



**Wimberly Lawson**  
 Wright Daves & Jones, PLLC

*Attorneys & Counselors at Law*

**Briefly**  
 June 2010 Volume 10, Issue 6

**TAG, YOU (EMPLOYERS) ARE IT!**



**Carol Merchant,**  
**Wage and Hour**  
**Consultant**.....

*"This new strategy...seeks to place increased responsibility on employers to take steps to ensure compliance with the laws and regulations enforced by DOL."*

For those of you who remember playing the childhood game of Tag, you might feel like you've just been "tagged" under the U. S. Department of Labor's (DOL) new "Plan/Prevent/Protect" strategy. This new strategy is outlined in DOL's Spring 2010 Regulatory Agenda and seeks to place increased responsibility on employers to take steps to ensure compliance with the laws and regulations enforced by DOL.

According to DOL statements on this strategy, Plan/Prevent/Protect is aimed at those employers who have not taken the necessary steps to ensure compliance. DOL states its recognition that some employers' lack of compliance is the result of difficulty understanding the laws and regulations that govern America's Workplaces. For other employers, DOL's opinion is that complacency or a "catch me if you can" philosophy may be why they have not taken more proactive actions to achieve compliance.

The Labor Department seeks to change the behavior of such employers by requiring employers to "find and fix" problems rather than waiting for a Labor Department investigator to discover the problems and enforce the law. Although the specifics will vary by law, industry and regulated enterprise, this "Plan/Prevent/Protect" strategy will require all regulated entities to take three steps to ensure safe and secure workplaces and compliance with the law:

**"PLAN":** The Department will propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers – for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer or other regulated entity would provide its employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.

**"PREVENT":** The Department will propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.

**"PROTECT":** The Department will propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.

What the strategy proposes is that employers be required to assemble plans, create processes and designate people charged with achieving compliance. They will be required to implement these plans and evaluate their effectiveness in achieving compliance.

Historically, worker protection agencies at the Department of Labor, most notably the Office of Federal Contract Compliance Programs (OFCCP) and the Mine Safety and Health Administration (MSHA) have developed compliance programs targeted at specific workplace risks and hazards. For example, employers and others implementing Executive Order 11246's anti-

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*Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

discrimination and affirmative action requirements are required to create programs for diverse workplaces under OFCCP's existing regulations. The Department's latest Regulatory Agenda contains new regulations, discussed in greater detail below, that will require employers and other regulated entities to improve the content, implementation, and evaluation of these existing protection plans and programs. But it also proposes new rules in new areas based on the same philosophy.

New rules will primarily target compliance with the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the Federal Mine Safety and Health Act of 1977 (Mine Act), the Employee Retirement Income Security Act (ERISA) and Executive Order 11246.

## **Proposed Regulatory Changes**

### OSHA

OSHA's Injury and Illness Prevention Program is the prototype for DOL's Plan/Prevent/Protect strategy. It would build on OSHA's existing Safety and Health Program Management Guidelines. It will require employers to provide their employees with opportunities to participate in the development and implementation of an injury and illness prevention program, including a systematic process to proactively and continuously address workplace safety and health hazards. This rule would involve planning, implementing, evaluating and improving processes and activities that promote worker safety and health and would require companies to specifically address the needs of certain categories of workers (such as youth, aging and immigrant workers). OSHA's efforts to protect workers under the age of 18 will be undertaken in cooperation with the Wage and Hour Division.

OSHA is also considering a regulatory measure to address Infectious Diseases in the workplace. During the spring and summer of 2010, OSHA will receive and analyze comments on the need for a standard to ensure that employers establish a comprehensive employee infection control program. Hospitals and nursing homes, certain laboratories, pathologists' offices, mortuaries and correctional facilities are examples of workplaces which might require such control measures.

### MSHA

MSHA will review its existing Pattern of Violations regulation to improve consistency in the procedures and criteria for placing mine operators into the pattern of violations program.

While MSHA currently requires development and approval of plans for control of specific hazards, it will work on regulations to improve the effectiveness of these existing plans and will publish a Request for Information about the possible imposition of a new requirement of a comprehensive health and safety management program for all mines.

MSHA will issue a proposed rule to reinstitute a requirement for underground coal mine operators to conduct pre-shift examinations in areas where miners work or travel to search for violations of mandatory safety or health standards.

### OFCCP

While OFCCP currently requires employers and other regulated entities to create affirmative action programs in some contexts, it intends to work on regulatory changes to enhance the effectiveness of Construction Contractor Affirmative Action programs. Specifically, it intends to address the content of those programs in the areas of recruitment, training and apprenticeships.

### Wage and Hour Division (WHD)

As part of the recordkeeping requirements of the Fair Labor Standards Act, the WHD proposes to establish a requirement that employers perform a classification analysis for any worker that the employer excludes from the minimum wage and overtime protections. The employer would then be required to disclose that analysis to the worker and retain that analysis to give to WHD investigators who might request it. This analysis would have to be completed for all workers classified as independent contractors. There is no indication at this time whether it might also include employees classified as exempt from minimum wage and/or overtime requirements.

As part of this department-wide initiative, both OSHA's Injury & Illness Prevention Program and OFCCP's Construction Contractor Affirmative Action Requirements also propose establishing similar requirements that employers notify workers of their employment status.

## Non-Regulatory Initiatives

In addition to the proposed regulatory changes outlined above, DOL has already implemented several non-regulatory actions.

### WHD and Employee Benefits Security Administration (EBSA)

Employers who are investigated by the WHD and found to have improperly classified employees as independent contractors and who have agreed to resolve the problem will be required to review their benefit plans, resolve the benefit rights of misclassified employees and report the related violations of plan provisions and ERISA to EBSA.

### EBSA

Under the Delinquent Filer Voluntary Compliance Program, plan administrators who file their ERISA reports late or incompletely can substantially reduce the otherwise applicable civil penalty if they correct their violation prior to EBSA's involvement.

EBSA will continue to facilitate employer compliance through the use of Pension and Health Checklists.

Under the Voluntary Fiduciary Correction Program, employers and other regulated entities who find and correct certain specific violations in accordance with EBSA rules will receive a "no action" letter from EBSA and may be exempt from applicable excise taxes.

### MSHA

MSHA has initiated a fatality prevention program called "Rules to Live By," based on an analysis of fatal accidents from 2000 through 2008. Mine operators are responsible for monitoring their work environments to assure that these hazardous conditions and practices do not exist and to fix them if they do.

## Employer Compliance Plans

Without a doubt, DOL's new enforcement program will compel employers to institute more proactive policies and actions to attempt to ensure their compliance with Federal employment laws. The first step is for employers or outside auditors to "find and fix" violations – that is, assure compliance – before a Labor Department investigator arrives at the workplace. The audit can then be used as the basis for writing and implementing a compliance plan to prevent future violations. The plan must contain implementation steps such as annual compliance audits, methods for employees to participate in the plan and designation of particular employees who are responsible for ensuring compliance. Ongoing education and training for these designated employees will also be a necessity as well as a system for compliance reporting.

Employers who fail to take the steps necessary to comprehensively address the risks, hazards, and inequities in their workplaces will be considered out of compliance by DOL and, depending upon the agency and the substantive law it is enforcing, subject to remedial action. In other words, "Tag, You're It" for developing, implementing and enforcing company policies that will assure your company's compliance with employment, safety and employee benefit laws.

## KNOW YOUR ATTORNEY MARY MOFFATT HELMS



MARY MOFFATT HELMS is a Member of the Morristown office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 1994.

Prior to joining Wimberly Lawson, Mary was a partner in a law firm in Kingsport, Tennessee. Her law practice includes Labor and Employment Law, Commercial and Business Law and Litigation. She received her Bachelor of Science degree, magna cum laude, from East Tennessee State University and her law degree from Washington and Lee University. Mary has served as a member on the Hearing Committee for Tennessee Board of Professional Responsibility, Supreme Court of Tennessee. She is as member of the Labor and Employment Law and Health Law Forum of the American Bar Association and is also a member of the Tennessee Bar Association. Mary is a member of the Board of Directors of the Morristown Boys and Girls Club. Mary is a Rule 31 Listed General Civil Mediator and currently serves as Municipal Judge for the City of Morristown.

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## SOCIAL MEDIA IN THE WORKPLACE



**Heather Thorne**

*"The key to using social media in the employment context is to implement a policy and establish guidelines to mitigate any potential legal risks."*

Countless employers are embracing social media networking in terms of marketing, advertising, branding, recruitment, and maintaining company morale. Due to the exponential growth in online networking, the question is not about when an employer gets involved in social media; it's about how it gets involved. Whether or not the employer is involved first hand, it is guaranteed that employees are actively signing on to social media accounts on a daily basis. The key to using social media in the employment context is to implement a policy and establish guidelines to mitigate any potential legal risks.

There are a number of benefits to using social media in the marketing context. It provides an inbound marketing method that targets individuals showing a particular interest in a certain industry or product as opposed to sending blast emails, print or broadcast advertising in hopes of finding that needle in the haystack. While the use of social media in the workplace can be a valuable tool in a number of areas, as with anything, there are legal implications that should be taken into consideration. Take recruitment, for example; a number of employers are now using social media as a means to locate and screen potential candidates for job openings. Consider whether, by relying heavily on the social media networks, this reflects disproportionately a certain race, gender, and age group or excludes those with certain disabilities. If using these sites for recruitment purposes only attracts Caucasian males, for example, this is a breeding ground for a discrimination claim.

Remember that anti-discrimination regulations prohibit employers from asking certain questions that would disclose the potential employee's protected class status (i.e., race, gender, age, religion, disability, etc.). However, these social media networks provide access to that information whether

it is being sought after or not. This is why it is so important to have a policy in place. An employer should know the information it wants to find and how it will be used to evaluate the job candidate before it ever evaluates the content within that social media account. In addition, be consistent with the screening process. Treat all job candidates the same and do not pick and choose which candidates will be screened. By not applying the policy to every job candidate consistently across the board, this creates vulnerability to a discrimination claim.

Because these sites are ever-changing, it is good practice to include screen captures in order to preserve the information that is found. Information on the social media account will likely be there one day and gone the next. Also, consider setting up a committee to screen these social media sites. The ultimate recruiter should not be responsible for seeing all the information posted. The less protected-class information that recruiter has when making their decision, the less chance a discrimination claim has to be successful.

Take note that the Fair Credit Reporting Act comes into play when using social media sites in conducting a background check. If the employer chooses to use a third party vendor to conduct a background check, the employer has an obligation to give notice to the employee that social networking sites will be searched as part of that check. However, this applies to third party agencies only. If the employer conducts these searches without using the third party vendor, there is no required notice.

There are a host of additional legal risks to consider: right to privacy, off-duty conduct, National Labor Relations Act and Collective Bargaining Agreements, copyright issues, contract law, etc. As is evident, this article only scratches the surface of the number of legal risks involved in social media networking which clearly shows the importance of having a policy in place to mitigate those risks. This policy can and should be in place regardless of whether the employee is accessing social media on company time and from company equipment, or on his or her own time with his or her own hardware. Because everyone potentially has access to these networks, the policy should be company-wide and cover all employees.

When should the employer implement this policy? The time is now. Social media networking sites have become one of the most used online categories. There is no doubt that social media is here to stay and its popularity only continues to grow. Thinking back to when technology provided us with the next big thing, e-mail; it's now hard to imagine how society ever functioned without it. This is just another advancement in technology and should be approached the same way. The key for employers is to understand the potential uses and benefits of social media networking. Do not be afraid to get involved simply because it's new. If an employer understands the legal risks involved, it can be prepared should that risk become an actual problem.



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# TARGET OUT OF RANGE



## THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 18 – 19, 2010

**COST:** Early, Early Bird (registration AND payment received by June 18, 2010)

\$289 per person

\$269 for each additional person from same company

\$229 for eight or more from same company

Early Bird (registration AND payment received by October 15, 2010)

\$299 per person

\$289 for each additional person from same company

\$239 for eight or more from same company

Registration and payment received AFTER October 15, 2010

\$339 per person

\$329 for each additional person from same company

\$299 for eight or more from same company



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

### REGISTRATION INCLUDES:

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

**CANCELLATION POLICY:** 50% cancellation fee will be incurred for cancellations after October 29, 2010. Cancellations made after November 10, 2010 will forfeit registration fee (registrants will receive the conference materials post-seminar).

#### FIVE WAYS TO REGISTER:

1. **Mail to:** Bernice Houle  
Wimberly Lawson Wright  
Daves & Jones, PLLC  
P.O. Box 2231  
Knoxville, TN 37901-2231
2. **Fax to:** 865-546-1001
3. **Email to:** [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. **Via website:** [www.wimberlylawson.com](http://www.wimberlylawson.com)
5. **Phone:** 865-546-1000

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BPR and State for CLE \_\_\_\_\_

Number attending reception \_\_\_\_\_

*This program will be submitted for HRCI recertification credit hours and Tennessee CLE general credit hours.*

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## TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21<sup>st</sup> Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves  
Managing Member