Employment Law Commentary

Change Comes to the Department of Labor: New Directions for Regulation and Enforcement Under the Obama Administration

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The purpose of this Commentary is to provide a retrospective and prospective look at what changes have taken place within the United States Department of Labor this year and what to expect for the remainder of 2010 and beyond. In addition to providing background on the Department's latest initiative, titled "Plan/Prevent/Protect," this Commentary will highlight select regulations on the horizon in the Wage and Hour Division and the Occupational Safety and Health Administration, as well as provide insight on three recently issued WHD Administrator's Interpretations.to fill two of the open seats ran into stiff opposition from Republicans. Finally, during a Congressional recess in March 2010, the President filled two of the open positions by appointment.

Background

Secretary of Labor Hilda Solis, one of President-elect Obama's last nominees, has been at the helm of the Department since February 2009. Since taking office Secretary Solis has pushed a generally pro-labor agenda. As part of the Obama Administration's commitment to transparency and government accessibility, the Secretary now maintains an active Twitter page (http://twitter.com/@HildaSolisDOL) that tracks her meetings with stakeholders and provides insight on her biggest priorities: increased enforcement, pay equality, mine safety, the Gulf cleanup, and job development and training programs. The elements of this agenda will be described more fully below, but briefly they include:

- Launching "Plan/Protect/Prevent"—an initiative aimed at ensuring safe, secure and equitable workplaces for American workers
- Transforming the way the Wage and Hour Division issues legal guidance by replacing fact-specific opinion letters with "administrative interpretations" addressing:
  - The administrative exemption as applied to mortgage loan officers
  - The definition of "changing clothes" as it affects hours worked
  - The definition of "son or daughter" under the Family Medical Leave Act as applied to the requirements for standing in loco parentis
- Proposing a new rule on recordkeeping to address compensation issues and the perceived practice of misclassifying workers as independent contractors

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- Launching the Occupational Safety and Health Administration's proposed "Injury and Illness Prevention Program"
- Proposing a rule on infectious disease transmission in the workplace
- Strengthening the Occupational Safety and Health Administration's enforcement power
- Bolstering the Wage and Hour Division's enforcement capacity by hiring more than a hundred new investigators

Plan/Prevent/Protect

In March the Department published its "Spring 2010 Regulatory Agenda," announcing a new approach to make the work of its agencies more efficient and effective. As part of this regulatory agenda, dubbed "Plan/Prevent/Protect" ("P/P/P"), the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), the Office of Federal Contract Compliance Programs (OFCCP), and the Wage and Hour Division (WHD) will propose regulatory actions to address certain employment law compliance issues within each agency's purview.

According to the Department's proposal, the three words *plan, prevent, and protect* signal three actions regulated entities must take to "ensure safe, secure, and equitable workplaces" for American workers. Each agency will promulgate standards and regulations to ensure that the American workforce has a safe, equitable and nondiscriminatory workplace. Although the specifics will vary by law, industry, and regulated enterprise, the Department has issued basic guidelines of what employers can expect from the various agencies in the coming year:

- **Plan**: Employers and regulated entities will be required to prepare a plan for identifying and remedying risks of legal violations and make these plans available to workers so that they can fully understand them and monitor their implementation.
- **Prevent**: The plan must be fully implemented in a manner that prevents legal violations. DOL made a point of noting that the process cannot be accomplished solely by filing paperwork.
- **Protect**: The employer must regularly check to see that the plan's objectives are met.

Out with the Old: Wage and Hour Division to Issue Administrative Interpretations

This year, the WHD broke its long-standing practice of writing "opinion letters" in response to fact-specific inquiries from the public, and substituted in its place "administrative interpretations." These interpretations will be issued when the Wage and Hour Administrator determines that further clarity regarding the proper application of a statute or regulation is needed. The interpretations are written to "provide meaningful and comprehensive guidance" to the "broadest number of employers and employees" on issues related to statutory and regulatory interpretation. According to the agency, interpretations issued by the Administrator that address the Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), the Davis-Bacon and Related Acts (DBRA), and the McNamara-O'Hara Service Contract Act (SCA) are official rulings for the purposes of the Portal-to-Portal Act, 29. U.S.C. §259. The agency will still respond to written requests for its opinion; however, the response will be limited to referring the writer to specific statutory language, regulations, interpretations, and cases relevant to the specific request without providing an analysis of the facts presented.

Despite lacking an Administrator, the WHD under the direction of Deputy Administrator Nancy Leppink issued three Administrative Interpretations between March and June of this year. The first of the three interpretations concerned whether mortgage loan officers qualified for the administrative exemption under Section 13 of the Fair Labor Standards Act, 29 U.S.C. §213(a)(1). The second interpretation dealt with Section 3 of the FLSA and narrowed the definition of "changing clothes" as it concerns hours worked. The third interpretation was a "clarification" of the definition of "son or daughter" as applied to an employee standing *in loco parentis* to a child under Section 12 of the FMLA. With each interpretation the WHD rejected the Bush Administration's perceived pro-employer interpretation.

Mortgage Loan Officers and the Administrative Exemption

The first of the three Administrator's Interpretations was issued in March. In this Interpretation, No. 2010-1, the Administrator addressed Section 13(a)(1) of the FLSA, 29 U.S.C. §213(a)(1), concerning whether mortgage loan officers qualify for the administrative exemption. In this interpretation the Administrator overturned two Bush Administration opinion letters that found mortgage loan officers exempt from overtime. Although the Administrator's Interpretation specifically concerns the exemption status of mortgage loan officers, it also provides insight into how the administrator is likely to approach other positions involving the administrative exemption.

As the Administrator points out, an employee's status is determined by job duties and compensation, not his or her title. For the exemption to apply, an employer must show that (i) the employee is compensated at a rate at least $455 per week, (ii) the employee's "primary duty" is "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (iii) the employee exercises discretion and independent judgment with respect to matters of significance. 29 U.S.C §213(a)(1). The Administrator focused on the second requirement, the employee's primary duty, to determine that mortgage

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loan officers generally do not qualify for the administrative exemption.

Deputy Administrator Leppink opined that if the mortgage loan officer's primary duty is to make sales, then it is unlikely that he or she is eligible for the administrative exemption because it is not work "directly related to management" or "business operations." Instead, the officers work on the "production" side of the business, selling the employer's goods (in this case, mortgages) rather than performing administrative duties (such as working in the finance department or human resources). She concedes that loan officers do collect and analyze information, tasks that undoubtedly call for independent judgment, but even so the officers "are not analyzing the information to provide advice to the customer, which the customer could take and use elsewhere." Rather, the loan officers are performing a screening function for the benefit of the employer. And, most importantly, such analysis is incidental to the loan officer's main responsibility to sell a product to a customer.

Accordingly, Deputy Administrator Leppink concluded that "a typical mortgage loan officer's primary duty is not related to the management or general business operations of the employer's customers" within the meaning of Section 13(a)(1) and therefore a typical mortgage loan officer is entitled to overtime.

Changing Clothes: Determining Hours Worked

The second Administrative Interpretation, No. 2010-2, was issued in June. This interpretation overturned Bush-era opinion letters stipulating that (i) protective equipment was considered clothing for the purposes of Section 203(o) and therefore (ii) time spent donning and doffing such equipment was excluded from hours worked. In administrative interpretation No. 2010-2, the Administrator defines "clothes" more narrowly excluding protective equipment.

Section 203(o) provides in relevant part, "there shall be excluded any time spent in changing clothes… at the beginning or end of each workday… from measured working time during the week…" (emphasis added). As explained above, because protective equipment was considered clothing under the previous Administration, employers were not required to include the time spent putting it on and taking it off in calculating "measured working time" or hours worked. The new Administration has changed that interpretation such that employees who don and doff certain protective equipment will have to be compensated for that time.

Additionally, the Administrator stated that the act of "changing clothes" constitutes a "principal activity" under the Portal-to-Portal Act, 29 U.S.C. §254, for the purposes of the so-called "continuous workday" rule. As a result, the Administrator potentially expanded the time during which an employer must compensate an employee.

FMLA Reinterpretation: The "Village" Approach to Parenting

On June 25, 2010, Secretary Solis wrote an article for the Huffington Post, an online newspaper, titled "Sometimes, It Takes an Interpretation" in which she outlined policy reasons behind the WHD's third Administrative Interpretation. In the article Secretary Solis describes the "unjust" treatment nontraditional families have received under FMLA, and the Administration's commitment to right what she saw as a wrong. Because of this "unjust" treatment, Solis writes, the Department "expanded FMLA protections to cover loving caregivers that have traditionally been left out" of FMLA coverage. It did so by issuing Administrator's Interpretation No. 2010-3 on June 22, 2010.

Passed during the Clinton Administration, the FMLA entitles eligible employees to take up to 12 weeks of unpaid leave to tend to the birth of a son or daughter, or in order to care for a son or daughter with a serious health condition. 29 U.S.C. §2616(a)(1)(A)-(C). The text of the act defines "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis." 29 USC §2611(12) (emphasis added). The latest Administrative Interpretation reinterprets the meaning of "son or daughter" under the FMLA as it applies to an employee standing "in loco parentis." The exact ramifications of this new interpretation are as yet unknown, but employers should be aware that it will likely remain in effect for the duration of the Obama Administration unless challenged in court. The Williams Institute at the University of California, Los Angeles, estimates that at least 50,000 same-sex couples and 100,000 children will be affected by this change.

Quoting congressional records, the Administrator pointed to the fact that Congress allegedly intended the definition to reflect "reality" and not limit the leave to those employees who live in "traditional nuclear families" as evidence that the definition was meant to be broader than previously interpreted by past Administrations. Before, an employee who wanted to take FMLA leave to care for a child that was not his or her own had to establish that he or she (i) provides the child with day-to-day care and (ii) provides the child with financial support. Now, instead of this two-prong test, all that is required is that he or she has at least one of the two elements to stand in loco parentis.

Although acknowledging that the number of individuals who are potentially eligible for FMLA leave has increased, neither the Administrator nor Secretary Solis in her article addressed the chief issue many employers (as well as judges) are likely to face: the means and burden of proving that such a relationship exists. According to the interpretation, to establish the relationship, employees need only provide "reasonable documentation or statement of the family relationship." An example given of "reasonable documentation" is a "simple statement" of the relationship's existence.

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WHD: Forthcoming Rules

Misclassifying Workers as Independent Contractors

According to a recent web chat hosted by Deputy Administrator Leppink, the WHD plans to publish a proposed rule on recordkeeping in August under the FLSA. This rule would require employers to provide workers with basic information about their positions, including how their pay is calculated. An employer who wishes to exclude workers from FLSA coverage would be required to perform a "classification analysis" and disclose that process to the worker, as well as keep a record of this analysis. There are also hints that the Administrator may make a legislative proposal in the future to address this issue.

Proposed FMLA Rule to Be Published in November

During the same web chat, Deputy Administrator Leppink also indicated that employers can expect to receive notice of a proposed rule on FMLA in November of this year. Despite multiple requests for more information regarding the actual scope of the rule, Deputy Administrator Leppink refused to provide any details beyond when attendees could expect to see the notice of proposed rulemaking in the Federal Register.

OSHA Initiatives

Injury and Illness Prevention Program (I2P2)

Billed as the prototype for the Department's P/P/P strategy, OSHA's Injury and Illness Prevention Program, nicknamed I2P2, will require employers to develop plans that address safety and health hazards in the workplace with a systematic process. The rules promulgated under this program would build on the existing Safety and Health Program Management Guidelines and best practices taken from OSHA's Voluntary Protection Program and Safety and Health Achievement Recognition Program. The rule will be modeled after California's IIPP program. Officials expect that the federal I2P2 will be less bureaucratic and paper oriented than California's because Secretary Solis wants employers to take a more proactive role in the process. OSHA plans to begin development of this program by holding stakeholder meetings, as well as web chats in the months leading up to the rule's promulgation.

Infectious Diseases

Expanding the scope of the request for information posted in the "Fall 2009 Regulatory Agenda," OSHA now plans to investigate not just airborne diseases in the workplace but all possible routes of infectious disease transmission. The agency plans to propose a rule to ensure that employers (with particular attention to the healthcare industry) establish a comprehensive employee infection control program to protect employees from infectious disease exposures. At the present time the rule is in the "Request for Information Stage."

New Ergonomics Recordkeeping Rule Proposed

In January, OSHA published a notice of proposed rulemaking announcing its intent to restore the musculoskeletal disorder (MSD) column to Form 300, the log of work-related injuries and illnesses. The proposed rule requires employers to report MSD injuries in their workplaces. It will also provide definitions of work-related ergonomic disorders that are covered by the column. The agency expects to promulgate the rule by August.

Despite having proposed a recordkeeping rule on the subject, the Administration continues to stress that it has no plans to revive a comprehensive ergonomics regulation. However, recent statements made by OSHA representatives to various workers' rights groups may indicate the contrary. It is also worth noting that current Deputy Assistant Secretary of Labor for OSHA Jordan Barab was in charge of ergonomics policy under the Clinton Administration.

Nonregulatory Initiatives: Illness, Injury, Fatality, and Exposure Data

Earlier in 2010, the Department published OSHA's fatal accident data on its website, along with establishment-specific injury and illness data. It believes that the data will help "prospective workers and consumers make more informed decisions." The Department also announced plans to include on its website a comprehensive searchable database as part of its drive to modernize recordkeeping systems.

As part of a proposal to convert its system to facilitate electronic reporting, the agency requested comments from stakeholders regarding issues that may arise. Employers and employer representatives are concerned that this data will not be used for its intended purpose, but instead will be used during collective bargaining and by the media to negatively portray a company. An additional concern is that the publicly accessible data will be used by competitors seeking a competitive advantage. Finally, there are privacy concerns regarding how much data to make available to the public regarding specific injuries and the identity of the injured parties.

"There's A New Sheriff in Town": Stepped Up Enforcement at the DOL

When Secretary Solis took the helm of the Department of Labor, she announced to the nation that there was a "new sheriff in town." With that statement, Secretary Solis clearly indicated her intent to create a more proactive enforcement agency that does not wait for violations to be reported. To that end, the Department has implemented several initiatives that are sure to lead to increased enforcement activity.

WHD's "We Can Help" Campaign

Launched in April, the Department's new public awareness campaign, We Can Help, is aimed at educating workers about their rights under the FLSA. Through its website, informational pamphlets, and public service announcements, the

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Department will instruct workers on how to file complaints with the Wage and Hour Division. The PSAs are in both English and Spanish, and feature labor organizer Dolores Huerta along with actors Jimmy Smits and Esai Morales.

More Than A Hundred New Wage and Hour Investigators to Be Hired

In her March 10, 2010 testimony before Congress, Secretary Solis stated that the Department plans to "reduce the prevalence of misclassification and secure the protections and benefits of the laws we enforce." Secretary Solis requested that the Department receive $25 million in 2011 for the express purpose of investigating and prosecuting employers who misclassify employees as independent contractors. According to the request, a majority of the allocated funds would be used to hire more than a hundred new full-time investigators to focus specifically on the discovery and prosecution of misclassification claims.

Proposed Changes to the Occupational Safety and Health Act Would Include Increased Penalties

Assistant Secretary of Labor David Michaels has been very vocal about his desire to punish safety violators, calling for increased penalties including in some cases the imposition of criminal liability. To that end, Assistant Secretary Michaels has called on members of Congress to amend the Occupational Safety and Health Act. At a hearing before the House Education and Labor Committee, Assistant Secretary Michaels testified, "Safe jobs exist only when employers have adequate incentives to comply with OSHA's requirements. Those incentives are affected, in turn, by both the magnitude and the likelihood of penalties."

The process of increasing OSHA's penalties began on July 21, 2010, when the Education and Labor Committee passed the Miner Safety and Health Act, H.R. 5663. The proposed bill includes a section that allegedly "strengthens a badly

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MoFo Wins Major Victory for California Retailers

On July 19, 2010, the Third Appellate District filed its highly-publicized opinion in *Ralphs Grocery Company v. United Food and Commercial Workers Union, Local 8* (2010) ___ Cal.App.4th ___ (3rd Civ. No. C060413), invalidating two long-standing statutes on the ground that they impermissibly favor speech related to labor disputes over all other speech in violation of the First and Fourteenth Amendments.

The story begins on July 25, 2007, when Ralphs opened its Sacramento Foods Co store, a large, privately-owned warehouse grocery store located in a modest retail development. On that day, eight to ten union picketers showed up to encourage patrons to boycott the store because its employees had voted to remain non-union. The union picketers protested directly in front of Foods Co's doors and in its parking lot, and continued to do so—five days a week, eight hours a day—for almost nine months before Ralphs brought suit for injunctive relief.

In seeking a preliminary injunction to stop the union's picketing, Ralphs faced two seemingly insurmountable barriers—the Moscone Act (Code Civ. Proc., § 527.3), which deprives California courts of jurisdiction to enjoin lawful union picketing, and Labor Code section 1138.1, which imposes insurmountable obstacles to injunctive relief in cases involving labor disputes. Ralphs argued that the statutes are unconstitutional content-based discrimination because they provide special treatment for labor speech. The trial court denied Ralphs' request for injunctive relief, and Ralphs appealed.

In a thorough and thoughtful opinion, the Court of Appeal reversed.

First, the Court rejected the Union's contention that the area in front of the Foods Co store is a public forum, distinguishing stand-alone retail stores, such as Foods Co, from the common areas of *Pruneyard* and *Fashion Valley* shopping centers.[1] Given that the area in front of the Foods Co store is not a public forum, Ralphs, "as a private property owner, could limit the speech allowed and could exclude anyone desiring to engage in prohibited speech. This remains true even though Ralphs granted the right to other groups to use the entrance and apron area of Foods Co for speech."

Second, the Court considered the constitutionality of the Moscone Act and Labor Code section 1138.1. Relying on two United States Supreme Court cases invalidating laws that favored labor speech over all other speech[2], the Court of Appeal concluded that both California statutes are invalid. The Moscone Act impermissibly "denies [owners of private property] involved in a protest over a labor dispute access to the equity jurisdiction

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outdated Occupational Safety and Health Act." This section includes increased penalties for employers who do not comply with workplace safety rules.

The bill, if passed, would deny employers an automatic stay of the requirement that they abate an OSHA violation before the adjudicative process has been conducted. Additionally, there would be increased protection for whistleblowers that would prohibit employers from discouraging employees from reporting workplace injuries and illnesses. This bill is still in its early stages and it remains to be seen whether the full House will vote on it this session.

Potential Legislation: Paycheck Fairness Act

Passed by the House as a companion to the Lilly Ledbetter Fair Pay Act in January 2009, the Paycheck Fairness Act (H.R. 12, S. 182) was excluded from the final version of the Fair Pay Act passed by the Senate. Earlier this week President Obama called on the Senate to pass the bill to help ensure that workers who perform equal work receive equal pay. If enacted, the bill would require employers to bear the burden of proving that unequal pay given to two employees is job-related and consistent with business necessity. It would also prohibit employers from retaliating against employees who share salary information with their co-workers. Furthermore, it would increase liability imposed on employers by allowing women to sue for compensatory and punitive damages. The Department would be tasked with increasing outreach efforts aimed at eliminating pay disparities, in addition to collecting and disseminating wage information based on gender.

The President's request to the Senate echoed his vow "to crack down on violations of equal pay laws" during his State of the Union address in January. The White House also proposed an $18 million budget increase for the Equal Employment Opportunity Commission (EEOC) for the 2011 year. The increase is intended to provide for the hiring of one hundred new EEOC investigators.

Conclusion

The Department has been involved in a flurry of activity in the first half of 2010. It is clear that the Obama Administration intends to be proactive, increasing enforcement activity and using all the means at its disposal to encourage workers to report workplace issues. The proposed changes are controversial, and will no doubt generate significant debate in the months and years ahead as they become more concrete and more generally known.

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of the courts even though it does not deny such access if the protest does not involve a labor dispute." Similarly, Labor Code section 1138.1 improperly "favors speech relating to labor disputes over speech relating to other matters," in that "[i]t adds requirements for obtaining an injunction against labor protestors that do not exist when the protest, or other form of speech, is not labor related." Because there was no compelling state interest to justify the statutes' differential treatment of labor speech, neither statute could withstand the Court's strict scrutiny review. Given that the Moscone Act and section 1138.1 are invalid, the Court held that the union's continuing trespass on Ralphs' private property alone justifies issuance of the requested preliminary injunction—and remanded the case to the trial court with specific directions to grant Ralphs' motion for injunctive relief.

The case is a major win for California retailers, many of whom have been unable to remove or regulate picketers on their properties and have suffered a resulting loss of business. The union is expected to petition the California Supreme Court for review of the *Ralphs* decision.

Ralphs was represented by a team from Morrison & Foerster, including attorneys Miriam Vogel, Timothy Ryan and Tritia Murata.

[1] *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 [large privately-owned shopping center is a public forum for the purpose of speech because owner had created a public forum]; *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 858 [following Pruneyard].

[2] *Police Department v. Mosley* (1972) 408 U.S. 92; *Carey v. Brown* (1980) 447 U.S. 455.