

## Employer compliance critical with increased focus on FLSA enforcement

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At a time when there is an increased focus at the federal level on compliance with employment laws, wage-and-hour enforcement is no exception. The Department of Labor is the agency responsible for enforcing the Fair Labor Standards Act, a law that establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting employees in the private sector and in federal, state and local governments.

Recent DOL communications and actions leave little question regarding the need for preparedness by employers.

Hilda Solis, the U.S. Secretary of Labor, expressed the agency's intent in regard to wage and hour violations in the following statement: "We will not rest until the act (FLSA) is followed by every employer, and each worker is treated and compensated fairly." Her message was reinforced by the decision to add 250 investigators to the Wage and Hour Division.

These increasing numbers are significant as they represent a one-third increase in staff, an addition that will facilitate the agency's ability to respond to complaints more expeditiously.

In keeping with this objective, DOL initiated a "We Can Help" campaign aimed at protecting workers' rights. The agency utilizes public-service announcements, a website, [www.dol.gov/wecanhelp](http://www.dol.gov/wecanhelp), and a telephone hotline to encourage workers to report potential violations.

The website provides relevant information on how to file a complaint, frequently asked questions and the investigative process. Although the campaign targets all workers who have encountered violations, the agency is focusing increased attention on employees working in health care, construction, janitorial fields, hotels and food services.

The DOL has implemented another significant effort, the "Employee Misclassification Initiative," to detect employers who have classified workers as independent contractors when, in fact, they are employees.

In testimony before Congress in March 2010, Solis stated: "Employers who misclassify their employees as independent contractors often avoid paying the minimum wage and overtime.

They evade payroll taxes, and often do not pay for workers' compensation or other employment benefits. As a result, employees are denied the protections and benefits of this nation's most important employment laws, and their employers gain an unfair advantage in the marketplace."

The DOL makes funds available to support targeted investigations that focus on industries where these errors are most likely to lead to violations of the law.

Alongside these initiatives, in March 2010, the DOL announced that it would abandon its long-standing practice of issuing Opinion Letters. Instead of writing opinions in response to fact-specific requests for FLSA information, the agency started issuing more general Administrator Interpretations Letters (see [www.wagehour.dol.gov](http://www.wagehour.dol.gov)). Skepticism has been expressed by a number of employment attorneys who view this change as another signal that the agency is becoming less employer friendly.

In addition to governmental efforts to alert employees to report illegal pay practices, plaintiffs' attorneys regularly advertise their availability to pursue claims involving overtime and other wage-and-hour violations. It is doubtful that these marketing dollars would be targeted for these purposes without evidence indicating widespread abuses.

Vigilant FLSA compliance is critical for employers. Organizations will be vulnerable to charges if compliance-related plans are delayed for invalid reasons, such as operational deadlines or difficulties in interpreting the law. The time and dollars spent on addressing these concerns are far less than on responding to charges.

The following are tips to assist employers in minimizing FLSA-related risks:

1. Before classifying an employee in an exempt status, analyze that employee's salary and duties to determine if they satisfy FLSA requirements established for administrative, professional, executive, or other "white-collar" exemptions.
2. Pay attention to FLSA restrictions prior to docking pay from exempt employees' salaries for time off from work.
3. Compensate non-exempt employees at one and one-half times their regular rates of pay if they are required or permitted to work overtime, generally over 40 hours worked per workweek.
4. Avoid allowing non-exempt employees to work during unpaid meal periods; if work is required occasionally, compensate the employee for work performed.
5. Examine FLSA requirements before deciding whether non-exempt employees should be paid for time spent performing activities that are incidental to their work, such as training programs, waiting time, breaks, travel and changing clothes.

6. Evaluate all independent contractors to assess whether they are classified appropriately.
7. Maintain accurate wage-and-hour records and ensure that recordkeeping procedures are in compliance with DOL requirements.
8. Establish and communicate procedures that allow exempt and non-exempt employees to address compensation mistakes.
9. Review policies, procedures and practices regularly to confirm FLSA compliance.
10. Stay abreast of current FLSA requirements and future developments.
11. Seek legal and/or human resource professionals' assistance, as necessary.

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