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The New DOL/ABA Attorney-Referral Program: Beware of Increased Litigation Against Employers for FLSA and FMLA Violations

A new lawyer-referral program recently announced by the U.S. Department of Labor (DOL) and the American Bar Association (ABA) threatens to substantially increase the number of minimum wage, overtime and other Fair Labor Standards Act (FLSA) and Family and Medical Leave Act (FMLA) cases filed against employers.

Currently, when the DOL declines to internally investigate a complaint against an employer, it simply notifies the complainant of his or her rights and leaves the complainant to decide whether or not to privately pursue the matter further. Beginning December 13, 2010, however, the DOL will now provide the complainant with a toll-free phone number for an ABA-approved attorney referral system that will recommend plaintiffs' attorneys to privately litigate a case on the complainant's behalf. In addition, where the DOL conducts an investigation, the agency will, for the first time, provide complainants with information about the results of that investigation, including the DOL's determination regarding "the violations at issue and back wages owed." Moreover, the DOL is developing special processes for complainants and their attorneys to quickly obtain relevant case information and documents.

According to the DOL, it developed these initiatives to "level the playing field" for workers by providing increased access to legal resources. The practical effect of the changes for employers, however, will likely be a substantial increase in private lawsuits by workers for alleged FLSA and FMLA violations. Given that the current trend in such cases is to pursue large collective/class actions, and not single-plaintiff cases, such litigation can be extremely costly and, many times, can place the employer's entire business at risk. Now, more than ever, it is crucial that employers evaluate their compensation and leave practices and perform regular audits to ensure such practices comply with federal, state and local laws.

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