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# Employment Law Commentary

## Full Speed Ahead: Employment and Labor Initiatives During the President's Second Term

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The purpose of this Commentary (and next month's) is to provide a forward-looking view of the regulatory and enforcement priorities of the federal labor and employment agencies in the second term of President Barack Obama. In addition to providing background on the Department of Labor's regulatory initiatives, including "Plan/Prevent/Protect" and "Right to Know," this Commentary will highlight additional proposed regulations and enforcement priorities in the Wage and Hour Division, the Occupational Safety and Health Administration, the Office of Federal Contract Compliance Programs, and the Equal Employment Opportunity Commission, as well as developments related to the National Labor Relations Board. In next month's Commentary, we will examine the NLRB and its increasingly aggressive inroads into non-union workplaces.

(Continued on page 2)

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## BACKGROUND

The levers of power in Washington did not shift hands in 2012. As a consequence, prognosticating about the future direction of our nation's employment and labor laws in the next four years requires little more than an examination of the enforcement and policy priorities of the past four. While employers can bemoan the decidedly "pro-labor" agenda of the current administration, they can also take comfort in the certainty that comes with continuity in the executive branch. With a divided Congress returning in January along with the re-elected president, we can expect that the president's legislative agenda will be muted in comparison to the Department of Labor's ("the Department") and other agencies' robust enforcement and policy agenda in the coming years. The president's second-term agenda will likely include the following elements, in addition to others more fully described below:

- Launching "Plan/Prevent/Protect," an initiative aimed at ensuring safe, secure, and equitable workplaces
- Finalizing "Right to Know" rulemaking, intended to enhance transparency of workers' employment status and how their pay is computed
- Implementing an Occupational Safety and Health Administration (OSHA) proposal requiring employers to implement an Injury and Illness Prevention Program
- Elevating OSHA's whistleblower protection enforcement capacity under the Dodd-Frank Act through increased funding and the newly formed Whistleblower Protection Advisory Committee
- Eliminating an exemption from minimum wage and hour requirements under the Fair Labor Standards Act (FLSA) for individuals who are engaged in providing companionship services to the elderly or infirm
- Implementing affirmative action rules by the Office of Federal Contract Compliance Programs (OFCCP) intended to boost hiring of veterans and disabled workers
- Finalizing the Equal Employment Opportunity Commision's (EEOC) Strategic Enforcement Plan, with a nationwide focus on eliminating systemic barriers in recruiting and hiring and emerging employment issues such as LGBT coverage under the Title VII sex discrimination provisions

## PLAN/PREVENT/PROTECT

With the re-election of the president, the Department is expected to move full speed ahead with his Plan/Prevent/Protect agenda, a regulatory and enforcement effort designed to ensure "safe, secure and equitable" workplaces for American workers. Plan/Protect/Prevent will require employers to implement self-monitoring plans to identify and remedy violations of laws administered by OSHA, the Mine Safety and Health Administration (MSHA), OFCCP, and the Department's Wage and Hour Division (WHD). Although the specifics will vary by law, industry, and regulated enterprise, the various regulatory units will likely promulgate standards and regulations pursuant to the following guidelines issued by the Department in March 2010:

- **Plan**: Employers and regulated entities will be required to prepare a plan for identifying and remedying risks of legal violations and make these plans available to workers so they can fully understand them and monitor their implementation.
- **Prevent**: The plan must be fully implemented in a manner that prevents legal violations. The Department made a point of noting that the process involves active implementation, not mere filing of paperwork.
- **Protect**: The employer must regularly monitor progress to ensure that the plan's objectives are being met.

## WAGE AND HOUR INITIATIVES

WHD will be busy in the years ahead implementing the following policy and enforcement initiatives announced in the first Obama term.

### Right to Know Rule

As part of the Department's "find and fix" approach under Plan/Prevent/Protect, WHD intends to propose a rule dubbed Right to Know updating the record-keeping requirements under the Fair Labor Standards Act (FLSA).

In the first Obama term, the White House pushed legislation intended to crack down on misclassification of workers as independent contractors. While the legislation has stalled in Congress and is likely to continue to fail in the next session, the proposed Right to Know rule would require employers to provide notice about how pay is computed and to perform a classification analysis for each worker excluded from coverage under FLSA.

Earlier this year, WHD announced that the proposed rule would not be completed by January 20, 2013. The rule met with strong resistance from employers when early reports indicated that it would require employers to, *inter alia*, prepare a written analysis of an employee's exempt status under FLSA, provide a copy of that analysis to the employee, and maintain a copy of that analysis for review by WHD investigators.

As indicated by Solicitor of Labor M. Patricia Smith at the ABA Section of Labor and Employment Law's annual conference on November 2, 2012, the Department will likely continue misclassification enforcement efforts, in conjunction with the Internal Revenue Service (IRS), targeting specific industries such as restaurants, construction, and hotels.

*(Continued on page 3)*

**Administrator Interpretations**

WHD is likely to begin issuing new Administrator Interpretations (AIs) in the coming months. In 2010, WHD broke its long-standing practice of writing "opinion letters" in favor of AIs, which are now issued when the WHD administrator determines that further clarity is needed regarding the proper application of a statute or regulation. Despite lacking an administrator, WHD under the direction of Deputy Administrator Nancy Leppink issued three AIs between March and June of 2010, addressing the FLSA administrative exemption as applied to mortgage loan officers, the definition of "changing clothes" for purposes of calculating hours worked, and the scope of Family and Medical Leave Act (FMLA) coverage for persons standing in *loco parentis*.

While WHD has not issued any AIs since those three were issued more than 18 months ago, the president's re-election, legislative inaction, and WHD's increasing focus on misclassification cases make it likely that additional AIs will be issued in the new administration.

**Additional WHD Regulations Coming Down the Pike**

WHD is also expected to finalize two regulatory efforts in the first months of President Obama's new term. First, it is likely that WHD will finalize efforts to eliminate the "companionship services" exemption for third parties. The proposed regulation relates to a 1974 amendment to the FLSA that created an exemption from the minimum wage and overtime requirements for individuals who are engaged in providing "companionship services" to the elderly or infirm. The proposed rule, the comment period for which expired on March 21, 2012, would eliminate the companionship services exemption for third-party employers (thus requiring the payment of minimum wage and overtime), severely limit the ability of the companion to engage in "meal preparation, bed making, washing of clothes, and other similar services [for the aged or infirm person]" by subjecting these tasks to the 20 percent limitation now applicable to "general" household work; and reinforce the prohibition on the provision of medical care. The Department will likely finalize this regulatory effort by issuing a final rule sometime in 2013.

Second, WHD is expected to move forward with a final rulemaking implementing certain statutory changes to FMLA related to military caregivers and airplane flight crews. The amendments would extend military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses, and would expand the definition of a serious injury or illness to include serious injuries or illnesses that result from pre-existing conditions. The amendments would also expand qualifying exigency leave to eligible employees with family members serving in the Regular Armed Forces, and would add a requirement that for all qualifying exigency leave the military member must be deployed to a foreign country. The proposed rule also contains proposals to eliminate the physical impossibility exception, significantly limit an employer's ability to require an employee to take leave in specified increments, and remove the FMLA forms from the regulations (allowing WHD to change the forms without public notice and comment). The comment period for the proposed rule expired in April 2012. It is expected that, after considering the comments, WHD likely will publish a final rule that tracks the language of the proposed rulemaking.

## OCCUPATIONAL SAFETY AND HEALTH INITIATIVES

During the president's first term, many safety and health policy initiatives remained on the sidelines during a sluggish economic recovery. In 2010, OSHA revamped its Severe Violator Enforcement Program, which targets employers who willfully violate safety and health rules, after the administration devoted additional budget resources to the agency. As a consequence, OSHA was able to hire more than 100 new compliance officers and redirect resources and personnel formerly involved in compliance assistance and cooperative programs into enforcement. As a result, the number of inspections increased substantially during Obama's first term as compared to the second term of George W. Bush. In the years ahead, OSHA will continue to work on a relatively robust rulemaking agenda as described below.

**Injury and Illness Prevent Program (I2P2)**

As part of OSHA's "find and fix" approach under Plan/Prevent/Protect, the agency will move forward with a proposal requiring employers to implement an Injury and Illness Prevent Program, also referred to as "I2P2." Although the details have yet to be released, the rule would require employers to "find and fix" all hazards at their worksites, regardless of whether there is a specific OSHA standard.

The rules promulgated under I2P2 would build on the existing Safety and Health Program Management Guidelines and best practices taken from OSHA's Voluntary Protection Program and Safety and Health Achievement Program. The rule will likely be modeled after California's similar IIPP program, but officials expect it to be less bureaucratic and paper-oriented than its California counterpart. Many have already criticized the proposal for creating the potential for conflict with existing voluntary programs put in place at workplaces across the country.

**Strengthening the Whistleblower Protection Programs**

The first Obama term saw the passage of the Dodd-Frank Act, which gives OSHA even greater enforcement authority over the various statutes with whistleblower

*(Continued on page 4)*

protection provisions. In May 2012, OSHA announced the formation of a Whistleblower Protection Advisory Committee to advise, consult with, and make recommendations to the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health on ways to improve the efficiency, effectiveness, and transparency of OSHA's administration of whistleblower protections. Now that the president has been re-elected, it is expected that OSHA will enhance its whistleblower protection efforts. The Department's proposed budget for fiscal year 2013 allocates an additional $5 million over last year's OSHA funding specifically for its whistleblower programs. This increased funding, combined with the huge dollar amounts that the agency can recover through whistleblower actions, may lead to expanded efforts in this area by OSHA in the second Obama term.

**Injury and Illness Reporting**

Employers can expect that OSHA will finalize rules expanding reporting requirements for serious injuries and revising the list of industries exempt from injury and illness record-keeping requirements. The proposed rulemaking, published in June 2011, would require tens of thousands of previously exempt employers to keep logs of work-related injuries and illnesses. The new regulations would also change the requirements for the types of incidents that must be reported to the agency, as well as the timing for reporting certain incidents.

## FEDERAL CONTRACTORS

OFCCP, the Department division charged with regulating federal contractors' employment and affirmative action practices, was busy in the first Obama term but has yet to finalize many of its initiatives. The president's re-election means that the aggressive regulatory changes pushed by OFCCP will likely become law in the coming months.

**Affirmative Action Rules for Veterans and Disabled Workers**

In the short term, it is expected that OFCCP will finalize two affirmative action rules for veterans and disabled workers. The rule proposed by OFCCP for veterans clarifies mandatory job listing requirements, under which a contractor must provide job vacancy and contact information for each of its locations to an appropriate employment service delivery system. The rule also proposes requiring contractors to engage in at least three specified types of outreach and recruitment efforts each year. In addition, the proposed rule would require that all applicants be invited to self-identify as a "protected veteran" before they are offered a job. The proposal also seeks to increase data collection on job referrals, applicants, and hires, as well as require contractors to establish hiring benchmarks to assist in measuring the effectiveness of their affirmative action efforts.

The proposed OFCCP rule for disabled workers would strengthen the affirmative action and reporting obligations of federal contractors by requiring them to set a hiring goal of having 7 percent of their employees be qualified workers with disabilities. The proposed changes also detail mandatory actions contractors would have to take in the areas of recruitment, training, record-keeping, and dissemination of affirmative action policies.

Both affirmative action rules emphasize the importance of data collection and outreach to disabled workers and veterans, categories that are not covered by census data (in contrast to women and minorities).

**Pay Equity for Women**

OFCCP is also likely to focus on the issue of gender pay equity, which featured prominently during the 2012 presidential campaign. In 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act, which lowers the bar for employees to sue for discriminatory pay practices that are hidden from them. OFCCP is likely to continue to seek employee compensation data from federal contractors in an effort to ferret out unequal pay practices, while efforts to push additional pay practice legislation are likely to stall on Capitol Hill.

**Non-Displacement of Qualified Workers**

In January 2009, President Obama issued Executive Order No. 13495 requiring successor federal contractors and subcontractors to offer employment to employees of the predecessor contractor. The rule becomes effective after WHD and the Federal Acquisition Regulation (FAR) Council issue final rules implementing the executive order. In August 2011, WHD issued a final rule. In May 2012, the FAR Council proposed a rule to implement the executive order, and the comment period has now expired. It is expected that the FAR Council will issue a final rule implementing the executive order early in the next year.

## EQUAL EMPLOYMENT OPPORTUNITY

EEOC will likely continue an aggressive enforcement policy, in keeping with the Commission's draft Strategic Enforcement Plan (SEP) for Fiscal Years 2012-2016, released in September 2012. The SEP identifies a number of national priorities for the coming years, not the least of which include eliminating systemic barriers in recruiting and hiring; protecting immigrant, migrant, and vulnerable workers; preserving access to the legal system; and addressing so-called "emerging issues" such as LGBT coverage under the sex discrimination provisions of Title VII. In the recruiting area, EEOC plans to scrutinize the use of screening tools, such as pre-employment tests, background screens, and date of birth screens in online applications, that adversely impact protected groups. The EEOC also plans a national campaign to educate and reach out to employees and employers on how to prevent and appropriately respond to workplace harassment.

*(Continued on page 5)*

## LABOR INITIATIVES

### The Department of Labor's "Persuader" Regulations

In June, the Department proposed a rule narrowing the advice exemption under the Labor-Management Reporting and Disclosure Act (LMRDA). By curtailing the exemption, the "Persuader" rule would expand what types of employer activity and legal advice in conjunction with a union organizing campaign must be disclosed.

Under the LMRDA, employers and labor relations consultants or law firms representing employers must file disclosure reports when the consultant is retained to persuade employees with respect to union organizing or collective bargaining. The proposed rule may influence a company's decision about whether to seek compliance assistance in reviewing presentations, speeches, or other written materials prepared during union organizing, collective bargaining, and strikes for fear of violating the LMRDA, which subjects some violators to criminal penalties.

In September, the American Bar Association requested that the Department reconsider the rule, noting that, if enacted, it would force lawyers to disclose confidential client information and create a conflict with their ethical obligations. A final rule on the Persuader regulations is expected in 2013.

## CONCLUSION

The re-election of the president means that employers can expect a continuation of the labor and employment policies and enforcement priorities of the past four years. The Department has announced a fairly proactive and aggressive agenda for the coming years, with some controversial rulemaking initiatives likely to become finalized in short order. Employers can expect many of these new "pro-employee" rules to have a significant impact on their workplaces, with some additional, yet unannounced, changes probably in store for the future.

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