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Solicitor of Labor Publishes Annual "Enforcement Report" for 2023

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In late January 2024, the Department of Labor released its annual report summarizing the Solicitor of Labor's (SOL) enforcement work in FY 2023. SOL enforces more than 180 federal statutes and their implementing regulations. This report is a helpful resource for employers as it demonstrates SOL's most recent enforcement priorities. In its report, SOL emphasized three aspects of its FY23 enforcement work:

- SOL's Emphasis on Retaliation Claims;
- SOL's Use of Litigation and Amicus Work to Affect Employee Misclassification and Coercive Employer Tactics; and
- SOL's Willingness to Use All Tools at its Disposable.

As the Solicitor of Labor said as an introduction to the report:

"We recognize that as the government, we play a unique role in the federal labor enforcement landscape.... This report will focus on three key aspects of our work: building out our retaliation priority across program areas; utilizing our litigation tools and our amicus and appellate practices to build positive developments in the law, such as combatting misclassification and coercive employer tactics; and deepening our use of all the tools in our toolbox, from warrants, to enhanced compliance agreements, to criminal enforcement coordination."

1. ***SOL's Emphasis on Retaliation Claims***

SOL demonstrated its focus on pursuing retaliation cases by obtaining temporary restraining orders (TROs) or preliminary injunctions in 19 retaliation cases. SOL also filed 13 cases to reinstate miners who were purportedly terminated for engaging in protected activities like raising safety concerns or refusing to do unsafe work. SOL touted its aggressive litigation tactics against a home-care company that interfered with a Wage and Hour Division (WHD) investigation, attempting to seek kickbacks and return of back wages from employees.

2. ***SOL's Use of Litigation and Amicus Work to Affect Employee Misclassification and Coercive Employer***

Tactics; and

SOL emphasized that in FY23 it focused considerable efforts litigating cases involving the misclassification of employees subject to mandatory arbitration clauses. SOL is not bound by the arbitration agreements and can still pursue litigation when employees are subject to them as well as class action waivers.

SOL focused on litigating cases against employers that used punitive contracts to force workers to repay lost profits, wages, and/or the cost of arbitration, particularly in instances where the contracts and arbitration demands had what it deemed to be a chilling effect on employees' ability to exercise their rights. This includes the protection to be free from an unsafe or hazardous workplace, and to obtain the wages they believe they are owed. In that regard, SOL filed an amicus brief against "loser pays" provisions in the Second Circuit in a private FLSA litigation seeking to enforce provisions that force employees to pay their employers' attorney fees if unsuccessful when litigating FLSA cases.

SOL also filed amicus briefs arguing that participants who paid for supplemental life insurance benefits as well as their beneficiaries should have access to their premiums in cases where insurance plans later told beneficiaries that the participant should not have qualified for coverage in the first place. SOL's amicus briefs contributed to favorable decisions in the Eighth and First Circuits. Additionally, SOL's multi-pronged strategy, involving amicus participation and enforcement, prompted settlements with *Prudential* and *United of Omaha*, addressing unfair claim denials. SOL secured a notable OSHA decision by piercing the corporate veil and finding a contractor personally liable for failing to require fall protection, which resulted in the death of an employee.

3. ***SOL's Use of a Range of Legal Tools***

SOL continually emphasizes its willingness to use non-litigation tools and collaboration to pursue its mission. It emphasized the following as evidence of its successes in that regard:

- Compliance Agreements: SOL highlighted its successful use of enhanced compliance agreements, by showcasing a prominent nationwide settlement agreement with Dollar Tree that traded OSHA's ability to continue a barrage of on-site inspections for commitments by Dollar Tree to implement systemic safety enhancements.
- Wage and Hour Division Collaboration: SOL collaborated with DOL's WHD by filing lawsuits and obtaining consent judgments against several companies in order to restrain child labor violations, secure compliance, and impose significant penalties for employing children in hazardous roles.
- Criminal Law Enforcement Collaboration: SOL collaborated with criminal law enforcement in several instances. It aided the US attorney for the Southern District of New York in filing criminal charges against Jose Lema and ALJ Home Improvement for willful OSHA violations stemming from the death of an employee. Additionally, SOL used criminal contempt proceedings to enforce abatement of safety conditions in an 8th Circuit Case, eventually taking a business owner into custody and not releasing him until after he agreed to an interim plan to cease and desist business operations until a compliance plan was entered. SOL also supported the prosecution of Black Diamond Coal Company and its dust examiner, Walter Perkins, for submitting false coal dust samples to MSHA and lying to MSHA investigators, resulting in probation, fines, and prison sentences.

Based on this report, SOL's 2023 direct involvement in retaliation cases was usually limited to the most grievous

and sensational violations. Similarly of note from 2023 was SOL's willingness and success in using a dual strategy of filing amicus briefs and pursuing litigation to put pressure on companies that utilized tactics that it deemed coercive.

Employers should expect this focus on retaliation and misclassification issues to continue in 2024. SOL's 2023 enforcement report mostly focused on its most aggressive enforcement actions, but its decision to promote its 2023 settlement and compliance agreement with Dollar Tree, demonstrates a willingness to work with employers in some instances.