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Employers Beware: The Department of Labor is After You!

Since President Obama's inauguration, employers and employees have been waiting for signals from Washington as to whether the Department of Labor will change the historical approach of prior administrations regarding the enforcement of wage and hour laws. Due to delays in the confirmations of new DOL officials, the wait has been long. Recently, though, some major new initiatives have been announced which shed light on the approach the Administration is taking on at least with respect to wage and hour matters. The new approach appears to be more aggressive and even somewhat hostile, but perhaps only time will tell if this true.

In order to appreciate the change, it's important to appreciate the system which has been in place for over a half-century. A key part of that system was the use of Administrator Opinion Letters published by the DOL's Wage and Hour Division (the agency which enforces the federal laws regarding overtime pay, as well as those regarding prevailing wages, the FMLA and youth employment). For past few years, for example, the Wage and Hour Division published an average of two to five "Opinion Letters" per month. These Opinion Letters were responses to inquiries – usually from employers – about how to comply with the overtime pay requirements of the Fair Labor Standards Act. Typically, the employers would ask whether the manner in which they were calculating overtime pay complied with the FLSA, or if a particular class of employees were exempt from being paid overtime premiums. In response, the Wage and Hour Administrator would give a legal opinion applying the facts provided by the requester to the law. The Opinion would be published and would become a part of the body of interpretations on which employers could rely in designing pay plans for their employees. Significantly, the law specifically provides that if any employer relies on an Opinion Letter, then that reliance is an absolute defense to liability for back-pay and other damages should a court later determine that the Administrator was in error. In essence, the Opinion Letters not only provided guidance as to whether a practice or plan was legal, the employer was entitled to substantial legal protection if it adhered to the Administrator's opinion.

In January 2009, the issuance of Opinion Letters came to an abrupt halt. In late March 2010, the reason for this halt became clear. The Wage and Hour Division is abandoning its long-standing (over 60 year) practice of issuing Opinion Letters, and will now provide its substantive guidance in the form of a new device – "Administrator Interpretations."

Administrator Interpretations differ from Opinion Letters in a key respect. Instead of addressing a specific factual situation as under the Opinion Letter system, and as explained by the DOL, Administrator Interpretations will "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form

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will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees."

But will it? As explained by the DOL: "The Wage and Hour Division believes that [issuing Administrator Interpretations] will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome. *Requests for opinion letters generally will be responded to by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented."* [Italics added]

In other words, when an employer wants to know if a practice or plan complies with the law, the Division will no longer give the employer a "yes" or a "no," but instead it will only point the employer to existing law expecting the employer to figure out the law for itself. While the broad stroke Administrator Interpretation may provide employers some guidance if they're in a particular industry or interested in a particular job category, the interpretations will be too broad to address nuances of particular pay plans or jobs. As a result, it is unlikely that Administrator Interpretations will help employers resolve specific questions, and further, it is even more unlikely that they will provide employers with an absolute defense to liability should they, in good faith, rely on the interpretation.

That is not to say that these Administrator Interpretations will have no significance. To the contrary, these broad interpretations will likely be used as arguments to strike down specific practices and create more litigation.

This is evidenced by the first Administrator Interpretation which – in a broad stroke – reversed a 2006 Opinion Letter recognizing that mortgage loan officers could be deemed exempt administrative employees. Instead, the Administrator Interpretation concluded that, as a class, these workers are not entitled to be classified under that overtime pay exemption. Not only does this a reverse prior interpretations, but it is also not narrowly tailored to a particular job. That is, not all mortgage loan originators do precisely the same job. Thus, despite the clear principle that an employee's exempt status will depend on the specific facts at issue, the Department announced a broad rule that such employees will not be eligible for this exemption.

Interpretations of this kind are often given deference by the courts while reviewing a particular practice. Since the interpretations will not be narrowly tailored to address nuances which in the past would have been recognized as being distinguishing enough to make a difference, courts (as well as attorneys for employees and DOL investigators) will attack practices with broader strokes. If an employer wishes to distinguish itself from the broad-stroked interpretation, it will have no choice but to do so in the context of litigation.

When the abandonment of Opinion Letters is reviewed in the context of other recent DOL initiatives, it appears that the DOL is consciously going to do less to help employers comply with the law through meaningful advice and other cooperative tools, and will instead focus more on adversarial proceedings including claims and litigation.

For instance, a week after announcing that it will no longer publish Opinion Letters, the DOL launched a new campaign, entitled "We Can Help," to urge employees to file claims against their

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employers. This campaign includes nine 30 to 60 second public service announcements (aka advertisements), some in Spanish, featuring officials and celebrities telling employees how to file claims with the DOL.

In addition, the DOL has also recently announced that is developing a new "Plan/Prevent/Protect" compliance initiative which will require employers to audit their pay practices, document how they reach determinations regarding each employee's exempt status and pay calculations, as well as document the basis on which each independent contractor is not given employee status. As the Assistant Secretary of Labor recently explained: "Employers 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." This initiative covers more than just wage and hour matters; it includes OSHA and other areas regulated by the DOL. Employers will need written plans and track how they are implemented. Employers who fail to do so to the DOL's satisfaction would be deemed out of legal compliance and sanctioned.

Certainly, there is nothing wrong with expecting employers to comply with the law or providing employees with information on how to remedy violations. But, in light of these recent initiatives, the goal of helping employers comply now appears to be secondary to the goal of catching employers who are not in full compliance. While violating the law should not be tolerated, the vast majority of employers try to comply with it. Wage and hour law is complex and nuanced, and therefore the borders of compliance vs. non-compliance are at times gray. Employers still want to comply. The DOL's new game-plan is for employers to do their best, but the government is not "here to help."

For these reasons, now – more than ever – employers must audit their pay and other employee practices, and develop a compliance plan and a compliance culture. Navigating these obligations also is much more challenging now than in the past due to the DOL's new tone and the fact that it has recently added 250 investigators to its staff. Employers should therefore be proactive and contact their legal counsel to respond to this new culture and avoid being caught in what is developing to be a tidal wave of aggressive and expensive wage and hour enforcement initiatives and litigation.

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