

L a b o r & E m p l o y m e n t
A L E R T

JANUARY
2009

INCREASED WAGE & HOUR AND OSHA ACTIVITY UNDER OBAMA ADMINISTRATION ANTICIPATED

“Change” was the buzzword of the 2008 Presidential Campaign, and, at least in the workplace, “change” is actually anticipated. The incoming president, by all appearances, holds dramatically different views on many issues than does the outgoing president. The Department of Labor’s regulation of American wage practices and workplace safety seem to have been targeted for “change” early on – and in a direction not likely to provide economically battered employers with any relief.

Two Department of Labor (“DOL”) enforcement arms that directly may impact business operations under the Obama Administration are the Wage and Hour Division (“WHD”) and the Occupational Safety and Health Administration (“OSHA”). It is likely that the WHD, using its investigative and litigation authority, will scrutinize the manner in which business classifies and pays workers to an extent not seen in nearly three decades. It also is expected that OSHA will pursue increased penalties more energetically than in recent memory for conduct resulting in worksite accidents, failure to pass routine inspections and “whistleblower” retaliation, including criminal penalties. Aiding OSHA’s increased punitive efforts, Congress will reintroduce legislation which large Democratic majorities in both Houses, urged on by labor unions, are expected to pass.

Predictions are that the WHD will ardently investigate and prosecute both the misclassification of employees as independent contractors, and of non-exempt workers as exempt from the wage and hour laws. Particularly at a time of widespread depressed government tax revenue, classifying an employee as a contractor deprives the government

of tax, social security, Medicare and unemployment revenues, while also denying workers of vital employee benefits. Employers can expect more and stricter WHD enforcement of Federal wage laws, including more investigations into overtime and minimum wage compliance, and into a practice which worker advocates call “wage theft”. All indications are that Secretary of Labor nominee Hilda Solis will prosecute employer infractions to the maximum extent afforded by the Fair Labor Standards Act, the Service Contract Act and the Family and Medical Leave Act. The cost to employers of uncovered wage and hour violations will exceed the payment of back wages and is likely routinely to include liquidated damages and penalties, the latter of which have been rarely imposed in the past. Further intensifying the DOL’s scrutiny of employer classification and payment of its workers, there are plans to increase the number of investigators and regulators.

Similar to the impact of the WHD, OSHA is expected to become more of a factor in everyday business operations. Those reported to have the ear of the new administration have advocated an end to the collaborative approach that has typified OSHA efforts under recent administrations and a return to OSHA’s former role as a vigorous enforcer. Therefore, it is reasonable to expect that OSHA routinely will propose penalties closer to their maximum allowable limit, especially in cases of willful, repeated, or high-hazard violations. Announcements made by the transition team suggest that the days of bargaining away fines in exchange for an agreement to abate may be coming to a close. In order to conform to exacting OSHA mandates, employees may be required to undergo expensive renovations or additions to existing facilities and fundamental changes in operations more frequently by OSHA and by a Review Commission that will reflect a Democratic majority in the near future.

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Although it cannot increase penalty maximums without legislation, the DOL has the unilateral power to adjust its present formula for reducing proposed penalties from the maximum permitted based on factors such as lack of history of violation and good faith. In the past, a citation asserting the violation of an OSHA standard often led to cooperative discussions over effective abatement and to a penalty reduction. This practice is not expected to continue in the new administration. Businesses that are unprepared for the change can expect stiffer and more frequent penalties.

There will be a push for increased DOL staffing by the incoming administration which already began at the Solis confirmation hearing. Since the Carter years, the DOL has been staffed at a level that some claim prevented both the WHD and OSHA from satisfactorily performing their roles. Instead, critics have argued, these enforcement agencies have been relegated to a reactive role, often depending upon worker-initiated complaints to prompt an investigation. Increased staffing would permit the DOL to increase compliance audits and investigations, particularly targeted investigations of high-violation industries.

Perhaps of greatest consequence, it seems likely that criminal penalties will be sought more frequently. Legislation, which, at the time Senator Obama co-sponsored, is expected to be reintroduced that would enable the Justice Department to prosecute an employer for a felony when it willfully causes death or serious bodily injury to a worker. The Protecting America's Workers Act would increase the potential term of imprisonment for these violations by twenty-fold - to ten years.

The next few years are projected to bring hard economic times, and the outlook for the business community is uncertain. Dramatic changes to the law, and to enforcement policy, create uncertainties, and raise costs of doing business, even in good economic times. The government's initial enforcement activity will be an important gauge of what is to come. The business community should be prepared to challenge through all available means those government efforts which prove a threat to their economic viability and to American jobs. ♦

If you have any questions concerning the "changes" discussed here, would like more information about Schnader's Labor and Employment Practices Group, or to request to speak with a member of the group at a particular Schnader office location, please contact the authors:

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