

EVERYBODY'S TALKIN'


LEGAL AND AGENCY
ENFORCEMENT UPDATE – 2011



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THE GAME PLAN


- DOL PLAN, PROTECT AND PREVENT INITIATIVE
 - COVERS BOTH EMPLOYMENT AND EMPLOYEE BENEFITS ISSUES
- EMPLOYMENT ELIGIBILITY UPDATE
- DRUG TESTING AND MEDICAL MARIJUANA



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PLAN, PROTECT, PREVENT

- Employers and others must "find and fix" violations
- **DOL MAKES IT CLEAR:** Employers and others in the Department's regulated communities must understand that the burden is on **them** to obey the law, not on the Labor Department to **catch them**



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GOOD JOBS FOR EVERYONE

- DOL OFFICIAL POSITION IS GOOD JOBS ARE:
- jobs that increase workers' incomes and narrow wage and income inequality;
- jobs that assure workers are paid their wages and overtime;
- jobs in safe and healthy workplaces, and fair and diverse workplaces;
- jobs that provide workplace flexibility for family and personal care-giving;
- jobs that improve health benefits and retirement security for all workers; and
- jobs that assure workers have a voice in the workplace.

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PLAN

DOL wants to require employers to create a plan to identify and remediate risks

DOL wants to see employee participation in creation of plans

DOL wants implementation training of employees



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PREVENT

- Plan must be “thoroughly and completely” implemented
- Plan cannot be a mere paper process
- Can’t just draft and put it on the shelf



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PROTECT

- DOL wants employers to actively examine their workplace to assure Plan's objectives are met.
- Such examination must occur on a regular basis
- The Plan must actually protect workers from violations of workplace rights.



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Active PPP Efforts

Active Efforts Include

- OSHA Injury and Illness Prevention Program
- OFCCP affirmative action enforcement in recruitment, training and apprenticeships
- Misclassification effort – Cooperative Effort between EBSA and WHD
 - Like we said, everybody's talkin'
- EBSA will force wage examinations and WHD will force benefit exams



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WE KEEP TELLING YOU – CLASSIFICATION ISSUES AREN'T GOING AWAY

EMPLOYEES



v.

INDEPENDENT CONTRACTORS



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EMPLOYEES



- HIRED
- PAID A SALARY OR WAGE
- RECEIVE A W-2
- ELIGIBLE FOR BENEFITS
- USE YOUR STUFF

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INDEPENDENT CONTRACTORS

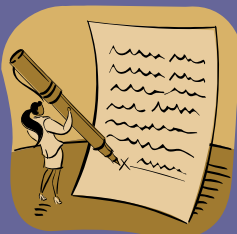
- ARE INDEPENDENT
- RETAINED
- RECEIVE A 1099
- NOT ELIGIBLE FOR BENEFITS
- USE THEIR OWN STUFF

» AND



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THEY HAVE A
WRITTEN CONTRACT



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THINGS TO DO

- CHECK OUT THE IRS FORM SS-8
– BUT DON'T SEND IT
- MAKE A CHECKLIST
- CALL FOR HELP



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Overtime Issues and Obligations Remain a Huge Focus

- Wage and Hour Division rules to:
 - establish a requirement that employers provide workers with basic information about their employment, including how their pay is calculated
 - 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.
 - “this initiative also contributes to the Labor Department's efforts to prevent misclassification that denies workers employment law protections to which they are entitled.”



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EXEMPTION REFRESHER

- EXECES
- ADMIN
- PROFESSIONAL
- HIGH COMPS
- COMPUTER GEEKS
- COWS



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WHAT THIS MEANS

- JOB DESCRIPTIONS
 - CAREFUL ANALYSIS OF THOSE JOB DESCRIPTIONS THAT YOU WRITE DOWN
- EXEMPTION WORKSHEETS
- SIGNED ACKNOWLEDGEMENTS REGARDING STATUS



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HOW YOU PAY MATTERS

SALARY BASIS TEST



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PLEASE GET THIS RIGHT

- THEY ARE WATCHING YOU, AND TALKING ABOUT YOU TOO.



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DOL FOCUS ON BENEFITS



- Suing Individuals for Breach of Fiduciary Duty
 - More than 20 cases announced in just the last 3 months.
 - They are suing for tiny amounts, too. Like \$9,000.00.
 - Suing on both 401(k) and Health Plans

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YOUR INVESTMENT ADVISOR JUST BECAME A FIDUCIARY

- New Rules:
- Expand the definition of investment advice to include appraisals and fairness opinions.
- Clarifies that fiduciary obligations can be created by giving advice to participants.
- Expands the role to advice regarding how to vote shares and the selection of managers.
- Clarifies that fees include both hard dollars and soft dollars.
- **So, do what we've told you: Get your advisors to agree that they are fiduciaries and avoid the argument later.**

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DOL Issues Final Rule on Fee Transparency

- Requires plan fiduciaries to:
- Give workers quarterly statements of plan fees and expenses deducted from their accounts.
- Give workers core information about investments available under their plan including the cost of these investments.
- Use standard methodologies when calculating and disclosing expense and return information to achieve uniformity across the spectrum of investments that exist in plans.
- Present the information in a format that makes it easier for workers to comparison shop among the plan's investment options.
- Give workers access to supplemental investment information in addition to the basic information required under the final rule.
- A model chart with the level of disclosure required is at <http://www.dol.gov/ebsa/participantfeerulemodelchart.doc>

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Health Care

WHAT'S NEW?


Much ado about nothing!



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EMPLOYMENT ELIGIBILITY

Office of Inspection
U.S. Department of Homeland Security
Customs

**U.S. Investigation
and Customs
Enforcement**

NOTICE OF INSPECTION

[Date]

[Name of Customs Official]
[Customs Office]
[Company Address]

Dear Sir/Machien:

Section 278A of the Internal Revenue Code, as amended by the Internal Revenue Service and Chapter Act of 1995, requires employers to file with Internal Revenue Service Form 941-BE to report the number of U.S. born and U.S. born citizens and permanent residents who are employed by the employer after November 6, 1986 using the Department of Agriculture Form 1-0.

U.S. Investigation and Customs Enforcement (ICE) regulations require the provision of Form 941-BE to the U.S. Customs and Border Protection (CBP) office. This requirement is necessary to ensure that U.S. born and U.S. born citizens and permanent residents are properly identified and that U.S. born and U.S. born citizens and permanent residents are properly identified and that U.S. born and U.S. born citizens and permanent residents are properly identified.

During the review, ICE will review the information provided to ensure the compliance of the law and to ensure that the information provided is accurate and that the information provided is accurate and that the information provided is accurate.

Sincerely,

ICE
[Signature]
[Title]

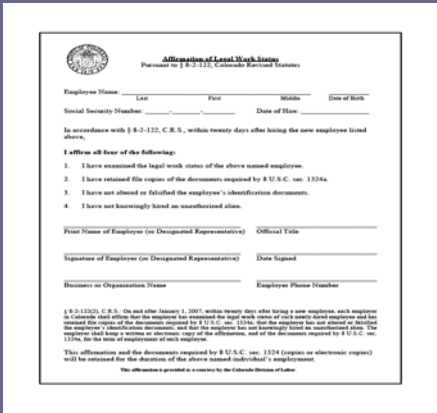
I wish to waive the three day notice to which I am entitled by regulation.

(Printed Name) _____ (Signature) _____ (Date) _____

USA Customs Inv. No. 8881288 (Revised 05/11/09)

...and Payroll Records, too!!!

- Just because you use a PEO
- doesn't mean you're in the clear.



Affirmation of Legal Work Status
Pursuant to § 8-2-112, Colorado Revised Statutes

Employee Name: Last First Middle Date of Birth
Social Security Number: Date of Hire

In accordance with § 8-2-112, C.R.S., within twenty days after hiring the new employee listed above:

I affirm all four of the following:

1. I have examined the legal work status of the above named employee.
2. I have retained the copies of the documents required by 8 U.S.C. sec. 1324a.
3. I have not allowed or falsified the employee's identification documents.
4. I have not knowingly hired an unauthorized alien.

Print Name of Employer (or Designated Representative) Official Title
Signature of Employer (or Designated Representative) Date Signed
Business or Organization Name Employer Phone Number

§ 8-2-112(2), C.R.S. On and after January 1, 2017, within twenty days after hiring a new employee, each employer in Colorado shall affirm that the employee has reviewed the legal work status of each newly-hired employee and has retained the copies of the documents required by 8 U.S.C. sec. 1324a. Notwithstanding any other law, no employer shall be liable for any civil or criminal penalty for failing to comply with this section, and any law that purports to impose a civil or criminal penalty for failing to comply with this section shall be null and void to the extent of any conflict with this section. This affirmation and the documents required by 8 U.S.C. sec. 1324a (copies in electronic copies) will be retained for the duration of the above named individual's employment.
This affirmation is provided in a courtesy by the Colorado Division of Labor.

THEY'RE BACK !
SOCIAL SECURITY ADMINISTRATION

**NO MATCH
LETTERS**

Whatever should we do???

- DON'T Ignore It
- Talk to the Employee (only one per letter)
- Check for Clerical Errors
- Give the Employee a REASONABLE TIME to get the problem fixed (Reasonable = 120)
- DO NOT TERMINATE unless the problem isn't fixed within the time provided
- Document
- Treat Everyone the Same

SOCIAL MEDIA THROWS SOME WILD PITCHES



- Facebook = Organizing Activity
- Public Discussion of Wages = Protected Activity under US and CO law
- They are watching you, and
- There's an App for that



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Really, There's an App for That

- On May 9, 2011 DOL launched a free iPhone application
 - Available in English en *Español*
 - Releases are planned for Android and Blackberry
 - Tip credit and commission calculators coming soon

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Drug Testing and Medical Marijuana in the Workplace

- It is still a federal felony
- But it's legal in Colorado – if you have a card
- So that makes issues regarding the “Smoker’s Bill of Rights” pretty complicated
- But

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Article XVIII of the Colorado Constitution Expressly States:

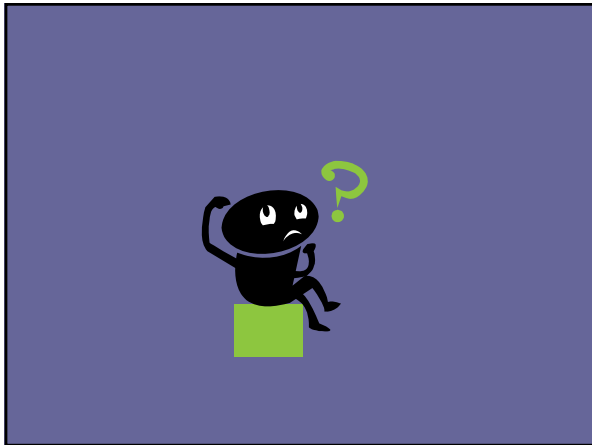
- “Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.”
- What does that mean?
- Who knows?
- We don't.

D + K

So, Do What you Know to Do

- Have a policy if you want one
- Focus your policy not on the product but on the effects
- Who cares if it is weed, Darvocet or heroin
- If they can't do their job, send them home
- If it repeats, fire them.

D + K



THANKS!
Dean & Kevin



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