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"PLAN/PREVENT/PROTECT": How the Department of Labor's New Strategy May Affect the Wage and Hour Arena

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In April 2010, in conjunction with the Spring 2010 Regulatory Agenda of the Department of Labor, the Secretary of Labor announced a new enforcement strategy called *"Plan/Prevent/Protect": The Beginning of a Broader Regulatory and Enforcement Strategy.*

According to the DOL, the purpose of this new initiative is to replace what it has termed the "catch me if you can" approach. In other words, the strategy is aimed at requiring employers to "find and fix" violations and ensure they are in compliance with wage and hour, and workplace safety laws before the arrival of DOL investigators. As the DOL explained, the new strategy calls for employers to take three steps to ensure compliance with the law:

- *Plan* — employers and other regulated entities will have to create a plan to find and fix violations of the law and other risks to workers.
- *Prevent* — employers and others will have to thoroughly implement their plans in a way that actually prevents violations of the law and other risks and hazards.
- *Protect* — employers and others will have to ensure that their plans actually protect workers.

The DOL cautions that it intends to consider any employers who do not take "these steps to comprehensively address risks, hazards, and inequities in their workplaces" to be "out of compliance with the law."

A Wage and Hour Paradigm Shift?

How will the DOL's new strategy affect wage and hour enforcement? Although this question has still not been fully answered, the DOL probably hopes it will revitalize its Wage and Hour Division, which was the subject of harsh criticism in a 2009 report by the U.S. Government Accountability Office entitled "Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft." In the wake of that report, Secretary of Labor Hilda L. Solis announced that the Division would hire 250 investigators with the help of the federal stimulus package "to refocus the agency on these enforcement responsibilities" and "reinvigorate" its work.

Now, one year later, there have already been several developments showing that, when it comes to putting the DOL's *Plan/Prevent/Protect* strategy into practice, the Wage and Hour Division means business.

Replacing Opinion Letters with Administrator Interpretations

The DOL has already begun to make big changes with respect to its Wage and Hour Division. In addition to committing to hire more investigators this year, on March 24, 2010, the

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Division announced that it would be departing from its longstanding practice of publishing opinion letters to provide fact-specific guidance to employers and employees. Instead, the Division announced, it will publish "Administrator Interpretations" to address "the law as it relates to an entire industry, a category of employees, or to all employees."

According to the Division, it will issue these new publications when the Administrator of the Division determines that "further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate." In announcing this change, the Division stated that, unlike fact-specific opinion letters, Administrator Interpretations will "provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees" by offering "a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue."

According to DOL Solicitor M. Patricia Smith, the decision of the Obama Administration's DOL to no longer issue opinion letters represents a shift in focus. While speaking at a labor law conference at Suffolk University Law School, Smith explained that, under the Bush Administration, the DOL had focused on "trickle-down enforcement" and enforcement measures "took a back seat to opinion letters." With a new emphasis on enforcement, Smith explained, the DOL is now broadening its focus to target industries as a whole and, more specifically, industries "prone to violations."

Proposing Tougher Regulations

Another way in which the DOL's new strategy promises to make a significant impact in the wage and hour arena is with new regulations. According to a recent Notice of Proposed Rulemaking, the Wage and Hour Division is proposing significant changes to its regulations with respect to recordkeeping requirements under the Fair Labor Standards Act. In particular, the DOL is proposing a regulation requiring ***"[a]ny employers that seek to exclude workers from the FLSA's coverage . . . 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."*** Although the DOL did not provide specifics, it announced that the proposed rule would "address burdens of proof when employers fail to comply with records and notice requirements."

The DOL's proposal would also "modernize" recordkeeping requirements for live-in domestic employees and industrial homeworkers by changing requirements with respect to keeping paper records.

According to the NPRM, these regulatory changes would promote the goals of the DOL's *Plan/Prevent/Protect* strategy "to encourage greater levels of compliance by employers, to enhance awareness among workers of their status as employees or independent contractors and employee rights and entitlements to minimum wage and overtime pay, and to facilitate DOL enforcement."

Supporting Tougher Legislation

On top of these new proposed regulations, the DOL is also a strong supporter of the Employee Misclassification Prevention Act, a bill being considered in Congress that would amend the FLSA to place greater burdens on employers seeking to classify workers as independent contractors. Among other things, the Act promises to affect employers in the following ways:

- *Requiring* employers to provide all workers a notice identifying the workers' classification, a DOL website (to be created), DOL contact information, and any other information to be required by regulation.
- *Requiring*, for workers classified as non-employees, that such notice also include the following: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any other questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor."
- *Imposing* civil penalties on employers who violate the notice and/or recordkeeping requirements or misclassify workers of up to $1,100 per work for the first offense and up to $5,000 for willful or repeated violations.
- *Subjecting* employers who misclassify workers to treble damages for FLSA minimum wage and overtime violations.

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Ramping Up Enforcement

The DOL has made clear that it intends to implement *Plan/Prevent/Protect* by focusing even more on enforcement. Toward that end, the DOL recently created a **website** that provides detailed information to the public on all of its investigations, including the identities and addresses of all employers investigated. An analysis of the extensive information in the "Data Catalog" available on the website shows that, although there has not been a dramatic uptick in the number of investigations under the Obama Administration, the Wage and Hour Division continues to perform a substantial number of investigations. Specifically, the data show that the Division engaged in almost 65,000 FLSA "compliance actions" from fiscal year 2008 to July 28, 2010, resulting in recovery of more than $328 million in back wages for more than 550,000 FLSA violations.

The DOL is also seeking to remedy employers' misclassification of employees as independent contractors by partnering with other governmental actors. For example, in its report entitled *Strategic Plan, Fiscal Years 2011-2016*, the DOL announced that

> ***[the Wage and Hour Division] will be a key partner in a joint Department of Treasury-Department of Labor initiative to detect and deter the misclassification of employees as independent contractors and to strengthen and coordinate federal and state efforts to enforce labor law violations arising from misclassification.***

Recently, there has also been a dramatic increase in collaboration between the DOL and dozens of state enforcement agencies with respect to employers' misclassification of employees as independent contractors. In recognition of the substantial efforts of state labor departments, the DOL is strategically teaming up with its counterparts at the state level to "spread the wealth," so to speak. Specifically, the DOL's fiscal year 2011 budget is poised to set aside $25 million to combat misclassifications, and half of that amount is going to the states. With the other half, the DOL plans to hire additional investigators and lawyers to pursue its own compliance actions.

This partnership is significant given that, although the DOL has recovered a significant amount of money in its efforts to target misclassification, the work of some investigators at the state level has been even more successful. For example, in 2009, the DOL recovered $2.6 million for misclassified employees. Yet, that same year, New York alone recovered $300,000 in unemployment insurance fraud penalties, more than $2.5 million in unpaid wages, and nearly $200,000 in workers' compensation fines and penalties. Moreover, while Massachusetts recovered $1.4 million in 2009, it has already recaptured a whopping $6.4 million in 2010.

Taking the Initiative

What do all of these changes mean for *your* business? The answer could not be more clear: all employers ought to *take the initiative* to ensure that their operations are in full compliance with the FLSA and applicable state laws. In other words, employers should indeed follow the direction of the DOL to *Plan, Prevent, and Protect*.

Moreover, conducting an audit of your practices will ensure that you are in compliance with the law before the DOL or another enforcement agency arrives at your doorstep. Keep in mind that just because your operation may be small or you may have relatively few potential violations does not mean you are immune from investigation. Indeed, the DOL's data show that, from fiscal year 2008 to July 28, 2010, only approximately eight violations were found in each investigation.
Finally, given the increased focus of federal and state enforcement agencies on employers' misclassification of employees as independent contractors, it is vital that employers who classify workers as independent contractors ensure that they are not in violation of the law. ***Making a commitment to do so today may not only prevent costly investigations and litigation down the road, but also better prepare your business for the likely arrival of stricter statutory and regulatory requirements in the near future.***

If you have questions about any wage-hour related question, please contact any member of Constangy's **Wage and Hour Practice Group**, or the Constangy attorney of your choice.

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