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# Special Report for HR Professionals

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The Management Advantage, Inc., PO Box 3708, Walnut Creek, CA 94598  
www.hrwebstore.com newsletter@management-advantage.com 925-671-0404

## DOL REGULATORY AGENDA – SPRING 2010

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On April 26, 2010, the U.S. Department of Labor published its Spring regulatory agenda in the Federal Register.

<http://www.dol.gov/asp/reg/unifiedagenda/spring-2010-regulatory-plan.pdf>  
(DOL's Regulatory Agenda Narrative is located at:  
<http://www.dol.gov/regulations/2010RegNarrative.htm> )

Several things are clear about the intentions embodied in these documents. First, the Secretary of Labor, Hilda L. Solis, sees it as her mission to obtain a “good” job for every American where some specific characteristics are guaranteed. Those include: an increase in workers’ incomes and narrowing of income inequality; actual payment of wages and overtime when it is due; safe, healthful and fair workplaces; flexibility for family and care giving needs of workers; improved health benefits and retirement security for all workers; and jobs that assure workers have a voice in the workplace.

If that sounds like the government is going to take over some of the management of your business, you’re probably getting the message clearly.

Secretary Solis has said she wants to end employers operating with a “Catch me if you can” attitude and replace it with “Plan/Prevent/Protect.”

In what she has described as a more transparent enforcement position, she defines these characteristics as:

- **Plan** – The Department will propose a requirement that employers and other regulated entities create a plan for identifying and remedying 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 their 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

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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.

DOL expects employers to “find and fix” violations before a DOL investigator arrives at the workplace.

Employers and other regulated entities who fail to take these steps to address comprehensively the risks, hazards, and inequities in their workplaces will be considered out of compliance with the law and, depending upon the agency and the substantive law it is enforcing, subject to remedial action. In some cases, sanctions are incorporated in the law as it is passed by Congress. In other situations, regulations specify penalties that employers will suffer if they fail to meet requirements.

One example of the DOL agenda has been used to explain how this three-step strategy will be unveiled in the coming weeks. The Organizational Safety and Health Administration (OSHA) will propose a requirement for employers to create and implement an Injury and Illness Prevention Program (IIPP). One can only imagine it might be modeled after the very same-named requirement California employers have had to meet for many years.

Mine safety auditors will be seeking significantly enhanced enforcement activities for mine operations that have large numbers of serious and substantial violations of the Mine Act. Construction contractors will be facing updated requirements in their affirmative action programs that “would enhance the effectiveness” of those programs. Areas to be changed include “recruitment, training and apprenticeships.” The Wage and Hour Division (WHD) will be proposing additional recordkeeping requirements when employers wish to exempt a job from overtime requirements. “All employers that seek to exclude workers from the FLSA’s coverage would be required to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it.” As part of this department-wide initiative, “both OSHA’s Injury & Illness Prevention Program notice of proposed rule-making and OFCCP’s Construction Contractor Affirmative Action Requirements notice of proposed rule-making will also propose establishing similar requirements that employers notify workers of their employment status.”

Expect hard hitting enforcement efforts in areas of overtime exemption, independent contractor vs. employee determinations, and injury prevention.

Whatever happens, it is a fairly sure bet that employers will have to increase their budgets for compliance staff beginning in 2011. That will very likely be less costly than DOL-assessed penalties and public relations implications of non-compliance.

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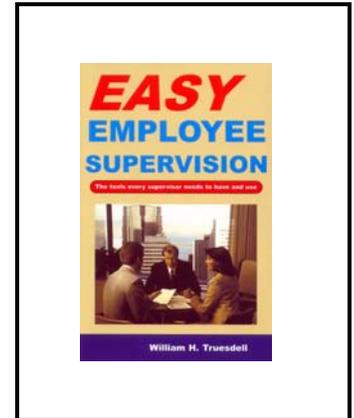
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## Easy Employee Supervision

Anyone who needs a desk-top reference for issues like motivation, discipline, performance management or risk management will want a copy of this book. It gives new and experienced managers alike the reference they want when they have a need. Easy to read and easy to use. 300 pages crammed with information.

[http://www.management-advantage.com/products/easy\\_book.htm](http://www.management-advantage.com/products/easy_book.htm)



## POTPOURRI

- **Wage and Hour Issues**

*The National Law Journal* (April 19, 2010) published a special report by Garry Mathiason of Littler Mendelson in San Francisco and Mark Thierman of the Thierman Law Firm in Reno, NV. In it they discuss the growing problem of class action law suits in the area of wage and hour issues. Of note...

*"During the coming decade, complex new issues will emerge testing the definition of compensable work as BlackBerrys, iPhones, iPads and multiple other devices evolve. What jurisdiction and law cover compensation requirements of virtual workers? When does work start and end for such workers? Are workers exempt who accomplish complex professional tasks with artificial intelligence systems that require increasingly simple human commands?"*

The complete article is available to paying subscribers at [www.nlj.com](http://www.nlj.com)

- **H-1B Advisor**

The U.S. Department of Labor has created an interactive, online **H-1B Advisor** for employers. (<http://www.dol.gov/elaws/h1b.htm>) H-1B visas allow for the temporary employment of foreign workers in the U.S. in certain specialty (usually high technology) occupations. Using a Q&A format the system helps determine if you fulfill the requirements of the visa program. It outlines notification requirements, monetary issues, worksite issues, recordkeeping, and worker protections.

- **Census 2010 Occupational Categories**

We asked the U.S. Bureau of the Census when EEO File Occupational Codes would be available for the 2010 Census. The answer...sometime this summer.



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## EEOC NOW HAS FIVE COMMISSIONERS

It has been a while since the Equal Employment Opportunity Commission (EEOC) had a full complement of five Commissioners. Now, thanks to recent recess appointments by President Obama, three new Commissioners have joined the group.

Jacqueline A Berrien is now Chair of the Commission. She was nominated on July 16, 2009, given a recess appointment on March 27, 2010 and will serve until the end of the current Congressional session in 2011. She has practiced law for more than 20 years, most recently as Associate Director and Counsel for the NAACP Legal Defense and Educational Fund. Victoria A Lipnic, a former U.S. Assistant Secretary of Labor was nominated on November 3, 2009, given a recess appointment on March 27, 2010 and will serve until the end of the Congressional session in 2011. Chai Feldblum, a former Georgetown University law professor was sworn in on April 7, 2010. She was nominated on September 15, 2009 and given a recess appointment on March 27, 2010. She, too, will serve until the end of the current Congress.

Also receiving a recess appointment is P. David Lopez, the new General Counsel of the EEOC. He had been nominated on October 22, 2009 and was sworn in on April 8, 2010. He is a 15-year veteran of the agency and is the first General Counsel to be appointed from the ranks of field attorneys.

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Walnut Creek, CA 94598  
925-671-0404

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Editor: William H. Truesdell, SPHR

[billt@management-advantage.com](mailto:billt@management-advantage.com)

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