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Labor and Employment Law Update

JUNE 2010

In This Issue

New Federal Child-Labor Regulations Become Effective July 19, 2010

By Frances S. P. Barbieri

The Wage and Hour Division of the United States Department of Labor (the "DOL") recently issued final regulations concerning non-agricultural child labor (the "Regulations"). Effective July 19, 2010, the Regulations are the most extensive revisions to child-labor law in the last 30 years.

As the summer season begins, we encourage employers to update policies, practices, employee handbooks and managers' guides to ensure compliance with the new federal regulations prior to the July 19, 2010 deadline. Moreover, state laws vary with respect to child-labor laws, and employers need to ensure compliance with these as well. Finally, providing training to managers and supervisors at the outset of the summer work season is recommended.

As the summer season begins, we encourage employers to update policies, practices, employee handbooks and managers' guides to ensure compliance with the new federal regulations prior to the July 19, 2010 deadline.

Changes Affecting 14- And 15-Year-Olds

Significantly, 14- and 15-year-olds may not be employed in any job not specifically permitted by the DOL. Therefore, any employer planning on hiring 14- and 15-year-olds should be sure to consult the Regulations.

The Regulations significantly change the scope of permissible employment of 14- and 15-year-olds, mandating that these youths:

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Recess Appointees To NLRB And EEOC Take Office

By Jessica L. Herbster

The individuals recently named by President Obama to the National Labor Relations Board ("NLRB") and Equal Employment Opportunity Commission ("EEOC") via recess appointment have now been sworn into office. The NLRB appointees are Craig Becker (D) and Mark Pearce (D), and the EEOC appointees are Jacqueline A. Berrien (D), Chai R. Feldblum (D), Victoria Lipnic (R), and P. David Lopez. The recess appointments will last until the end of the 2011 Congressional session. They signal an initiative to place Democratic leadership in key labor and employment agencies and to step up agency enforcement.

Constitutional Authority

Generally, after the President nominates individuals to fill high-level policy-making positions in federal departments, agencies, boards, and commissions, the Senate must confirm the nominations before the President can appoint them to office. The U.S. Constitution provides an exception to this process for appointments made when the Senate is in recess. During a recess, the President may make a temporary appointment, called a recess appointment, to any such position without Senate approval. Recess appointments are fairly common. President Clinton made 139 recess appointments, and President George W. Bush made 171.

NLRB Appointments

The NLRB normally has five members and decides cases with three-member panels. Historically, the NLRB has consisted of two Democrats, two Republicans, and a fifth member from the President's party. However, since 2008, the NLRB has operated with only two members – Chair Wilma B. Liebman (D) and Peter C. Schaumber (R).

Approximately 80 of the almost 600 rulings issued by Liebman and Schaumber have been challenged as invalid on the theory that the NLRB lacks authority to issue rulings without a quorum of at least three members. This issue is pending before the U.S. Supreme Court.

President Obama nominated Becker, Pearce, and Brian E. Hayes (R) last July to fill the three vacancies, but a bipartisan agreement to treat the nominees as a package fell apart amid strong opposition to Becker. This stalled all three nominations.

Becker was associate general counsel to the Service Employees International Union ("SEIU") and, before that, staff counsel to the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). This has prompted the National Right to Work Legal Defense Foundation to file motions with the NLRB seeking Becker's recusal from pending cases involving the SEIU. The less controversial Pearce, also a Democrat, represented unions and employees in labor and discrimination cases.

Much of the uproar regarding Becker concerns his allegedly radical theories of labor law. For example, Becker has written that employers should be barred from challenging union election results—even amid evidence of union misconduct. Opining that traditional notions of democracy should not apply in union elections, Becker has argued that "captive audience speeches" made by employers to advocate against unionization should be grounds for overturning any election in which the union lost. Becker also is believed to support "card check," *i.e.*, replacing secret-ballot elections with automatic

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- Will no longer be generally limited to jobs in retail, food service, and gasoline service establishments, but also will be permitted to accept employment in industries such as advertising, banking, clerical services, and information technology.
- Will be allowed to perform work of an intellectual or artistic nature, including computer programming, drawing, and teaching.
- Will be permitted to momentarily enter freezers to retrieve items.
- Will be permitted to ride in a motor vehicle as passengers, except when a "significant reason" for being a passenger is to perform work concerning the transportation of other persons or property.
- Will be permitted to load and unload certain light hand tools (such as a rake, hand-held clippers, a shovel, or a broom) and personal items (such as a backpack, lunch box, or coat) that the minor will use at the job site.
- Will be permitted to work inside and outside places of business that use power-driven machinery to process wood products, under specific conditions.
- Will be permitted to participate in a new work-study program involving school-supervised employment of students enrolled in college-preparatory curricula. Public and private schools may establish and administer the work-study program, but must follow the Regulations' detailed guidelines for doing so.
- Will be prohibited from participating in "peddling" activities, including door-to-door sales and "sign waving" (unless directly outside the employer's place of business). This ban does *not* include "persons who, as volunteers and without compensation, sell goods or services on behalf of eleemosynary [charitable] organizations or public agencies."

The Regulations continue to permit the employment of 14- and 15-year-olds in retail, food service, and gasoline service establishments for tasks such as cooking, cashiering, price marking, assembling orders, shelving, bagging and carrying out customers' orders, errand and delivery work, clean-up work, and kitchen-prep and serving work.

Additionally, under the Regulations, 15-year-olds (but not 14-year-olds) may work as lifeguards and swimming instructors at swimming pools and water parks if trained and certified in "aquatics and water safety" by the American Red Cross or "a similar certifying organization." However, youths under age 16 are still prohibited from working as dispatchers at the top of elevated water slides or as lifeguards at natural environments (*e.g.*, lakes, rivers and ocean beaches).

When school is in session, 14- and 15-year-olds may not work more than 18 hours per week, more than three hours on a school day, including Fridays, or during "school hours." "School hours" are the hours of the local public school where the minor resides while employed.

When school is *not* in session, employment of 14- and 15-year-olds will continue to be limited to eight hours per day and 40 hours per week between the hours of 7:00 a.m. and 7:00 p.m., except that permitted work hours are from 7:00 a.m. to 9:00 p.m. from June 1 to Labor Day.

There also are exceptions for work-study programs, school-supervised programs, and employment as attendants at professional sporting events. These exceptions apply both when school is in and out of session.

Changes Affecting 16- And 17-Year-Olds

Under the Regulations, 16- and 17-year-olds will now be permitted to operate power-driven pizza-dough rollers and portable countertop food mixers. The pizza-dough rollers must contain mechanical safeguards that have not been overridden. The portable countertop food mixers must be comparable to models intended for household use and may not be used to process meat or poultry products.

Changes Affecting All Minors Under Age 18

The following requirements are applicable to the employment of *all* minors under age 18. First, employers must use the same workweek for child-labor compliance as they do for overtime compliance, and second, employers are prohibited from employing minors to perform the following activities:

- Working at poultry slaughtering and packaging plants;
- Using or cleaning power-driven meat processing machines;
- Riding on a forklift as a passenger;
- Working in forest-fire fighting, forestry services, and timber-tract management;
- Operating certain power-driven hoists, such as elevators, and work-assist vehicles;
- Operating balers and compactors designed or used for non-paper products (the Regulations also refine the exception that permits minors to load certain scrap-paper balers and paper-box compactors); and
- Operating power-driven chain saws, wood chippers, reciprocating saws, and abrasive cutting discs.

Penalties For Non-compliance

Under federal child-labor laws, employers may be fined up to $11,000 per each employee affected by the violation. Additionally, employers may be fined up to $50,000 for any violation causing death or serious injury to a minor employee, and up to $100,000 if the violation causing death or serious injury is repeated or willful.

Compliance With More Restrictive State Laws Still Required

Employers must remain cognizant of relevant state laws, as more restrictive state mandates will continue to apply. For instance, in Massachusetts:

- 16- and 17-year-olds cannot work after 11:30 p.m. on weekends and during school vacations (or after midnight if employed at restaurants or racetracks);
- A business that stops serving customers at 10:00 p.m. may not permit a minor to work later than 10:15 p.m;
- With some exceptions, minors working past 8:00 p.m. must be under "the direct and immediate supervision of an adult acting in a supervisory capacity"; and
- Employment of a minor in any job requiring possession or use of a firearm is prohibited.

Recommendations For Employers

We recommend that employers update policies, practices, employee handbooks and managers' guides now to ensure compliance with the new federal regulations by the July 19, 2010 deadline. Providing training to managers and supervisors at the outset of the summer work season also is advised.

As always, please contact the Firm if you have questions or if we can assist in helping your organization achieve compliance.◆

Connecticut Increases Penalties For Misclassifying Employees As Independent Contractors

By Heather E. Davies

On May 6, 2010, Connecticut enacted a law increasing the penalties to be imposed upon employers for misclassifying workers as independent contractors. The law will become effective October 1, 2010.

Specifically, the new Connecticut law does the following:

- increases civil penalties for businesses that misclassify employees as independent contractors from $300 per violation to $300 *per day* per violation;
- authorizes the Connecticut Attorney General, upon complaint from the Labor Commissioner, to institute civil actions to recover these monetary penalties;
- makes it a Class D felony for an employer to either misrepresent the number of its employees or cast them as independent contractors in order to defraud or deceive the state so as to pay lower workers' compensation insurance (the penalty under this law previously extended only to fraud and deception of insurance companies);
- makes it a Class D felony for an employer that is fully insured for workers' compensation to fail to pay the required state assessments for administration of the Workers' Compensation Commission and the Second Injury Fund; and
- authorizes enforcement officials to mount joint investigations of misclassification complaints with other state agencies.

Connecticut Attorney General Richard Blumenthal, who co-chaired the commission recommending passage of the new law, commented that "calling workers independent contractors when they are really employees costs workers benefits, taxpayers revenue and honest businesses a fair opportunity to compete for work."

The new Connecticut law is particularly daunting to employers given that different Connecticut agencies use different rules to determine a worker's employment status, as illustrated below:

1. ***Common Law Rules*** – Like the federal Internal Revenue Service, the Connecticut Department of Revenue Services looks to "common law rules" to determine whether a worker is an independent contractor. Under these rules, a worker is an "employee" when the business for which the services are performed has the right to direct and control the worker who performs the services. The rules take into account three major factors: (a) *behavioral control* (*e.g.*, when/where to do the work, what tools/equipment to use, what routines/patterns to use, and what workers to hire to assist with the work); (b) *financial control* (*e.g.*, whether the worker has a significant investment in facilities and equipment, whether the worker's business expenses are reimbursed, how the worker is paid, and whether the worker has an opportunity for profit or loss); and (c) *relationship of the parties* (*e.g.*, the intent of the parties, whether the worker receives a Form W-2 or 1099-MISC, whether the worker is providing services as a recognized corporate entity, and whether the worker is receiving employee benefits that are traditionally associated with employee status).
2. ***The "ABC Test"*** - The Connecticut Department of Labor's Unemployment Compensation Division uses an "ABC" test to determine whether a worker is an independent contractor. In order to properly classify a worker as an independent contractor under this test, an employer must satisfy all three of the following criteria: (a) the individual must be free from direction and control in connection with the performance of the service, both under his or her contract of hire and in fact; (b) the individual's service must be performed either outside of the usual course of business of the employer or outside all the employer's places of business; and (c) the individual must be customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service performed.

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recognition of a union based on its collection of authorization cards from employees, one of the central features of the controversial Employee Free Choice Act that has stalled in Congress.

Republicans and business groups have criticized the recess appointments. Sen. John McCain (R-Ariz.) said he was "very disappointed" by the recess appointments and called Becker's appointment "clear payback by the Administration to organized labor." U.S. Chamber of Commerce Senior Vice President Randel K. Johnson said the business community "should be on red alert for radical changes that could significantly impair the ability of America's job creators to compete." The fact that the only Republican nominee, Hayes, was not appointed was another point of criticism.

On the other side of the aisle, Democrats and labor unions have applauded President Obama's actions. Sen. Tom Harkin (D-Iowa) commented that President Obama "took an important step on behalf of American workers" by breaking the "stronghold of obstructionism that has held nominations up for months in the Senate."

The recess appointments create a Democratic majority on the NLRB for the first time since 2001. When Schaumber's term expires on August 27, 2010, the NLRB will consist of three Democrats. Although some warn that the majority will result in sweeping pro-labor reforms, NLRB Chairman Liebman has publicly stated that suggestions of "radical" change are unfounded. Only time will tell.

EEOC Appointments

The EEOC recess appointments sparked relatively little controversy. Berrien was sworn in April 7 as the agency's 14th chair and is the former associate director-counsel of the NAACP Legal Defense and Educational Fund, Inc. Feldblum was sworn in April 7 as a commissioner and is a former Georgetown University law professor. Lipnic was sworn in April 10 as a commissioner and served as assistant secretary of labor under President George W. Bush. Finally, Lopez, who has been with the EEOC for thirteen years, will serve as general counsel.

This will be the first time since August 2008 that the EEOC has operated with a full complement of five commissioners. Since December 2009, the EEOC has operated with only two members – Acting Chairman Stuart Ishimaru (D) and Commissioner Constance Barker (R). At full capacity, the EEOC will likely increase its enforcement efforts, streamline case processing, and address areas requiring regulatory action (*e.g.*, pending EEOC regulatory initiatives involving the ADA Amendments Act and the Genetic Information Nondiscrimination Act).

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Please do not hesitate to contact us if you have any questions about the recess appointments or their potential impact on your business.◆

You Got To Know When To Hold 'Em Record Retention And The Litigation Hold

By William E. Hannum III[1]

In the words of Kenny Rogers, "The secret to surviving is knowing what to throw away and knowing what to keep."

One thing that an employer should never gamble with is the preservation of documents and information that are relevant to actual or pending litigation. An employer must identify, locate and preserve relevant records whenever the employer is involved in litigation *or reasonably anticipates litigation*. This obligation is known as a "litigation hold." If an employer fails to effectively implement a litigation hold, whether willfully or negligently, the employer can be subject to harsh sanctions.

In the flurry of activity required when responding to a complaint or a demand letter, the litigation hold is often put on the back burner. Likewise, employers often fail to issue a litigation hold when a more subtle threat of litigation triggers the obligation. However, two recent cases out of Massachusetts and New York serve as harsh reminders that parties face severe sanctions if they take a "careless and indifferent" approach to identifying and preserving records for litigation.

Accordingly, employers are encouraged to follow the steps outlined below, namely, to issue a litigation hold at the right time, to enlist the participation of the right people at (and formerly at) the employer, and to preserve the appropriate records, as these steps should minimize the risk of the kinds of sanctions issued in the cases summarized below.

Massachusetts Court Imposes Severe Sanctions For Destruction Of Evidence

In *Israel M. Stein, M.D. v. Clinical Data, Inc.*, a case brought in the Massachusetts Superior Court, Judge Judith Fabricant imposed severe sanctions on the plaintiff for failure to identify and preserve documents, and for the intentional destruction of evidence. The physician-plaintiff brought claims against his former employer, CDI, for, among other things, breach of his employment agreement. CDI contended in counterclaims that, among other things, Stein violated his employment agreement by consulting for CDI's competitors, both during and after his termination.

Although Stein initiated the litigation and CDI propounded numerous discovery requests, Stein failed to identify and preserve relevant emails. A forensic examination of Stein's computer revealed that (a) seven months after he filed suit, Stein installed on his personal computer a shredding program to automatically erase deleted emails every seven days, and (b) several months later, Stein took steps to wipe the computer clean of everything that remained on it that would be relevant to the litigation.

The court reasoned that Stein knew, long before he began to delete his emails, that those emails would be potentially relevant to the litigation. Thus, the court ruled that Stein had a duty to preserve those emails.

The court further found that Stein's conduct imposed an unnecessary burden on judicial resources and substantial unnecessary costs on CDI, while significantly prejudicing CDI's position in the litigation. Therefore, the court:

1. dismissed all of Stein's affirmative claims;
2. ordered Stein to pay all of CDI's costs associated with its efforts to obtain the relevant emails *(which included attorneys' fees and expert fees and amounted to approximately $243,000)*; and
3. warned that the court would instruct the jury that it may infer from Stein's conduct that additional relevant materials existed but have not been recovered or produced, and that such materials would have provided evidence of facts contrary to Stein's position.

Second Circuit Finds Failure To Issue Timely Litigation Hold Is Gross Negligence

Similarly, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, a case brought in the United States District Court for the Southern District of New York, Judge Shira Scheindlin imposed severe sanctions on a party that took a "careless and indifferent" approach to its litigation hold.

Judge Scheindlin, the author of the seminal *Zubulake* decisions regarding electronic discovery, warned: *"By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence."*

Although the plaintiffs in *Pension Committee* initiated litigation in February 2004, they failed to issue written litigation hold notices until 2007. Judge Scheindlin reasoned that this failure "constitutes gross negligence because it is likely to result in destruction of relevant information."

Likewise, Judge Scheindlin reasoned that the failure to identify all of the "key players" (including parties named in the Complaint, demand letter or other relevant communications or discovery) and to ensure that their electronic and paper records are preserved constitutes gross negligence.

Thus, Judge Scheindlin ordered severe sanctions against the offending plaintiffs, including:

1. an order that they pay the defendants' costs and attorneys' fees associated with bringing the discovery motion, as well as the expenses incurred to develop the facts surrounding the discovery misconduct; and
2. an adverse jury instruction, which would permit the jury to presume that the lost evidence was relevant and would have been favorable to the defendants.

Steps To A Successful Litigation Hold

To avoid the types of sanctions described above, employers should follow these steps to preserve records for litigation.

1. Implement A Record Retention & Destruction Policy

Even before an employer is faced with litigation or potential litigation, an employer should have record retention and destruction policies in place. These policies should clearly set forth which documents and information are to be retained, and which are not, and when they are to be destroyed. As a federal court in Utah recently stated:

> An organization should have reasonable policies and procedures for managing its information and records. The absence of a coherent document retention policy is a pertinent factor to consider when evaluating sanctions. Information management policies are not a dark or novel art.

Phillip M. Adams & Assoc., LLC v. Dell, 621 F. Supp. 2d 1173 (D. Utah 2009) (internal quotations and citations omitted).

An effective record retention policy will provide for the systematic review, retention and destruction of documents received or created in the course of business and should address issues such as: how long data will be retained; where data will be retained; in what form data will be retained; how data will be secured; how and when the data will be destroyed; and who in the organization is responsible for implementing and auditing the policy.

Later, when a litigation hold must be issued, these policies and procedures will need to be suspended, to some extent, and thus will provide the framework for implementing the litigation hold.

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2. Issue The Litigation Hold Early And Often

Clearly, an employer must issue a litigation hold whenever a party initiates litigation, or when a demand letter is sent or received. However, there are also many other times when an employer may reasonably anticipate litigation (*e.g.*, when human resources is managing the performance improvement process for a particularly adversarial employee). In these and many other situations where there is no complaint or "lawyer letter," the employer may reasonably anticipate litigation. In those circumstances, out of an abundance of caution, the employer should consider issuing a litigation hold to minimize the risk of the kinds of sanctions described above.

It is important to remember that a litigation hold is a *process* – not a one-time event. Effectively issuing a litigation hold requires, among other things, regularly reissuing the written litigation hold memoranda to alert new employees to their obligations to preserve documents and to remind existing employees of their ongoing obligations.

A litigation hold involves *a series* of written and oral communications that suspend the routine document destruction policies of an employer and ensure preservation of the relevant records.

3. Ensure Preservation Of Relevant Records

Simply relying on employees to search and collect records is not sufficient. In order to ensure that the litigation hold will adequately protect the employer against claims of spoliation of evidence and corresponding sanctions, the employer should involve its counsel in supervising, monitoring and documenting the preservation and collection efforts. In this regard, the documents and records made subject to the litigation hold need to be described with care, and the process of collecting those documents and records needs to be actively managed. Counsel can help to ensure that the necessary steps are taken.

4. Communicate With All Key Players

The employer should confer with its information technology personnel to determine system-wide backup procedures and document destruction policies.

In addition, counsel must be sure to identify and communicate with all "key players" to ensure that their electronic and paper records are collected and preserved. "Key players" will vary depending on the litigation, but generally include individuals who are either named as parties or identified in the Complaint, demand letter or other relevant communications or discovery. Key players will often include *former* employees and/or third parties over whom the employer can exert some form of control. As part of this process, the employer's counsel needs to understand the retention practices of all key players to ensure that relevant records are not modified, deleted or destroyed.

5. Apply The Litigation Hold Broadly

A litigation hold should identify the type of documents that need to be collected and preserved.

Terms such as "documents" and "records" must be interpreted broadly to include information or communications recorded in *any* medium. Documents and records should include, among other things, email, information on any personal digital assistant ("PDA"), spreadsheets, calendars, letters, reports, drafts of records, magnetic tapes and zip drives. Any questions that an employer may have about the relevance of a particular document, file, email or other electronic data compilation should be resolved in favor of preservation and retention.

6. Develop, Educate And Train

A litigation hold is a rigorous process. Employers should develop both (i) document retention and destruction policies and (ii) litigation hold protocols to follow when a duty to preserve arises. These protocols should include, among other things, notifying counsel, identifying and educating key players, and issuing written litigation hold memoranda.

Employers should then train in-house counsel, human resources personnel and management personnel regarding these policies and procedures.

* * *

Given the high stakes involved – including dismissal of claims, substantial attorneys' fees, and adverse inference instructions to the jury – employers should implement appropriate record retention and litigation hold policies, and consult with experienced counsel when issuing (and reissuing) a litigation hold.

[1]This article previously appeared in New England In House in May, 2010. Will gratefully acknowledges New England In House, for their support in publishing his article, and also his colleagues, Todd Newman (a Partner) and Shannon Lynch (an associate) of Schwartz Hannum PC, for their help in preparing this article. ◆

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A searchable archive of past Update Articles and E-Alerts is available on the Firm's website, www.shpclaw.com.

Grievance Denied!

Massachusetts Nurses Association v. Hospital
American Arbitration Association No. 11-300-XXXXX-XX

The Firm successfully represented a Hospital client (the "Hospital") in this labor arbitration by obtaining a ruling that the Hospital had just cause to discharge a registered nurse with approximately 21 years of experience for threatening members of the public with harm in the event that they came to the Hospital for treatment. Attorneys for the Hospital were Todd A. Newman and Heather E. Davies.

New England Health Care Employees Union, District 1199, SEIU v. Nursing Home
American Arbitration Association No. 12-300-XXXXX-XX

The Firm successfully represented a Nursing Home client (the "Nursing Home") in this labor arbitration by obtaining a ruling that the Nursing Home had just cause to discharge a certified nursing assistant with 13 years of experience for initiating a hostile confrontation with a manager that involved inappropriate language. Attorneys for the Nursing Home were Todd A. Newman and Heather E. Davies.◆

Connecticut Increases Penalties For Misclassifying Employees As Independent Contractors

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3. ***The Workers' Compensation Commission Criteria*** - The Connecticut Workers' Compensation Commission determines a worker's status by applying various concepts, factors and criteria from the above tests, but without resort to a specific rule, an approach that encourages employers to make classification determinations conservatively.

Connecticut employers should perform an independent contractor audit and risk assessment to ensure that their workers are properly classified. In light of the significant penalties contained in the new law, employers are encouraged to classify their workers in accordance with the most restrictive test. That is, if a worker would be considered an employee under any of the three tests, then he or she should be classified as such.

* * *

If you have any questions about the proper classification of employees and independent contractors under federal law, in Connecticut, or in any other state, please do not hesitate to contact us. We regularly assist employers in this area and would be happy to help.◆

U.S. Department Of Labor Announces "Plan/Prevent/Protect" Enforcement Strategy Requiring Employers To Proactively "Find And Fix" Workplace Problems

By Paul Dubois

On April 26, 2010, the U.S. Department of Labor ("DOL") announced a new regulatory and enforcement strategy for employers entitled "Plan/Prevent/Protect." Under Plan/Prevent/Protect, employers will be required to take affirmative measures to find and fix workplace problems rather than wait for a DOL audit to unearth them.

In particular, Plan/Prevent/Protect will require employers to create plans for achieving compliance with a number of laws enforced by DOL, including the Fair Labor Standards Act ("FLSA"), the Occupational Health and Safety Act ("OSHA"), the Employee Retirement Income Security Act ("ERISA") and Executive Order 11246 ("E.O. 11246"), which regulates equal employment and affirmative action requirements for federal contractors and subcontractors.

The actual requirements of Plan/Prevent/Protect have not yet been determined. According to DOL, they will be formulated and announced through a series of notices of proposed rulemaking over the next year. DOL has indicated, however, that employers that fail to comply with Plan/Prevent/Protect will be considered out of compliance with the law and, depending upon the underlying violation, subject to remedial action.

Main Components Of Plan/Prevent/Protect

While the specific mandates of Plan/Prevent/Protect are still being formulated, DOL describes the main components of this initiative as follows:

- **Plan:** [DOL] will propose a requirement that employers and other regulated entities create a plan for identifying and remedying risks of legal violations and other risks to workers — for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide their employees with opportunities to participate in the creation of the plan. In addition, the plan would be made available to workers so they can fully understand it and help to monitor its implementation.

- **Prevent:** [DOL] will propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.

- **Protect:** [DOL] will propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.

Intent To Eliminate "Catch Me If You Can" Compliance Strategy

DOL goes on to say that Plan/Prevent/Protect is intended to eliminate the "catch me if you can" compliance strategy used by many employers based on a "cold economic calculus." This strong language suggests that DOL is highly suspicious that workplace violations result from deliberate decisions by employers to play the odds against getting caught—and that the agency intends to come down hard on employers found not to be in compliance.

Worker Misclassification Issues

An anticipated Plan/Prevent/Protect requirement of particular note is a revised wage-and-hour recordkeeping rule. In this regard, DOL states that its Wage and Hour Division ("WHD") will soon propose to require employers using independent contractors to perform a "classification analysis, disclose that analysis to the worker[s], and retain that analysis to give to WHD enforcement personnel who might request it." This means that employers will have to explain in writing to their independent contractors why they are not classified as employees. The potential consequences of such a rule for employers—more litigation and increased reporting of suspected misclassifications to the labor and taxing authorities, to name a few—are enormous.

Recommendations For Employers

While the specific requirements of DOL's Plan/Prevent/Protect initiative will emerge over time via the regulatory rulemaking process, one thing is clear—employers should act now to ensure compliance with the laws enforced by DOL. Accordingly, we recommend that employers:

- Audit wage-and-hour practices and procedures to ensure that workers are properly classified as either employees or independent contractors, and that employees are properly classified as either exempt or non-exempt;

- Audit OSHA practices and procedures and, in doing so, affirmatively identify and remedy any existing safety and health hazards;

- Audit benefits administration to ensure compliance with any applicable ERISA requirements; and

- If a federal contractor or subcontractor, ensure compliance with all applicable equal employment and affirmative action requirements.

We will keep you apprised of significant developments as proposed rulemaking concerning Plan/Prevent/Protect commences and unfolds. Meanwhile, please contact us if you have any questions about this new enforcement initiative, or if you would like assistance with your organization's compliance efforts.◆