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December 8, 2017

Mr. Bryan Slater
Assistant Secretary for Administration
and Management
U.S. Department of Labor
200 Constitution Ave. NW
Washington DC 20210

By electronic submission: dolstratplan@dol.gov

Re: Comments on U.S. Department of Labor Draft Strategic Plan, Fiscal Years 2018-2022

Dear Mr. Slater:

The U.S. Chamber of Commerce is pleased to submit the attached recommendations as our response to the Department of Labor's Draft Strategic Plan for Fiscal Years 2018-2022. These recommendations focus on the Office of the Solicitor of Labor, the Occupational Safety and Health Administration, the Wage and Hour Administration, and the Office of Labor-Management Standards.

These comments are based on input gathered from members of the U.S. Chamber and other sources. In particular this input revolved around the experiences our members had during the previous administration and thus the theme of these comments is "Looking Back to Look Forward."

The Chamber is looking forward to working closely with the Department of Labor (DOL) to expand job opportunities and grow the economy. At the same time, the Chamber fully supports the laws and regulations enforced by the Department. These comments offer recommendations on how the various offices within the Department can better achieve their missions of providing the necessary protections employees deserve, while also developing a more collaborative relationship with employers.

Thank you for providing us this opportunity to comment on the Department's Strategic Plan.

Sincerely,

Recommendations for the Office of the Solicitor

The Solicitor of Labor (SOL) is one of the most important positions in the Department, despite the relative lack of attention the position attracts. The Solicitor oversees both the regulatory and enforcement activities of the Department and, therefore, has a hand in much of the activity that affects employers.

Under the Obama administration, many of the policies and efforts which were most troubling to employers were either driven, or approved by, the Solicitor. Among these were the Occupational Safety and Health Administration's (OSHA) and Wage and Hour Division's approach to enforcement and resistance to settling cases. In addition, various rulemakings with questionable claims of statutory authority were approved by the Solicitor, such as OSHA's "anti-retaliation" provision of their electronic reporting regulation, and the "Volks" rulemaking that contradicted statutory language on the window for OSHA to issue citations for recordkeeping violations. Finally, there were guidance documents that looked more like rulemakings such as the Wage and Hour Administrator's interpretations on classifying workers under the Fair Labor Standards Act, and finding joint employment under the Fair Labor Standards Act.

While the views of the office regarding rulemakings have yet to emerge, we have yet to see a fundamental change in the handling of enforcement matters. The previous administration was characterized by an intransigent attitude towards punishing employers regardless of whether the employer acted in good faith or there were extenuating circumstances.

The Solicitor's office works alongside the enforcing agency in negotiating settlements and resolving cases. In some cases, the line between the agency and SOL roles may be hard to discern. Nevertheless, the Solicitor of Labor in the previous administration, Patricia Smith, made clear that her office was going to make sure the absolute maximum penalty was imposed. At the American Bar Association's 2012 annual meeting, Solicitor Smith told the group that DOL planned to make employers see "the full effect" of the laws they are allegedly violating.[1] Given that legitimate areas of uncertainty abound in the different laws enforced by the Department and the Solicitor's office such as the Fair Labor Standards Act (FLSA) and OSH Act, the business community took these kinds of statements to really mean, "We will exploit every ambiguity we can to make life very difficult for employers, even where very legitimate disagreements can be had over what exactly the employer is required to do."

For both OSHA and Wage and Hour cases, the sooner a case can be resolved, the sooner corrective actions can happen. With OSHA, employers are not required to abate a hazard until a final resolution has occurred. If the SOL impedes settling, or makes the terms untenable to the employer causing the employer to pursue the contest to higher authorities, then abatement is delayed. Similarly, with Wage and Hour cases involving violations of the FLSA, the sooner the case is resolved and a final amount of damages agreed to, the sooner the employees can receive their back pay.

[1] Lawrence E. Dube, *DOL, State Agencies, and Litigants Proceed With Challenges to Worker Misclassification*, BLOOMBERG BNA, August 2, 2012.

Of particular concern are OSHA citations where the national office and regional solicitor offices do not operate in concert. As a practicing OSHA attorney has relayed to the Chamber:

> Each Solicitor of Labor Region has completely different, "non-negotiable" non-admissions provisions for settlement agreement. Some regions offer a "menu" from which we can choose; others simply have what they deem to be the only acceptable language. It is completely and utterly ridiculous because the language is of no moment to SOL or to OSHA. They are demanding and obstinate only because they can and know most employers won't throw away an otherwise-good settlement over the issue.
>
> This idea of "regional policy" is incredibly annoying … and does nothing either to expedite settlement or to draw the two sides of the OSHA bar closer professionally. It comes across as petty and as a "we do it because we can" move. The fact is that, when it comes to exculpatory language, so long as OSHA's interest in using settled citations for future enforcement purposes is satisfied, neither it nor SOL has a single, even arguable dog in the race. For the regional offices to take "policy" positions on issues that have no bearing on them or their interests just because they want to is simply off-putting and alienating. It gives the agencies a bad name.

As he details in one of his cases:

> I recently had a settlement conference in a significant case involving willful citations for alleged violations that are important to our client. After we'd spent hours convincing OSHA that its position isn't as strong as the Agency thought and we had come to terms with the Deputy Regional Administrator for OSHA in Region IV and one of the SOL Attorneys, the Regional SOL's OSHA Counsel nixed the deal – telling OSHA, her client, that it couldn't settle on the terms it had elected.

Another practicing OSHA attorney describes her current frustrations with the Solicitor's office:

> SOL seems to be taking the approach 'the employer filed a notice of contest then you can litigate.' Reasonable settlement discussions and honest conversations about the facts and legal analysis are non-existent; failing to have substantive legal discussions about the merits of items results in boiling settlement down to an employer's 'terms of surrender'. In some cases, discovery during the litigation phase has even been used to expand the investigation of the employer.
> The Solicitor's office has even attempted to amend citations after settlement discussions/offers or amended citations to include parties who were never inspected. This tactic in general is problematic and raises issues of violations of the statute of limitations since the statute explicitly states that OSHA has only six months from the violation to issue a citation (this issue was the focus of the *Volks* ruling and the subsequent rulemaking to reverse that court decision).

Similarly, the approach taken by the SOL in Wage and Hour cases in the previous administration, has been as unjustified. This includes the practice of insisting on a third year of back wages instead of the standard two years, with liquidated damages which double the amount of the damages, along with Civil Money Penalties (added level of penalties for willful or repeated violations that are paid to the Wage and Hour Division) in minimum wage and overtime cases where the employer has not demonstrated willfulness in the violation, or even acted in good faith.

These damages and penalties that were previously reserved for the most egregious violators are still being imposed as a matter of standard operating procedure. While there are employers who warrant such stiff sanctions, imposing these on all violators eliminates that distinction. Under previous administrations, the incentive for an employer to settle an investigation was the threat of liquidated, or double damages, and civil money penalties if a suit were to be filed. By insisting on the imposition of these penalties during the investigative stage, the agency may actually encourage employers to engage in litigation thereby delaying payment of back pay to employees.

Additionally, the Portal to Portal Act seems to reserve the discretion for assessing liquidated damages or civil money penalties to the court.[2] The Wage and Hour Division is frequently treating violations as warranting these penalties that Congress designated for the most severe cases where there is no suggestion that the employer acted in good faith[3]; the Division does not seem to want to acknowledge the possibility of a good faith disagreement. Indeed, Solicitor Smith made clear that demands for liquidated damages from the Wage and Hour Division would be the routine procedure.[4]

Further discussion of the excessive use of penalties and the negative consequences appears elsewhere in this paper under the discussion for the Wage and Hour Division.

Conclusion

The Solicitor of Labor is the chief legal officer for the Department of Labor. Employers count on the SOL to provide supervision of agencies and insure that their regulations and enforcement actions are appropriate and within the bounds of the laws that are enforced by the Department and that govern its activities. That person, and the office under them, must be regarded as operating strictly without bias. To do otherwise sacrifices the credibility of the office and thus the expectation employers have of being treated fairly.

[2] See 29 U.S.C. 260: "In any action commenced…to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938…if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."
[3] *Id.*
[4] 36 BNA Daily Labor Report C-1, Feb. 23, 2012.

Recommendations for OSHA

In any workplace there are effectively three parties that determine how safe the workplace is: the employer, the employees, and OSHA (sometimes the workers' compensation carrier). Each of these have their roles and obligations. The employer is obligated to instill a culture of safety, and provide the necessary training and safety equipment. The employee is obligated to, in the words of the OSH Act, "comply with occupational safety and health standards and all rules, regulations and orders issued…which are applicable to his own actions and conduct."[5]

OSHA's role is to provide guidance—through regulations and other actions—and to enforce those requirements fairly with the goal of improving workplace safety. Thus, OSHA must be driven by the question of how it can best help employers in their quest to make their workplaces as safe as possible. Too often, OSHA is looked upon as the prime actor, or the guarantor of whether a workplace is safe. That view is not accurate, nor practical. At best, OSHA can help, at worst it can impede.

The metrics for gauging the state of workplace safety should be simple—what are the rates of injuries, illnesses and fatalities? In the previous administration, new regulations and strong enforcement seemed to be proxies for improving workplace safety. Since injury and fatality levels were not declining consistent with historic trends, OSHA had to highlight other measures of activity.

There are three main areas where the new administration can improve on the previous in furthering OSHA's mission to advance the cause of improving workplace safety: attitude and relationships with stakeholders; strategy for improving workplace safety; and substantive policy and procedures.

Attitude and Relationships with Stakeholders

OSHA needs to welcome input from all sectors and stakeholders. The last eight years were characterized by, if not open hostility to employers, then at least open dismissal of their interests. Throughout the rulemakings, the agency openly dismissed legitimate concerns raised by the employer community about practical issues, statutory authority questions, and assessments of impact. The result were regulations that were driven by ideological views and will be impractical if not impossible to comply with.

Employers also bore the brunt of OSHA's public remarks as part of the "Regulation by Shaming" tactic followed by the agency (more on this under the discussion on strategy). Cooperative programs designed to foster opportunities for the agency and employers to work together lost support as employers and their representatives decided the agency was not interested in developing collaboration. OSHA ratcheted up the requirements for participation in the Voluntary Protection Program (providing relief from scheduled inspections for employers with exemplary safety records) and the Alliances program (collaboration with associations) in

[5] 29 U.S.C. 654 (b).

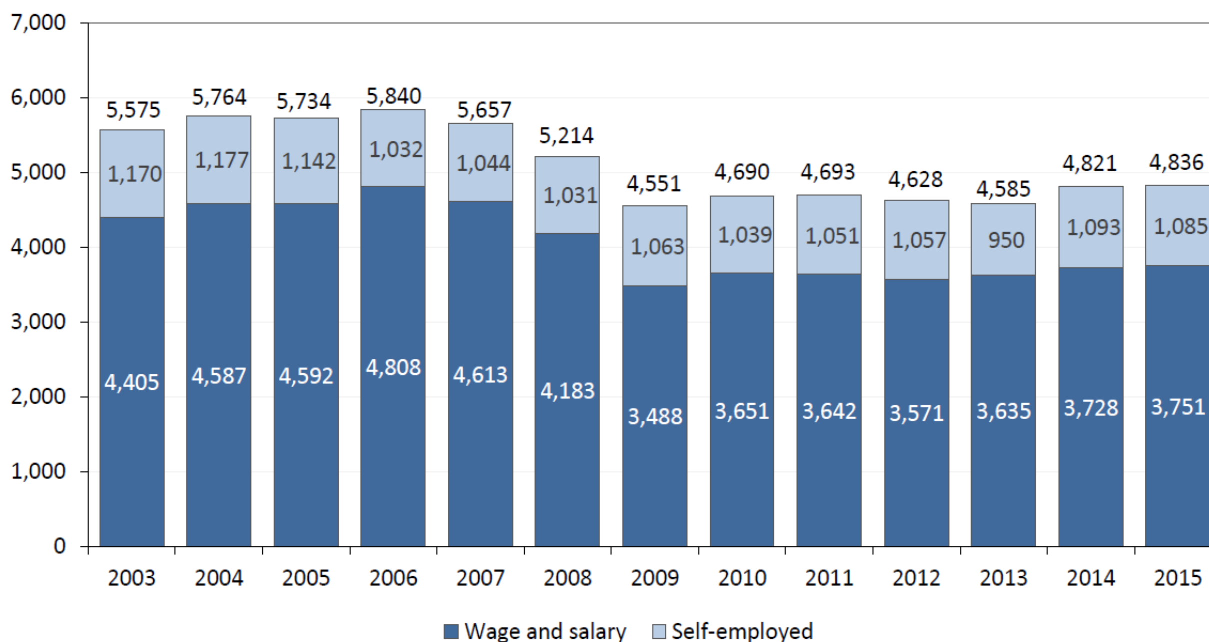
ways that no longer made these programs attractive or worth the effort. The agency even tried to promulgate a regulation that would have made small businesses who voluntarily entered the consultation program vulnerable to enforcement—the firewall between these two functions is one of the main selling points used to attract small businesses to the program.

Instead of being the opposition, OSHA needs to regard employers as partners. Employers are the ones held accountable for compliance with regulations and interpretations and their views deserve respect. OSHA should be guided more by the question of "How can we help employers keep employees safe?" than by "How can we make sure we are making examples of bad employers, or catching as many bad employers as possible?"

Strategy for Improving Workplace Safety

The overall philosophical approach to improving workplace safety needs to change as well. The "shaming strategy" that characterized the previous administration has been proven to have failed—the latest BLS fatality data shows rates at their highest levels in seven years, and rates during the intervening years were either flat or slightly increased, even when economic activity was lagging. Enforcement will always be a critical part of OSHA's agenda, but it cannot serve as OSHA's only, or even primary, method for encouraging employers to improve workplace safety.

Number of fatal work injuries by employee status, 2003–15



A total of 4,836 workers died from an occupational injury in 2015. This number increased slightly from 2014 and is the highest count since 2008. Self-employed workers have consistently accounted for around one-fifth of fatal work injuries.

Source: U.S. Bureau of Labor Statistics, 2016.

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The shaming strategy relied on publicizing strong enforcement actions and trying to "scare employers straight;" make them fear strong enforcement enough that they would work towards compliance and thus safer workplaces. The key component to this strategy was press releases at the time citations were issued. These press releases often included comments asserting that the company was in violation, rather than focusing on the mere issuance of the citation—the beginning of the process, not the end. As the cases proceeded, some to settlements or resolutions with lower levels of severity and penalties, no follow up releases were issued, or adjustments to OSHA's webpage were made. Thus the permanent digital record only reflects the initial enforcement action, not the final resolution of the case. OSHA should adjust the style and tone of its press releases to be less conclusory, and update the record so that final resolutions are easily found.

Another component to the shaming strategy was the belief that citations should be as severe as possible and penalties as high as possible. The result was that many employers felt compelled to challenge their citations. OSHA, the employer, and the employees involved would have been better served if OSHA had approached informal conferences with the goal of finding a solution instead of fining the employer as much as possible. In many cases, the employer is prepared to fix the violation but OSHA has not been willing to give the employer any credit for doing so. Finding ways to help employers make improvements in these contexts will provide several benefits: First and foremost this will result in the hazard or violation being abated, since under OSHA law, abatement is not required until the employer has exhausted their challenges or the case is settled. Thus, focusing on the fix and not the fine will get changes to the workplace made much quicker. Second, by reducing the level of penalty, there will be less reason for the employer to challenge the citation and drag out the proceedings, saving both the employer and the agency significant resources.

Relatedly, OSHA should consider committing to reimburse small businesses for their attorneys' fees when the employer successfully challenges its citation. The Equal Access to Justice Act requires this only after the business establishes in a separate proceeding that the government's actions were not "substantially justified." This separate proceeding represents a significant obstacle to small businesses recovering their attorneys' fees under EAJA. However, there is no bar to OSHA deciding *sua sponte* to adopt this policy. Not only would small businesses who prevailed be made whole, but this would likely force OSHA to consider closely whether a citation was worth defending.

Beyond modifying press releases and enforcement tactics, an overall new approach is needed, even as enforcement must remain a focus. OSHA must develop and deploy other tools—the agency should be seen as a resource for answers, not just the hammer with every problem looking like a nail. The obvious alternative is to further build out the compliance assistance effort. One possible model would be to look to the IRS—taxpayers can find answers to their tax questions directly. The same should be true for employers and small businesses—the people who really need help should be able to get answers to safety questions directly from OSHA in real time.

While OSHA has posted resources and information on their website intended to guide employers and small businesses through top level safety questions, the agency has not done an

adequate job of promoting the availability of this information, nor the overall cause of improving workplace safety. If this is such a priority, it should be promoted like various other social or public health causes. OSHA has relied too heavily on "preaching to the choir"—making presentations to audiences already invested in workplace safety. To really make a difference, this message has to reach new audiences, both employers and employees, not yet engaged in the cause.

Substantive Policies and Procedures

While regulations are important, what is **most important about regulations is that they have credibility**. OSHA's rulemaking in the previous administration was characterized by weak or non-existent data support; dismissive responses to employer concerns about practical compliance issues; questionable interpretations of statutory authority; and driven by requests from outside interests that were not consistent with helping employers improve their safety programs. Any new regulations must meet legitimate demonstrated needs, be driven by data, and be as narrowly tailored as possible.

To provide the best opportunity for input into the process, **OSHA should make maximum opportunity of the Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel Review** process conducted in conjunction with the Small Business Administration's Office of Advocacy and the Office of Information and Regulatory Affairs within the Office of Management and Budget. SBREFA Panel Reviews are triggered when the agency determines that the proposed regulation would have "a significant economic impact on a substantial number of small entities" and the previous administration consistently defined these terms in ways that would avoid having to conduct these reviews, even when the proposed regulation explicitly applied to small businesses such as the proposal to "clarify" when small businesses in the consultation program would be subject to enforcement.

Under the panel review process, small businesses who would be affected by a proposed regulation are allowed to review the draft proposal as well as OSHA's draft impact assessment and provide direct comments on them. This happens at a stage in the process when there is still time to make adjustments, as compared to once a proposed regulation has been issued when there is very little chance to make significant changes. One former Chief Counsel for Advocacy during a Democrat administration noted that OSHA having to reveal its economic assessments was perhaps the most valuable aspect of the process. OSHA's assessments of impact typically overlook significant details and costs, and the SBREFA process can help identify these so that the agency's final impact assessments have more credibility. OSHA would be well served by adopting a position that conducting these reviews is the default policy rather than the exception.

Rulemakings under the previous administration often suffered from a lack of supporting data, or relied on assumptions as justifications. For instance, the rulemaking to establish the electronic injury and illness reporting requirement, perhaps the most significant rulemaking of the previous administration, was justified with speculative and conclusory statements such as, "OSHA believes that the data submission requirements of the proposed rule will improve the quality of the information and lead employers to increase workplace safety," and "Many accident prevention measures will have some costs, but even if these costs are 75

percent of the benefits, the proposed rule would have benefits exceeding costs if it prevented 4.8 fatalities or 0.8% fewer injuries per year. OSHA expects the rule's beneficial effects to exceed these values." (78 Fed. Reg. 67277-78, November 8, 2013.)

In another rulemaking that resulted in employers having to report the hospitalization of every employee, instead of only when three or more were hospitalized, OSHA justified the expanded reporting requirements by speculating that "if such improvements in information and enforcement save even one life every three to four years as a result of this proposed rule, they will more than pay for the costs associated with such notifications." (76 Fed. Reg. 36426, June 22, 2011.) OSHA was just guessing that this new approach may have some benefits. And why just one life over three to four years? Why not some higher number of lives every year? This is also a clear example of OSHA equating more enforcement with better workplace safety.

Not only were OSHA's rulemakings often lacking in solid supporting data, there were also **rulemakings that lacked clear statutory authority**. The best examples were the "supplemental" rulemaking to the injury and illness reporting regulation addressing OSHA's belief that employers retaliated against employees for reporting injuries and safety violations. This proposal directly contradicted statutory language in Section 11(c) specifying the procedures for protecting whistleblowers. OSHA's version would allow for whistleblower violations with no employee coming forward, i.e. no whistleblower. Another clear example of OSHA ignoring the statute was the rulemaking to reverse the ruling in the *"Volks"* case where the court was explicit that the statute only permits OSHA to issue a citation for recordkeeping violations within six months of the violation occurring—not five years as OSHA maintained.

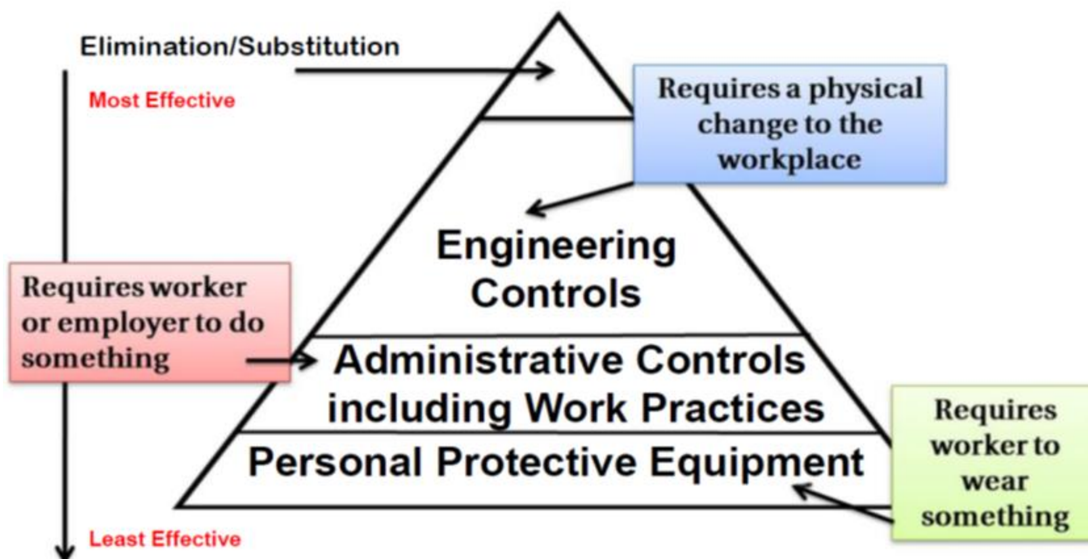
Perhaps even more troubling than shoddy rulemaking was when OSHA skirted the rulemaking process to make **substantive changes in regulations through interpretations and other sub-regulatory actions**. The best examples of this were the interpretation of "feasible" being anything that did not put the company out of business under the noise reduction standard (withdrawn due to objections from OIRA), and the letter of interpretation granting union representatives walk-around rights during inspections that directly contradicted existing regulations (withdrawn by the current administration as part of a settlement to a legal challenge). OSHA also used incorporation by reference of outside standards to produce *de facto* regulations such as when it referenced the National Fire Protection Association's Standard 654 in the direction to field personnel on how to enforce the new combustible dust hazard under the Globally Harmonized Standard system of labels of safety data sheets—thereby effectively adopting NFPA 654 with no rulemaking or regulatory process.

Similarly, OSHA saw **expanded use of the General Duty Clause as a substitute for actual rulemaking**. The courts have interpreted the OSH Act's General Duty Clause[6] to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or industry recognizes as hazardous and that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard.

[6] "Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654

OSHA relied on the GDC to develop an enforcement strategy targeting workplace violence. The GDC was also invoked when OSHA wanted to issue citations related to ergonomics. The General Duty Clause is an important and powerful tool for OSHA, but OSHA must deploy it judiciously where hazards are truly identifiable and remedies are well known. Issuing directives on how to issue citations for certain perceived hazards is effectively regulating without rulemaking.

OSHA has long followed the **hierarchy of controls** to describe how employers should respond to safety hazards. While the hierarchy of controls is not wrong *per se,* myopic adherence to it imposes unnecessary compliance burdens and costs. Merely because a response to a safety hazard falls in the Personal Protective Equipment (PPE) category does not mean it inadequate for protecting employees, or a less appropriate response than engineering or work practice controls. Indeed, some PPE is highly engineered and can provide superior protection at lower costs than some more elaborate control measures.



Source, OSHA Website: https://www.osha.gov/dte/grant_materials/fy10/sh-20839-10/hierarchy_of_controls.pdf (last viewed December 4, 2017). See also the hierarchy of controls as enshrined in OSHA recommendations for Safety and Health programs: https://www.osha.gov/shpguidelines/hazard-prevention.html (last viewed December 4, 2017).

A good example of this would be the respirator protection currently available to protect employees from exposure to respirable crystalline silica. Under OSHA's revised silica standard, employers are explicitly required to demonstrate that engineering controls (primarily large containment and ventilation systems), or work practice controls (primarily wetting methods) before they can rely on PPE (various types of respirators). This will cost millions of dollars

before employers can use what has already been proven to be effective. Indeed, some respirator systems are more like portable engineering controls with supplied air systems that provide fresh air to the breathing zone under protective helmets and face masks. By focusing too rigidly on the hierarchy of controls in this is regulation, OSHA has made compliance enormously more expensive and complicated than necessary. OSHA's reliance on the hierarchy of controls, and the distinctions between different control measures should be reexamined to allow for more flexible and cost effective responses to various workplace hazards.

One of the most frustrating aspects to OSHA has been the **inconsistencies between the OSHA field offices**. One former Deputy Assistant Secretary used to be fond of saying that there are 64 OSHAs (the number at the time, but which has grown since then), with each area office being its own. Each area director holds its own view of what OSHA's standards mean, what its enforcement authority is, etc. This has been a problem dating back several administrations and it is a problem that must be addressed. The current situation means that companies with facilities in multiple regions, or areas, can get conflicting advice and enforcement for the same hazard.

Along with inconsistencies between offices, the **attitude and approach taken by OSHA's Compliance Safety and Health Officers (CSHOs, OSHA's inspectors)** has become antagonistic and not focused on improving workplace safety. They are more focused on merely issuing citations and enforcement than actually adding value to interaction with the agency. As one practicing OSHA attorney described his interaction with CSHOs:

> Closing conferences have become check-the-box exercises for CSHOs. Rather than using them to tell employers what the CSHOs are going to 'recommend' in the way of citations, the CSHOs either are not holding them at all or are holding them and saying nothing. A CSHO in a deposition I took just a few weeks ago conceded to me that closings now are essentially nothing more than a hoop for him to jump. So where is the promotion of workplace safety and health in not telling employers what their alleged safety and health hazards are until the citations issue?
>
> CSHOs from certain area offices have begun telling employers, in cases of complaint-based inspections, that the employers have no right even to know what the complaints allege, never mind a right to copies of the complaints, prior to inspection. A client just experienced such a refusal in Alabama. And most employers do not know better. So what ought to be narrowly-scoped inspections are broadened because the employers do not know what the appropriate limits to the scope are and CSHOs deliberately take full advantage of the employers' ignorance.
>
> Similarly, CSHOs in many areas have become very aggressive in expanding inspections without justification, just because employers often are not sophisticated enough to understand what the limits to the scope are or to say no to expansion. Again, it's deliberate opportunism on the part of the CSHOs to avoid having to play by the rules.

Finally, some industries are actually seeking their own standard to avoid having to comply with an ill-fitting standard for a similar industry. The best example of this is **the tree care industry** that functions very differently from the logging industry with whose standard the tree care industry has had to comply. In the tree care setting, the circumstances of tree removal and pruning are very different from the harvesting and removal processes used in the logging industry. The tree care industry has petitioned OSHA for its own standard for several years but has yet to see any progress.

Conclusion

OSHA lost the trust of employers during the previous administration. To effectively lead the effort at improving workplace safety, that trust needs to be rebuilt. There is no one action or statement that will achieve this, but rather the accumulation of several actions and policies will make a difference over time. Employers will welcome having a partner in the agency and being able to see it as a resource rather than just a source of punishment.

Recommendations for the Wage and Hour Division

The Fair Labor Standards Act of 1938 (FLSA or Act) requires employers to pay certain employees at least a minimum wage and overtime to certain employees for working more than 40 hours in a week. The Act covers nearly every employer in the country. Employers must not only comprehend and apply an almost 80 year-old statute to the modern workplace, but must also understand its attendant regulations and myriad court decisions, many of which reach contradictory conclusions on similar issues. Accordingly, employers face serious challenges in trying to navigate legal requirements which were created in a different era. Even the most careful, well-intentioned and well-represented employer will often be unsure as to whether he or she has properly satisfied his or her obligations under the regulations.

Most of the attention focused on the Wage and Hour Division (WHD) during the previous administration, and most relevantly the last two years, was directed to the rulemaking to change the salary threshold for the "white collar" exemptions from overtime under the Fair Labor Standards Act. The previous administration's overtime regulation has since been invalidated by a federal court ruling. The appeal of that ruling by the federal government has been stayed, pending the outcome of the Department's rulemaking to set a new salary threshold, meaning that it will remain in place for the foreseeable future.

The Chamber will be heavily involved in the rulemaking to set a new salary threshold. The Chamber believes a new salary level should be set using the methodology relied on by the WHD in 2004. Furthermore, the Chamber objects to any auto increasing mechanism as being contrary to the authority given to the Secretary in the FLSA. Additionally, we do not support regional variations in the salary threshold due to the disruptive effects of creating multiple pay levels for employers operating on a national basis.

Just as importantly, there are other actions and policies of the WHD that are worth reviewing. Among these were the division's views on enforcement, the use of interpretations instead of opinion letters as well as their replacement for rulemakings, and the WHD's over aggressive approach taken towards the use of independent contractors and misclassification of workers. Finally, there are some key areas where the WHD can provide much needed guidance and clarity for employers.

Enforcement Issues

The previous administration was known for pushing the limits on enforcement—both in theories of liability, and levels of penalties.

The Division dramatically increased its insistence on imposing liquidated or double damages and on assessing civil money penalties as part of settling wage and hour investigations prior to initiating litigation. In addition to the payment of back wages and attorneys' fees for plaintiffs, WHD, in conjunction with the Solicitor's office, regularly imposed liquidated damages on an employer who violates the minimum wage or overtime provisions of the FLSA. In the past, WHD did not regularly pursue liquidated damages, but instead let expert field staff determine which remedies to pursue in a particular case. Instead, the Obama WHD stated that, "when

appropriate, WHD increasingly is seeking liquidated damages, which are paid to employees, and civil penalties against employers, which are paid to [the] Labor Department."[7] This was understood to be driven by a directive from the national office.

Thus, the Division took discretion away from the expert field staff in determining the appropriate remedy for an FLSA violation. Under the FLSA, an employer who violates the minimum wage or overtime requirements is liable for: two years of back wages; an additional third year of back wages for willful violations; liquidated damages in an amount equal to the back wages, unless the employer acted in good faith; and attorneys' fees. In addition, the Division has discretion to impose civil money penalties (CMPs) of up to $1,925 (currently) per violation for repeat or willful violations. Unlike civil money penalties for child labor violations which go into the Treasury's general fund, civil money penalties for minimum wage and overtime violations go back to the Division to fund additional enforcement efforts.

In the past, the WHD generally required employers to pay 100% of back wages for a two-year period. The Division did not assess civil money penalties for minimum wage and overtime violations unless an employer had a significant history of serious violations (e.g., a sweatshop employer or bad faith agricultural labor contractors). Further, the Division rarely requested liquidated damages.

Under the Obama DOL, the Division required the field staff to assess civil money penalties against every employer with even one prior violation recording in the agency's enforcement database—regardless of the type of violation or when the violation occurred, even on a $500 violation which was on a completely different issue and occurred a decade before at a different corporate subsidiary. The investigator conceded that the new violation was not willful, but was bound to regard a decade-old violation on a totally different issue as a "repeat" violation. In the previous administration, there were virtually no standards, and few limits on the Division, for determining when a violation is repeat or willful.

Often employers are willing to pay 100% of back wages found due for a two-year period. However, employers are much less likely to settle when the Division seeks civil money penalties, and certainly will be more likely to litigate with the Division in order to challenge an assessment of liquidated damages. Thus, the WHD's approach, used even against good faith employers, delayed the resolution of investigations and payment of back wages to employees.

Additionally, the agency increased its use of its "hot goods" authority—invoking its authority under sections 12(a) and 15(a)(1) of the Act, to seek a court order to prevent shipment of goods produced in violation of the FLSA.

Not only did the previous administration pursue severe penalties, but they also used coercive tactics against employers to get them accept one-sided settlement terms. These included severely limited timeframes for considering offers, even telling employers that they had to accept the terms "immediately" at the settlement conference. Another tactic that was used was to

[7] Gayle Cinquegrani, *Enforcement Initiative Garners $1.3 Million for Massachusetts Restaurant Workers*, BLOOMBERG BNA, April 5, 2012.

discourage the employer from consulting with competent outside counsel. Such tactics are anathema to principles of fair enforcement.

Finally, because the expense and burden of defending against a citation from an agency are so severe, small businesses may feel coerced into settling when a regulatory agency pursues a minor, or even meritless, action. The Equal Access to Justice Act allows small businesses to recover attorneys' fees if they are successful and can prove that the government's actions were not "substantially justified." However, this is such a high standard to prove that this provision has essentially eliminated the possibility of small businesses recovering their legal fees. A system which would more easily allow small businesses to recoup attorneys' fees when they prevail in administrative or court cases brought by DOL would aid in leveling the playing field between small employers and federal agencies and be a built-in check on agencies to help ensure that charges they bring are based on a sound foundation. There is no bar to the Department of Labor implementing such a policy *sua sponte*.

Administrator's Interpretations Issues

One action that defined the lack of interest the previous administration had in in cooperating with the employer community was its policy to cease issuing Opinion Letters. In the past, when an employer was unclear of the FLSA implications of a situation in the workplace, it could voluntarily request assistance from DOL, which would analyze the situation and provide a legal analysis in the form of an Opinion Letter. Unfortunately, the Obama WHD ended this longstanding and cooperative practice. Ultimately, an employer who was confused about a particular workplace FLSA matter—a situation which would hardly be surprising, given the lack of clarity in the regulations—no longer had the option of asking DOL for assistance. Thankfully, the Trump DOL has announced that issuing Opinion Letters will resume.

As the Obama administration came into office, almost 20 Opinion Letters developed by the Bush administration were withdrawn because: "Some of the posted opinion letters, as designated by asterisk, were not mailed before January 21, 2009." No other reason was provided. The Division did not state that the enforcement positions expressed in the Opinion Letters were wrong, and the Division has not since replaced those Opinion Letters with other guidance expressing different views. As the new administration reinstates the Opinion Letter process, the first step should be to remove the asterisk on the letters from the Bush administration and make them active interpretations on which employers can rely.

Instead of issuing Opinion Letters, the WHD began issuing "Administrative Interpretations" (AIs)—pronouncements from the Administrator on topics of his choosing, not fact specific, not driven by employer questions, and with no opportunity for input or review by any affected party. Among the AIs that were particularly problematic were AI 2015-1 that redefined how to classify workers as employees or independent contractors under the FLSA, and AI 2016-1 that redefined how to determine whether two employers were "joint employers" for purposes of FLSA violations. Both AIs relied on a multi-factor economic realities test where many factors are weighted evenly and an employer would be unable to tell where they stood with respect to the terms being defined. Furthermore, both AIs sought to interpret statutory terms, rather than regulatory terms as an AI is supposed to do. Thus, these functioned much more like

regulations without any of the protections and input associated with traditional notice and comment rulemakings. Fortunately, Secretary Acosta has rescinded both AIs. As they were only interpretations, they needed no specific process for elimination.

Employee Misclassification Initiative

A 2009 GAO report claimed that the misclassification of workers—whether as independent contractors or as exempt from minimum wage and overtime protections—resulted in a significant amount of lost tax revenue for the federal and local governments. To remedy the alleged problem, the report recommended, in part, increasing federal and state coordination and enforcement efforts in this arena. As a result, the WHD embarked upon its "Employee Misclassification Initiative" which focused on increased enforcement and punitive measures, rather than education and cooperation.

As part of the initiative, in September of 2011, the DOL and IRS entered into a Memorandum of Understanding (MOU) in order to coordinate their enforcement activities in regard to employers' classification of workers. Pursuant to these MOUs, the DOL and its WHD will share with participating state agencies, as well as the IRS, when its investigations reveal instances of employee misclassification. Likewise, the IRS and state agencies shared certain information with the WHD. Employers had to assume that any information they give to DOL as a result of an audit or investigation will also be shared with IRS. The involvement of the IRS suggested that this was at least as much about trying to generate tax revenue as it was about protecting workers.

When the AI on misclassification was issued, it helped support this initiative by providing stronger legal reasoning to support the enforcement actions. Instead of processing workers' claims on a first-come, first-served basis as it used to, WHD concentrated its resources on industries that "employ particularly vulnerable workers who don't complain."[8] Some industries that found themselves under the suspicious eye of WHD include the hospitality industry, construction trades, and landscaping/agriculture businesses. Simply because they operate in these fields, some national employers found themselves subjected to WHD demands that they turn over—within 72 hours—two years' worth of time records and payroll data for all employees nationwide.

Issues Requiring Guidance and Clarity

The FLSA provides for exemption from the minimum wage and overtime requirements for employees classified as **"outside sales persons,"** subject to this term being defined by the Department of Labor. DOL has defined an outside sales person as someone whose "primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and the employee must be customarily and regularly engaged away from the employer's place or places of business."[9] The requirement that the employee must conduct the sales activity away from the

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[8] Gayle Cinquegrani, *Wage and Hour Division Forges Ahead with Misclassification Enforcement*, BLOOMBERG BNA, January 24, 2012.

[9] 29 CFR 541.500, as restated in Fact Sheet 17F.

employer's place of business is an antiquated distinction that ignores how contemporary sales people operate. The advent of digital video, and other electronic communications technologies, means that the distinction between an inside sales person and an outside sales person has collapsed. Instead of having to travel to a customer's location to present the product and negotiate the terms, that is now being done from an office using a variety of modern technologies. Since the Secretary is instructed to "define and delimit" this term "from time to time", updating the definition of outside sales so that it more accurately reflects contemporary sales activity should be pursued.

Another area of broad confusion is how to define **"hours worked."** The regulations at 29 CFR 785 were generally written in the early 1960s or early 1970s. Thus they predate, by decades, modern technologies such as cell phones, email, and texting. Many employees need to check some form of electronic communication to determine where they will be working that day. Should the checking of these devices be considered "hours worked"? This critical term needs to be updated for the modern workplace.

Conclusion

The Wage and Hour Division's implementation of the Fair Labor Standards Act touches almost all workplaces in the country. Enforcement must be based on principles of fairness with the goal of making sure employees receive any back pay awards as soon and efficiently as possible. Employers need to be able to get answers to compliance issues in a reliable and expedited manner. Finally, many FLSA terms and their accompanying regulations do not reflect the contemporary workplace. The WHD needs to update and clarify these terms so that employers and employees can maintain operations with confidence that they are in compliance with the requirements of the FLSA.

Recommendations for the Office of Labor-Management Standards

Congress passed the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) following the McClellan congressional hearings in the late 1950s, during which committee chief counsel Robert Kennedy revealed numerous examples of union-associated violence and coercion. The dramatic evidence and riveting testimony exposed many instances of corrupt union practices and highlighted several disreputable union officers who abused the special privileges and exemptions afforded to labor unions. The resulting congressional action created what is now the Office of Labor-Management Standards (OLMS), which is the agency principally responsible for overseeing the internal democratic governance and financial integrity of private sector labor unions.

OLMS establishes and enforces standards for union officer elections and union trusteeships and safeguards for union assets, and it performs civil compliance audits as well as criminal investigations for violations of the LMRDA. OLMS also promotes labor union and labor-management transparency through reporting and disclosure requirements for labor unions and their officials, employers, labor relations consultants, and surety companies.

For most of its history, OLMS has been a small and often overlooked agency, despite its involvement in several high-profile criminal cases that have sent union leaders to federal penitentiaries. For example, it was the agency that investigated and secured the conviction of former Washington Teachers' Union president Barbara A. Bullock for embezzling over $5 million to fund an extravagant lifestyle; she was sentenced to nine years in prison. Despite its relative obscurity, OLMS stokes the ire of organized labor because of its oversight role that requires unions to open their books for inspection by OLMS investigators. As a result, OLMS has seen its resources vary significantly depending on the administration in power.

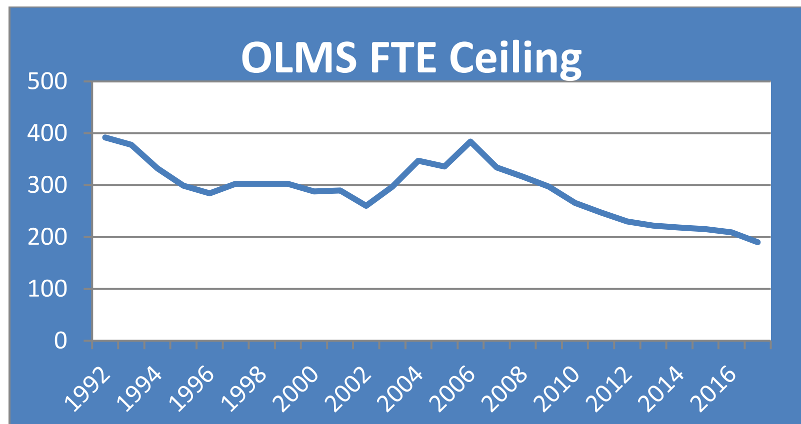
In 2001, Secretary of Labor Elaine L. Chao ushered in a new era following the Clinton years, making tremendous strides to improve financial transparency in labor organizations to bring the LMRDA into the 21st century. Most significantly, under Chao OLMS revamped the labor organization annual financial report known as Form LM-2 to provide much greater information about internal union finances. In addition, union and employer reports are now available free online, whereas they were not before. Labor unions fought Chao tooth and nail against every effort at reform, and the Obama administration spent its eight years working to undo many of Chao's efforts, starve OLMS of resources, and adopt policies tilted toward unions' interests. The new administration has the opportunity to restore OLMS's resources, credibility, and reinvigorate its oversight of organized labor for the purposes of protecting the interests of union members in having their unions managed without corruption or deceit.

Restoration of OLMS Staffing Resources

To say that OLMS is now woefully understaffed is an understatement; indeed, it currently has almost exactly half the number of full-time employees (FTE) as it did at the beginning of the Clinton administration, under which OLMS's budget and FTE allocation were cut dramatically. Despite considerable efforts by Secretary Chao to restore at least some of OLMS's funding, the Obama administration again targeted OLMS's budget with incredible fervor and greatly

diminished its staffing resources. The result was a reduction of about 36 percent in OLMS's total number of FTEs as well as an elimination of virtually all training funds for investigators. In addition, OLMS's regional director positions are no longer part of the Senior Executive Service (SES), the top rung of the civil service career ladder. Thus, the most talented investigators with ambitions to achieve SES status in their careers are forced to leave OLMS, which creates a drain on talent in the agency.

The accompanying chart illustrates the serious decline of OLMS's FTE.

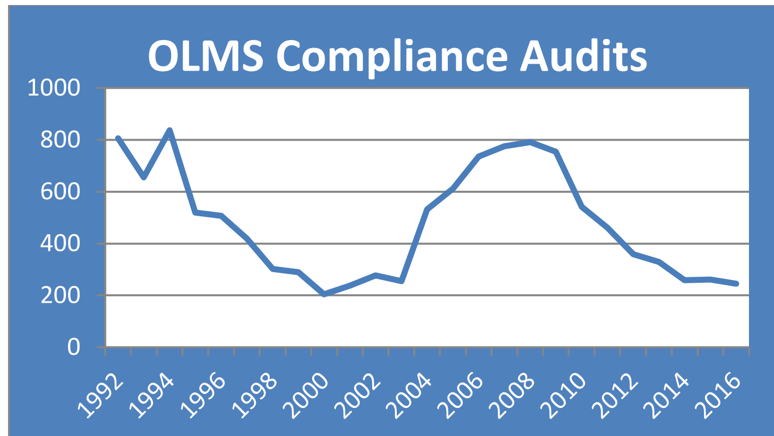


The career leadership at OLMS is fully cognizant of the challenges presented by the budget cutbacks of the last several years, and, working with Congress, the administration should make every effort to push for increased appropriations to restore OLMS's budget and reverse the decline in FTEs as well as to consider restoring SES status for its regional directors.

Revive Compliance Audit Programs

At the core of its mission, OLMS conducts audits of labor unions to detect embezzlement and ensure and promote compliance with the LMRDA. Even without budget cutbacks, it has never been feasible to audit every union, but the staffing and resource reductions have negatively affected OLMS's Compliance Audit Program (CAP). In fact, OLMS field investigators are limited to auditing unions within close geographic proximity of their offices because there are not enough funds to pay for official overnight travel, which means that some unions are completely beyond the reach of OLMS compliance audits. Moreover, the Obama administration abolished OLMS's Division of International Union Audits (DIUA), which was responsible for auditing large, more complex international headquarters unions through its International CAP (I-CAP) program; the last I-CAP occurred in FY 2008.

The graph below illustrates the sharp decline of OLMS audits during the last eight years.



The new administration will need to secure appropriations to expand its compliance audits, which yield criminal prosecutions in approximately 15-20 percent of cases. Moreover, should it secure enough funding, OLMS should restore the DIUA so that international unions are not exempt from oversight.

Worker Center Oversight

The LMRDA contains the following definition of a labor organization under its jurisdiction:

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization **of any kind**, any agency, or employee representation committee, group, association, or plan so engaged **in which employees participate** and **which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment**, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body. (29 U.S.C. 402 (i), emphasis added)

That definition is deliberately broad, and it imposes disclosure and other requirements on organizations that fall under the purview of the LMRDA. A similar definition can be found in the National Labor Relations Act (NLRA), which imposes certain other burdens on labor organizations related to organizing and representation. Perhaps unsurprisingly, labor unions have sought to skirt the requirements of the LMRDA and the NLRA by funding so-called "worker centers," which the Obama administration tacitly allowed by refusing to investigate whether such groups should be considered labor organizations.

Worker centers often engage in highly disruptive campaigns against employers, typically targeting a specific industry such as restaurants or retail establishments. They conduct rallies, lead protests, distribute literature, urge boycotts, level charges of racism and sexism, push distorted stories with local media, and even work with government agencies to bring enforcement actions against an employer—all the tactics unions use in a corporate campaign.

Although they act like unions in some respects—including demanding higher wages and richer benefits, and even claim to have members whom they represent—worker centers typically organize as 501(c)(3) organizations under the Internal Revenue Code. As such, they claim to be exempt from the reporting requirements and restrictions on behavior that apply to unions under the LMRDA and NLRA. Under the NLRA, for example, labor organizations cannot engage in secondary boycotts (when a labor dispute is extended to employers other than the one that the union is targeting). Under the LMRDA, unions must have a constitution and bylaws, hold regular officer elections and file financial reports with OLMS, none which worker centers do.

The new administration should examine the status of these organizations and evaluate their activities in light of the LMRDA's broad definition of labor organizations. Depending on the facts involved, some worker centers may meet that definition and should be investigated for non-compliance with the law.

Trust Reporting

In the last year of the Bush administration (2008), OLMS published a final rule implementing the Form T-1, Trust Annual Report, which had been a part of the Department's overall effort to improve disclosure by labor unions and related entities when it first revised the form LM-2 in 2003. The purpose of the T-1 was to require fiscal transparency for entities created by unions, as opposed to the unions themselves, and the final rule was the culmination of many years of effort following a variety of legal challenges.

To be a covered trust, the regulation required that it be "established by the labor union or have a governing body that includes at least one member appointed or selected by the labor union. A primary purpose of the trust must be to provide benefits to the members of the labor union or their beneficiaries." Covered trusts could include, for example, credit unions, strike funds, development or investment groups, training funds, apprenticeship programs, building funds, and educational funds, and in some cases, they control massive amounts of money.

The Form T-1 final rule was published on October 8, 2008, and was to take effect on January 1, 2009. However, the Obama administration delayed its implementation and then published a proposal to rescind it on February 2, 2010. It proceeded with a final rule to do so later that year, so the T-1 never took effect.

The new administration should move forward with its announced plan to re-issue a rule requiring trust reporting. These kinds of entities serve as convenient vehicles for significant amounts of money—often mandatory dues money—under the control of union officials. Union members and the public alike would benefit from such reporting.

Coverage of Intermediate Bodies

In its 2003 revision to the Form LM-2, OLMS announced its intent to revise its interpretation of the definition of "labor organization" under the LMRDA to include intermediate bodies that are subordinate to a national or international labor organization, even if the

intermediate body's constituents are solely public sector local labor unions otherwise not covered by the law.

That interpretation of the LMRDA was challenged in federal district court by labor unions affected by the interpretation, and the court granted summary judgment in favor of the unions (*Alabama Education Association* v. *Chao*). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court and held that the statutory definition of "labor organization" is ambiguous and subject to more than one permissible interpretation, including the OLMS's interpretation. The court also concluded, however, that OLMS had failed to provide a "reasoned analysis supporting its change of position" and remanded the rule to OLMS to provide such analysis. In January 2007, OLMS issued a Policy Statement in response to the court's order.

In its 2008 final rule on the T-1, the Obama administration abandoned the Policy Statement and declared that the LMRDA's coverage does not encompass intermediate bodies that are wholly composed of public sector organizations. The new administration has the opportunity to enhance public disclosure by requiring that all intermediate bodies file with OLMS regardless of whether they have private sector workers.

The Persuader Rule

In March 2016, OLMS released its 446 page final "persuader rule, which, at its core, sought to all but eliminate the "advice exemption" under the LMRDA. The statutory language explicitly states that labor relations consultants who advise employers about certain employment matters are not required to report information about their consulting arrangements. A DOL interpretation of the advice exemption that tracked the statute had been in place since 1962. It generally held that labor consulting arrangements were exempt from disclosure if labor consultants did not speak directly with employees to persuade them one way or another about joining a union.

The Obama administration rejected that longstanding interpretation and sought to impose a much more sweeping standard, similar to what the Clinton administration had tried to do during its last days in power in January 2001. Unlike that attempt, however, the Obama administration used the rulemaking process to lock in its interpretation.

Not long after the final rule was published, two separate federal courts—one in Minnesota and one in Texas—addressed the legality of Obama's persuader rule. The U.S. District Court for the Northern District of Texas issued a nationwide injunction against enforcement of the rule, saying that DOL's interpretation "is not merely fuzzy around the edges….[it] is defective to its core because it entirely eliminates the LMRDA's Advice Exemption."

Under the new administration, OLMS issued a Notice of Proposed Rulemaking (NPRM) proposing to rescind the Obama-era persuader rule, and the NPRM's comment period closed on August 11, 2017. OLMS is currently reviewing comments received. It remains to be seen what the final rule will say, but the NPRM proposed merely to rescind the rule, in part, "to engage in

further statutory analysis." The result of rescission would be that "the reporting requirements in effect would be the requirements as they existed before the Rule."

Following rescission of the persuader rule, OLMS should publish another NPRM that would proactively define the advice exemption to reflect its longstanding interpretation of the law.

Conclusion

The Office of Labor-Management Standards has a unique and important role in the Department of Labor, but it is an agency that was under sustained attack during the Obama administration, which sought to advance organized labor's interests. The new administration should take the opportunity to restore balance to public policy and ensure the proper oversight of labor unions and their related entities. Union members, the business community, and the public at large will benefit from a concerted effort to restore OLMS to the gold standard established under Secretary Chao.