

There's A New Sheriff In Town

President Obama's Enforcement-Driven OSHA

By Edwin G. Foulke, Jr. (Atlanta)

Throughout his campaign, Sen. Barack Obama continually promised change if he was elected President, and he is now making good on that promise. If you read the safety-activist blogs and media reports, many seem to believe that OSHA is broken and the Obama Administration has to fix it. They cite the decrease in OSHA funding (adjusted for inflation) and a decrease in the number of OSHA inspectors as proof positive that this is not the OSHA that should be.

This ignores the fact that injury, illness and fatality rates in the American workplace are the lowest in recorded history. When this fact is presented to them, they dismiss it on the claim that companies are not accurately reporting the injuries and illnesses and the statistics reported by the U.S. Bureau of Labor Statistics are incorrect.

Regardless, the Democrats won the 2008 election and it is clearly a new day at OSHA. President Obama's selection of Rep. Hilda Solis to be Secretary of Labor is a strong signal to all in the businesses community that there will be substantial changes at the Labor Department, and a clear departure from the Bush Administration's policies.

What's In Store For Stores?

The changes will not be subtle. Gone will be the days of strong emphasis on compliance assistance to employers by OSHA. Substituted will be strong emphasis on enforcement and rulemaking. In fact, Secretary Solis stated in a speech to the AFL-CIO Executive Committee that she was "bringing back enforcement to the Department of Labor." This is not to say that compliance assistance programs like Voluntary Protection Programs, alliances and partnerships will disappear. They did not go away in the Clinton Administration and they will not go away during the Obama Administration. But they will not have the focused attention that they did in the Bush Administration.

Secretary Solis has already made changes at OSHA. She recently appointed Jordan Barab to be Deputy Assistant Secretary of Labor for OSHA and immediately made him the Acting Assistant Secretary. In this role, Mr. Barab can run OSHA and start making the changes that the Obama Administration and the unions want. He has already testified twice before Congress and announced support for several congressional bills to expand OSHA enforcement areas. OSHA has already received additional funding focused on enforcement.

There are other changes that American businesses can expect at OSHA. While increased enforcement will most likely be the watchword for the next four years, it is interesting to note that the recently-ended Bush Administration conducted *more* OSHA inspections than the prior Clinton Administration. Clearly, there will be more OSHA inspections, and the Obama Administration is already ramping up on the number of inspectors. In addition to increased inspections there will be an increase in the number of citations and the amount of penalties. Businesses can also

expect that there will be a number of new national, regional and local emphasis programs covering different industries and other identified safety-and-health issues.

Here Come The Rules

Another area scheduled for big change is in the area of standards and rulemaking. One of the biggest complaints from the non-business side of the fence was that OSHA, in the past eight years, did not do much in promulgating safety-and-health standards and that OSHA's regulating agenda was basically cut in half at the beginning of the Bush Administration. It's true that then Assistant Secretary John Henshaw did reduce the number of standards listed on the OSHA regulation agenda, but the main reason for the reduction was to give a more accurate reflection of the standards that OSHA was actually working on. You can be fairly certain that there will be more standards added to OSHA's rulemaking list.

While certain industries, such as construction and chemicals, are the most likely to see new standards, all businesses will see some major proposed OSHA standards, such as the Global Harmonization standard and the walking/working surfaces standard. The Obama Administration will be able to quickly complete these proposed and final standards since 95% of the work had already been completed during the Bush Administration. In addition, a revival of the Clinton Administration's ergonomics standard will most likely be attempted as well as a push to lower many of the current permissible exposure limits on chemicals.

Finally, there may be an attempt to take OSHA's recently updated voluntary safety-and-health-management system guidelines and make them a mandatory standard. This would be a mistake. An attempt to mandate that every employer have a one-size-fits-all safety-and-health management system will fail, because it would be either economically infeasible or so generic that it would be ineffective.

At The End Of The Day . . .

But as spelled out in OSHA's mission statement, it is important that every worksite in America have an effective (voluntary) safety and health management system in place that fits that facility or that worksite.

The bottom line is this: no matter what changes come to OSHA in the next four years, the ultimate goal for the agency must still be that each employee returns home from work safely to their families and loved ones every night. If this becomes a reality, America would truly show its greatness.

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How Did They Manage? *Part Two*

By C.R. Wright (Atlanta)

In the last issue of *Retail Industry Update* (March, 2009) we looked at the facts of *Morgan v. Family Dollar Stores*, an overtime lawsuit, which resulted in a jury verdict of over \$35 million. The case was affirmed on appeal, and turned principally on the issue of how much actual control store managers had over the day-to-day operations in their outlets.

In this follow-up article we'll deal with some changes in operations you might want to consider in order to avoid a similar problem.

Lessons To Learn And Action To Take – Now!

So what can we learn from all of this? For one thing, no company wants a jury to decide whether its managers “manage” and are exempt executives. These are the things you should do now to lessen the chance that this can happen to your organization:

1. Review the exempt status of managers and supervisors – especially assistants. Duties change. Store volume fluctuates. Scheduled staffing and hours change. As they do, they may change the factors that can determine whether the executive test is met for managers at a store.
2. Train senior management to understand how the FLSA executive test applies, and why it is so important to be right before asserting it. Otherwise, faced with increasingly tight budgets in a tough economy, senior managers may make decisions or implement changes that cause lower-level managers to lose exempt status.

Make everyone aware of who in the organization actually makes decisions about whether lower levels of management are classified as exempt executives. Guard against managers who want to apply the FLSA “plain meaning” without understanding the complexity of the analysis and application of the exempt tests. To the extent possible, conduct exemption-related communications in a way that increases the chances of asserting the attorney-client privilege.

3. Do not assume that all stores may be treated the same way. You cannot take a “one size fits all” approach.
4. Weigh the need for centralized control against the need to delegate in order to allow the managerial latitude necessary to be an exempt executive. If you want to micromanage from the top, then maybe all of your store managers should be classified as nonexempt.
5. Review job descriptions for managers. Make sure the duties are accurately described and that they represent actual exempt duties performed, so as to convey that the manager’s primary duty is really management. While job descriptions alone can’t ensure that the executive test is met, too much wording about nonexempt work required to be performed by the manager can be used to make it appear that the test is not met.
6. Review operating and training manuals. Too much detail and instruction shows that managers have little or no discretion or ability to manage. Read them as if you were a skeptical juror deciding whether the individual’s primary duty is management.
7. Audit email and other electronic or internal communications. Detailed instructions about what a first-line manager can or cannot do can be used against you to show that the individual was not “managing.”
8. Instruct first-line managers to make assignments and communicate their own management decisions to subordinate employees in writing. Have first line managers document employee counseling, interviews, recommendations and other management tasks.

Require that they make written recommendations to their superiors about procedures, policies, hiring, firing, changes in employee status and other management tasks and make sure those recommendations are seriously reviewed, considered and the process is documented. Have district managers document instructions to first line managers in ways that show they are supervising the first line managers instead of actually running things themselves.

Check And Double Check

Finally, remember that state law may be more restrictive than federal law. It is important to not forget about the possible impact of the wage-hour laws of other jurisdictions in which you employ people. For example, a state might not recognize the FLSA’s executive exemption or might define it in a different or more-limited way that makes the state’s version harder to meet.

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