



# Regulatory Agenda Narrative

U.S. Department of Labor

Spring 2010

## DEPARTMENT-WIDE REGULATORY AND ENFORCEMENT STRATEGIES – “PLAN/PREVENT/PROTECT” AND OPENNESS AND TRANSPARENCY

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.

Every year on April 28, we commemorate Workers’ Memorial Day to remember thousands of workers killed on the job each year. This year, those remembered will include 29 miners who lost their lives at the Upper Big Branch Mine in West Virginia. We will keep their families and co-workers in our thoughts. Workers should never have to sacrifice their lives for their livelihood. All workers should come home to their families at the end of their shifts safe and whole. Workplace accidents like the Upper Big Branch mine explosion are preventable. They must be prevented. 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.

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 few 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.

The “catch me if you can” model of workplace health and safety appears to have been at work at the Upper Big Branch Mine. The company that owns this mine, Massey Energy, had a troubling record when it comes to protecting its workers in the months leading up to the disastrous explosion. Of course, systemic safety problems are not limited to the Upper Big Branch Mine, to Massey Energy, or to the mining industry. Indeed the “catch me if you can” approach to compliance is a problem in many types of American workplaces, affecting many different workplace rights.

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.

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.

To advance *Good Jobs for Everyone*, the Department’s Spring Regulatory Agenda and several non-regulatory initiatives seek to change the calculus that leads to violations of the law. The Department’s goal is to foster a new calculus that strengthens protections for workers and results in significantly increased compliance. These steps can be taken without undermining the activities of the many companies that responsibly protect their workers’ health and safety.

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, discussed 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.

“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.

### **Openness and Transparency: Tools to Achieve Compliance**

Using regulatory changes to produce greater openness and transparency also is an integral part of a Labor Department-wide compliance strategy. These efforts will not only enhance our agencies' enforcement tool set, but will encourage greater levels of compliance by the regulated community and enhance awareness among workers of their rights and benefits. Increased openness and transparency in the workplace will also enable workers to report violations, thereby assisting the Department's enforcement efforts and enhancing compliance. When employers, unions, workers, advocates, and members of the public have greater access to information concerning workplace conditions and expectations, then we all become partners in the endeavor to create *Good Jobs for Everyone*.

### **Strategies Highlighted by the Spring 2010 Regulatory Agenda: “Plan/Prevent/Protect” and “Openness and Transparency to Achieve Compliance”**

These two strategies highlighted in the Labor Department's Spring 2010 Regulatory Agenda --- “Plan/Prevent/Protect” and openness and transparency --- will work together to increase the level of compliance with the employment laws enforced by the Department.

#### ***“Plan/Prevent/Protect”: The Beginning of a Broader Regulatory and Enforcement Strategy***

The following regulations are part of the Department's “Plan/Prevent/Protect” regulatory and enforcement strategy:

#### **Injury and Illness Prevention Program (OSHA)**

OSHA's project is the prototype for the Department's “Plan/Prevent/Protect” strategy. It will require employers to provide their employees with opportunities to participate in the development and implementation of an injury and illness prevention program, including a systematic process to proactively and continuously address workplace safety and health hazards. This rule would involve planning, implementing, evaluating, and improving processes and activities that promote worker safety and health, and address the needs of special categories of workers (such as youth, aging and immigrant workers). OSHA's efforts to protect workers under the age of 18 will be undertaken in cooperation with the Department's Wage and Hour Division which has responsibility for enforcing the child labor provisions of the Fair Labor Standards Act. OSHA has substantial evidence showing that employers that have implemented similar injury and illness prevention programs have significantly reduced injuries and illnesses in their workplaces. This rule would build on OSHA's existing Safety and Health Program Management Guidelines and lessons learned from successful approaches and best practices that have been applied by companies participating in OSHA's Voluntary Protection Program (VPP) and Safety and Health Achievement Recognition Program (SHARP), and similar industry and international initiatives. OSHA will initiate its Injury and Illness Prevention Program rulemaking with stakeholder meetings during the Spring and Summer of 2010.

### **Infectious Diseases (OSHA)**

OSHA is also considering a regulatory measure to address Infectious Diseases in the workplace. During the Spring and Summer of 2010, OSHA will receive and analyze comments on the need for a standard to ensure that employers establish a comprehensive employee infection control program consistent with guidance from the Centers for Disease Control and Prevention and other industry guidelines to protect employees from infectious disease exposures. Such control measures might be necessary in occupational settings where employees may be at increased risk of exposure to people with infectious diseases. Hospitals and nursing homes, as well as certain laboratories, pathologist offices, coroners' offices, medical examiners, correctional facilities, homeless shelters, drug treatment programs and mortuaries are examples of such workplaces.

### **Pattern of Violation Regulation Review (MSHA)**

MSHA will review its existing Pattern of Violations regulation. The goal will be to assure that mine operators like Massey Energy with large numbers of serious and substantial violations of the Mine Act and its implementing regulations will be subjected to significantly enhanced enforcement activities. The regulation will simplify and improve consistency in the procedures and criteria for placing mine operators into the pattern of violations program. For example, MSHA is considering how it could use the pattern of violations process to require operators to implement effective comprehensive safety and management programs aimed at fixing problems before they occur. MSHA is also considering simplifying the procedures for applying the pattern criteria so that operators would be required to more quickly and effectively address systemic hazards and allow MSHA the flexibility to investigate different kinds of patterns.

### **Safety and Health Management Programs for Mines (MSHA)**

MSHA currently requires development and approval of plans for control of specific hazards. For coal mines, the Mine Act requires unique mine plans for ventilation, roof control, dust control, and other mining issues in addition to mandatory and specific mine operator inspections designed to identify and correct hazards. MSHA will work on regulations to improve the effectiveness of these existing plans, but MSHA will also publish a Request for Information (RFI) about the possible imposition of a new requirement of a comprehensive health and safety management program for all mines. The RFI will solicit information in the areas of management commitment and employee involvement; worksite analysis; hazard prevention controls; safety and health training; pre-shift inspection; violations of any mandatory safety or health standards and correction of those that are identified; and, program evaluation.

### **Pre-Shift Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Safety and Health Standards (MSHA)**

To complement the RFI concerning Safety and Health Management Programs for Mines, MSHA will issue a proposed rule to reinstitute the provision in section 303(d)(1) of the Mine Act that requires underground coal mine operators to conduct pre-shift examinations in areas where miners work or travel to search for violations of mandatory safety or health standards.

## **Construction Contractor Affirmative Action Requirements (OFCCP)**

The Office of Federal Contract Compliance Programs (OFCCP) currently requires employers and other regulated entities to create affirmative action programs in some contexts. During the Spring 2010 Regulatory Agenda cycle, OFCCP intends to continue work on a notice of proposed rulemaking (NPRM) that would enhance the effectiveness of the affirmative action program requirements for Federal and federally assisted construction contractors and subcontractors. The NPRM would remove outdated provisions and update the regulations that set forth the actions construction contractors are required to take to implement their affirmative action programs and would address the content of those programs in the areas of recruitment, training, and apprenticeships.

## **Records to be Kept by Employers Under the Fair Labor Standards Act (WHD)**

The Wage and Hour Division (WHD) will publish a NPRM concerning employers' recordkeeping requirements under the Fair Labor Standards Act (FLSA). This proposal would establish a requirement that employers provide workers with basic information about their employment, including how their pay is calculated. Any employers that seek to exclude workers from the FLSA's coverage would be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it. The proposal will also address burdens of proof when employers fail to comply with records and notice requirements. In addition to serving the Department's "Plan/Prevent/Protect" strategy, this initiative also contributes to the Labor Department's efforts to prevent misclassification that denies workers employment law protections to which they are entitled.

As part of this department-wide initiative, both OSHA's Injury & Illness Prevention Program NPRM and OFCCP's Construction Contractor Affirmative Action Requirements NPRM will also propose establishing similar requirements that employers notify workers of their employment status.

## **Non-Regulatory Labor Department Initiatives Supporting "Plan/Prevent/Protect"**

In addition to enhanced enforcement and regulatory enforcement efforts, the Labor Department is pursuing several non-regulatory efforts to support its "Plan/Prevent/Protect" strategy:

- **Misclassification Settlements (WHD) (EBSA)**: The Employee Benefits Security Administration (EBSA) will work with WHD to ensure that employee benefit plan issues are addressed in settlements with employers regarding misclassification of employees as independent contractors. WHD will require settling employers to review their benefit plans, resolve the benefit rights of misclassified employees and report related violations of plan provisions and ERISA to EBSA.

This requires the employer to identify violations related to benefit plans and prevents the consequences of misclassification from continuing uncorrected.

- Delinquent Filer Voluntary Compliance Program (DFVCP) (EBSA): The Delinquent Filer Voluntary Compliance Program (DFVCP) encourages employers and other regulated entities to take proactive steps to come into compliance with their reporting obligations under Employee Retirement Income Security Act (ERISA). Plan administrators who file their Form 5500 Annual reports late or incompletely can substantially reduce the otherwise applicable civil penalty if they correct their violation prior to EBSA's involvement.
- Checklists for Pension and Health (EBSA): EBSA will continue to facilitate employer compliance through the use of Pension and Health Checklists. By making the checklists used by investigators to determine compliance available to the public, EBSA provides a compliance guide that assists employers and other regulated entities in taking responsibility for their workers' retirement security.
- Voluntary Fiduciary Correction Program (VFCP) (EBSA): EBSA's Voluntary Fiduciary Correction Program (VFCP) provides an incentive for employers and other regulated entities to assume responsibility for finding and correcting fiduciary violations of ERISA. Through the VFCP, employers and other regulated entities who find and correct certain specific violations in accordance with EBSA rules will receive a "no action" letter from EBSA and may be exempt from applicable excise taxes.
- Fatality Prevention: Rules to Live By (MSHA): MSHA has initiated a fatality prevention program called "Rules to Live By," based on an analysis of fatal accidents from 2000 through 2008. The analysis identifies conditions and practices that contributed to almost half of these deaths and the 24 safety standards associated with them. MSHA is providing information, such as engineering solutions to common problems, and is reaching out to miners and miners' representatives during inspections to ensure that information on why these accidents happen and how to prevent them is available to all. Mine operators are responsible for monitoring their work environments to assure that these hazardous conditions and practices do not exist and to fix them if they do. All MSHA inspectors are being trained to improve consistency in recognition of violations of these standards and to better understand their critical importance.

### *Openness and Transparency: Tools for Achieving Compliance*

The Labor Department's Spring 2010 Regulatory Agenda will continue the Department's emphasis on openness and transparency as a means of ensuring comprehensive and continual compliance with the Department's worker protection statutes. The following regulations promote openness and transparency as a means of achieving compliance:

#### **Amendment to Claims Procedure Regulation (EBSA)**

The rules governing the filing, review and appeal of group health, pension and other employee benefit plans claims under the Employee Retirement Income Security Act (ERISA) are almost ten years old. EBSA will be reviewing these rules and proposing changes necessary to ensure that workers receive timely, complete and understandable explanations of benefit claim denials, as well as a full and fair review of any denied claims when a claim determination is appealed to a plan

fiduciary. This initiative also will update the claim procedure rules to comport with the requirements of the recently enacted Patient Protection and Affordable Care Act of 2010.

### **Improved Fee Disclosure for Welfare Plans (EBSA)**

EBSA recently completed work on a regulation that significantly improves the disclosure of information furnished to pension plan fiduciaries by plan service providers. This follow-on initiative is intended to improve disclosure and bring transparency to compensation arrangements with group health and other welfare benefit plans subject to ERISA. These rules will help to ensure that fiduciaries of group health and other ERISA-covered welfare plans have the information they need to assess the reasonableness of the compensation being paid for plan services, as well as assess potential conflicts of interest on the part of plan service providers.

### **QDIA Target Date Fund Disclosure**

EBSA is undertaking a number of informal and formal actions to ensure that both plan fiduciaries and plan participants have the information they need to assess the appropriateness of target date-type investment vehicles as plan investment options and as plan investment choices. One of these actions involves amendment of the notice requirements under the Qualified Default Investment Alternative (QDIA) regulation. The other action involves establishing special disclosure requirements for target date-type investments when such investments are offered on a plan's investment menu. Both of these initiatives are intended to better inform participants and beneficiaries about the unique characteristics and risks associated with target-date funds.

### **Interpretation of the "Advice" Exemption of Section 203(c) of the Labor Management Reporting and Disclosure Act (OLMS)**

Consistent with the transparency rationale underlying the Labor-Management Reporting and Disclosure Act (LMRDA) and the goal of giving workers greater voice in the workplace, the Office of Labor-Management Standards (OLMS) will propose an interpretation of the "Advice" Exemption that will better implement the requirement to disclose employer and consultant agreements to persuade employees concerning their collective bargaining and representation rights. A narrower exemption would provide for disclosure of persuader activities currently exempt from the statute's reporting requirements.

### **Form LM-30, Labor Organization Officer and Employee Report (OLMS)**

OLMS will propose revisions to the Form LM-30 Labor Organization and Employee Report on which labor union officials must report potential conflicts of interest, as required under the LMRDA. The proposed revisions will seek to improve the clarity of the form and its instructions and resolve significant questions regarding the scope of the union officer and employee reporting requirements.

### **Hazard Communication (OSHA)**

Hearings on OSHA's proposal to modify its Hazard Communication standard have helped OSHA to promote improved transparency in the communication of chemical hazard information. These

hearings have gathered information to assist OSHA in creating consistency between its current Hazard Communication standard and the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals. This proposal would involve changing the criteria for classifying health and physical hazards, adopting standardized labeling requirements, requiring a standardized order of information for safety data sheets, and adopting standardized labeling requirements that would be understandable for low-literacy workers or those who do not speak English.

**Non-Regulatory Initiatives Supporting Openness and Transparency as Compliance Tools:**

In addition to enhanced enforcement and regulatory enforcement efforts, the Labor Department is pursuing a non-regulatory effort in support of its "Openness and Transparency" strategy:

- Injury, Illness, Fatality, and Exposure Data (OSHA): Earlier this year, the Labor Department published OSHA's fatal and catastrophic accident data on its web site, followed by the February release of OSHA's establishment-specific injury and illness data. For the first time ever, these critical data sets are accessible to anyone and everyone who wants them and will result in America's prospective workers and consumers making more informed decisions. In the near future, the Department plans to expand this undertaking to include public access to OSHA's illness, injury, and exposure data through a comprehensive, searchable enforcement database.