



Nature Of DOL's "Right To Know" Remains Largely Unknown

Insights

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The U.S. Labor Department's most-recent regulatory agenda now targets April 2011 for the release of a proposed rule that DOL says is intended to, among other things, "update [federal Fair Labor Standards Act] recordkeeping requirements to foster more openness and transparency in demonstrating employers' compliance with applicable requirements to their workers, to better ensure compliance by regulated entities, and to assist in enforcement."

Elsewhere, DOL has stated that this forthcoming "Right To Know Under The Fair Labor Standards Act" would address "notification of workers' status as employees or some other status such as independent contractors, and whether that worker is entitled to the protections of the FLSA." The proposal would "also explore requiring employers to provide a wage statement each pay period to their employees," apparently so as to convey to employees "how their pay is computed."

These current notifications include even fewer specifics than their predecessors, about which we reported in May. At that time, DOL expressed an intention to require employers to notify workers of their FLSA rights in some unidentified way and to provide unspecified "information" about hours worked and wage computations.

DOL also said earlier that employers would be required to prepare some sort of "classification analysis" for a worker whom the employer will "exclude . . . from the FLSA's coverage," to disclose this analysis to the worker, and to provide the analysis to a DOL investigator upon "request." Judging from the latest notices, this is still on the table. It is less than transparent whether such an analysis would be restricted to situations in which a worker is categorized as being or not being an employee for FLSA purposes. For example, there is concern that it will also extend to an employer's decisions about which employees it will treat as being exempt from the FLSA's pay requirements. At a May "Stakeholder Forum" in Washington, D.C., DOL officials declined to address this question.

We continue to recommend that employers remain on the alert for this proposed rule. When it is published, employers should evaluate each provision in detail, should carefully consider all potential ramifications, and should be prepared to submit suggestions, comments, and any objections. In light of the recent "Bridge to Justice" initiative, there is every reason to anticipate that information compiled under the requirements of any final regulation will wind up in the hands of claimants and their lawyers.

