The Department of Labor’s “Bridge to Justice” Program:
“One Small Step for Workers, One Giant Step for Trial Lawyers”

And, two steps back for employers. Despite the continued need for more jobs in the private sector, Washington pursues its anti-employer agenda. With little public fanfare, the United States Department of Labor’s Wage and Hour Division (WHD) implemented a new program in December entitled “Bridge to Justice.” A more accurate title would be “Bridge to Trial Lawyers.”

By its own estimate, the WHD received more than 40,000 complaints from employees in the 2010 fiscal year on issues such as unpaid overtime, minimum wage violations, and Family and Medical Leave Act (FMLA) problems. To handle the increasing number of complaints, the WHD recently hired 350 new investigators. But it then went even further, and entered into a formal agreement with the American Bar Association to connect workers whose complaints are not fully investigated or resolved by WHD investigators with trial lawyers “who may be able to help” those workers. In fact, the lawyers who receive referrals through the Bridge to Justice Program must have some prior experience with wage and hour and FMLA issues, which could make litigation against employers more likely.

The WHD admits that the program is “an unprecedented collaboration” between the Department of Labor and the American Bar Association. The WHD claims that by referring workers whose claims have questionable merit to trial lawyers, the program will “help level the playing field for employers who want to do the right thing.” Forget it. They may be the employer being sued, and the WHD is steering employees toward litigation.

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As a result of the Bridge to Justice Program, the WHD has significantly changed the way it processes complaints and communicates with employees bringing those complaints. Now, the WHD will provide the complaining employee with a toll-free number to the American Bar Association for referral to a local trial lawyer at any one of four stages of its investigation, including before any real investigating is done.

In addition to the toll-free number, if the WHD has conducted any form of an investigation, it will also provide the employee specific information about possible violations that may have occurred and even an estimate of potential back wages owed. The WHD will also explain its “special process” for the employee and any retained lawyer to “quickly obtain certain relevant case information and documents when available,” which presumably will not be available to the involved employer until formal litigation occurs. At least the WHD is candid about the effect of these changes and expanded assistance to employees, stating that they “will be very useful for attorneys who may take the case.”

Employers will be well served to review their procedures for identifying and handling potential FMLA issues and common wage-hour issues such as the misclassification of non-exempt employees as exempt employees; the failure to pay for all time worked, particularly where lunch periods are automatically deducted from working time; and the use of individuals as independent contractors. In fact, in its Strategic Plan for Fiscal Years 2011-2016, the WHD has committed to focus on independent contractor issues in its investigation and enforcement activities.

Employers must also be very careful about what information they provide to the WHD during the course of an investigation since it is possible that the information will be transmitted directly to a trial lawyer who takes a case. Since employers frequently provide time records and wage data for a broad range of employees during an investigation, they must anticipate that such data could be used against them in subsequent litigation. In a worst case scenario, if the WHD passes along information it obtained in an investigation to a trial lawyer receiving a referral, that lawyer could contact other, non-complaining employees to try to mount a class action suit against an unsuspecting employer.

Bridge to Justice should at least create more work for trial lawyers and redistribute some of employers’ wealth when the complaint has little or no merit. If it is even a remotely meritorious complaint, the federal government and a gaggle of trial lawyers stand ready to help redistribute even more wealth.

The WHD webpage for Bridge to Justice may be found at (http://www.dol.gov/whd/resources/ABAReferralPolicy.htm).