



# Inside The Beltway

Keeping You Informed

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## Critical developments in labor and employment law

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### **Executive branch/administration**

#### Department of Defense, General Services Administration, and National Aeronautics and Space Administration

Implementing Presidential Executive Order 13494, "Economy in Government Contracting," a proposed rule was announced to prohibit reimbursement to federal contractors for costs to persuade employees regarding unionization while allowing reimbursement of costs for shop stewards, labor management committees, employee publications, and related activities associated with employee relations. Comments from interested parties are due by June 14, 2010.

Implementing Presidential Executive Order 13502, "Use of Project Labor Agreements for Federal Construction Projects," a final rule issued directing federal agencies to consider project labor agreements (PLA) on construction projects exceeding \$25 million to promote "economy and efficiency" in federal procurement. A PLA is a pre-hire collective bargaining agreement with one or more labor organizations establishing terms and conditions of employment for a specific construction project. According to the Associated Building and Contractors, approximately 85 percent of construction workers are unorganized and would be excluded from PLA projects.

#### Department of Labor (DOL)

The DOL's Semiannual Regulatory Agenda published April 26, 2010, (75 Fed. Reg. 21824-21838) lists 117 rule actions under review, development, or completed during the past 6 months addressing a variety of issues including:

- evaluation of contractor and subcontractor recruitment and placement results;
- internet balloting for union officer elections;
- persuader agreement reporting by employers and consultants;
- notification of employee rights under federal labor laws;
- new recordkeeping requirements under the Fair Labor Standards Act (FLSA);
- child labor;

- application of the FLSA to domestic service;
- retirement plan lifetime income options;
- investment advice and fee disclosure for pension plan participants;
- genetic information nondiscrimination;
- implementation of the 2010 Patient Protection and Affordable Care Act;
- provision of multiemployer plan information upon request;
- civil penalty amendments to ERISA;
- mine safety and health management programs;
- occupational injury and illness recording and reporting requirements; and
- jobs for veterans grants.

The DOL's new strategy called "Plan/Prevent/Protect," requires employers to work with their employees to create plans for identifying and remediating workplace hazards. In announcing the new approach, Deputy Secretary of Labor Seth Harris said that while most companies comply with and obey the law, some play a "dangerous game of catch-me-if-you-can" putting workers' right and lives at risk. The PPP program is part of the DOL's vision of Good Jobs for Everyone defining a "good job" to include:

- 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 caregiving;
- jobs that improve health benefits and retirement security for all workers; and
- jobs that assure workers have a voice in the workplace.

The DOL launched its "We Can Help" campaign to inform low-wage and vulnerable workers in such industries as construction, janitorial work, hotel/motel services, food services, and home health care of their rights to file complaints for unpaid wages. <http://www.dol.gov/wecanhhelp/> Employers are advised to periodically check the "We Can Help" website for updated information made available to employees.

The DOL's new website, <http://ogesdw.dol.gov/>, reports all DOL enforcement data reporting employer violations across all DOL enforcement agencies except for the Office of Labor-Management Standards (OLMS). The agencies reporting include the Employee Benefits Security Administration (EBSA); Mine Safety & Health Administration (MSHA); Office of Federal Contract Compliance Programs (OFCCP); Occupational Safety & Health Administration (OSHA); and Wage & Hour Division (WHD). Soon the site will allow searches by company name (facilitating union corporate campaign advocacy). Employers are advised to check this site frequently to ensure the accuracy and extent of reported data.

Bureau of International Labor Affairs (ILAB)—In an effort to reduce the likelihood of child labor and forced labor violations of international standards in supply chains and to create a standard set of practices, ILAB seeks information from employers by June 14, 2010, regarding codes of conduct, standards used to implement such codes, auditing/monitoring systems, supply-chain management practices, training modules, reporting practices, collaborative practices, policy statements, and case studies.

Occupational Safety and Health Administration (OSHA)—On April 22, 2010, OSHA announced its new Severe Violator Enforcement Program (SVEP) effective within 45 days. <http://www.osha.gov/dep/svep-directive.html> A "severe violator" is an employer with one or more

willful or repeated citations, a failure-to-abate notices related to the death of an employee or three or more hospitalizations, or a high gravity serious violation related to a high-emphasis hazard. SVEP provides for nationwide inspections of related workplaces when there is evidence of a broader pattern on non-compliance. It is unclear how an employer can qualify to remove itself from the severe violator list. Notably, on April 16, 2010, the D.C. Circuit Court of Appeals in *National Ass'n. of Home Builders v. OSHA*, No. 09-1053 upheld OSHA's authority to impose penalties for each employee affected by an OSHA violation rather than a single company violation and that OSHA has the authority to prepare standards adopting penalties on a per-employee basis.

Wage and Hour Division (WHD)—Opinion letters responding to specific facts will no longer be issued. Going forward, administrative interpretations will provide general interpretations of law and regulations applicable to entire industries and categories of employees.

Wage and Hour Division (WHD)—To implement Presidential Executive Order 13495, "Nondisplacement of Qualified Workers Under Service Contracts," a new rule is proposed requiring any successor to a follow-on service contract in excess of \$100,000 to provide the same or similar services at the same location to offer a right of first refusal of employment to the predecessor's non-managerial, non-supervisory employees. Comments are due by May 18, 2010.

#### Equal Employment Opportunity Commission (EEOC)

In its semi-annual regulatory agenda released April 26, 2010, the EEOC announced that a final rule interpreting the Genetic Information Nondiscrimination Act will issue within weeks. A final rule revising Americans with Disabilities Act Amendments Act is expected to issue in July. New rules regarding the Age Discrimination in Employment Act will be delayed until March 2011.

#### Internal Revenue Service (IRS)

Form W-11 (employee affidavit) is now available for employers to claim a special Social Security payroll tax exemption for each worker hired in 2010 who has been unemployed for at least 60 days. For those workers retained for 52 weeks, the newly enacted Hiring Incentives to Restore Employment (HIRE) Act will provide employers a \$1,000 tax credit or 6.2 percent of the wages paid. Revised forms W-2 and W-3 provide for reporting exempt wages and tips and deferred compensation under the Act.

#### National Labor Relations Board (NLRB)

Although not confirmed by the U.S. Senate, Democrat nominees Craig Becker and Mark Pearce were recess appointed by President Obama on March 27, 2010. Becker was sworn in on April 5 and Pearce on April 7. Both Becker and Pearce were re-nominated on April 21. On March 23, 2010, the U.S. Supreme Court heard oral argument in *New Process Steel LP v. NLRB*, No. 08-1457 challenging the authority of the two-member board to issue decisions for the period January 1, 2008, until April 4, 2010. The Court ordered supplemental briefing on April 16 regarding the effect of the recent recess appointments. Both parties responded that the appointments did not render the issue moot.

### **Legislative branch/Congress**

#### Proposed Legislation

The "Paycheck Fairness Act" (S. 182; H.R. 12) would make compensatory and punitive damages available as remedies in Equal Pay Act cases, authorize class actions, and require outreach efforts by the EEOC and OFCCP.

"Protecting America's Workers Act" (S. 1580; H.R. 2067) would amend the Occupational Safety and Health Act by:

1. Increasing protections for whistleblowers to include reinstatement, back pay; compensatory damages; costs, expenses, and attorney fees.

2. Increasing penalties for discouraging employee reports of injury or illness; making employee time spent in inspections compensable hours worked; mandating the preservation of evidence in any incident resulting in death or serious bodily harm; rights of access to investigative reports and rights of review by victims and families of the deceased.
3. Increasing civil penalties for willful and repeated violations from \$70,000 to \$120,000 and in the death of an employee, a minimum of \$50,000 to a maximum of \$250,000 per violation adjusted for inflation.
4. Increasing criminal penalties for willful violations causing the death of an employee from 6 months to 10 years for a first offense and to 20 years for repeat convictions for any responsible corporate officer.

The “Employment Non-Discrimination Act” (S. 1584; H.R. 3017) would prohibit job discrimination by employers with 15 or more employees based on sexual orientation and gender identity.

The “Employee Misclassification Prevention Act” (S. 3254; H.R. 5107) would amend the FLSA to require recordkeeping of hours worked by non-employees performing labor or services for remuneration and civil penalties and liquidated damages for misclassification of workers as independent contractors.

The “Voluntary Protection Program Act” (S. 3257) would require the Secretary of Labor to establish cooperative safety and health management systems providing for the systematic assessment of hazards and employee participation in voluntary protection programs.

The “Balancing Act of 2009” (H.R. 3047), a 247-page bill, proposes family and medical need assistance, child care assistance, in-school and afterschool assistance, family care assistance, and encourages the establishment of family-friendly workplaces.

The “Work-Life Balance Award Act” (H.R. 4855) would direct the Secretary of Labor to establish an advisory board to select annually an employer that has created policies permitting employees to achieve a work-life balance.

#### Legislation enacted and signed into law

The “Patient Protection and Affordable Care Act of 2009” (Pub. L. No. 111-148, 124 Stat. 119 (2010)) includes whistleblower provisions, anti-retaliation right of action, reporting requirements, complaint resolution process for residents and persons acting on behalf of residents at skilled nursing facilities, and redefines “original source” under the False Claims Act favoring qui tam relators. For detailed information and updates, please refer to the Nixon Peabody Health Law Alerts. [http://www.nixonpeabody.com/publications\\_list2.asp?type=NL2&NLID=5](http://www.nixonpeabody.com/publications_list2.asp?type=NL2&NLID=5)

#### Judicial branch/U. S. Supreme Court

*Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.*, No. 08-1198—The 5–3 decision issued April 27, 2010, reversed the U.S. Court of Appeals for the Second Circuit and held that class arbitration cannot be inferred from an arbitration clause that is silent on the issue and to allow otherwise would be inconsistent with the Federal Arbitration Act. Although the case involved antitrust claims, the issue impacts employment law.

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