

Management Alert



The Solis Labor Department: A Look Back at the First Four Years of the Obama Administration's Labor Agenda

With last week's announcement that Secretary of Labor Hilda Solis is resigning, the management and labor communities await the announcement of the Department of Labor's next leader with anticipation. The precise contours of any agenda are difficult (if not impossible) to flesh out without knowledge of whom the President's nominee will be, but it is widely expected that the next Secretary of Labor will build upon the Department's existing programs, practices, and enforcement philosophy. Thus, in this Alert, we look back at the record of the Solis Labor Department. We will follow this Alert with our thoughts of what we expect the agenda of the next Department of Labor's Secretary will be after the President announces his nominee.

Undoubtedly, any review of Secretary Solis's tenure at DOL will be marked by references to a continued high unemployment rate, a strident support of organized labor, and the impact of the American Recovery and Reinvestment Act of 2009 (both in the grant-making context as well as in the enforcement context). The grant-making and employment-training components of the Department are vast and consume the bulk of the departmental budget. Those components address issues ranging from funding public-private partnerships in manufacturing to providing grants to community colleges to develop "innovative training programs" to providing financial assistance to foreign countries for child labor enforcement.

The impact of these programs (and the decisions to fund particular programs) is significant to the national economy and the federal deficit issue. For day-to-day operational issues of the nation's employers, however, the work of the Department's enforcement agencies is far more significant. In that arena, Secretary Solis will be known for implementing an increased and aggressive enforcement agenda, a regulatory agenda that was much less impactful than originally expected, and a subregulatory strategy with mixed results.

Increased and Aggressive Enforcement

From her first days as Secretary, Solis made clear that significantly increased activity by the Department's enforcement agencies would be one of her key priorities. Indeed, early in her tenure, Secretary Solis made clear that "there is a new sheriff in town," drawing a contrast with what she perceived to be an employer-friendly Department of Labor in the Bush Administration.

Step one in the Administration's increased enforcement plan was to add new investigators to the Department's enforcement agencies, including the Wage and Hour Division (WHD), the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), the Employee Benefits Security Administration (EBSA), and the Office of Federal Contract Compliance Programs (OFCCP). Each of these agencies received significant additional funding for investigative resources in the 2009 budget and those levels have largely been retained in the intervening years through the continuing resolutions that Congress has passed instead of a budget.

With hundreds of additional enforcement personnel on the watch, the Solis DOL prioritized information-sharing, targeted investigations, and corporate-wide compliance efforts. Focused attention was given to the issue of “misclassification” of independent contractors under the various laws enforced by the Department. The Department even began cracking down on firms that use summer interns. WHD announced a “fissured industry” initiative, designed in part to break down the traditional franchise arrangement in an effort to establish liability under the FLSA where none had existed previously. Specific industries, including hospitality and construction, were targeted by the enforcement agencies for wide-sweeping compliance initiatives.

Once the investigators and compliance officers completed their investigations, they sought increasingly aggressive penalties. Surprise investigations and invocation of the Department’s subpoena authority have been on the rise. Increased use of litigation (including consent decrees), debarment, criminal referrals, fines, and liquidated damages have become commonplace, often followed by a DOL press release to publicly “shame” the employer. In October 2009, OSHA levied the largest fine in its history for a failure to fix safety problems following a refinery disaster. In 2012, WHD announced the highest level of backwages ever collected -- \$280 million to approximately 300,000 employees.

Unfulfilled Regulatory Ambitions

The Department’s initial proposals struck fear in the hearts of the employer community for their anticipated sweeping impact. Whether it was the “right-to-know” proposal under the FLSA that would have required employers to provide written, individualized analyses of exempt status to each exempt employee; or a complete overhaul of the FMLA regulations; or revisions to the “persuader” rule that would fundamentally alter the manner in which law firms advised employers on unionization efforts; or the ever-present specter of an ergonomics rulemaking, the initial regulatory agenda proposed by the Solis DOL was ambitious, expansive, and aggressively anti-business.

Over the first four years of the Obama Administration, however, the Department has had more limited success with its wide-ranging rulemaking ambitions. The Department did put some new rules into effect, including implementing a proposal by the Bush WHD to clean up the FLSA regulations (including final rules on fluctuating workweek and tip credit); an OSHA rule relating to cranes and derricks; and final rules to reverse the Bush Administration’s changes to the H-2A agricultural worker visa program. Although, the latter regulations came at a high cost to the Department after they lost a lawsuit by employers and had to start the regulatory process anew.

The Department ran into significant problems with other rulemakings, including an attempted rewrite of the H-2B program rules, which remains tied up in two different lawsuits, as well as a Congressional directive barring DOL from finalizing the regulations. In addition, the Department’s efforts to prohibit young people from working on family farms ran into fierce opposition on Capitol Hill and had to be shelved. There are also numerous rules that remain unfinished, as well as OSHA’s other regulations that are in the works, but have not yet been proposed.

Mixed Results with Subregulatory Strategy

At the subregulatory level, the Solis DOL focused heavily on what often has been described as the “regulation by amicus” program. A very active Office of the Solicitor has filed approximately 100 amicus curiae briefs advocating the Department’s position on a wide variety of issues, the vast majority of which relate to the FLSA or ERISA. Those briefs have met with varied success in the courts, with some courts accepting DOL’s positions and others rejecting them. The Department’s amicus program suffered a notable loss, however, in last year’s Supreme Court decision of *Christopher v. SmithKline*, in which the Court unanimously decided that the Department’s briefs should not be provided any “especially favorable weight” (at least in the context in which the Department first articulates -- or changes -- its position in an amicus brief).

Another significant subregulatory decision by the Solis DOL was the elimination of opinion letters by WHD in favor of Administrator Interpretations (AI). When announced in 2010, the AI program was expected to provide a more efficient method by which WHD would be able to address critical wage and hour issues. With recent AIs addressing the treatment of the pine straw industry and the definition of “son or daughter” under the FMLA, however, WHD now has issued a total of five AIs since announcing the program.

What's Next?

Once we know the identity of the new Secretary of Labor, we will be in a much better position to determine the specific direction of the Department. What is likely, however, is that the new Secretary will be agreeable to organized labor. That means still more aggressive enforcement, as well as a renewed focus on achieving many of the regulatory goals -- either by regulation or by subregulatory activity -- that were set at the beginning of President Obama's Administration.

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