



Be On Guard For Looming FLSA Recordkeeping Changes

Insights

5.18.10

The U.S. Labor Department has now provided additional, disquieting insight into its "Plan, Prevent, Protect" program that we first reported on in our [April 30 post](#). [Part of DOL's Spring Regulatory Agenda 2010](#) announces an intention to issue a Notice of Proposed Rulemaking ("NPRM") proposing significant amendments to the FLSA recordkeeping regulations.

There are as yet no details. But DOL says that its new rules will, among other things, seek to require employers:

- To notify workers of their FLSA rights (apparently, the longstanding requirement to display DOL's prescribed poster somehow does not accomplish this);
- To provide currently-unspecified "information" about hours worked and wage computation; and
- To perform and document some kind 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".

DOL's amendments will also undertake to "address burdens of proof when employers fail to comply with record and notice requirements." It will be interesting to see whether and to what extent DOL will presume to instruct the courts as to what proof burdens they must apply and how and when to apply them.

These proposals are likely to raise a host of substantial and troubling questions. For instance, must a "classification analysis" be done for each worker, rather than simply for a group of similarly-classified ones? What level of detail will be necessary? Must the analysis directly or indirectly reflect the advice of in-house or outside counsel so as to implicate the attorney/client privilege? Must it contain confidential business information where this might be linked to a decision to treat an employee as being exempt from the FLSA's minimum-wage, overtime, and timekeeping requirements? What assurance will DOL give (indeed, what assurance *can* it give) that a written analysis turned over in response to an investigator's demand will not be disclosed outside of DOL?

We recommend that employers remain on the alert for this NPRM. Once the document is published, each proposed amendment and its potential ramifications should be closely scrutinized and carefully considered. We strongly suspect that there will be provisions as to which comments, and perhaps even strenuous objections, will be advisable before any revisions are adopted.

Keep in mind also that, as we have noted earlier, pending legislation would attach potentially burdensome penalties to an employer's being found not to have complied with whatever any final recordkeeping amendments turn out to be.