive Workplace Safety and Health Program standards, and possibly revisions to the recordkeeping rules—including a close examination of how ergonomic injuries are recorded. On the enforcement side, Professor Michaels is also likely to focus more attention on general duty clause citations, particularly those involving ergonomics.

Second, it is expected that Patricia A. Shiu, an attorney with the Legal Aid Society of San Francisco, will take the helm at the Office of Federal Contract Compliance Programs (OFCCP) in September. Ms. Shiu has been focused on civil rights issues and has been involved in many important cases at both the federal and state levels. We expect she will bring her litigation background to Washington and continue to strengthen OFCCP's enforcement capabilities.

With these two appointments, Secretary of Labor Hilda Solis's leadership team has now taken shape, although a number of appointees, most prominently Solicitor of Labor nominee M. Patricia Smith, Administrator of Wage and Hour Division nominee Lorelei Boylan, and Assistant Secretary of Mine Safety and Health nominee Joseph Main, have not yet been confirmed and are not expected to be confirmed before the Senate leaves next week for its summer recess.

These two appointments to head key DOL enforcement agencies are especially important given the Obama administration's focus on enforcement of worker protections and on examination of companies that work on stimulus projects. In particular, OSHA, OFCCP, and the Wage and Hour Division are expected to institute vigorous oversight and enforcement programs around projects funded with stimulus money to ensure all workers involved in stimulus-funded projects receive the benefits of these protections. As these new appointees assume their positions and get up to speed with the requirements of their offices, employers may want to take a close look at their policies and practices to determine if they are fully compliant with the laws the DOL enforces. Such a review may be especially important for employers involved in stimulus projects.

Intention to Nominate David Michaels for Assistant Secretary of Labor OSHA

The Obama administration announced on July 28 that Professor David Michaels would be nominated to serve as the next Assistant Secretary of Labor for OSHA. David Michaels, an epidemiologist, is currently Research Professor and Interim Chair of the Department of Environmental and Occupational Health at the George Washington University (GWU) School of Public Health and Health Services. He also directs GWU's Project on Scientific Knowledge and Public Policy, which examines the "use and misuse" of science in public policy development in regulatory agencies and in the courts. If Professor Michaels is confirmed by the Senate, Jordan Barab, currently the acting head of OSHA, will continue with OSHA as the Deputy Assistant Secretary.

In addition to his extensive background in the field of safety and health, mainly from the academic perspective, Professor Michaels also has experience as an agency leader. Under President Clinton, he served as the Department of Energy's (DOE's) Assistant Secretary for Environment, Safety and Health from 1998 to January 2001, where he led the effort to develop rulemakings on beryllium and on nuclear safety management.

While it is still too early to predict exactly how Professor Michaels will run OSHA if he is confirmed as the next Assistant Secretary, a review of his background, writings, and recent congressional testimony provides certain clues as to his viewpoints and perspectives:

- Regarding regulatory and public policy, his work has focused on the use of science in the development of regulations to protect public health, particularly on how industry-funded scientific research impacts this regulatory process. In one article, he recommended that Congress adopt "Sarbanes-Oxley for Science" legislation requiring more public disclosure of industry-funded scientific studies, and preventing sequestration of unfavorable industry-funded data.
- Regarding OSHA, he testified in April 2007 that despite some improvements in workplace safety and health, OSHA enforcement had not been able to further reduce workplace incidents, and will not be able to do so, without significant changes. Professor Michaels attributed the recent declines in workplace injuries and illnesses largely to changes in OSHA's recordkeeping rules. He further noted that the true incidence of workplace injuries and illnesses is "far higher" than reported because in his view the statistics fail to capture two-thirds of actual work-related injuries and illnesses.

We anticipate that if confirmed, Professor Michaels will likely focus OSHA on the following rulemakings: (1) beryllium, (2) diacetyl, (3) silica, and (4) comprehensive standard to cover the many hazardous chemicals that OSHA does not currently address (including requiring OSHA to adopt by rulemaking Threshold Limit Values (TLVs) for hazardous substances as determined by ACGIH). We also expect that, after receiving preliminary results from the expected upcoming recordkeeping National Emphasis Program, Professor Michaels will seriously consider changing the recordkeeping rules and will take a critical look at the recording of ergonomic injuries in particular.

We believe that one of his top priorities as Assistant Secretary would also be for the agency to issue a comprehensive Workplace Safety and Health Program standard, under which every employer would be required to develop and follow a hazard reduction plan for all hazards on its jobsite by assessing each hazard (both "real and potential") and developing abatements for each such hazard. Under such a standard, the CEO or chief responsible officer for every employer would likely be required to sign off on such plan.

In terms of enforcement, employers should expect to see a sharp increase in the use of the general duty clause. While it is unclear whether Professor Michaels will direct OSHA to draft a new ergonomics standard, employers should expect to see significantly more general duty clause citations for ergonomics. He has stated that “work-related musculoskeletal disorders are by far the leading cause of workplace injuries,” and that in his view, the Bush Administration’s approach to ergonomics, including industry-by-industry guidelines, failed to address this problem. Finally, in addition to any legislative changes that might be enacted into law, expect to see changes in how OSHA assesses penalties for violations.

Patricia A. Shiu to Be Named Director of OFCCP

Patricia A. Shiu, Vice President, Programs of the San Francisco Legal Aid Society–Employment Law Center (LAS-ELC) will be appointed as the next Director of the OFCCP. As the position of Director of OFCCP does not require Senate confirmation, it is expected that Ms. Shiu will assume her position as the head of OFCCP in September.

Ms. Shiu has been with the LAS-ELC for 25 years, focusing on low-income workers and family/workplace balance issues such as family and medical leave laws. She has been described by colleagues as someone with a “passion for the cause,” and her professional background offers every indication that she will aggressively implement Secretary Solis’s pro-enforcement agenda at OFCCP.

While with LAS-ELC, Ms. Shiu has had an active litigation practice involving employment discrimination, leave rights, education cases under the ADA or Title IX, and wage and hour cases. Ms. Shiu has pursued pro-worker positions in high-profile discrimination litigation. For example, she filed an amicus brief in *California Fed. Savings & Loan Assn. v. Guerra*, 479 U.S. 272 (1987), in which she argued that the California pregnancy leave statutory protections were not preempted by the federal Pregnancy Discrimination Act. The Supreme Court ultimately agreed with her position. In *Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846 (Cal. 1999)—a class-based racial harassment case—she filed a successful amicus brief in which she argued against a First Amendment challenge to the lower court’s injunction prohibiting employees’ continued use of racial epithets in the workplace.

LAS-ELC has long focused on affirmative action. Since 1994, the LAS-ELC has maintained an Affirmative Action Project that is described as “[a]lmost entirely litigation-based” and “seeks opportunities to develop remedies in race-related workplace discrimination cases that will lead to greater opportunity for women and people of color in the workplace, and to intervene or file amicus briefs in actions where affirmative action programs are under attack.” Under this project, the LAS-ELC filed amicus briefs in high-profile cases challenging affirmative action in the award of government contracts, such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995), in which the Court held that race considerations in the award of public contracts are permissible only if narrowly tailored to serve a compelling governmental interest.

Ms. Shiu’s long experience as a litigator and commitment to worker rights may suggest that she would continue OFCCP’s emphasis on systemic discrimination and seek to improve the agency’s capability to develop statistical evidence of discrimination that can support enforcement litigation. Also, once DOL completes its elimination of the Employment Standards Administration in November, Ms. Shiu will be reporting directly to the Secretary and should have significantly greater access to Secretary Solis and Deputy Secretary Harris.

Conclusion

These two new appointments continue the implementation of Secretary Solis's pro-enforcement agenda across the broad spectrum of workplace laws and regulations enforced by the DOL. Employers should consider proactive steps to review their compliance with existing OSHA and OFCCP requirements to prepare for this new challenging enforcement and regulatory environment. We will continue to watch for enforcement trends as the new appointees join DOL and begin implementing their approaches to policy and enforcement.

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