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# DOL Debuts Regulatory and Enforcement Agenda; New Burdens on Employers

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On April 26, the Department of Labor (DOL) released its spring 2010 regulatory agenda outlining its anticipated regulatory and enforcement focus for the upcoming year. In connection with the release of the spring 2010 agenda, the DOL announced a new "departmentwide regulatory and enforcement strategy," which it dubbed "Plan/Prevent/Protect." This new initiative builds upon the DOL's previously announced and ongoing "Openness and Transparency Initiative." If fully implemented by the DOL, the "Plan/Prevent/Protect" program may have a significant impact by requiring employers to prepare, implement, and share with employees comprehensive compliance programs in the workplace. Although the agenda itself gives little detail about the scope of the proposed program, the changes that are outlined will require employers to invest significant resources in developing, implementing, and auditing labor law compliance.

## Overview

The "Plan/Prevent/Protect" program is a cross-department initiative that involves the DOL's worker protection agencies—including the Wage and Hour Division (WHD), the Occupational Safety and Health Administration (OSHA), the Office of Federal Contract Compliance Programs (OFCCP), and the Mine Safety and Health Administration (MSHA)—and, to a lesser extent, the Employee Benefits Security Administration (EBSA). The "Plan/Prevent/Protect" initiative is intended to be a fundamental, departmentwide shift in thinking away from what the DOL calls "catch me if you can" compliance to placing the onus on all employers to "assemble plans, create processes, and designate people charged with achieving compliance." That is, employers not only will have to comply with the various laws that the DOL enforces, but may be required to devote their resources to auditing their compliance with the laws and providing the results of such audit to all of their employees. Another departure from past DOL practice is the extent that employers would be required to involve their employees in the development of these plans and to allow employees to monitor their implementation.

Although the ideas forming the basis of "Plan/Prevent/Protect" are certainly not new, the implementation is well beyond what we have seen from the DOL in the past. If fully implemented, this new program promises to impose significant challenges and costs on all employers.

While each agency will develop specific guidance based on its area of supervision, as outlined later in this LawFlash, all five agencies are expected to propose regulations and/or take other actions requiring employers to adopt a compliance plan that includes the following elements:

- "**PLAN"** – Identify and remediate the risks of legal violations and other workplace risks to their employees. Employees must be included in the creation of the plan, and the completed plan must be circulated to those employees who will be able to monitor the plan's implementation.
- "**PREVENT**" – Implement the plan "thoroughly and completely" and in a manner that prevents legal violations (in other words, the plan cannot be drafted and then left on a shelf; an employer must fully carry out its plan to address the violations, as well as update the plan regularly).
- "**PROTECT**" – Ensure that the plan's objectives are met on a regular basis and that the plan will result in protecting employees from violations of their workplace rights.

While many employers already have some policies and practices in place addressing these issues, even the most proactive employers with full compliance staffs will likely find this new DOL initiative challenging and costly. Moreover, aspects of the DOL agenda raise questions about attorney-client privilege, such as the WHD's expected proposal that employers provide each employee deemed to be exempt from overtime with an analysis of why they are exempt.

The two centerpieces of this initiative are the WHD's Public Classification Analysis and OSHA's Injury and Illness Prevention Program. This LawFlash will review some of the specific elements of these programs and the other parts of "Plan/Prevent/Protect." It will also provide some practical tips that will assist in preparing for the DOL's rollout of the program

**WHD Increased Recordkeeping and Public Classification Analysis**

As noted above, the WHD announcement of this new public classification rule is one of the priorities of the DOL's "Plan/Prevent/Protect" program. This WHD component is particularly alarming to many employers because the DOL anticipates an unprecedented level of employee access to internal analyses regarding, among other things, compensation and classification decisions.

This program will begin with the WHD issuing a Notice of Proposed Rulemaking (NPRM), changing employers' recordkeeping requirements under the Fair Labor Standards Act (FLSA). While details on the proposal are limited, the DOL has suggested that the WHD proposal will include, for example:

- A requirement that employers provide workers with information about their employment, including how their pay is calculated.
- A requirement that employers that seek to exclude workers from the FLSA's coverage perform a classification analysis, disclose that analysis to the employees, and retain that analysis for WHD enforcement personnel who might request it.

The proposal will also address burdens of proof when employers fail to comply with records and notice requirements.

Nancy Leppink, Deputy Administrator of the WHD, stated on a recent DOL Web-based "regulatory chat" that the WHD recordkeeping NPRM will be issued in August 2010. If the WHD continues to target August 2010 as the release date, the regulation will soon be sent to the Office of Management and Budget (OMB) for review before publication. If employers and other stakeholders are interested in reacting to the proposed rule, they should consider approaching OMB during this review and before the proposal is sent out for public comment. Employers can also express their views during the public comment period that follows OMB review.

Because there is no "black and white" test for classification of employees, even employers that want to do the "right thing" often struggle with compliance. Introducing public classification analyses will only draw increased scrutiny to those "close calls" and increase litigation in what is already a highly volatile area of law. Even where employers are able to successfully defend against private litigation, companies are often forced to expend considerable resources that could be put to other uses.[1]

**OSHA's Injury Illness and Prevention Program**

While not as far along in the process as the WHD's public classification analysis rule, OSHA's Injury, Illness, and Prevention Program (or I2P2 as it is known) will be the prototype "Plan/Prevent/Protect" program, which comes as no surprise, as mandatory compliance programs have long been a focus of OSHA Assistant Secretary of Labor David Michaels.

Building on OSHA's existing Safety and Health Program Management Guidelines, the new proposed I2P2 would require employers to develop an injury and illness prevention program that includes a proactive and continuous process to address safety and health hazards, with emphasis on the special needs of young, aging, and immigrant workers.

Specifically, OSHA anticipates that the I2P2 rule will include the following elements:

- **Management duties** (including items such as establishing a policy, setting goals, planning and allocating resources, and assigning and communicating roles and responsibilities)
- **Employee participation** (including items such as involving employees in establishing, maintaining, and evaluating the program; employee access to safety and health information; and the employee's role in incident investigations)
- **Hazard identification and assessment** (including items such as what hazards must be identified, information gathering, workplace inspections, incident investigations, hazards associated with changes in the workplace, emergency hazards, hazard assessment and prioritization, and hazard identification tools)
- **Hazard prevention and control** (including items such as what hazards must be controlled, hazard control priorities, and the effectiveness of the controls)
- **Education and training** (including items such as content of training, relationship to other OSHA training requirements, and periodic training)
- **Program evaluation and improvement** (including items such as monitoring performance, correcting program deficiencies, and improving program performance)

Stakeholder meetings regarding I2P2 are already scheduled for June 3 in East Brunswick, N.J.; June 10 in Dallas; and June 29 in Washington, D.C. In order to participate, interested stakeholders must register for a particular meeting at least two weeks before that meeting. OSHA anticipates approximately 30 to 40 participants at each meeting. Stakeholders may also register as observers to attend and listen in to the discussion.

Safety programs are certainly not new to OSHA. Over the years, OSHA has established a number of initiatives to encourage employers to develop and implement employee safety and health programs. Two

[1] The WHD's role in this initiative also includes working closely with EBSA on misclassification settlements to make certain that employee benefit plan issues are addressed in settlements with employers that have misclassified employees as independent contractors.

examples of such initiatives are OSHA's Small Business Consultation Program, which offers small businesses with exemplary safety and health programs an opportunity for recognition under their Safety and Health Achievement Recognition Program (SHARP), and the agency's Voluntary Protection Program (VPP).

Participation in OSHA's safety and compliance programs has, however, always been voluntary—but that is likely to change under I2P2.[2] It is the forced compliance aspect of this initiative that could have the most impact on employers. If this Injury and Illness Prevention Program rule is put into effect, employers would be required to not only develop such a plan for each worksite but also to regularly update their plans, particularly if the agency identifies new hazards or imposes new requirements.

It certainly is possible that this new rule will be used as a form of "back door" rulemaking, permitting OSHA to identify a new hazard, and instead of being required to participate in the lengthy, complex, and cumbersome OSHA rulemaking process, simply require employers to address the new hazard through the Injury and Illness Prevention Program rule. The possibility of such a scenario must be considered, because Assistant Secretary Michaels has, in the past, expressed frustration with the lengthy OSHA rulemaking process and stated that he would like to speed up the process. For these reasons, it is important for employers and stakeholders to understand the potential impact now, and to consider participating in the stakeholder meetings as well as in the rulemaking process itself.

**OFCCP to Update Requirements for Construction Contractors and Subcontractors**

OFCCP already requires employers and other regulated entities to create specific affirmative action programs. Thus, its formal role in "Plan/Prevent/Protect" can be expected to be smaller than that of its sister agencies. As part of the "Plan/Prevent/Protect" initiative, OFCCP intends to continue work on a previously announced NPRM that would enhance the effectiveness of the affirmative action program requirements for federal and federally assisted construction contractors and subcontractors.

The NPRM would remove outdated provisions and update the regulations that set forth the actions construction contractors are required to take to implement their affirmative action programs. The proposed rule-making would also address the content of those programs in the areas of recruitment, training, and apprenticeships.

The NPRM will include a proposal requiring that federal and federally assisted construction contractors take steps to properly classify workers—especially independent contractors—similar to the initiative being developed by the Wage and Hour Division. For more information on this development, see Morgan Lewis's February 9, 2010 LawFlash, "U.S. Department of Labor's Proposed 2011 Budget Reflects an Increased Emphasis on Enforcement," available at http://www.morganlewis.com/pubs/LEPG_Proposed2011Budgets_LF_09feb10.pdf.

**Expansion of MSHA's Existing Hazard Control Standards**

Following the recent coal mine tragedies, it comes as little surprise that there are a raft of MSHA initiatives as part of the DOL's "Plan/Prevent/Protect" program. First, MSHA is preparing a proposed

[2] The DOL has included a second OSHA rulemaking in its new approach. OSHA is "considering" whether to propose a specific regulation governing infectious diseases in the workplace. This possible rulemaking is aimed at the healthcare industry. OSHA is in the process of preparing a Request for Information to obtain data to determine what actions, if any, OSHA should take.

rule to "re-address" the pre-shift examination requirement to ensure that these examinations include all violations that could present hazards. Second, the agency is developing a proposed rule to revise the Pattern of Violation regulations. Third, MSHA will publish a Request for Information concerning possible implementation of a comprehensive safety and health management program for mines. Finally, MSHA created a new fatality prevention enforcement program titled "Rules to Live by Program," which will focus on the 24 MSHA standards most frequently cited in fatality investigations.

**EBSA Nonregulatory Initiatives**

EBSA has no regulatory initiatives in the "Plan/Prevent/Protect" program. Rather, EBSA's role in this program is to emphasize three of its long-standing and most successful compliance programs: the Delinquent Voluntary Compliance Program: the Voluntary Fiduciary Correction Program, and Checklists for Pension and Health (which involves making the checklists used by EBSA investigators available to the public). In addition, as noted in footnote 1 above, EBSA will work closely with the WHD to ensure that employee benefit issues are addressed in settlements with employers that misclassify employees as independent contractors.

**Conclusion**

Many employers already have policies and procedures in place to ensure compliance with federal and state labor law. Employers, however, will need to give careful consideration to how they conduct compliance analyses of such policies as the proper classification of their employees. Imagine, for example, if an employer had to provide each employee with the employer's analysis of whether the employee's position is exempt. Moreover, it is unclear how these new rules will address privileged audits done by counsel and subject to the attorney-client privilege. While the direction DOL is heading will present challenges, it could also be opportunity for employers, for example, to create nonprivileged documents that could form the basis of a good faith defense to limit liability under the FLSA.

Although it is too early to tell exactly what form some of these regulations will take and whether the DOL will be able to complete this broad initiative, employers should prepare for some form of these initiatives. For example employee handbooks and internal human resources manuals should be vetted to ensure (1) that the policies are up to date and (2) that the policies give a realistic—not optimistic—picture of the workplace. An FLSA policy, for example, should not reference job descriptions if the employer does not regularly maintain job descriptions. An OSHA policy should not reference safety procedures that the workforce does not regularly use. Moreover, employers should begin thinking about aspects of the "Plan/Prevent/Protect" program that will be most problematic and consider commenting on and participating in the proposed rulemakings.

Employers will also need to consider the impact of I2P2 down the road in terms of the potential obligation to update Injury and Illness Prevention Programs on a regular basis and to be aware of new obligations that OSHA could impose on their worksites through back door rulemaking. We expect that the WHD public classification proposal and the I2P2 will be extremely high DOL priorities, and that the DOL will devote the resources necessary to complete these rulemakings in an expedited fashion.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact the authors of this LawFlash, **Howard Radzely** and **Jonathan Snare** (contact information below), a member of our cross-practice Washington Government Relations and Public Policy Practice group, or a member of our Labor and Employment Practice versed in this matter in your region:

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