



# Employment Law Alert

## Legal developments affecting human resource management

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### U.S. Department of Labor Wage and Hour Division's activist agenda — significant new mandates, including required classification analyses and worker disclosures

Regulatory and enforcement strategies — “Plan/Prevent/Protect”...and punish!

*By Nixon Peabody's Wage-Hour Strategic Response Team*

In a sweeping pronouncement, the Department of Labor (DOL) disclosed that it intends to issue regulations requiring employers to provide workers with information about their rights to minimum wage and overtime pay. And, for employees exempt from overtime, the DOL's regulations would require employers to perform an exemption analysis that would have to be disclosed to the worker, retained, and provided to any enforcement agent of the DOL's Wage and Hour Division (WHD).

This coming August, WHD intends to publish a Notice of Proposed Rulemaking to update recordkeeping regulations under the Fair Labor Standards Act (FLSA). The stated reason is to enhance transparency and disclosure to workers regarding how their pay is computed. The rule is expected to increase workers' awareness of their status as employees or independent contractors and their rights to minimum wage and overtime pay, and to encourage the filing of complaints and DOL enforcement. Any employer attempting to exclude a worker from FLSA coverage, or from overtime pay, would have to perform an exemption or classification analysis, disclose the analysis to the worker, retain the analysis, and provide the analysis to a WHD enforcement agent. It is anticipated that penalties may also be proposed given DOL's comment that the proposed rule will also address employer burdens of proof for failing to comply with recordkeeping and notice mandates.

On April 1, 2010, Secretary of Labor Hilda Solis announced the DOL's initiative, “We Can Help.” The nationwide campaign focuses on educating employees of their workplace rights and how to file complaints to recover wages owed. Also in April, the DOL launched its new strategy — “Plan/Prevent/Protect (PPP).” Future DOL rulemaking will propose requirements that employers create a plan, with employee participation, to identify issues, develop planned responses, and monitor implementation. Left out of the alliterative PPP program strategy, but central to DOL's agenda, is “punish.” DOL has hired an additional 250 inspectors, has some 90 regulations in preparation, and, through its announced commitment to transparency, intends to publicize violations to shame employers into compliance.

Interestingly, at the same time the DOL is mandating new diligence regarding exempt status and independent contractor classifications, it also announced that the WHD would end its longstanding practice of providing Opinion Letters in response to fact-specific inquiries regarding classification and exemption issues. Employers had relied upon the DOL's Opinions as evidence of good faith compliance in litigation.

In addition to DOL's agenda, Congress is currently considering legislation to address the problem of employee misclassification and independent contractor status. On April 22, 2010, the Employee Misclassification Prevention Act was introduced in both the Senate and House. (S. 3254; H.R. 5107). The legislation would amend the FLSA and create a presumption of "employee" status absent compliant recordkeeping and notice to the worker of non-"employee" status. Moreover, notice of classification status would be required for all new employees and all new non-employees and to any individual whose status changes. Civil penalties for non-compliance would include a fine up to \$1,100 for each worker violation or up to \$5,000 for each repeated or willful violation. The legislation would expand reporting, analysis, and coordination with states regarding underreporting of wages and unemployment compensation contributions and would require the WHD to report such information to the Internal Revenue Service to enable collection of unpaid taxes. Finally, the legislation requires targeted audits by the WHD to include those industries with a "frequent incidence" of misclassification.

### Suggested Next Steps

Nixon Peabody's Wage-Hour Strategic Response Team (SRT) strongly recommends that employers conduct company-wide audits of current employee exempt/non-exempt classifications and independent contractor determinations. Please consult with one of the SRT attorneys listed below and/or your regular Nixon Peabody attorney to assist with your review and documentation of the determinations.

For further information, please contact your regular Nixon Peabody attorney or:

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