

New U.S. Department of Labor (DOL) and American Bar Association (ABA) Joint Program May Increase FLSA and FMLA Litigation

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Employees seeking to address alleged violations of the Fair Labor Standards Act (FLSA) or the Family and Medical Leave Act (FMLA) now have greater access to legal assistance in pursuing these claims. Effective December 13, 2010, individuals who are informed by the DOL that the Wage and Hour Division is not pursuing their complaints will be given a toll-free number to contact the newly created ABA-Approved Attorney Referral System. In turn, the ABA will provide the name of a local attorney who is qualified to pursue an FLSA or FMLA claim. At this time, Michigan does not have an approved referral system registered with the ABA.

According to the DOL announcement, the Wage and Hour Division received over 40,000 complaints during FY 2010. Ten-percent of those individuals were informed that the DOL was not pursuing the complaints even though the department determined that a violation may exist. The DOL hopes that the new program "will both provide workers a better opportunity to seek redress for FLSA and FMLA violations and help level the playing field for employers who want to do the right thing."

Under the new program, individuals and their attorneys will be able to obtain the DOL's determination of the violations at issue, the amounts of back wages owed, and any supporting documentation available. According to the DOL announcement, individuals may be provided the toll-free number at any one of the four typical stages of a complaint: (1) at the intake stage if the individual declines to file a complaint; (2) at the complaint review stage if the DOL decides not to pursue the claim; (3) after a conciliation attempt if the employer refuses to remedy a violation; or (4) after an investigation and a settlement is not reached.

What does this mean for employers?

First, there is likely to be an increase in the number of FMLA and FLSA lawsuits filed by private individuals. Second, all employers should immediately review their current pay and leave policies and practices to ensure compliance with the FLSA and FMLA. Conducting an audit of your exempt positions to determine if they continue to qualify for exempt status could help avoid future claims.

Third, all employers should ensure that all employee, contractors and third-party relationships are properly categorized. The DOL recently added 350 new investigators and is "targeting fissured industries," which it defines as industries relying on subcontracting, third-party management, franchising and independent contracting.

Finally, all employers should carefully scrutinize all information that they provide to the DOL during any investigation, since that information could likely be subsequently provided to an attorney pursuing litigation on behalf of a current or former employee.