



"plan, prevent, protect": department of labor announces new enforcement strategy

MSK Client Alert

June 14, 2010

By Anthony J. Amendola

Secretary of Labor Hilda Solis recently critiqued what she calls the current "catch-me-if-you-can" model for enforcement of federal labor and employment laws by the U.S. Department of Labor ("DOL"). Citing the recent tragedy at the Upper Big Branch coal mine in West Virginia, the Secretary noted that, ultimately, American workers pay the price when some employers take "shortcuts" and make "calculated decisions" not to comply with worker protection legislation. In place of "catch-me-if-you-can," Solis announced a new DOL enforcement strategy called "Plan, Prevent, Protect." The stated goals of "Plan, Prevent, Protect" are to require employers proactively to prevent violations from occurring and to enlist employees in the enforcement effort. "Increased openness and transparency in the workplace," notes the DOL, will "enhance awareness among workers of their rights" and "enable workers to report violations."

This new direction was articulated in the DOL's Regulatory Agenda issued on April 26, 2010, and will be utilized by various DOL agencies, including 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). Specific regulations will be proposed over the coming months, and the public and interested parties will then have opportunities to comment on them. But the broad outlines are already clear.

As explained in the Regulatory Agenda, "employers and other regulated entities must take responsibility to find and fix problems rather than wait for a Labor Department investigator to inspect, discover the problems, and enforce the law." In practice, this will mean that employers will need to take specific concrete steps to prevent violations of law before they occur, and any failure to take such

practice areas

employment litigation & counseling

labor & employment

labor litigation & counseling



"plan, prevent, protect": department of labor announces new enforcement strategy

steps could itself constitute a violation. In general terms, the DOL is proposing that employers be required to take the following steps:

- **Plan:** Employers will be required to "create a plan for identifying and remediating risks of legal violations";
- **Prevent:** Employers will not be permitted to simply "draft a plan and then put it on a shelf"-they must "thoroughly and completely implement the plan in a manner that prevents legal violations"; and
- **Protect:** Employers will be required to ensure, on a regular basis, that the basic objectives of a plan (such as worker safety or wage-and-hour compliance) are being met. In other words, employers must investigate whether their plans, as drafted, are actually achieving the policy goals contained within various federal labor laws.

With respect to federal wage-and-hour laws, "Plan, Prevent, Protect" would likely require employers to perform a variety of proactive functions, including: (1) analyzing and documenting each job position classified as "exempt" or as an "independent contractor," in collaboration with the individual workers holding those jobs; (2) disclosing the analysis to individual workers; (3) retaining the analysis to provide to the DOL's Wage and Hour Division; and (4) conducting management training sessions to ensure that managers understand the differences between exempt employees, non-exempt employees, and independent contractors.

Similarly, with respect to workplace safety, "Plan, Prevent and Protect" would obligate an employer to: (1) audit safety and health information and records; (2) develop procedures for inspecting the workplace for hazards; (3) develop written plans (perhaps in conjunction with workers) to improve safety; (4) disclose the plans to workers so they can monitor compliance; (5) continually evaluate the success of those plans; and (6) create an Injury and Illness Prevention Program ("IIPP").

While most responsible employers already monitor and self-audit to ensure compliance with their numerous legal obligations, the "Plan, Prevent and Protect" strategy would add yet another layer of regulatory burden for employers and their often overextended human resources, labor relations, safety, and legal departments. Moreover, the stated objective of increasing employee involvement in enforcement is likely to generate more claims against employers. Although the details remain sketchy, employers should begin preparing for this new enforcement philosophy by taking steps to identify and remedy potential violations of the various laws enforced by the DOL.

Ask MSK - Q&A Section

Q: For California employers, will there be overlap between the new DOL rules and existing California requirements?

A: Probably. For example, if adopted, the DOL regulations will now require every employer to develop an Injury and Illness Prevention Program ("IIPP"), which is already required by California law.

Q: Will the "Plan, Prevent, Protect" enforcement strategy apply to all federal labor and employment laws?



"plan, prevent, protect": department of labor announces new enforcement strategy

A: No. The DOL does not enforce certain federal labor and employment laws. For example, most federal anti-discrimination laws, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Americans With Disabilities Act are enforced by the Equal Employment Opportunity Commission (EEOC). Similarly, the National Labor Relations Acts is enforced by the National Labor Relations Board ("NLRB"). To date, neither the EEOC nor NLRB has announced any plans for adopting a similar enforcement strategy. Even still, the DOL has wide-ranging enforcement authority over various federal laws, including those regulating wages and hours, workplace safety, affirmative action, family and medical leaves, and employee benefits.