

THE DAILY RECORDER

October 5, 2010

A New Sheriff in Town

By: Jennifer Brown Shaw and Geoffrey M. Hash

Now that we are nearly two years into President Barack Obama's administration, it is a good time to step back and consider where there have been substantive changes to employment law, and where there may be additional changes coming. Whether you view the administration's policies as good, bad or otherwise, one thing is clear. There is a new sheriff in town to enforce workplace laws.

A Reinvigorated Equal Employment Opportunity Commission

Today's Equal Employment Opportunity Commission ("EEOC") is a different organization than it was even two years ago. The number of charges filed between 2007 through 2009 broke all previous records. Funded by increased government spending, the EEOC has responded to higher volume by aggressively hiring staff, increasing enforcement activity, and engaging in a very active public relations campaign.

The EEOC's new leadership has played an important role in forging this path. Chair Jacqueline A. Berrien, sworn in on April 7, 2010, is the former Associate Director/Counsel of the NAACP's Legal Defense and Education Fund. Commissioner Chai Feldblum, also sworn in on April 7, 2010, is the first openly lesbian commissioner and a leading scholar on equal employment opportunity in the LGBT community. Victoria Lipnic, sworn

in on April 20, 2010, is a former Assistant Secretary of Labor and the lone Republican. These three join Commissioners Constance Barker and Stuart Ishimaru. P. David Lopes, sworn in as the General Counsel on April 8, 2010, is the first General Counsel to be appointed from the ranks of field attorneys. This appointment confirms the EEOC's reliance on litigation as an increasingly important enforcement tool.

Statistics reveal some interesting trends concerning EEOC litigation. For example, in Fiscal Year 2008, the EEOC filed just 37 disability-related lawsuits on behalf of employees. Fiscal Year 2009 saw a 105% increase, with 76 disability-related lawsuits filed by the EEOC on behalf of applicants and employees. During that same period, there was a decrease in Title VII-related lawsuits, from 224 in Fiscal Year 2008 to 188 in Fiscal Year 2009. The trend seems to be toward litigation involving disability-related claims specifically. The new Americans with Disabilities Act Amendments Act, with its relaxed definition of "disability," no doubt has spurred the EEOC into action.

A Revitalized Department of Labor

Secretary of Labor Hilda L. Solis, speaking at the "Work-Life Balance Event" on July 20, 2010, declared, "The Department of Labor is back in the enforcement business." Secretary Solis explained that the Department

has hired 200 new enforcement officers. She also noted that the Department is poised to increase OFCCP audits of government contractors' compliance with affirmative action requirements. It is also set to reintroduce the Equal Opportunity Survey (EO Survey). The Bush Administration stopped using EO Surveys in 2006. The Clinton Administration originally introduced it to gather information about personnel activities, compensation data, and government contractors' affirmative action programs. The EO Survey will once again be used to target enforcement efforts.

The DOL has also focused on addressing work-life balance, especially for employees with family responsibilities. As part of this effort, Secretary of Labor Solis recently expanded the protections of the federal Family and Medical Leave Act by essentially redefining "family." The DOL also launched the related "National Dialogue on Workplace Flexibility." This town-hall style discussion group is coming soon to Dallas, Los Angeles, Chicago and New York.

In addition to the DOL and EEOC, President Obama has made significant and controversial appointments to the National Labor Relations Board. The Board is set to reconsider a number of prior decisions with an eye towards facilitating union organizing and

increasing unions' influence in the workplace.

Inter-Agency Cooperation/Independent Contractor Classification

A concerted push to get various agencies to work with each other is one of the most interesting things to develop since President Obama took office. We have seen federal agencies work with state agencies more actively. We have also witnessed an increase in cooperation among various federal agencies.

The misclassification of independent contractors is a good example of how federal and state agencies are joining together with Congress to increase enforcement. There have not been many changes in the applicable legal standards in this area to date. However, the enforcement picture has changed drastically. President Obama in Fiscal Year 2011 budget sought \$25 million for a new multiagency initiative aimed at strengthening and coordinating federal and state initiatives to target misclassification issues specifically. The budget also allows for additional \$12 million in funding for 90 new investigators for the DOL's Wage/Hour Division.

The Internal Revenue Service's (IRS) has implemented the "Employment Tax National Research Project" (NRP). The NRP began in early 2010. It is an audit-like project, spanning three filing years – 2008, 2009 and 2010. The NRP is focused on identifying areas where employers are not currently complying with their tax responsibilities. The IRS recently announced it will examine not only for-profit businesses, but also 500 charities and other tax-exempt organizations as part of the NRP. The IRS has signed information-sharing agreements with many state

agencies, providing for the exchange of results of the misclassification audits each agency performs. Agencies have also started to shift the enforcement burden directly to employers. For example, the DOL's Wage and Hour Division may soon announce new recordkeeping rules. The proposed rules include one requiring employers to conduct a classification analysis of all independent contractors, share that analysis with the workers directly, and retain the analysis for any future audit/agency request.

Legislators have also taken an active role in this effort. For example, Sen. John Kerry introduced the Taxpayer Responsibility, Accountability, and Consistency Act in late 2009. The bill in part would eliminate the safe harbor provision for worker misclassification (found in Section 530 of the Revenue Act of 1978). This measure also would give workers the right to petition the IRS for a determination of their status—essentially giving every worker an express avenue to trigger an IRS audit of their employer's business. More recently, on April 22, 2010, Sen. Sherrod Brown introduced the Employee Misclassification Protection Act (EMPA). The EMPA, as proposed, would amend the Fair Labor Standards Act and the Social Security Act, with the goal of preventing employers from misclassifying workers as independent contractors and increasing penalties for misclassification. Rep. Lynn Woolsey has introduced an identical bill in the House of Representatives.

The EMPA would introduce additional recordkeeping and notice requirements for employers. For example, it would require employers to: (1) advise each worker of his/her classification; (2) direct individual workers to the DOL's website established for providing additional

information about the rights of employees under the law; (3) provide the address and telephone number for the local DOL office; and (4) provide additional notifications regarding benefits that employees receive. The legislation also creates a rebuttable presumption that individuals are employees if the employer fails to satisfy the recordkeeping and notice requirements. In keeping with current trends, the legislation encourages inter-agency cooperation (e.g., if the DOL's Wage/Hour division finds a violation, it is encouraged to report the same to the IRS). And, the legislation directs the DOL's Wage/Hour division to conduct targeted audits of industries that frequently misclassify workers as independent contractors. Unions, too, are also focusing their organizational efforts on sectors and employers that use independent contractors. Of course, the more workers who are reclassified from contractors to employees, the more workers who are eligible to join a union.

The increased focus on independent contractor status in part is due to increased pressure on government to find revenue sources. An employer avoids withholding taxes if it classifies a worker as an independent contractor instead of an employee. The independent contractors may fail to pay estimated taxes, shelter their income with offsetting expenses, or not pay taxes at all. The federal government estimates it can capture \$7 billion in lost employment tax revenue over the next 10 years by reducing employers' misuse of independent contractor status.

The penalties for misclassification also will result in new revenue for government coffers. Hundreds of thousands of employers face financial liability for non-compliance

with existing state and federal tax and employment laws. The U.S. Bureau of Labor Statistics, part of the DOL, estimates that more than 10.3 million workers in the U.S., roughly 7.3% of the workforce, are classified as independent contractors. A study by the DOL in 2000 claims that as many as 30% of businesses have misclassified employees as independent contractors. Similarly, the Government Accountability Office recently stated that the number of misclassified workers has expanded

by 50% since 2000.

What The New Developments Mean for Employers

With increased government scrutiny comes more opportunities for employers to incur unplanned liabilities. Over the past several years, employers mainly feared the possibility a plaintiff's lawyer would bring a wage and hour class action. However, government agencies have enforcement budgets and staff that a plaintiff's lawyer cannot match. The

odds are now far greater that employers that do not endeavor to comply with existing laws will be caught.

As a result, employers without strategies for preventing liability are at greater risk. Investing in audits and training may have been put on the "back burner" during recent economic turmoil. It may now be time to revisit those programs before the IRS, EEOC, DOL, or corresponding state agencies come knocking.

Reprinted by permission of The Daily Recorder.



Jennifer Brown Shaw is a partner at Shaw Valenza LLP. Her practice includes providing regular advice and counsel to private and public sector employers. She also develops and presents seminars on legal issues in the workplace for management and non-supervisory employees.

jshaw@shawvalenza.com



300 Montgomery Street, Suite 788
San Francisco, California 94104
Tel: (415) 983-5960
Fax: (415) 983-5963

520 Capitol Mall, Suite 630
Sacramento, California 95814
Tel: (916) 326-5150
Fax: (916) 497-0708

<http://shavalenza.com>