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Wage and Hour E-news

April 8, 2010

Wage and Hour News Flash – The DOL Announces New Compliance Initiatives and Congress Amends the FLSA

The past week has brought to light some major DC policy initiatives with respect to Fair Labor Standards Act compliance. This News Flash just provides the highlights of these developments. Due to these developments, though, employers can expect higher scrutiny and legal challenges to their wage and hour practices. While it is never too late to review payroll practices, the importance of doing so now cannot be overemphasized.

"Administrator Interpretations"

First, on March 24th the Department of Labor's Wage and Hour Division announced that instead of providing fact-specific Opinion Letters to guide employers in their efforts to comply with the FLSA, it will instead issue "Administrator Interpretations" to "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 will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees." 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]

What does this mean? Under Section 259 of the Portal-to-Portal Act (the act which controls cases brought under the FLSA), Opinion Letters signed by the Wage and Hour Administrator provide significant defenses to employers who rely on those opinions. Thus, if an Opinion Letter provides substantive guidance to an employer indicating that a particular payroll practice or exemption is appropriate under the FLSA, then the employer will not be liable for any back pay or damages resulting by its reliance on the letter and following the same practice.

An "Administrator Interpretation" may not equate to an Administrator's Opinion Letter. Therefore, given that future "Opinion Letters" will merely refer parties to the law and regulations and require them to make their own interpretations and analyses, there will be no substantive guidance

provided. The value of Administrator Interpretations being detailed enough to provide the defenses Opinion Letters have provided is questionable. As a result, the DOL may no longer be issuing the types of guidance Congress expressly envisioned by enacting the Portal-to-Portal Act.

What else does this mean? If Administrator Interpretations do not provide the detailed guidance of Opinion Letters, then the DOL is essentially leaving the development of the law to the courts. Rather than providing guidance that will have the specificity of the Department's official agreement that certain practices are compliant with the FLSA, parties will have no choice but to navigate these perilous waters on their own. Will this foster compliance and reduce litigation? Likely, no.

The next questions are to the DOL. While "interpretations" may be helpful, why not provide the specific guidance found in Opinion Letters? What policy is being fostered by this change in a practice and application of Section 259 that has been around for over 60 years? Why doesn't the DOL wish to fully stand behind its interpretations in specific situations, as it has done under the former Opinion Letter practice?

"We Can Help" Campaign

Compounding the above concerns, on April 1st the Wage and Hour Division launched a new national campaign entitled "We Can Help." While abandoning the practice of helping employers comply with the law via the Opinion Letter practice as just discussed, the DOL also is undertaking a major public relations campaign advising employees of their rights – or more accurately, inviting them to file complaints – about their employers' payroll practices. The DOL announcement reads: "Today, the Secretary of Labor and the Deputy Administrator of the Wage and Hour Division officially launched a national public awareness campaign called 'We Can Help.' This public awareness effort is intended to provide workers with information about their rights in the workplace and to educate them on how to seek the assistance of the Wage and Hour Division when they believe that they have been the subject of a violation. The campaign includes a launch of a new Web site at http://www.dol.gov/wecanhelp."

The website premieres nine video Public Service Announcements ("PSA") which presumably will air across the nation in various media. The PSAs run 30 and 60 minutes, and are in English and Spanish. In addition, a PowerPoint presentation is provided to provide a detailed outline of employee rights and employer liabilities under the FLSA and related statutes. While educating employees about their rights is a fair (if not admirable) objective, it nonetheless appears that the DOL views it more important to create challenges to employer practices rather than to promote compliance.

The FLSA Is Amended to Require Break Time for Nursing Mothers

Some indicated during the healthcare debates that we would not learn what would be contained in the healthcare reform act until it would pass. For instance, included in the new Patient Protection and Affordable Care Act passed on March 23rd is a provision which amends the FLSA to require employers to provide nursing mothers break time for the purpose of expressing milk.

Under this new law, the FLSA now requires employers to provide: "A) a reasonable break time

for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and B), a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." Employers will not be required to compensate employees receiving reasonable break times for expressing milk under the FLSA, but some states may require this time to be compensated. The amendment specifically provides that this rule will not supersede state laws providing employees with greater protections. The amendment also does not apply to an employer employing less than 50 employees if complying would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."

Providing break time to nursing mothers in a manner similar to that now (as of last week) required by the FLSA has been the law in a number of states. For instance, New York and Florida have such laws, but Michigan does not. A bill to amend the FLSA to provide this right to nursing mothers has been pending in Congress for the past few years, but hearings have never been held. Nonetheless, the basic provisions of the bill were tacked onto the healthcare reform package and are now law.

Conclusion

Rules are changing. Employers cannot count on the government to assist them in their efforts to comply with law. Instead, employees are being encouraged to obtain compliance via adverse actions, investigations, etc. Also, employers must now legally provide accommodations to nursing mothers. Again, while this perhaps is a fair and even an admirable goal, it has become the law of the land with virtually no analysis or consideration for how it will actually work in the workplace.

Employers must make compliance a high priority. When the DOL says "We Can Help," the DOL is not suggesting that this service applies to employers.

For additional information, please contact your Butzel Long attorney or the author of this E-news Bulletin.

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