NLA REGULATORY UPDATE

The Wage and Hour Division of the U.S. Department of Labor held a stakeholder conference at DOL headquarters On May 21, 2010 for the alleged purpose of receiving feedback from employers, employees, and the organizations that represent them regarding WHD's proposed regulatory and enforcement agenda for FY 2010 and 2011. Here are the highlights of points made during the plenary and employee misclassification breakout sessions:

1. To counteract perceived widespread worker misclassification overtime violations, WHD will be pursuing an aggressive auditing and enforcement policy, targeting industries that "have been setting the pace in the race for the bottom of the compensation scale," according to WHD Deputy Administrator Nancy J. Leppink.

2. WHD's Misclassification Initiative emphasizes the detection of misclassified employees as part of the designated FY 2010 and 2011 strategic enforcement plan. WHD is coordinating with other DOL agencies, the Department of Treasury, the Vice President's Middle Class Task Force, and State agencies to identify, investigate, and prosecute violators to the full extent of the law. In FY 2009, 250 new WHD investigators were hired and trained; 100 additional investigator positions are allocated for FY 2010. The President's FY 2011 DOL budget request includes $12M for WHD increased enforcement.

3. WHD audits will no longer be confined to a particular worker classification or employment facility. Instead, WHD will pursue corporate-wide compliance, with the stated goal of reaching the broadest possible determination as to a company's liability for FLSA non-compliance, as well as other laws administered by WHD, including child labor and prevailing wage laws. WHD wants to leverage its compliance budget through maximum publicity of big hits against big targets.

4. Within the next six months, WHD expects to issue revised FLSA regulations, which will include major changes in company recordkeeping obligations. Specifically, companies will be required to maintain written records stating the factual basis for claiming independent contractor status and/or exemption from the minimum wage and or overtime requirements for each worker, together with a record that this information has been disclosed to the affected worker. Companies who fail to maintain such records will be deemed guilty of a willful violation and subject to the maximum penalties available under the law.

5. No safe harbor or amnesty will be made available to employers who may have violated laws enforced by the WHD and there are no plans to publish corrective action procedures to employers who desire to correct past violations on

a voluntary basis. As one official stated, "If an employer wants peace of mind it must change its compensation practices immediately to conform to the law, pay the misclassified workers three years' back wages and be done with it."[1] On a related note, WHD will no longer entertain requests from employers and their attorneys to supervise the distribution of back wages to employees and obtain signed WHD Form 58 releases from employees. Further, WHD anticipates revising Form 58 in Summer 2010 to limit its effect to a mere notice of receipt of unpaid wages, potentially limiting its use as a bar to further liability in the event of a private lawsuit or enforcement action.

6. WHD will no longer provide advice to companies who are unsure of their obligations under FLSA and seek clarification that a particular worker or class of workers is overtime exempt through a request for an administrative opinion. This breaks with a 40-year tradition of offering companies a statutorily recognized safe harbor from overtime liability if subsequently sued by the Secretary or the subject class of workers, provided the facts are as stated in the prior written disclosures providing the basis for the exemption opinion.

If sued by individuals or their representatives, companies must recognize that liquidated damages are presumptively available to plaintiffs, rendering the judgment equal to double the amount of back pay liability, in addition to payment of the plaintiffs' attorneys' fees and costs.[2] Further, any owner, officer, board member or supervisor of an entity with knowledge of the entity's unlawful worker classification and compensation policies and procedures can be held individually liable for back pay and civil money penalties assessed by the Administrator against the employer, or the amount of any final judgment rendered by a court of competent jurisdiction under the FLSA. In bankruptcy, FLSA wage claims have priority over secured and unsecured creditors. In general, EPLI insurance does not cover wage and hour audits, lawsuits and judgments.

Given the foregoing considerations, companies should consult with wage and hour counsel regarding the merits of undertaking a confidential FLSA audit prior to the establishment of new obligations mandating recordkeeping that purportedly will require full disclosure of the grounds for worker classification decisions and overtime exemptions. Companies also should avoid self-audits and sharing of information with third parties, which are not protected under the attorney client privilege. The fruits of self-audits audits and admissions made to third parties outside the scope of the attorney client relationship are subject to discovery and provide a quick and easy means of establishing liability, willful misconduct, and the amount of back pay owed to covered workers.

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[1] The general statute of limitations for FLSA overtime and minimum wage violations is two years, except that the statute may be extended to 3 years in the case of willful violations. In general, the courts require proof that the employer ignored a prior WHD determination with respect to the treatment of a particular employee or class of employees in order to make the employer liable for 3 years' back pay.

[2] Some states have adopted little FLSA statutes that provide more generous liquidated damage schemes. For example, the Maryland Wage and Hour Act provides for the payment of treble the back pay liability with respect to persons employed in Maryland in the event of suit to collect unpaid minimum wages and overtime. For that reason, many plaintiffs' lawyers file suit in state courts seeking recovery only under the state statute.

Following the advice of competent wage and hour counsel can serve as a legitimate defense to a claim of liability and liquidated damages in the event of a future suit or audit. Where the company has made full disclosures of all relevant facts and circumstances to counsel and counsel has advised that the company has complied with the FLSA compensation scheme, the company may elect to waive the privilege and permit the attorney to testify based on the results of the audit that the company is not liable to a worker or class of workers for unpaid wages or overtime. Companies should also confer with tax counsel to advise them on the filing of amended returns and the payment of associated taxes and penalties due to the IRS with respect to misclassification or underpayment of wages in past tax years, based on the results of the audit conducted by wage and hour counsel.