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What Happened To Plan/Prevent/Protect, and Where Are We Now? A Look Inside OSHA, WHD and OFCCP

SPECIAL REPORT

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What Happened To Plan/Prevent/Protect, and Where Are We Now? A Look Inside OSHA, WHD and OFCCP

It has been about two years since Secretary of Labor Hilda Solis announced the Department of Labor's (DOL) "Plan/Prevent/Protect" compliance strategy, a key component of its *Good Jobs for Everyone* vision. The basic goal of Plan/Prevent/Protect is to "ensure employers and other regulated entities are in full compliance with the law every day, not just when Department inspectors come calling." While the DOL launched the program with much enthusiasm, two years down the road, there appear to be other initiatives that have taken precedence on the regulatory agenda. Regardless of whether these initiatives technically fall under Plan/Prevent/Protect, they serve the same purpose: encouraging affirmative employer compliance with various workplace laws. This paper examines where we are in 2012 with respect to the Plan/Prevent/Protect strategy, as well as what items top the regulatory agenda at the Occupational Safety and Health Administration (OSHA), Wage and Hour Division (WHD) and Office of Federal Contract Compliance Programs (OFCCP).

Plan/Prevent/Protect

In its Spring 2010 Regulatory Agenda, the DOL charged several of its agencies, including OSHA, WHD and OFCCP, with proposing regulatory actions that "require… regulated entities to take three steps to ensure safe and secure workplaces and compliance with the law."[1] These steps are:

- **"Plan":** The Department will propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers — for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide their employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.

- **"Prevent":** The Department will propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The

[1] The Mine Safety and Health Administration also plays an important role in Plan/Prevent/Protect, but a summary of its regulatory initiatives under Plan/Prevent/Protect is beyond the scope of this paper.

plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.

- **"Protect":** The Department will propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.[2]

In addition to regulatory initiatives, the Department described non-regulatory efforts to support Plan/Prevent/Protect, including collaboration between the WHD and Employee Benefits Security Administration (EBSA) and other EBSA programs. The goal of the Department's strategy, whether through regulation or enforcement, is to replace "catch me if you can" with "Plan/Prevent/Protect."

OSHA

One of the centerpieces of Plan/Prevent/Protect is a rulemaking announced by OSHA to require employers to implement an Injury and Illness Prevention Program (IIPP). An IIPP is a program whereby employers take the initiative to look for and address workplace safety and health hazards. Most IIPPs have some form of the following elements:

- Management Leadership
- Employee Participation
- Risk Identification and Prioritization
- Hazard Control
- Education and Training
- Evaluation and Continuous Improvement

A mandatory federal IIPP rule would follow similar rules implemented by various states, most notably California, which already requires employers with establishments in that state to have an IIPP.[3]

While OSHA's IIPP initiative was announced with great fanfare, it has been stalled within the agency. For over a year, OSHA has been predicting that it would initiate the Small Business Regulatory Enforcement Fairness Act (SBREFA) process for the rule, but it has yet to do so. Just a few weeks ago, OSHA publicly announced it would begin SBREFA by sending out background material on the rule to Small Entity Representatives (SERs). A few weeks later, however, it

[2] United States Department of Labor, *Regulatory Agenda Narrative: Department-Wide Regulatory and Enforcement Strategies—"Plan/Prevent/Protect" and Openness and Transparency*, http://www.dol.gov/regulations/2010RegNarrative.htm (last visited March 26, 2012).

[3] The effectiveness of the California rule has been debated, and a recent Rand Corporation study of the California experience questioned the need for a mandatory IIPP requirement, as opposed to voluntary incentives.

informed the SERs that there was another delay, and it had to hold off sending materials. It is unclear when or if OSHA will release to the public its initial regulatory approach to the IIPP rule. OSHA may still initiate the SBREFA panel process this year for the IIPP rule, but a proposed rule – and, thus, a final rule – is several years down the road.

Meanwhile, OSHA has been busy with other regulatory priorities that impact employers across the country. In particular, the agency recently published a final rule bringing its Hazard Communication standard into accord with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). In order to comply with the new rule, at a minimum, all employers that have a written hazard communication program will need to retrain covered employees on new labeling and Material Safety Data Sheet (MSDS) provisions.

OSHA, like other DOL agencies, also continues to beat the enforcement drum, with historically high enforcement levels. The agency is bringing more significant cases and, as a result of its enhanced administrative penalties memorandum, employers are seeing higher proposed penalties in response to OSHA citations. From a conceptual standpoint, OSHA's enforcement efforts serve the Plan/Prevent/Protect strategy's goal of forcing employers to "find and fix" issues at the workplace on their own without "prompting" from the Department.

Employers cannot afford to let up on their safety and health programs, regardless of the status of Plan/Prevent/Protect, IIPP or any other OSHA rulemaking. Employers should consider taking the following actions to ensure compliance with safety and health requirements:

- Review worksites for uncontrolled hazards;
- Examine recordkeeping logs and other incident reports for areas of concern;
- Engage employees and front-line supervisors in hazard identification; and
- Control and annually review the effectiveness of safety and health efforts.

WHD

Perhaps the most controversial initiative under Plan/Prevent/Protect was undertaken by the Wage and Hour Division: a contemplated regulation touted by the Department as the "Right to Know Under the Fair Labor Standards Act." Under "Right to Know," the Department proposed "to update the recordkeeping regulations under the Fair Labor Standards Act in order to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed."

After first announcing the initiative in the Department's Spring 2010 Semi-Annual Regulatory Agenda on April 26, 2010 under the less-catchy title "Records to Be Kept By Employers Under the Fair Labor Standards Act," the Department discussed publicly some of the concepts that

were being considered in the rulemaking, including requiring employers to review the status of all of their employees to determine if they should properly be considered "employees" or "independent contractors" and requiring employers to review the status of exempt and non-exempt employees and verify that they were appropriately classifying such employees for purposes of compensation. WHD originally projected that it would issue a Notice of Proposed Rulemaking (NPRM) in August of 2010.

As with OSHA's IIPP rulemaking, while Right to Know was announced with great fanfare, it has fizzled over the last several months. In the Fall 2010 and Spring 2011 regulatory agendas, WHD rebranded the regulatory project and pushed the date for the NPRM back, first to April 2011, and then to October 2011. Finally, in the Fall 2011 regulatory agenda, issued on January 20, 2012, WHD transferred Right to Know from the category known as the Proposed Rule Stage to the category for Long-Term Actions, changed the next anticipated step from NPRM to "Next Action Undetermined," and deleted any timeframe for proceeding. The Department has publicly acknowledged that Right to Know has moved to the backburner in favor of other regulatory projects, including the current NPRM addressing home healthcare workers.

In the meantime, WHD continues to take very aggressive positions during investigations. Among other initiatives, the agency is asserting that many situations previously understood to be proper independent contractor arrangements actually constitute an employment relationship, thereby subjecting businesses to unexpected liability for overtime and minimum wage violations for workers they never viewed as their employees. These situations have involved a wide variety of industries, but the assertion of so-called joint employment in home construction, parent-subsidiary corporate relationships, and franchisor-franchisee situations has been of particular concern. And when WHD investigates, it is now taking the position in many instances that it will not settle a matter without payment of liquidated damages, which potentially double the employer's exposure. Before the Obama Administration, administrations under both parties had consistently operated under the Department's legal guidance that WHD lacks the authority to seek liquidated damages at the administrative stage before the filing of a complaint in court. Now, as one WHD District Director recently stated in a final conference at the conclusion of an investigation, "Liquidated damages are the new normal."

In order to prepare for this type of enhanced enforcement activity, as well as the eventuality that Plan/Prevent/Protect may become a reality with respect to wage and hour issues, employers should take steps now to ensure that their policies and practices comply with the Fair Labor Standards Act:

- First, employers should ensure that they are aware of what the hot-button issues are in their industry. Are there any pending wage and hour lawsuits against competitors? Has WHD investigated companies in the industry? There is a strong likelihood that if competitors have been targeted in wage and hour actions, there will be interest in seeing whether those issues are present for other employers in the industry.

- Second, employers should take a close look at their practices, preferably in a manner covered by the attorney-client privilege. Are independent contractors truly independent? Are exempt employees, especially in administrative or information technology positions, really exempt? Do timekeeping practices accurately capture all time non-exempt workers spend on their job-related activities? Do overtime calculations properly include all necessary items of compensation, such as commissions, shift premiums and most bonuses?

- Third, where there are compliance gaps or gray areas, take the necessary and appropriate steps to come into compliance. With proper planning, most wage and hour issues can be addressed in a way that is not unduly costly in the long run. It is critical, however, for a business to understand and to manage this situation rather than being blind-sided by a company-wide WHD investigation or a class action lawsuit.

OFCCP

OFCCP has been very active in pursuing regulatory initiatives consistent with Plan/Prevent/Protect. Since 2010, OFCCP has issued several important proposed rules, which are discussed below.

Section 503 of the Vocational Rehabilitation Act

The agency has proposed significant revisions to its regulations addressing non-discrimination and affirmative action obligations of government contractors with respect to individuals with disabilities under Section 503 of the Vocational Rehabilitation Act. The proposed revisions include:

- Establishing, for the first time, statistical utilization goals for individuals with disabilities;
- Significantly increasing contractors' data collection obligations;
- Requiring employers to invite individuals to self-identify disability status both pre- and post-offer and on an annual basis; and
- Requiring employers to submit annual reports to OFCCP, regardless of whether they are undergoing a compliance review.

In addition, under the proposal, employers would be required to undertake actions in the areas of recruitment, training, record keeping and policy dissemination (similar to the obligations under the race and gender affirmative action regulations). Contractors and subcontractors also

would have to engage in a minimum number of outreach and recruitment efforts to solicit qualified disabled applicants. This requirement is in line with OFCCP's recent focus on the development of linkage agreements with certain organizations. Employers would have to enter into a linkage agreement with either the local State Vocational Rehabilitation Agency office or a local organization listed in the Social Security Administration's Ticket to Work Employment Network Directory. Alternatively, employers would be permitted to enter into a linkage agreement with one of several other listed organizations and consult with recruitment sources specified by OFCCP.

As noted above, the proposed revisions would impose a number of burdensome new obligations and raise legal concerns. For example, employers would be required to retain certain data for five years, create written documentation of denials of reasonable accommodation requests, and create voluminous documentation that could be sought by plaintiffs during discovery in ADA cases. The data collection requirements also would allow OFCCP to conduct adverse impact analyses based on disability status.

While the period for submitting comments about the proposed revisions was due to expire on February 7, 2012, OFCCP extended the comment period to February 21, 2012. OFCCP will now review the comments before publishing a final rule. Employers can prepare for OFCCP enforcement of the proposed regulations by taking the following steps:

- Reviewing staffing and systems resources to determine capacity to implement and comply with the changes;
- Identifying diversity referral sources for individuals with disabilities to establish or enhance relationships;
- Developing processes to implement resurvey obligations and educate business partners about the changes; and
- Reviewing applicant/new hire data collection processes to ensure all relevant information is being captured.

Vietnam Era Veterans' Readjustment Assistance Act of 1974

Making good on its promise to reexamine affirmative action requirements as they relate to veterans, OFCCP has also published a NPRM that would affect federal contractors' compliance obligations under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). In a significant departure from existing requirements, OFCCP's proposal would mandate that federal contractors track applicants who self-identify their protected-veteran status either before or after an offer of employment and analyze that data. Employers would be required to establish annual veteran hiring benchmarks based on this data.

The proposed rule also would require contractors to maintain an affirmative action policy laying out its commitment to engage in affirmative action to increase employment opportunities for qualified, protected veterans, train employees on the benefits of employing protected veterans, and provide appropriate sensitivity training.

While covered federal contractors are already required to take affirmative action to employ and advance in employment qualified covered veterans, these requirements often received little attention during OFCCP compliance reviews. The proposal's data tracking obligations would allow OFCCP to enforce the regulations in a more robust manner.

OFCCP is expected to issue a final rule in the Spring 2012 timeframe. Employers can take the following steps now to ensure compliance when the final rule takes effect:

- Review staffing and systems resources to determine capacity to implement and comply with the changes;
- Identify diversity referral sources for veterans to establish or enhance relationships; and
- Review applicant/new hire data collection processes to ensure that all relevant information can be captured.

Audit Submissions for Federal Contractors

OFCCP has also proposed changes that would significantly increase the burden on employers subject to OFCCP audits, including overhauling its "Scheduling Letter," which is used to notify a particular contractor establishment that it has been scheduled for a compliance evaluation and to request submission of the contractor's Affirmative Action Program(s) and supporting data. Under OFCCP's proposal, the revised Scheduling Letter would require the recipient to also submit (a) Family and Medical Leave Act (FMLA) and other leave or accommodation policies; (b) data on sub-minority by both job group and job title for applicants, hires, promotions and terminations; (c) data on "actual pool" of employees considered for promotions and terminations; and (d) detailed employee-specific pay data (typically requested only where OFCCP identifies indicators of potential discrimination).

The new Scheduling Letter would allow OFCCP to take a "deeper dive" into contractors' employment processes. For example, employers would have to submit specific minority group designations for all applicants, hires, promotions and terminations; this would allow OFCCP to conduct adverse impact analyses both at the aggregate level and specific minority group level at the outset of every review.

In anticipation of the new Scheduling Notice, employers should take steps now to ensure that they are in a position to comply with these requirements. Steps for employer consideration include:

- Ensuring that specific race information is tracked and can be produced by job group and job title for personnel activity data;
- Reviewing compensation policies and procedures to determine which variables are germane to compensation determinations;
- Ensuring that these pay data fields can be reported; and
- Ensuring that "actual pool" data for promotions and terminations is tracked and can be reported.

Submission of Pay Data to OFCCP

In the latter part of 2011, OFCCP sought public comment on the agency's development and implementation of a new compensation data collection tool. Possible uses for the tool, according to the agency, include identifying potential problems of compensation discrimination that would warrant further review by OFCCP or self-audit by the contractor, as well as identification and analysis of industry trends, contractor compensation practices and equal employment-related issues.

OFCCP requested input "related to the scope, content and format of the data collection tool" and "suggestions for ensuring that the tool will be an effective and efficient means of identifying contractors for review." The agency accepted comments for 60 days, and the public will have an additional opportunity to comment following OFCCP's publication of the NPRM. Although the compensation data collection tool is not yet in effect, employers should consider the burdens the tool may impose. Undertaking this analysis now will allow employers to submit a comment expressing these concerns if and when OFCCP issues an NPRM.

What Is On the Horizon?

Initially envisioned as part of Plan/Prevent/Protect, OFCCP plans to issue an NPRM to revise the affirmative action requirements for construction contractors. OFCCP claims that the revision is needed because the regulations, last revised in 1980, have not been effective "at making meaningful progress in the employment of women and certain minorities in the construction industry."

OFCCP also plans to revisit the Sex Discrimination Guidelines, which "set forth the interpretations and guidelines for implementing Executive Order 11246…" In assessing the need to revise the regulations, OFCCP points to the age of the guidelines: "The guidance ….is more than 30 years old and warrants a regulatory look back. OFCCP will issue an NPRM to create sex discrimination regulations that reflect the current state of the law in this area."

* * *

While the DOL may have fallen behind on some of the Plan/Prevent/Protect initiatives described in its Spring 2010 Regulatory Agenda, it has, through enhanced enforcement and other initiatives, taken strides to meet its goal of forcing employers to affirmatively address workplace law violations. Jackson Lewis attorneys are available to answer any questions on the Plan/Prevent/Protect strategy, as well as questions regarding any of the Department's 2012 initiatives.

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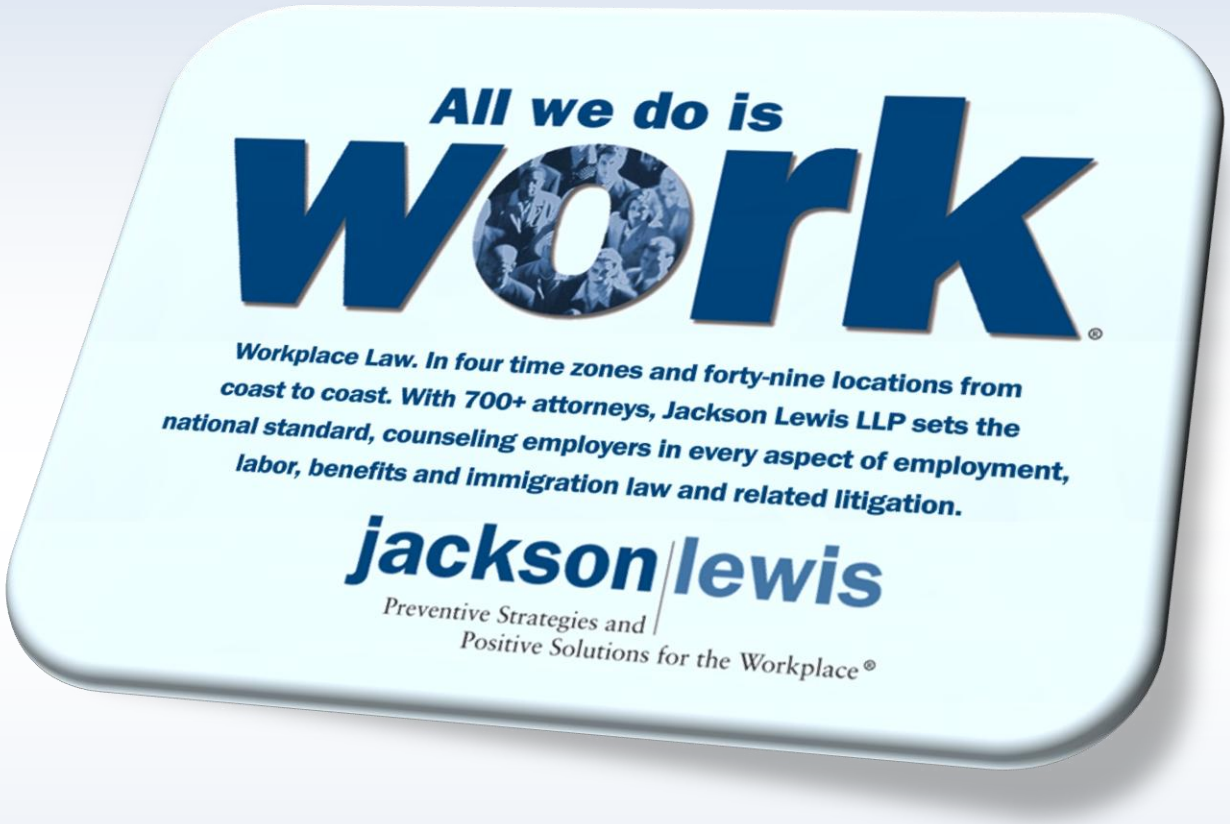
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