



"Comply Or Else – But Don't Ask For Help" (Updated 05/23/10)

Insights

4.30.10

UPDATED 05/23/10: Fisher Phillips participated last week in a Washington, D.C. "Stakeholder Forum" conducted by the Division. On multiple occasions, we urged the Division to reconsider its new position regarding opinion letters. Among other things, we pointed out that these letters serve a far-broader educational purpose than the Division might realize, such that the "cost/benefit analysis" it referred to in taking its recent stance might well have ascribed too little weight to the positive impact its opinions have upon FLSA compliance.

Tough talk and other recent developments could reveal an increasingly adversarial, "gotcha" approach to FLSA enforcement by the U.S. Wage and Hour Division. A prior [post](#) covered both the We Can Help initiative and other intensified U.S. Labor Department enforcement measures.

The Division also announced this week that, as part of a broader DOL policy, it will disclose quarterly investigative information on its website. This will show wage-hour violations found in specific investigations, as well as back-wage amounts, numbers of employees involved, and any civil money penalties assessed.

Then, on April 29, senior DOL officials said that they are developing "Plan, Prevent, Protect" rules to require employers (1) to create a plan for identifying and correcting non-compliance; (2) to implement the plan in concrete ways; and (3) to monitor the plan's effects. A [New York Times account](#) indicates that an employer will be required to disclose some or all of the plan to the Labor Department and to employees. DOL believes that these rules are warranted because "too many" companies "are playing a dangerous game of catch me if you can". While it remains to be seen, we anticipate that failing to follow these Plan, Prevent, Protect requirements to the Division's satisfaction could lead to civil penalties and perhaps other sanctions.

The FLSA can seem simple in the abstract, but it is often difficult and complex to deal with in the real world. Any worthwhile compliance plan necessitates knowing exactly how the FLSA applies in innumerable situations. But at the same time DOL is adopting a take-no-prisoners enforcement posture as to a no-excuses law, the Division is offering little guidance on the endless FLSA gray-area questions that exist.

In the past, some employers have asked for the Division's official written explanation of how the law works in particular situations. The Division's reply educated both the inquiring employer and the many others who read it. Instead of continuing to leverage its efforts in this way, the Division has announced that it will respond to interpretation requests by sending generalized legal citations instead of specific answers. It has also demonstrated its willingness to change or withdraw prior interpretations without warning, thereby adding to uncertainty and unpredictability in FLSA matters.

The current atmosphere is likely to affect how the Division views investigations right now. Employers should not wait for DOL compliance-plan rules to come out before systematically being sure that their pay policies and practices pass muster under the FLSA.