

United States Department of Labor: Coming to Your Business



Charlotte Chapter
Association of Corporate Counsel
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Presented By:

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US DEPARTMENT OF LABOR

Secretary of Labor Hilda L. Solis

■ Key Staff

- Deputy Secretary – Seth Harris
- Employee Benefits Security Administration – Phyllis Borzi
- Occupational Safety and Health Administration – David Michaels
- Office of Assistant Secretary for Policy – William E. Spriggs
- Office of Federal Contractor Compliance Program – Patricia Shiu
- Office of Labor Management Standards – John Lund
- Solicitor of Labor – M. Patricia Smith
- Wage and Hour Division - Nancy Leppink

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US DEPARTMENT OF LABOR

Vision – Good Jobs for Everyone

“Good Jobs” Means:

- Grow employee incomes, narrow wage and income inequality
- Ensure wages and overtime are paid to workers
- Workplaces are safe and healthy, fair and diverse
- Workplace flexibility for family and personal care-giving
- Improving health benefits and retirement security for employees
- Assure workers have a voice in the workplace

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US DEPARTMENT OF LABOR

Regulatory and Enforcement Strategies

- Plan/Prevent/Protect
 - Leverage limited resources to enhance worker protections
- Openness and Transparency
 - Enhance outreach and promote compliance

Non-Regulatory Initiatives

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US DOL: PLAN/PREVENT/PROTECT

- **Heart of DOL's New Strategy to Assure Compliance**
 - Find and fix violations before a DOL investigator arrives
- **Employers' Burden Is to Obey the Law**
 - Not DOL's burden to catch them violating the law
- **Replaces Catch Me if You Can**

US DOL: PLAN/PREVENT/PROTECT

- **Expands Worker Protection Efforts at DOL**
- **Agencies to Propose Regulations**
 - Require employers to develop programs that address compliance within the agency's portfolio
- **Strategy Will Require Three Steps to Ensure that Workplaces Comply with the Law:**
 - Three "P's"

PLAN/PREVENT/PROTECT: What Is It?

■ Plan:

- Employers will need to create a plan for identifying and remediating risks of legal violations and other risks to workers.
- Employers would provide employees with opportunities to participate in creating the plans
- Employees would have access to the plans so they can understand them and monitor their implementation

PLAN/PREVENT/PROTECT: What Is It?

■ Prevent:

- DOL will require employers to implement thoroughly and completely a plan in order to prevent violations
- It can not be a paper process – an employer can not draft a plan and then put it on a shelf
- Plan must be fully implemented for the employer to comply with the Plan/Prevent/Protect compliance strategy

PLAN/PREVENT/PROTECT: What Is It?

■ Protect:

- DOL's regulations will require employers to ensure that the plan's objectives are met on a regular basis
- Not just any plan will not do
- Plan must actually protect workers from violations of their workplace rights

■ Consequences

PLAN/PREVENT/PROTECT: Regulatory Initiatives

■ OFCCP

- Construction Contract Affirmative Action Requirements
- Other Activities

■ OSHA

- Injury and Illness Prevention Program
- Other Activities

■ WHD

- Right to Know Initiative
- Other Activities

PLAN/PREVENT/PROTECT: WHD

- **Right to Know Would Require Employers to:**
 - Notify employees of FLSA rights
 - Provide information on hours of work and wage computation
 - Perform classification analysis for exempt employee and share with employee and WHD
 - Modernize recordkeeping requirements

OTHER ACTIVITIES: WHD

- Bridge to Justice program
- Time Recording App
- Recent FLSA Regulation Changes
- Applications Development Contest

PLAN/PREVENT/PROTECT: OFCCP

- **Construction Contractor Affirmative Action Requirements Would:**
 - Require construction contractors to develop and implement affirmative action programs in the areas of recruitment, training and apprenticeship
 - Prevent the misclassification of workers as independent contractors and require proper classification

OTHER ACTIVITIES: OFCCP

- Compensation Data Collection Tool
- New Veterans and Disabled Individuals Proposed Regulations
- Active Case Enforcement Directive
- Jurisdiction Over Providers of Healthcare Services and Supplies

PLAN/PREVENT/PROTECT: OSHA

- **Injury and Illness Prevention Program (I2P2) Would Require Employers to:**
 - Develop injury and illness prevention programs
 - Identify and fix workplace safety and health hazards
 - Give employees a voice and participation in developing program
 - Implement processes to reduce workplace injuries

OTHER ACTIVITIES: OSHA

- Occupational Injury and Illness Recording
 - Musculoskeletal Disorder Reporting Logs

- New Standards at Various Stages in Development

US DOL: OPENNESS & TRANSPARENCY

- **Proposal on “Persuader” Reporting Requirements**
 - Notice of proposed rulemaking and request for comments published June 21, 2011 (76 Fed. Reg. 36178)
 - Primary focus is to revise the advice exemption in Labor-Management Reporting & Disclosure Act (LMRDA)
 - 60-day comment period ends August 22; extended to September 21

- **LMRDA Enforced by Office of Labor-Management Standards (OLMS)**

OPENNESS & TRANSPARENCY: OLMS

LMRDA Requires Disclosure of:

- Agreements or arrangements where the consultant agrees to undertake activities with a direct or indirect object to persuade employees to exercise, or not to exercise, their rights to organize and bargain collectively
- President and Treasurer required to sign Form LM-10 that company files
- Agreements or arrangements when a consultant undertakes supplying information about the activities of a union or employees involved in a labor dispute with the employer
- Consultants file a Form LM-20
- Criminal penalties for failure to file or filing false information

OPENNESS & TRANSPARENCY: OLMS

- **LMRDA Advice Exemption: Section 203(c)**
 - No report of an employer-consultant agreement is required where the consultant has no direct contact with employees and only provides advice or materials for the employer to use in persuading its employee
 - US DOL views this advice exception as overly broad and claims it has resulted in significant underreporting of agreements and persuader activities by employers and consultants

OPENNESS & TRANSPARENCY: OLMS

- **Proposed Modifications to Advice Exception:**
 - Adopt plain meaning of the term to limit “advice” activities:
 - “Advice” is “an oral or written recommendation regarding a decision or a course of conduct”
 - Expand persuader activity which must be disclosed
 - “Persuader Activity” includes providing material or communications or engaging in other conduct on an employer’s behalf with “the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively”

OPENNESS & TRANSPARENCY: OLMS

■ Proposed Modifications to Advice Exception:

- Examples of “persuader activity” that no longer constitutes “advice”
 - Providing material for distribution to employees
 - Drafting policies with an object to persuade employee
 - Orchestrating a campaign to avoid union organizing
 - Providing supervisory training, audio-visuals, etc.
- Revises Forms LM-10 and LM-20

US DOL: OPENNESS & TRANSPARENCY

■ Open Government Webpage

- www.dol.gov/open/
- Enforcement Database (searchable)
 - EBSA
 - MSHA
 - OFCCP
 - OSHA
 - WHD

PROPOSAL TO EXPEDITE ELECTIONS: NLRB

Proposed Changes to Representation Election Process:

- Notice of proposed rulemaking published Wednesday, June 22, 2011 (76 Fed. Reg. 36812)
- Designed to expedite union elections by eliminating barriers to elections, simplifying election process and eliminating needless litigation in order to determine union representation through secret ballot election
- Comment period expires August 22, 2011
- Public Hearing July 18-19, 2011 in Washington, DC
- Member Brian Hayes lodges dissent

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PROPOSAL TO EXPEDITE ELECTIONS: NLRB

■ Proposed Amendments Would:

- Allow electronic filing of election petition and other documents
- Provide that employees, unions and employers receive and exchange information on a timely basis and that is needed to understand and participate in the representation case process
- Establish standard timeframes within which to resolve or litigate issues before and after elections

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PROPOSAL TO EXPEDITE ELECTIONS: NLRB

■ Proposed Amendments Would:

- Require parties to identify issues and describe evidence after the filing of an election petition to promote resolution and eliminate litigation
- Postpone unit or voter eligibility questions until after an election
- Require employers to provide an electronic list of voters, including their telephone numbers and e-mail addresses, if available, to the NLRB and other parties

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PROPOSAL TO EXPEDITE ELECTIONS: NLRB

■ Proposed Amendments Would:

- Reduce the time for providing the eligible voter list from 7 to 2 days after the NLRB approves an election agreement or directs an election
- Consolidate election-related appeals to the Board in a unified post-election appeal process
- Render Board review of post-election decisions as discretionary instead of mandatory

PROPOSAL TO EXPEDITE ELECTIONS: NLRB

■ Implications of Regulatory Proposals:

- Together will limit or inhibit an employer's free speech rights
- Regulates rather than legislates provisions of the Employee Free Choice Act while keeping a secret-ballot election
- Infringes upon employer's ability to seek legal advice
- Small employers are particularly disadvantaged
- Dissent notes that NLRB proposal will "stifle full debate" because employers should have little, if any, "involvement in the resolution of questions" concerning union representation

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United States Department of Labor: Coming to Your Business

- **Current Debates in Congress**
 - HR 2587 Protecting Jobs from Government Interference Act (Scott, R-SC)
 - Debt ceiling and balancing spending with income

- **COMMENTS and QUESTIONS**

DOL & Others: Coming to Your Business

Thank you!

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