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W A G E A N D H O U R

DOL Budget Proposal Offers Window Into Compliance Priorities

BY ANDREA M. KIRSHENBAUM

Special to the Legal

As part of the annual budgeting cycle, the U.S. Department of Labor (DOL) has offered employers a window into its compliance priorities and initiatives, which continue to focus on directed investigations initiated by the DOL in “high risk” industries and so-called “fissured workplaces.” The insights come courtesy of the DOL Wage and Hour Division’s (WHD) fiscal year 2016 Budget Justification, as well as Secretary of Labor Thomas Perez’s testimony at hearings in March before the U.S. House of Representatives’ Labor, Health and Human Services, Education and Related Agencies Subcommittee, and the House Education and the Workforce Committee.

Notably, the WHD requested a budget increase of nearly \$50 million for FY 2016. As part of the proposed increase, the DOL seeks to hire hundreds of additional enforcement staff to step up its investigative efforts. The DOL’s investigative initiatives already have



ANDREA M. KIRSHENBAUM

is a principal in the Philadelphia office of Post & Schell and is part of the firm's employment and employee relations law practice group. She litigates and provides compliance counseling on wage-and-

hour, employment discrimination, noncompetitive and public accommodation issues for employers and places of public accommodation. She can be contacted at akirshenbaum@postschell.com.

yielded the recovery of over \$1.3 billion in back wages for 1.5 million workers since 2009.

Over the last several years, the DOL’s WHD has moved from a complaint-driven process toward a more proactive enforcement strategy. In FY 2014, nearly half (44 percent) of the DOL’s investigations were directed, up from 27 percent in FY 2010. In its Congressional Budget Justification, the WHD also touted its reduction in the percent of investigations (both directed and complaint-driven) that resulted in a finding of no violation, which in FY 2014 hovered around 20 percent. The WHD attributed this number to

its “careful selection of workplaces with the greatest problems.”

The WHD’s choice in selecting targets for investigation over the past several years has been driven primarily by two factors: Is the employer in a “high risk” industry that the DOL has defined as “those industries with high minimum wage and overtime violations and among vulnerable worker populations where complaints are not common,” or is the employment relationship in the workplace “fissured apart,” that is, does the employer “contract out or otherwise shed activities to be performed by other businesses,” which then may be further subcontracted. The DOL is particularly focused on “the various forms of misclassification found among those fissured business models,” which seems to refer both to classification as W-2 employees versus 1099 workers as well as classification as exempt from overtime and/or minimum wage versus nonexempt.

In addition to its aim to increase enforcement efforts with a burgeoning investigative staff, in its Congressional Budget Justification

the WHD articulated its goal to “prioritize increasing civil money penalties” assessed against employers by the DOL in an investigation.

In his comments to Congress in March, Perez shared that the goal of the WHD’s investigative efforts is “to create ripple effects that impact compliance far beyond the workplaces where we are actually on the ground investigating.” Perez also informed Congress that the DOL seeks to “ensure our investigation of a single employer resonates throughout that sector,” by creating “a credible deterrent” to wage-and-hour violations.

One example offered by Perez to Congress as a DOL high-impact enforcement action was the investigation into Chickie’s & Pete’s, which resulted in payments by the Philadelphia-based restaurant chain of \$6.8 million in back wages and damages to over 1,100 employees. The example offered by Perez highlights one of the industries targeted as an enforcement priority by the DOL: restaurants. Other industries identified by the WHD as targeted for focused enforcement efforts are hotels, construction, janitorial, retail, agriculture, manufacturing and health care.

Of significant note, in speaking to Congress about “fissured workplaces,” Perez expressed that “one way to leverage our enforcement resources is to identify the supply chain. The idea is to cause those at the top of the chain to evaluate the compliance practices of those below them; and to get them to think twice about whether it is worth the risk to their good name, and possibly their bottom line, to

do business with a supplier or subcontractor who skirts the law.” The secretary’s message is clear: The DOL will try to hold large employers accountable for the pay practices of its business partners.

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In addition to the DOL’s targeted enforcement, wage-and-hour private litigation continues to rise, reaching 8,086 Fair Labor Standards Act (FLSA) case filings in federal courts during calendar year 2014, according to Public Access to Court Electronic Records (PACER). Employers are also eagerly anticipating the WHD’s proposed revisions to the FLSA’s overtime regulations (Perez expressed during the March hearings that the DOL expects to release the proposed regulations “in the coming months”). The proposed changes could substantially increase the salary requirements for employees to be exempt from minimum wage and overtime requirements, and could narrow the types of duties required to satisfy certain white-collar exemptions.

Given the DOL’s stepped-up enforcement efforts, as well

as the level of private wage-and-hour litigation, employers, especially those in industries identified by the DOL as “targeted industries”—restaurants, hotels, construction, janitorial, retail, agriculture, manufacturing, and health care—should assess their compliance with the FLSA. Moreover, the DOL has made clear that in focusing its enforcement efforts on the “top of the supply chain” it will scrutinize not just the pay practices of an employer, but also those of an employer’s subcontractors and outsource service providers. Robust defense and indemnification provisions may provide some protection to businesses that subcontract for certain services (like cleaning or food services), or that flex their capacity through the use of contingent workers provided by temporary services agencies. In addition, employers would be well-advised to gauge the wage-and-hour compliance efforts of such business partners.

To be sure, the DOL and WHD under the current administration will continue efforts to implement its proactive initiatives. Likewise, employers should continue to be proactive in ensuring their compliance with current state and federal wage-and-hour laws and regulations, with an eye toward potential changes on the horizon in the coming year. •