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On April 26, 2010, the Department of Labor (DOL) issued its Spring 2010 Regulatory Agenda. Additionally, the DOL announced an enhanced regulatory and enforcement strategy for U.S. businesses entitled: *“Plan/Prevent/Protect”: The Beginning of a Broader Regulatory and Enforcement Strategy*.

“Plan/Prevent/Protect”: The DOL’s Program to Transform Employment Law Compliance for Businesses

By Jay Sumner, Van A. Goodwin, Mary E. Sharp and Antonio D. Robinson

On April 26, 2010, the Department of Labor (DOL) issued its Spring 2010 Regulatory Agenda. Additionally, the DOL announced an enhanced regulatory and enforcement strategy for U.S. businesses entitled: *“Plan/Prevent/Protect”: The Beginning of a Broader Regulatory and Enforcement Strategy*. This plan formalizes the Department’s strategy, which until now has been unofficial.

Similar to current government contractor self-evaluation processes, the DOL’s new initiative seeks to require companies to create Compliance Action Plans to address employment law compliance issues that fall under the purview of the Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), the Office of Federal Contract Compliance Programs (OFCCP), and the Wage and Hour Division (WHD).

Changing the Compliance and Enforcement Paradigm

According to statements issued by the DOL, the stated goal of the new enforcement strategy is to require employers to “find and fix” violations — that is, ensure compliance — **before** a Labor Department investigator arrives at the workplace. The DOL says that “[e]mployers and others in the Department’s regulated communities must understand that the burden is on them to obey the law, not on the Labor Department to catch them violating the law. This is the heart of the Labor Department’s new strategy.” As Deputy Labor Secretary Seth Harris characterized it recently “This strategy begins with the premise that Congress directed employers and the other entities we regulate to bring themselves into compliance with the law. Congress put the burden of compliance on employers, and expected they would obey the law, in most cases, without government intervention.”

Mr. Harris described the new initiative as an effort by the DOL to foster a culture of compliance among employers to replace what he described as a “catch me if you can” system. This system, according to Mr. Harris, involves some employers depending “on

luck or coincidence to avoid the violations of workers' rights or, perhaps worse, they make a calculated decision whether to comply with employment laws. They assess the benefits of refusing to comply with the law and compare them to the costs of complying with the law. Then, they weigh these costs and benefits against the likelihood they will be caught and the penalty they might suffer if they are caught."

This new enforcement strategy will require, in various ways, employers and other regulated entities to assemble plans, create processes, and designate people charged with achieving compliance. They will be required to implement these plans and evaluate their effectiveness in achieving compliance. Mr. Harris noted that the limited number of DOL inspectors makes discovery of compliance violations difficult, thus justifying the shift in strategy. However, while the number of DOL investigators is currently limited, the Department is currently hiring new investigators to rapidly expand its ability to conduct audits and investigations of employers.

What Full Compliance Might Mean Going Forward

Giving examples of how the new program will work, Mr. Harris stated, "Employers will have to put together a plan that is designed to avoid violations of workplace laws." He further stated, "[i]n safety and health, they will have to prepare a plan that will avoid safety hazard in the workplace. They will have to implement the plan, and they will have to make sure the plan, as implemented, is effective in avoiding violations for risks and hazards to workers."

In another example, Mr. Harris said companies that classify workers as independent contractors would have to prepare a written explanation of why those workers should be considered contractors rather than employees and provide the contractors with that explanation. When speaking at the DOL webinar recently on this part of the initiative, Wage and Hour Deputy Administrator Nancy Lippink did not indicate whether this proposal would be limited to independent contractors or include an employer's decision to classify employees as exempt from the FLSA's minimum wage and/or overtime requirements. In a Fact Sheet posted on the DOL's web site, however, the DOL states, "[a]ny employers that seek to exclude workers from the FLSA's coverage will be required 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."

The specifics of the new program are still months away. The business community will have the opportunity for input into the new regulations and initiative. In general, the DOL specifically describes the new program as follows:

- **"Plan"**: The Department [of Labor] 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 plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.
- **"Prevent"**: The Department [of Labor] 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"**: The Department [of Labor] 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.

Under the new plan, DOL enforcement personnel will be looking to ensure companies are in compliance with the "plan/prevent/protect" steps instead of simply responding to and investigating reported alleged violations of the law. In other words, employers will not only have to comply with the underlying federal laws but also with the DOL's new proposed regulations (assuming they become final rules) that will include plan creation, implementation, and a regular review of whether their plan objectives are being met.

The DOL has indicated that employers and other regulated entities who fail to take these steps will be considered out of compliance with the law and, depending upon the agency and the substantive law it is enforcing, subject to remedial action. Consequently, an employer's failure to adopt and implement effective plans as contemplated by the DOL could result in increased penalties for substantive violations. Stated differently, the DOL intends to make this obligation to "find and fix" compliance failures an affirmative duty and will treat the absence of such actions by employers as, itself, a compliance failure.

Companies May Need to Significantly Change the Approach to Compliance

As a result of this new DOL initiative, employers will need to reexamine their practices and shift their focus regarding employment law compliance. No longer will businesses have the luxury of waiting until a potential problem arises to address and resolve the issue. Employers instead would have to develop, implement, and enforce policies that are designed to eliminate, not merely mitigate, employment, safety, and employee benefit law violations.

While the actual shape of what an employer's compliance initiative should look like will not be completely known until the details of the new regulatory agenda are known, at the very least employers will need to consider a compliance plan that involves the following components:

- Base-line compliance audit
- Remedial efforts to bring the company into full compliance
- Compliance officers dedicated to ensuring compliance
- On-going compliance education and training
- Compliance plan design and implementation
- Annual compliance assurance audits
- Compliance reporting systems

Without a doubt, the new program will force the Legal, Human Resources, Safety, and Benefits Departments of many companies to focus more specifically on employment law compliance in a proactive manner. Under the "Plan/Prevent/Protect" program, companies will be subject to citations even when no substantive violation exists. The DOL has adopted an approach, akin to that of math teachers, requiring employers not only to prove compliance with federal law but also to show how they achieved compliance.

For government contractors, this new enforcement program is even more important because of other efforts by the DOL and the Obama Administration to address contractor compliance with labor and employment laws. Non-compliance, and the risk of being found non-compliant under "Plan/Prevent/Protect" program, could lead to government contractors not only being liable for violations of the law, but also could cause the contractor to lose its ability to be a federal government contractor. Thus, while all companies must take heed of the new enforcement program and plan now for how to comply, government contractors must take special note and respond accordingly since the future of their ability to do business is at stake.

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