

In This Issue:

February 2011

The Department of Labor's (DOL) 2012 proposed budget would increase funding for the agencies charged with regulating and enforcing worker protections, a clear sign that employers should prepare for greater enforcement activities, implementing the Obama Administration's stated goals.

U.S. Department of Labor's 2012 Budget Shows Increasing Resources Toward Regulation and Enforcement of Employment Laws

By Ilyse Schuman

The U.S. Department of Labor's (DOL) Fiscal Year 2012 proposed budget, which was released on Monday, seeks \$12.8 billion in discretionary budget authority and 17,848 full-time equivalent employees (FTE). Although the proposal would reduce the DOL's overall discretionary spending by 5% from current levels, the budget would increase funding for the agencies charged with regulating and enforcing worker protections. The Wage and Hour Division (WHD), Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), Employee Benefits Security Administration (EBSA), and the Office of Federal Contract Compliance Programs (OFCCP) would each receive additional funding under a budget that allocates a total of \$1.8 billion for DOL's worker protection agencies. Given President Obama's plan to freeze all non-security discretionary spending and DOL's overall discretionary budget reduction, the increase in resources for worker protection demonstrates the Administration's continued commitment to enhancing the regulation and enforcement of labor and employment laws. The Department is requesting these funds and manpower to carry out a number of new and ongoing initiatives to support its strategic plan for "keeping workers safe" and "helping workers provide for their families and keep what they earn," as explained in DOL's budget summary.

Labor Secretary Hilda Solis and DOL division leaders held a web chat to discuss the 2012 budget. Highlights of the budget request and the web chat include the following.

Wage & Hour Division

The budget request for the DOL's WHD, responsible for the administration and enforcement of the Fair Labor Standards Act (FLSA) among other laws, is \$241 million, an increase of \$13.3 million from the estimated 2011 level. The agency also is seeking to increase its FTE from 1,582 to 1,677. Among other things, the funding request seeks to maintain the WHD staffing increases that were implemented in 2009 and 2010. The goal of those increases was to return to the FY 2001 staffing levels in this division. According to the budget summary, the WHD began FY 2010 with 898 investigators and ended the fiscal year with 1,038 investigators following an aggressive hiring effort throughout the last three quarters of the fiscal year.

Notably, the agency plans to add 107 FTE to support the Administration's multi-agency initiative to detect and deter the inappropriate misclassification of employees as independent contractors and to strengthen and coordinate federal and state efforts to enforce labor violations arising from misclassification. Staffing increases for this misclassification initiative would be partially offset by a decrease of 12 FTE for the Employer Compliance Assistance and Call Center. The WHD would receive \$15 million of the \$46 million multi-agency budget to combat misclassification. According to the budget summary, the funds and personnel for the misclassification initiative will support field investigator training activities and an additional 3,250 investigations. The budget summary states that these investigations will be directed to industries that have higher rates of violations, such as construction, child care, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping.

In addition, Nancy Leppink, Assistant Secretary of the WHD, mentioned that the WHD "is developing a proposed rule to update the recordkeeping regulation issued under the Fair Labor Standards Act to assist employers in protecting workers' entitlement to wages that they have earned and to bring greater transparency and openness to the workplace. This initiative also contributes to the Department's efforts to prevent misclassification that denies workers employment law protections to which they are entitled."

OSHA

The DOL seeks \$583 million and 2,387 FTE for OSHA. These amounts represent an increase of more than \$24.7 million and 52 FTE over the FY 2010 enacted level. The request for OSHA includes increases of \$6.4 million to improve regulatory standards; \$7.7 million for Compliance Safety and Health Officers; and \$6 million for additional whistleblower investigators.

As OSHA Assistant Secretary of Labor for Occupational Safety and Health David Michaels noted during the web chat, the budget request includes increases of \$6.4 million to improve regulatory standards that protect workers, including those concerning combustible dust, infectious disease, walking and working surfaces, hazard communication and silica. Also included in the request is \$2.4 million in the safety and health standards budget to continue to develop the Injury and Illness Prevention Program (I2P2) rule. According to Michaels, "since the majority of companies, especially small businesses, do not currently have programs, OSHA will use some of this proposed funding to conduct extensive site surveys and economic and feasibility analyses to ensure that a rule is developed that employers of all sizes can easily comply with. In addition, we plan to begin to develop compliance assistance materials to help small and large employers develop prevention programs." The remaining \$4 million is intended to support safety and health standards by expanding the agency's regulatory program.

As for the whistleblower program, an increase of almost \$6.9 million and 45 FTE is requested for the 21 whistleblower protection programs administered by OSHA. According to the DOL's budget summary, this increase "is designed to reduce the backlog of whistleblower claims, expedite the handling of current complaints received by the agency, and prepare for a high volume of complex cases with recently passed laws involving health care reform, food and safety, and finance reform."

In response to a question during the web chat as to why \$4 million was restored to OSHA's compliance assistance program after \$3 million was taken out of the President's 2011 budget requests, Michaels explained that the agency is "no longer proposing alternative funding to the Voluntary Protection Program (VPP). OSHA will continue to fund VPP out of the federal compliance assistance budget activity."

The budget proposal includes an increase of \$7.7 million and 25 FTE to "further support a reinvigorated enforcement program by expanding the compliance safety and health officer (CSHO) workforce to meet the challenges raised by changes in worker demographics and new technologies." According to the budget summary, "increasing the number of CSHOs will allow the agency to address the challenges raised by changes in worker demographics and the increasing number of immigrant and vulnerable worker populations."

Michaels also noted during the web chat that OSHA's Site-Specific Targeting Program will for the first time target establishments with 20 or more employees, a change from the "40 or more" standard in the past. Michaels explained that "by targeting employers with high injury rates who have 20 or more employees, we will be impacting a far larger group of workplaces, while actually conducting a slightly higher number of inspections. In 2012, we project about 2,000 SST inspections compared to 1,780 conducted in FY 2010."

As part of the multi-agency misclassification initiative, a total of \$650,000 and two FTE are requested to modify the training curriculum

for agency compliance officers to enable them to better identify potential employee misclassifications. Michaels further indicated that the budget also includes funding for an additional 25 compliance officers.

EBSA

EBSA is requesting \$197.5 million and 1,089 FTE “to protect more than 718,000 pension plans, 2.6 million health plans and a similar number of other employee plans, which, combined represent over \$6.1 trillion in assets.” This request includes an increase of \$41.4 million and 179 FTE.

The stated goals for this division are to:

- continue a multi-faceted enforcement program that effectively targets the most egregious and persistent violators;
- establish a strong regulatory framework with an active regulatory agenda;
- undertake significant new responsibilities and workload items in response to Congressional action in the health benefits arena (e.g., the Genetic Information Nondiscrimination Act (GINA), the Mental Health Parity and Addiction Equity Act (MHPAEA), Michelle’s Law, the Children’s Health Insurance Program Reauthorization Act (CHIPRA), and the Affordable Care Act (ACA));
- provide innovative outreach and education that assists workers to protect their pension and health benefits; and
- conduct a robust, well-integrated research program based on evidence and comprehensive analysis.

The agency believes that these additional funds and resources will enable the EBSA to conduct more than 3,800 civil and criminal investigations, a 12% increase above FY 2010. The agency also believes that it will be able to obtain more than \$1 billion in total monetary results, an increase of over \$88 million above FY 2010 results. EBSA’s plans for an “active regulatory agenda” include committing “significant resources to the development of pension and health care regulations, interpretive guidance and other materials” according to the agency’s Congressional Budget Justification.

OFCCP

For FY 2012, the Office of Federal Contract Compliance Programs is requesting a salaries and expenses appropriation of \$109 million and 786 FTE “to ensure compliance with affirmative action requirements, target systemic discrimination, and prioritize the elimination of discrimination against veterans and individuals with disabilities.” A total of \$46 million is sought to implement the multi-agency worker misclassification initiative, of which \$3.5 million would be allocated to the OFCCP to address misclassification in the federal contractor community. According to the agency, the OFCCP will expand its investigative process to include an analysis of workers’ potential misclassification as independent contractors during compliance evaluations.

In addition, the OFCCP will use its resources to “execute a robust regulatory agenda.” Specifically, OFCCP is:

- Issuing proposed rules to strengthen its affirmative action regulations in order to increase the hiring of protected veterans by federal contractors.
- Issuing proposed rules to reduce discrimination against women and minorities in construction and strengthen its affirmative action regulations in order to increase the hiring of women and underutilized minorities by federal contractors in the construction industry.
- Issuing proposed rules to strengthen its affirmative action regulations in order to reduce discrimination against applicants with disabilities and increase the hiring of individuals with disabilities by federal contractors.
- Issuing a notice of proposed rescission of the interpretive standards for systemic compensation discrimination under Executive Order 11246 and the voluntary guidelines for self-evaluation of the compensation practices under Executive Order 11246.
- Issuing an Advance Notice of Proposed Rulemaking soliciting information on how it might collect and use appropriate data to identify compensation discrimination. Eliminating compensation discrimination is a priority issue for OFCCP.

The agency notes in its Congressional Budget Justification that “in support of President Obama’s Equal Pay Enforcement Task Force,

OFCCP is making the issue of pay equity a top priority.” Towards that end, the agency also plans to design a web-based, searchable database system comprised of aggregated data from the Compensation Data Collection Tool.

PBGC

The Budget proposes to give the Board of the Pension Benefit Guaranty Corporation (PBGC) authority to adjust premiums and directs PBGC to take into account the risks that different sponsors pose to their retirees and to PBGC. According to the budget summary, implementation and gradual phasing in of this change would occur after two years of study and public comment. The proposal is estimated to save \$16 billion over the next decade while strengthening the defined benefit pension system for the millions of Americans who rely on it.

State Paid Leave Fund

DOL is requesting \$23 million to help states establish Paid Leave Programs. Grants would be given to states to help them plan and start paid leave programs to help workers who must take time off to care for a seriously ill child, spouse, parent, or bond with a newborn or recently adopted child. The goal is to enhance job retention of workers or help workers stay on career paths by not forcing them to choose between the needs of their family and their jobs.

Expanded Work-Sharing

The budget summary also claims that the budget will encourage Work Sharing, a voluntary program that will help firms retain workers by reducing their hours instead of laying them off. Workers with reduced hours will receive partial unemployment checks to supplement lost income. Several bills to promote work sharing were introduced during the 111th Congress, but failed to advance.

More information on the DOL’s budget can be found here.

Other Agencies

Other federal agency budgets would allocate funds to implement programs that affect the workplace.

EEOC. The budget request for the Equal Employment Opportunity Commission (EEOC) is \$386 million, the majority (\$305 million) of which would go to private sector program activities and enforcement, which is an increase of \$19 million from the 2010 enacted level. According to the budget, “[t]he priority for agency resources continues to be litigating systemic cases and maintaining a manageable inventory of cases.”

NLRB. The budget allocates an additional \$288 million to the National Labor Relations Board (NLRB).

Treasury. The Treasury Department’s budget sets aside money to implement provisions of the Hiring Incentives to Restore Employment Act and the Affordable Care Act, among other measures. Other initiatives include its intent to implement standards to clarify when employee leasing companies can be held liable for their client’s federal employment taxes, and to require that additional information be electronically filed on Form 5500s. In addition, the Treasury Department is part of the multi-agency worker misclassification initiative, as is the Department of Justice.

The Administration’s release of the Fiscal Year 2012 budget represents only the first stage of the appropriations process. Agency funding is subject to Congressional approval, and Congress has yet to approve the budget for Fiscal Year 2011. Nonetheless, the Administration’s budget request is a clear signal that employers should prepare for greater regulatory and enforcement activities.

.....
Ilyse Schuman is a Shareholder in Littler Mendelson’s Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Schuman at ischuman@littler.com.