ABA Annual Meeting

Turn, Turn, Turn:
Update on Labor and Employment Law Developments under the Obama Administration

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I. Introduction

The U.S. Department of Labor (“DOL”) is playing the leading role in the efforts by President Barrack Obama and his administration to implement changes in the policies and regulations governing the workers and workplaces in the United States. Below we outline some of the more significant developments that will be discussed during the panel presentations. The summary of the current regulatory agenda was prepared by Nancy Schiff and the summary of the additional developments by David Fortney. The views and comments included in the materials are those of the authors alone. A full copy of the DOL’s Spring 2010 Semiannual Regulatory Agenda also is provided as part of the program materials.

II. Summary of U.S. Department of Labor’s Semiannual Regulatory Agenda, issued April 26, 2010

Office of Federal Contract Compliance Programs (OFCCP)

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors
Advance Notice of Proposed Rulemaking on improving employment opportunities for individuals with disabilities by conducting more substantive analyses and more fully monitoring recruitment and placement efforts on behalf of such individuals.

Vietnam Era Veterans’ Readjustment Assistance Act
NPRM to strengthen the affirmative action requirements of VEVRAA to require that Federal contractors and subcontractors conduct more substantive analyses of recruitment and placement actions taken under VEVRAA and require the use of numerical targets to measure effectiveness of affirmative action efforts.

Office of Labor Management Standards (OLMS)

Persuader Agreements:
A proposed regulatory initiative to better implement the public disclosure objectives of the LMRDA regarding employer-consultant agreements to persuade employees concerning their rights to organize and bargain collectively. Regulatory action is needed to narrow the construction of Section 203(c) of the LMRDA, which creates an “advice” exemption from reporting requirements that apply to employers and other persons in connection with persuading employees about the right to organize and bargain collectively; a proposed revised interpretation would better allow for the employer and consultant reporting intended by the LMRDA.

Notification of Employee Rights Under Federal Labor Laws:
Final Action 6.00.10 to prescribe the size, form and content of the notice to be posted by a contractor pursuant to Executive Order 13496 of January 30, 2009.
**Wage and Hour Division (WHD) and Employment Standards Administration (ESA)**

**Nondisplacement of Qualified Workers Under Service Contracts:**
Final Action 12.00.10 to implement Executive Order 13495 of January 30, 2009, which establishes the policy that Federal service contracts generally include a clause requiring the contractor and its subcontractors, under a contract that succeeds a contract for the same or similar service at the same location, to offer qualified employees employed by the predecessor a right of first refusal to employment under the successor contract.

**Child Labor Regulations, Orders and Statement of Interpretation**
Update child labor regulations to better address the safety needs of today’s workplaces to ensure good jobs that are safe, healthy and fair for workers between 14 and 16 years of age.

**Wage and House Division (WHD)**

**Family and Medical Leave Act of 1993:**
DOL will propose regulatory changes to implement the National Defense Authorization Act for FY 2010, which further expanded the existing military leave provisions; and the Airline Flight Crew Technical Corrections Act, which expanded FMLA eligibility requirements to include airline flight crews.

**Records to be Kept by Employers under the Fair Labor Standards Act:**
Update the recordkeeping requirements to foster more openness and transparency in demonstrating employers’ compliance with applicable requirements to their workers, to better ensure compliance by regulated entities and to assist in enforcement; to modernize the requirements, consistent with the increasing emphasis on flexiplace and telecommuting, to allow for automated or electronic recordkeeping systems instead of the mandatory manual preparation of “homeworker” handbooks currently required for all work that an employee may perform in the home.

**Application of the Fair Labor Standards Act to Domestic Service:**
In light of significant changes in the home care industry, the DOL is proposing to update regulations regarding domestic workers, including examining the definition of “companionship services.”

**Employment and Training Administration (ETA)**

**YouthBuild Program Regulation**
The YouthBuild Transfer Act of 2006 transfers the YouthBuild program from the HUD to the DOL; new regulations will govern the administration of the YouthBuild program by the Employment and Training Administration to shift the emphasis to skills training for youth participants by enhancing the job training and employment opportunities available to participating at-risk youth.
Trade Adjustment Assistance for Workers Program
Update the program’s regulations to be in concert with changes enacted by the Trade and Globalization Assistance Act of 2009 of the American Recovery and Reinvestment Act of 2009, which reauthorizes the Trade Adjustment Assistance for Workers program and amends the criteria for certification of worker groups as eligible to apply for benefits and services and substantially expands those benefits and services; it also requires reports on the program’s effectiveness.

Temporary Agricultural Employment of H-2A Aliens in the United States:
Amending regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers, to provide a more adequate level of protection for workers. The Department believes that there are insufficient worker protections in the attestation-based model in which employers merely confirm, and do not actually demonstrate, that they have performed an adequate test of the U.S. labor market. The Department has also determined that the area in which agricultural workers are most vulnerable – wages – has been adversely impacted to a far more significant extent than anticipated by the 2008 Final Rule.

Equal Employment Opportunity in Apprenticeship and Training, Amendment of Regulations
Revisions to the equal opportunity regulatory framework for the national Apprenticeship Act are a critical element in the Department’s vision to promote and expand registered apprenticeship opportunities in the 21st century while continuing to safeguard the welfare and safety of apprentices. In October 2008, the Agency issued a Final rule updating regulations for Apprenticeship Programs and Labor Standards for Registration; the companion regulations, 29 CFR Part 30, EEO in Apprenticeship and Training, have not been amended since first promulgated in 1978. Updates are necessary to ensure that DOL regulatory requirements governing the National Registered Apprenticeship System are consistent with the current state of EEO law.

Employee Benefits Security Administration (EBSA):

Definition of “Fiduciary”:
To bring the definition of “fiduciary” into line with investment advice practices and to recast the current regulation to better reflect relationships between investment advisers and their employee benefit plan clients. The current regulation may inappropriately limit the types of investment advice relationships that should give rise to fiduciary duties on the part of the investment adviser.

Genetic Information Nondiscrimination
GINA Section 101(f)(1) requires the Secretary to issue regulations to carry out its statutory provisions.
Mental Health Parity and Addiction Equity Act
Pursuant to ERISA, Section 712, as amended by the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, enacted on October 8, 2008; the DOL is developing regulatory guidance to provide clarifications to participants, beneficiaries, health care providers, employment-based health plans, health insurance issuers, third-party administrators, brokers, underwriters, and other plan service providers.

Lifetime Income Options for Participants and Beneficiaries in Retirement Plans
With a continuing trend away from defined benefit plans to defined contribution plans, employers are not only increasingly responsible for the adequacy of their retirement savings, but also for ensuring that their savings last throughout their retirement. Employees may benefit from access to and use of lifetime income or other arrangements that will reduce the risk of running out of funds during the retirement years. The Department intends to explore what steps, if any, it could or should take, by regulation or otherwise, to enhance the retirement security of workers by increasing access to and use of such arrangements.

Regulations Implementing the Patient Protection and Affordable Care Act of 2010 (PPACA):
Initial regulatory action will likely address statutory provisions relations to the prohibition of lifetime or annual income limits; the prohibition of rescissions of health coverage after coverage begins; requirements for coverage without cost sharing for preventive health services; an extension of dependent coverage; the prohibition on preexisting condition exclusions and other discrimination in favor of highly compensated individuals.

Mine Safety and Health Administration (MSHA)

Safety and Health Management Programs for Mines:
Developing a request to solicit information from the mining community on suggestions for addressing injury and illness prevention through implementation of comprehensive safety and health management programs.

Lowering Miners’ Exposure to Coal Mine Dust Including Continuous Personal Dust Monitors
MSHA is considering amendments, revisions, and additions to existing standards and will develop a preliminary regulatory economic analysis.

Respirable Crystalline Silica Standard
MSHA to publish a proposed rule to address miner’s exposure to respirable crystalline silica.
Pattern of Violations:
MSHA will review regulations regarding the pattern criteria and procedures contained in
the regulations in 30 CFR Part 104 with the goal of simplifying them to improve the
process and to improve consistency in the application of the pattern of violations notice.

Coal Mine Dust Sampling Devices:
Rulemaking to establish new requirements for NIOSH and MSHA to use to approve coal
mine dust personal samplers and permit the approval of a new type of device, the
“continuous personal dust monitor.”

Occupational Safety and Health Administration (OSHA)

Occupational Exposure to Crystalline Silica:
A comprehensive standard for crystalline silica is needed to provide for exposure
monitoring, medical surveillance, and worker training, for workers exposed to crystalline
silica dust in general industry, construction, and maritime industries. OSHA is currently
developing a NPRM to modernize its exposure limits and address related issues.

Cranes and Derricks in Construction:
There are estimated to be 64 to 89 fatalities associated with cranes each year in
construction, and a more up-to-date standard would help prevent them.

Combustible Dust:
OSHA has commenced rulemaking to develop a combustible dust standard for general
industry; the Agency does not have a comprehensive standard that addresses combustible
dust hazards.

Occupational Injury and Illness Recording and Reporting Requirements—
Musculoskeletal Disorders (MSD) Column:
OSHA has published a proposed rule to add a definition of work-related musculoskeletal
disorders (WMSC) to 29 CFR Part 1904 and a separate column on the 300 Log to track
this class of injury/illness. The Agency believes that additional data on WMSDs may
help employers and workers track these injuries at individual workplaces, and that the
Nation’s occupational injury and illness information may benefit from improved statistics
on WMSD. Improved WMSD information might also assist the Agency in its day-to-day
activities and overall safety and health policymaking.

Injury and Illness Prevention Program:
OSHA is developing a rule requiring employers to implement an Injury and Illness
Prevention Program; it involved planning, implementing, evaluating, and improving
processes and activities that protect employee safety and health. As a first step, the
Agency plans to hold stakeholder meetings to obtain input for an injury and illness
prevention rulemaking.
Infectious Diseases:
OSHA is soliciting information on a rule to protect health care workers and other workers from infectious diseases such as pandemic flu, tuberculosis and SARS.

III. Additional Developments

DOL’s Open Government Initiative

President Obama called – on his very first day in office – for "an unprecedented level of openness in government… to strengthen our democracy and promote efficiency and effectiveness in government." DOL has implemented its Open Government Initiative in response. DOL’s Open Government Initiative Plan is detailed on DOL’s website. See http://www.dol.gov/open/OGDplan.htm.

Key components of the Open Government Initiative Plan include:

- DOL’s Online Enforcement Database (available at http://ogesdw.dol.gov/) provides searchable access to various enforcement data – some of which was previously unpublished – in one location. Plans for the expansion of this database will open access to the raw data files. DOL encourages feedback about how they are using the data, what features they would like to see added, and how DOL can improve the site overall.
  - DOL’s Online Enforcement Database provides access to enforcement data collected by the Employee Benefits Security Administration (EBSA), Occupational Safety and Health Administration (OSHA), Office of Federal Contract Compliance Programs (OFCCP), Mine Safety and Health Administration (MSHA) and Wage and Hour Division (WHD) in one location. Users can search a growing series of common dimensions which open a window to all of DOL’s enforcement actions. This database also provides access to a variety of previously unpublished data.

- The development of collaborative partnerships and information sharing among DOL’s internal agencies and between DOL and other federal entities, especially those who also engage in enforcement activity. These developments are expected to lead to stepped up enforcement efforts.

- DOL expanded external collaboration with private, non-profit and academic entities and the public-at-large through meeting and web-based activities and outreach efforts.
Plan/Prevent/Protect – DOL’s New Strategy

In unveiling its Semiannual Regulatory Agenda on April 26, 2010, DOL announced its plans to propose regulations in each of its enforcement agencies that will impose new requirements on employers.

DOL's new strategy, called “Plan/Prevent/Protect,” would require employers to create Compliance Action Plans to address compliance with the Occupational Safety and Health Act, the Mine Safety and Health Act, Executive Order 11246 (non-discrimination and affirmative action by federal contractors) and the Fair Labor Standards Act, among other programs.

The new strategy will require all regulated entities to take three steps to ensure safe and secure workplaces and compliance with the law, although the specifics will vary by law, and will be instituted only after employers and others have an opportunity to comment during rulemaking procedures. DOL’s regulatory agenda describes the strategy as follows:

“Plan”: DOL 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”: DOL 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 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.

Although the specifics of the new strategy will unfold during the rulemaking process, which has not yet begun, DOL has given examples of how the new strategy might work. In the case of employers’ designation of workers as exempt under the FLSA or as independent contractors, for example, employers would be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give
to Wage and Hour enforcement personnel who might request it. Currently, there is no requirement that employers perform or retain such a written analysis, nor are employers required, if they have such an analysis, to provide it to a government agency.

Similarly, the new strategy would require employers to provide their employees with opportunities to participate in the development and implementation of an injury and illness prevention program, including a systematic process to proactively and continuously address workplace safety and health hazards. This rule would involve planning, implementing, evaluating, and improving processes and activities that promote worker safety and health, and address the needs of special categories of workers (such as youth, aging and immigrant workers). Employers are not currently under an obligation to prepare such plans.

DOL plans to initiate rulemaking over the next several months to impose these new requirements on employers.

The Executive Orders affecting Federal Contractors’ Workers

At the outset of his presidency in 2009, President Obama signed four Executive Orders aimed at workers for federal contractors.

**E.O. 13494: Economy in Government Contracting**, as amended by E.O. 13517

- Disallows contractors to be reimbursed for costs of any persuader activities for collective bargaining or organizing, whether involving employees of the recipient of the Federal disbursements or of any other entity.
  - E.O. 13517, signed October 30, 2009, clarifies allowable costs.
  - Activities such as labor-management committees and employee publications *unrelated* to persuasive activities are allowable costs.
- Proposed regulations published by DOL for comment in April 2010. The comment period closed on June 14th. Under the proposed regulations, costs incurred strictly for maintaining satisfactory labor relations, such as labor-management committees or employee publications, may be reimbursed.
  - When issued, unions praised the executive order, which the U.S. Chamber of Commerce cited as interfering with employers' rights to communicate with their employees.
- The costs of the following activities, when they are undertaken to persuade employees, would be deemed unallowable:
  - Preparing and distributing materials;
  - Hiring or consulting legal counsel or consultants;
- Holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and

- Planning or conducting activities by managers, supervisors, or union representatives during work hours.

**E.O. 13495: Nondisplacement of Qualified Workers under Service Contracts**
- Requires successor contractors and subcontractors subject to the Service Contract Act (“SCA”) performing the *same or similar services* at the *same location* to offer the predecessor’s employees (*other than managerial and supervisory employees*), who may otherwise have been terminated, “*a right of first refusal of employment*” under the new contract in *positions for which they are qualified*.

- Employment offers must remain open not less than 10 days.

- There shall be no employment openings under a contract until the contractor has complied fully with the right of first refusal to the predecessor employees.

- There are exclusions.

- Violations can result in back wages and debarment of the federal contractor.

- DOL issued Notice of Proposed Rulemaking March 18, 2010 to implement; final regulations have not been issued.

**E.O. 13496: Notification of Employee Rights Under Federal Labor Laws**
- Requires contractors to post notices specified by the Secretary of Labor in regulations.
  - DOL’s regulations prescribe the size, form, and content of the notice to be posted by a contractor and describe certain rights of employees under Federal labor laws. The contracting agencies are to include provision in contracts issued on or after the regulations issue.
  - DOL’s final regulations issued in June 2010. 29 CFR Part 471.
  - The Federal Acquisition Regulations (FAR) require a corresponding amendment to allow the new posting requirements to be added to federal contracts, and for the new DOL regulations to become effective. As of the date these materials were prepared, the amended FAR regulations have not yet issued.

- The final DOL rule requires all applicable federal contracts and modifications entered after June 21st to include a provision obligating federal contractors to post the new notice and to include the posting provisions in subcontracts (“flow down clauses”). The rule replaces the Bush Administration’s “Beck notice” posting requirement.
How the new posting rule operates:

- The rule requires all applicable federal contracts and modifications entered after June 19th to include a provision obligating federal contractors to post the new notice and to include the posting provisions in subcontracts (“flow down clauses”). Once the required contract clause is included in the Government contract, contractors then begin to assume the burdens associated with compliance. Those obligations include posting the required notice and incorporating the contract clause into all covered subcontracts, thus making the same obligations binding on covered subcontractors.

- Posting may be done by using physical notices or electronic postings. The contractor (or subcontractor) generally must follow the same posting rules as for other DOL employee notices. These include, for those posting physical notices, that notice be the required size (11x17 inches or larger) and be placed conspicuously where the contract work is being done, and in appropriate languages. Notices are available on the DOL website at http://www.dol.gov/olms/regs/compliance/EO13496.htm. DOL also will print posters that can be obtained from contracting agencies or from DOL’s Office of Labor-Management Standards (OLMS). DOL also will provide translations to those required to post in another language.

- Employers that customarily post notices to employees electronically must also post the required notice electronically. One method is to provide a link to the DOL website’s full text of the notice, with the link reading “Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers.”

Compliance and enforcement procedures:

- The rule provides that employees may file complaints with DOL and that DOL’s Office of Federal Contract Compliance Programs (“OFCCP”) may conduct compliance evaluations and investigations. If a contractor fails to comply, after a hearing, DOL’s Director of Office of Labor-Management Standards (“OLMS”) may order that the contract be canceled, terminated, or suspended absolutely, or continued conditioned upon compliance. OLMS may also issue an order of debarment.

- Some contracts will be exempt.
E.O. 13502: Use of Project Labor Agreements for Federal Construction Projects

- Authorizes (not requires) federal agencies to require all contractors or subs on a large-scale construction project (minimum $25 million) to negotiate or become a party to a Project Labor Agreement (“PLA”) with one or more unions.

- PLAs are pre-hire collective bargaining agreements (“CBAs”) with one or more labor organizations that establish the terms and conditions of employment for a specific construction project.


- The E.O. applies to solicitations for contracts issued on or after the effective date of the Federal Acquisition Regulation (FAR) Council’s action to amend the Federal Acquisition Regulation to implement the E.O.

- Final regulations to implement the E.O. issued by the FAR Council on April 13, 2010, 75 FedReg 19168.