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# FOCUS

Stowe Associates Insurance and Compliance Tips Newsletter



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## Excerpts from US Department of Labor's Regulatory Agenda Narrative Department-Wide Regulatory and Enforcement Strategies—"Plan/Prevent/Protect" and Openness and Transparency—Spring 2010

With the publication of the Department of Labor's spring 2010 Regulatory Agenda, the Labor Department is taking another step toward making its vision of *Good Jobs for Everyone* a reality. By helping to ensure America's workplaces are safe, secure, and equitable, the Regulatory Agenda, along with several non-regulatory initiatives, announces a new strategy that leverages resources across the Labor Department's worker protection agencies to make their work more efficient and effective. The Regulatory Agenda also re-commits the Labor Department to openness and transparency, not only as good government and stakeholder outreach strategies, but as critical strategies to achieving compliance with the employment laws enforced by the Department.

As part of the Labor Department's Spring Regulatory Agenda and other related initiatives, we recommit ourselves to the important work of ensuring the safety and health of all of America's workers and our continued focus on achieving good jobs for everyone.

### **The Labor Department Has Limited Resources to Protect America's Workers**

The Labor Department's vision of a "good job" includes:

- ◆ jobs that increase workers' incomes and narrow wage and income inequality;
- ◆ jobs that assure workers are paid their wages and overtime;
- ◆ jobs in safe and healthy workplaces, and fair and diverse workplaces;
- ◆ jobs that provide workplace flexibility for family and personal care-giving;
- ◆ jobs that improve health benefits and retirement security for all workers; and
- ◆ jobs that assure workers have a voice in the workplace.

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Helping workers get and keep “good jobs” requires the Labor Department’s worker protection agencies to assure compliance with and enforce dozens of employment laws: the Fair Labor Standards Act, the Occupational Safety and health Act, the Federal Mine Safety and Health Act of 1977 (“Mine Act”), the Employee Retirement Income Security Act, and Executive Order 11246, just to name a few. But even with the recent addition of hundreds of new enforcement personnel and the proposal in the President’s latest budget to restore staffing in the Department’s worker protection agencies to levels not seen in almost a decade, assuring compliance throughout the American economy is a very difficult challenge. With only a thousand inspectors, the Department is charged with protecting 140 million workers in some 9 million workplaces. Unfortunately, in our current system, Labor Department enforcement personnel must intervene to assure compliance in too many cases. It is a “catch me if you can” system.

Fortunately, many employers and other regulated entities have a culture of compliance. Their ordinary, day-to-day business practices include protecting workers against safety and health hazards, assuring workers benefits and family leave, and paying workers the wages and overtime to which they are entitled, among other aspects of "good jobs." Like the millions of ordinary citizens who pay their income taxes every year without ever coming into contact with the Internal Revenue Service, these compliant employers and other regulated entities should be congratulated for their responsible behavior. No government intervention in their workplaces is required to achieve compliance.

Some employers, unions, workers, and others have difficulty understanding the laws and regulations that govern America's workplaces. For these enterprises and individuals, the Labor Department provides extensive compliance assistance materials on its Web site and in printed form, many of which are available in several languages. More in-depth assistance is also available. For example, the Occupational Safety and Health Administration works with states to provide consultation services for small businesses to advise these employers and other regulated entities about how to create a safe and healthy workplace. The Employee Benefits Security Administration provides detailed checklists that help plan sponsors assure that workers' pensions and health benefits are secure. The Department's policy office sponsors a long list of on-line tools called "elaws Advisors" (Employment Laws Assistance for Workers and Small Businesses) which provide answers to difficult employment law questions. For some employers, unions, workers, and others who need help in understanding their rights and responsibilities, educational efforts are sufficient to achieve compliance.

Yet, there are other employers and enterprises regulated by the Labor Department that do not have a culture of compliance and will not change their behavior even if provided with the best information. Some are complacent and depend upon luck or happenstance to avoid workplace violations. Still others make a calculated decision whether to comply with employment laws. They assess the benefits of refusing to comply with the law and compare them to the costs of complying with the law. Then they weigh these costs and benefits against the likelihood they will be caught and the penalty they might suffer if they are caught. This is the "catch me if you can" system in action. And for far too many employers and others subject to the laws enforced by the Labor Department, this cold economic calculus leads them to violate the law.

Ultimately, America's working men and women pay the price of non-compliance, as shortcuts aimed at maximizing profits are met with a significantly increased risk that workers' workplace rights will be violated or safety will be compromised.

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The Labor Department seeks to change behavior in these "catch me if you can" operations. Employers and other regulated entities must take responsibility to find and fix problems rather than wait for a Labor Department investigator to inspect, discover the problems, and enforce the law. Labor Department enforcement personnel cannot be in every workplace every day, on every shift, in every section of a construction site, factory, or mine, for example. The employer is the first and most important line of defense against violations of the law that threaten workers' safety, health, wages, benefits, equal employment opportunity, and fairness in the workplace. The Labor Department's goal is to foster a wide-ranging culture of responsibility and compliance with a focus on prevention. To achieve this goal, a new system is needed to replace "catch me if you can." Employers and other regulated entities should be encouraged to plan to prevent violations and protect workers, while the Labor Department's worker protection agencies should create and strategically deploy the tools needed to ensure that employers and other regulated entities that continually fail, or simply refuse, to comply with the law are held accountable.

The Labor Department's new regulatory and enforcement strategy — Plan/Prevent/Protect — is designed to expand and strengthen that effort.

**Leveraging Limited Resources to Increase Compliance: "Plan/Prevent/Protect"**

Employers and others must "find and fix" violations — that is, assure compliance — before a Labor Department investigator arrives at the workplace. Employers and others in the Department's regulated communities must understand that the burden is on *them* to obey the law, not on the Labor Department to *catch them* violating the law. This is the heart of the Labor Department's new strategy.

We are going to replace "catch me if you can" with "Plan/Prevent/Protect."

In various ways, employers and other regulated entities will be asked to assemble plans, create processes, and designate people charged with achieving compliance. They will be required to implement these plans and evaluate their effectiveness in achieving compliance. While the Labor Department can be flexible about which path is chosen to achieve compliance, compliance will be non-negotiable under the "Plan/Prevent/Protect" system.

Historically, worker protection agencies at the Department of Labor, most notably the Office of Federal Contract Compliance Programs (OFCCP) and the Mine Safety and Health Administration (MSHA), have developed compliance programs targeted at **specific** workplace risks and hazards. For example, employers and others implementing Executive Order 11246's anti-discrimination and affirmative action requirements are required to create programs for diverse workplaces under OFCCP's existing regulations. The Mine Act requires unique mine plans for ventilation and dust control, among others. The Department's latest Regulatory Agenda contains new regulations in greater detail below that will require employers and other regulated entities to improve the content, implementation, and evaluation of these existing, hazard-specific protection plans and programs. But it also proposes new rules in new areas based on the same philosophy.

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"Plan/Prevent/Protect" marks an expansion of these kinds of requirements to more worker protection efforts in the Labor Department. In this Regulatory Agenda, the Occupational Safety and Health Administration (OSHA), MSHA, OFCCP, and the Wage and Hour Division (WHD) will propose regulatory actions that require employers and others to develop programs to address certain employment law compliance issues within each agency's portfolio. Although the specifics will vary by law, industry and regulated enterprise, this "Plan/Prevent/Protect" strategy will require all regulated entities to take three steps to ensure safe and secure workplaces and compliance with the law:

**"Plan"**: The Department 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"**: The Department 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.

Employers and other regulated entities who fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and, depending upon the agency and the substantive law it is enforcing, subject to remedial action. But employers, unions, and others who follow the Department's "Plan/Prevent/Protect" strategy will assure compliance with employment laws before Labor Department enforcement personnel arrive at their doorsteps. Most important, they will assure that workers get the safe, healthy, diverse, family-friendly, and fair workplaces they deserve.

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