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# "P-Cubed": DOL To Require Employers To Show Advance Compliance With Pay, Discrimination and Other Laws

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Later this year or early next, the U.S. Department of Labor ("DOL") is expected to announce a new regulatory strategy — called "Plan, Prevent and Protect" (which we have dubbed "P-Cubed" for this article) — to require employers, as DOL puts it, to "find and fix" violations of federal wage/hour and other laws "before DOL investigators find them." The impetus for this, according to DOL, is the need to crack down on employers who DOL believes have a "catch me if you can" mentality.[1]

While that may be a worthy goal, unfortunately it appears the new DOL regulatory program is intended to apply across the board, and therefore may impose substantial administrative and other burdens and costs on both the "good" employers, who DOL says "should be congratulated for their responsible behavior" and as to whom "no government intervention in their workplaces is required," and the "catch me if you can" operators whose behavior DOL seeks to change. All are tarred with the same brush.

Under this new program, for the first time, federal regulations may require employers not only to draft and issue written compliance programs for a variety of federal laws in advance of any claim or lawsuit, but also to give employees a strong voice, or at least an oversight function, with regard to both the formulation and the enforcement of the employer's compliance plans.

P-Cubed will be a multi-agency initiative, involving a slew of agencies overseen by DOL, including Wage and Hour Division ("WHD"), Occupational Safety and Health Administration ("OSHA"), Mine Safety and Health Administration ("MSHA"), Office of Federal Contract Compliance Programs ("OFCCP"), and Employee Benefits Security Administration ("EBSA"). All will be expected to issue regulations requiring employers to take affirmative steps to ensure compliance with federal wage-and-hour, safety and anti-discrimination laws. The regulations will insure that violations found by one agency are immediately reported to the agency best equipped to take action and impose remedial sanctions where appropriate against offending employers.

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*The Purpose of P-Cubed*

As DOL has previously announced, one of its new initiatives under the Obama administration is "Openness and Transparency" in employment relations, the stated goal being "Good Jobs for Everyone." The stated purpose of the P-Cubed approach is to see to it that the onus for compliance with federal wage and hour, safety and (for federal contractors) anti-discrimination laws is placed squarely on the shoulders of employers. As part of the initiative, employers will be required to create compliance action plans to address compliance with each of these federal laws.

Employers have always understood that any time an employee makes a claim of failure to pay proper overtime, or of unsafe working conditions, or discrimination, the employer, in order to defend itself, will have to prove that in the employee's individual case the employer complied with the federal law applicable to the employee's specific claim. There is nothing unusual about that.

Under P-Cubed, however, not only will employers face that usual business risk, but, depending on how the final regulations are drafted, they may also be required to make an affirmative showing, in advance of any specific claim or lawsuit filed by an individual employee, that they are in general compliance with each those laws.

In other words, it will not be enough to focus on whether the individual employee was or was not the victim of discrimination, or was or was not paid properly, or was or was not subjected to an unsafe working condition. Rather, or so it seems, the employer will have to demonstrate, in advance — and to the satisfaction of the DOL — general compliance, not just as to a single employee who has asserted a specific claim, but as to the employer's entire workforce; and not just as to the law applicable to the individual employee's specific claim, but as to all federal laws within the DOL initiative's purview.

And, for the first time, in formulating their compliance plans, employers may not be able to act independently in exercising their business judgment involving legal compliance issues, but instead may be required to give employees a seat at the table, or at least the right to monitor and oversee the effectiveness of their compliance plans. This includes, presumably, the right to report to the government not only what employees consider to be violations of their employer's plans, but also possibly the right to report on employer-adopted plans that employees believe are ineffective or do not go far enough.

As the DOL describes it, the new strategy will require employers "to improve the content, implementation, and evaluation of these existing, hazard-specific protection plans and programs. But it also proposes new rules in new areas based on the same philosophy." In other words, the new regulations will require employers to formulate new compliance plans, not just retool existing plans.

According to its published statements, DOL appears to be of the view that while "many employers have a culture of compliance" and "should be congratulated," and others are simply ignorant of the law, some make a calculated decision not to comply with the law, based on weighing the costs of compliance against the risks and penalties associated with getting caught — what the DOL described as a "catch me if you can" mentality. The P-Cubed initiative is intended to crack down on that

mentality. As DOL put it, employers must "find and fix" violations before DOL investigators find them. Employers "must understand that the burden is on **them** to obey the law, not on the Labor Department to **catch them** violating the law."

While conscientious employers who already take steps to insure compliance with federal laws will appreciate DOL's effort to bring these "catch me if you can" operators into compliance and thereby reduce or eliminate the competitive advantage the latter sometimes have due to the compliance costs they save by gambling that they will not get caught, the new program does come with additional compliance costs and burdens to the responsible employers as well, in that the formulation of all of these new written plans and programs, and the coordination efforts with employee groups in the formulation, implementation and enforcement of these plans that DOL seems to envision, lay on additional bureaucratic requirements that translate into hours and dollars diverted from the employer's regular business activities. This is therefore a case of a few bad apples spoiling the whole barrel.

*What Do the "P's" Mean In DOL's Parlance?*

According to the recent DOL pronouncement, the "Plan" component means that employers will be required to create plans and processes "for identifying and remediating risks of legal violations and other risks to workers." The DOL is considering requiring employers to work with employees in the creation of these plans and, at the very least, employers will be obligated to distribute the plans to employees so that they can fully understand the plans and monitor their employers' compliance.

"Prevent" means that employers will be required to "thoroughly and completely implement the plan in a manner that prevents legal violations." Employers must demonstrate to employees that the plans are actually in use. As DOL explained, "The plan cannot be a mere paper process. The employer … cannot draft a plan and then put it on a shelf. The plan must be fully implemented" for the employer to be in compliance.

Finally, the "Protect" component means that employers will be required to "ensure[] that the plan's objectives are met on a regular basis." "The plan must actually protect workers from violations of their workplace rights." Employers will be required to designate certain workers to be charged with implementing plans and evaluating their effectiveness.

Employers who "fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and [will be] subject to remedial action." The preliminary announcement does not specify what form that remedial action might take.

*What Are Some Examples Of The Types of "Plans" DOL Might Require?*

While the DOL's published announcement of this new initiative leaves many of the details to be addressed in the final regulations — for example, what exactly will employers be required to do to demonstrate to employees that the plans are actually in use, and how far will the plans have to go to "ensure" that legal violations will be "prevented?"— the DOL official who announced the new initiative did provide some

examples of the types of issues it was designed to address, particularly the classification of independent contractors.

*Independent Contractors*

Whether an employer has correctly classified certain individuals as independent contractors is a hot-button issue both with DOL and with many state employment taxation agencies. Making the wrong classification decision can have major federal and state employment tax, employee benefits and other financial implications. In the past, employers have made this decision in a variety of ways; some employers were probably more diligent than others in considering the relevant legal factors. Some, if not many, may have relied on in-house or outside legal analysis. Under current law, in particular IRC Section 530, to the extent the employer had a "reasonable basis" for the classification decision at the time it was made, including reliance on the advice of a business lawyer or accountant who had the requisite training and access to relevant facts, and if the employer satisfied all of its other requirements, Section 530 provides a "safe harbor," under which, if the employer's decision qualified, the IRS would not retroactively reclassify "independent contractors" as employees, with all of the financial implications that come with such a reclassification.

Bills have been introduced before both houses of Congress, however, that seek not only to do away with or severely limit the "safe harbor" provision of Section 530, but also to impose on employers additional record-keeping requirements, substantial penalties and liquidated damages for independent contractor misclassifications.

If any of these legislative proposals prevail, the misclassification of independent contractors will become an even more serious problem for employers with even greater adverse consequences. Even if these initiatives do not prevail, independent contractor misclassification will continue to present serious risks for employers from the state employment tax and employee benefits standpoint. In this respect, the DOL's P-Cubed initiative could be of assistance in forcing employers who in the past have not given sufficient thought or analysis to their independent contractor classification decisions to do so now.

Under the DOL's initiative, it appears an employer will have to create a process and procedure, including working in collaboration with individuals holding the position, to assess whether a job is properly classified as an independent contractor position. Once the written analysis is complete, the employer may have to distribute the written analysis to the worker while keeping a copy of its analysis on hand for recordkeeping purposes. Next, the employer would have to designate a certain employee to be responsible for implementing the plan and keeping it current with wage-and-hour laws. Finally, the employer will have to conduct periodic reviews of the plan to ensure that its objectives are being met.

If one reads literally the "Prevent" component's requirement that the plan the employer adopts must "prevent legal violations," or the "Protect" component's requirements that the employer "ensure[] that the plan's objectives are met on a regular basis" and that the plan "actually protect workers from violations of their workplace rights," one cannot help but wonder, is this intended to make the employer a guarantor that its classification decision was correct?

In addition, the new strategy will require federal agencies over which DOL has oversight to coordinate their enforcement efforts against employers found to have misclassified independent contractors. WHD will be expected to coordinate both with EBSA, the agency that has oversight responsibility regarding employee benefits, "to resolve the benefit rights of misclassified employees and report related violations of plan provisions and ERISA [Employee Retirement Income Act] to EBSA," and with IRS, so that it can recover federal employment taxes applicable to employees but not independent contractors, such as FICA, FUTA, FIT and applicable penalties and interest. WHD will also be expected to coordinate with state employment tax agencies, such as California's Employment Development Department, to enable those agencies to collect state employment taxes and other required withholdings.

*Other Job Classification Decisions*

In addition to the hot-button issue of independent contractors, DOL's announcement of its upcoming initiative is certainly worded broadly enough to suggest that employers would also be responsible for conducting similar job analyses with respect to *any* position for which the employer believes an FLSA exemption — executive, administrative or professional — is applicable.[2] Employers, particularly those in California, have been put through the litigation wringer on classification issues, typically arising in the context of a class action filed on behalf of all employees working in a job classification the employer had categorized as exempt. Even where a strong argument existed to support the classification decision, because of the high-stakes nature of class action cases, in many cases the litigation prompted employers to reclassify the affected employees as non-exempt to avoid future risk.

The DOL's initiative appears to require an assessment to be conducted for every job an employer has classified (or in the future wishes to classify) as exempt. While many employers may have conducted such an analysis at the time of the original classification decision, many others may not have; and to the extent those that did involved counsel, they likely considered the analysis protected by the attorney/client privilege, whereas the analysis the DOL envisions would unlikely qualify for the privilege. Thus, it would be fair game for litigation. Hence, extreme care should be taken in drafting it.

Again, although it is probably too late for many employers in California, this job analysis to be required by the DOL, seemingly to involve an "interactive process" of sorts with the employee-job holder, could have a salutary effect in focusing employers' attention on whether the jobs they currently think are exempt really are exempt and in emphasizing to the job holder the duties required of them. The problem is, in many cases making a classification decision as to a particular job or position involves making careful legal judgments about which reasonable minds can differ. Thus, again, care in conducting the analysis, and in considering and properly weighing the factors the courts look to in determining whether a given classification is correct, is essential.

*Safety Compliance Plans*

Similarly, an employer seeking to comply with federal safety laws may be required by the new strategy to develop an Injury and Illness Prevention Plan ("IIPP"), as is already required in California.[3] Under the IIPP, employers would have to audit their

relevant safety and health information, develop procedures for inspecting the workplace for safety and health hazards and investigating accidents, develop written plans, possibly in conjunction with workers, to improve safety and demonstrate to workers that the plans have been implemented, and circulate safety plans to workers so that they can understand the plans and monitor their employers' compliance. Next, the employer may be required to designate workers to monitor and evaluate the success of their compliance with the plans as well as conduct management trainings on safety issues to ensure that managers are aware of and able to implement the plans they create.

*Anti-Discrimination Compliance Plans*

Finally, an OFCCP-regulated employer (i.e., one that has a qualifying federal contract) seeking to comply with federal anti-discrimination laws may be required by the new strategy to draft, implement and disseminate a policy prohibiting discrimination, harassment and retaliation on the basis of protected categories, and conduct management trainings to teach managers about their employer's anti-harassment/discrimination policy and how to avoid the appearance of discrimination, harassment or retaliation, a requirement similar to that imposed by laws governing employers in California, Connecticut, Maine and the Virgin Islands.

*What Other Plans Might Be Required?*

DOL's initiative is worded sufficiently broadly as possibly to apply to all manner of wage and hour and other compliance issues. If, for example, it is an employer's responsibility to promulgate plans that literally "ensure" against wage and hour violations, the initiative could go so far as to require employers to consider, and draft plans regulating, all aspects of its pay practices, from how to handle "donning" and "doffing" issues (as to which even the courts are in some disarray), to methods for insuring that existing "off the clock" work prohibitions are complied with, to dealing (in some jurisdictions) with rest break and meal period issues. In short, every conceivable aspect of wage and hour compliance.

According to DOL, employers who "fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law" and may be subject to remedial action. This means that the DOL could fine an employer who failed to enact a compliance plan even when no substantive violation exists.

*Be Prepared*

While the new strategy may increase employer compliance with federal laws, it also will impose significant additional costs and burdens on both responsible and irresponsible employers. It will also likely encourage employees and independent contractors to file complaints with the DOL or bring civil lawsuits against their employer for perceived violations of the new regulatory scheme.

Although many employers are proactive in instituting and monitoring policies compliant with wage-and-hour, safety and anti-discrimination laws, many others, at least according to DOL, are reactive, doing little or nothing until forced to act by a

DOL audit or employee complaint. Given the new "Plan, Prevent, Protect" regulatory strategy, the DOL has made it clear that the latter approach will no longer suffice.

Employers will want to get out ahead of these upcoming initiatives. To do that, they will want to take at least the following steps:

- Analyze all existing independent contractor engagements to see if they pass muster under the common law and IRS tests, and if they do not, make appropriate changes;
- Analyze all existing exempt job classifications (in many cases this will need to be done on an individual employee by individual employee basis) to see if the legal requirements of both federal and (where applicable) state exemption rules are satisfied;
- Identify and analyze pay practices with respect to other wage and hour issues, including what the FLSA refers to as "preliminary" and "postliminary" activities, "off the clock" work and other issues, and craft appropriate policies to foster compliance with wage and hour laws;
- Analyze physical workplaces from the standpoint of worker safety (OSHA provides a workplace self-inspection checklist that is helpful in this regard), and consider drafting an appropriate IIPP;
- For OFCCP covered employers — for that matter, all employers, since this proactive approach may catch the attention of other government agencies such as EEOC — formulate anti-discrimination plans and analyses, possibly including conducting periodic statistical wage and promotion equality audits and then taking appropriate steps if those audits identify a problem or area of concern.

Employers should also analyze, on a company-wide basis, whether and to what extent their existing policies are actually being *implemented* in the workplace. In our experience, many employers have all the right policies and try hard to "do the right thing," but still find themselves easy targets for litigation because their policies have not been communicated as well as they could have been or have not been properly enforced. If, in conducting this analysis, issues or violations are uncovered, this is an opportunity to remediate them early on and potentially avoid litigation.

Finally, as part of their "implementation" efforts, employers should consider conducting regular comprehensive management trainings in federal wage-and-hour, safety and anti-discrimination laws to ensure that front-line managers are attuned to these issues and understand and follow company policies regarding them.

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[1] The full text of the initiative, announced as part of DOL's Spring 2010 Regulatory Agenda, entitled "Department-Wide Regulatory and Enforcement Strategies — 'Plan/Prevent/Protect' and Openness and Transparency," is available on-line at www.dol.gov/asp/regs/agenda.htm. The DOL's semiannual regulatory agenda is a listing of regulations DOL expects to have under active consideration during the upcoming year.

[2] *See* WHD's Notice of Proposed Rulemaking (NPRM) at www.dol.gov/regulations/factsheets/whd-fs-flsa-recordkeeping.htm, which states, "Any employers that seek to exclude workers from the FLSA's coverage will be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it."

[3] As of this writing, OSHA is developing rulemaking that would require employers to develop and implement IIPPs. *See* www.dol.gov/regulations/factsheets/osha-fs-I2P2.htm.