



A Quantum Of Solis

By D. Albert Brannen (Atlanta)

President Obama has selected Hilda L. Solis as his choice for Secretary of Labor. Solis has been a Democratic member of the U.S. House of Representatives for the past seven years, representing a district just east of Los Angeles, California. While Solis's confirmation was delayed because of questions concerning her husband's business, she was recently confirmed by the Senate. Labor leaders throughout the country are ecstatic; business leaders, not so much. In this article we'll take a look at some of the more important aspects of her career.

Early Career

Solis was born in Los Angeles in 1957 and is one of seven siblings and the daughter of Nicaraguan and Mexican parents. She earned a bachelor's degree at California State Polytechnic University, Pomona and a Master's degree at the University of Southern California.

She served in the Carter White House in the Office of Hispanic Affairs and later became an analyst with the Office of Management and Budget. She was elected as a member of the California State Assembly in 1992 and after one term won election to the California State Senate before entering the U. S. House in 2001. In the California legislature, she became well known for authoring bills to prevent domestic violence. She was the first Hispanic woman ever to serve in the state's senate.

While Solis identifies herself as a Roman Catholic, she is pro-choice. She also signed a "Statement of Principles," released to the public on February 28, 2006, which affirmed Catholic Democrats' commitment to their faith, but said that they disagreed with the Church on some issues. They stated that on those issues, such as abortion rights, they decided to follow their conscience instead of the Church teachings.

Comments About Solis . . . Diverge

Among other things, AFL-CIO President John Sweeny has said: "We're thrilled at the prospect of having Rep. Hilda Solis as our nation's next labor secretary" and "The AFL-CIO looks forward to working with Rep. Solis as she charts new territory for our nation's working men and women."

Business leaders have not been quite as enthusiastic. Mark Mix, President of the National Right to Work Committee, said the selection of Solis is "very disturbing news for America's independent-minded workers" and that she has "carried water for Big Labor and voted in favor of every forced unionism power grab that has come before her."

Justin Wilson, an analyst for the Center for Union Facts, said that her co-sponsorship of the Employee Free Choice Act "signals that Obama's Department of Labor will tow the line for union bosses."

Here are Ms. Solis's positions on several key labor issues; you can draw your own conclusions.

Increasing the Federal Minimum Wage

Throughout her career, Solis has been a staunch advocate for increasing the federal minimum wage. As a California State Senator in 1996, she led the fight to increase California's minimum wage. In the U.S. House, she cosponsored the Fair Minimum Wage Act, an



important piece of the "first 100 hours" legislation that the new Democratic majority passed. In May of 2007, the federal minimum wage increase to \$7.25/hour was signed into law.

Expanding union rights in the workplace

She is a strong supporter of workers' rights to unionize and co-sponsored the Employee Free Choice Act. This legislation would take away workers' rights to vote in a secret ballot election to select a union as their sole representative, significantly change the rules of collective bargaining and adopt substantial monetary penalties for employer misconduct.

Honoring Labor Leaders

She authored legislation to recognize specific labor-union leaders. For example, she wrote a law which passed in May, 2008 to authorize the Department of Interior to study lands important in the life of Cesar Chavez and introduced a resolution to honor Dolores Huerta for her commitment to the improvement of labor conditions for farm workers.

Free Trade

Throughout her career, she has worked to end sweatshop conditions at home and abroad and protect American jobs. She strongly opposes any trade agreement which does not include protections for labor, environmental, and human rights. She voted to suspend fast track procedures for the U.S.-Colombia Free Trade Agreement (FTA), because of alleged workers' rights violations and other human rights issues in Colombia. She also voted against the U.S.-Central America Free Trade Agreement (CAFTA) and against granting the President "Fast Track" trade negotiating authority.

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Creating And Managing A Diverse Workforce

By Jim Holland and Greg Ballew (Kansas City)

For several years, employers in various industries ranging from high tech to agriculture have known that they face a potential labor shortage. Not only do employers need to add hundreds of thousands of jobs in the coming years, they also will need to fill existing positions each year due to the retirement of baby boomers and normal attrition. The labor shortage will be particularly acute in the area of skilled labor.

As a result, employers must reach out to persons who have not traditionally pursued careers in their particular industry. In many cases that means overcoming misperceptions about employment opportunities in the industry. For example, there is a prevailing myth that construction jobs are for white men, that work in the restaurant industry is a lesser alternative to other career options, and that only younger people can excel in computer-oriented high tech industries. To succeed, such employers must embrace the challenge of fostering diversity in the workplace.

Getting The Terms Straight

Encouraging diversity is not affirmative action – it is a recognition that people in your organization will differ in background and experience. A diverse workforce is one which enhances productivity by affording all employees and applicants a positive work environment and the opportunity to advance within an organization. There are a number of things employers can do to foster a workforce which recognizes diversity.

- prepare a written policy that demonstrates a commitment to providing equal employment opportunity for all applicants and employees;
- have a strong statement of non-discrimination in the workplace and an effective complaint procedure;
- consider adopting a diversity mission statement;
- be clear about what qualifications are needed for a position and make sure that the qualifications established for a given position actually reflect those needed to do the job rather than those based on historical assumptions;

- develop relationships with organizations that cater to the needs and interests of atypical industry candidates (e.g., people of color, women, older workers, etc). Membership in such organizations will increase your networking base and, thus, increase and diversify your applicant pool;
- consider partnerships with local schools and trade schools; become a mentor through such programs and use your company as a means to further and promote interest in careers in your industry;
- place job listings in newspapers that have a diverse audience so that you reach new candidates in different communities;
- monitor your diversity efforts and determine what activities have promoted a positive and diverse workforce; and
- showcase diversity in your annual report, on your website, and at every opportunity to communicate with the public. A diverse workforce is something to be proud of – it is indicative of progressive corporate thinking that will likely result in increased profitability.

Developing Your Corporate Culture

As your workforce becomes more diverse, you must also effectively train workers to deal with the changing workplace culture. “Buy-in” from all levels is critical for maintaining diversity. While a company may be committed to diversity, if front-line supervisors have not been trained, the company’s objective will likely fail. Managers and supervisors must recognize that the way they treat their existing employees has a great deal to do with whether a particular organization is able to attract and retain the employees it needs to be a successful organization.

Unless a company creates a climate that welcomes and is hospitable to those who are in some way different from the existing group, costly turnover can result as new talent leaves. Consider the following in maintaining and managing a diverse workforce:

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Preventing Workplace Injuries

She was a cosponsor of the Protecting America’s Workers Act, which would significantly alter the Occupational Safety and Health Act. This proposed legislation increases penalties against employers for safety violations, enhances protections for whistleblowers, provides for involvement of third parties in the settlement process and mandates that employers pay for personal protective equipment for employees.

Extending Unemployment Benefits

In parts of her Congressional District, the unemployment rate has reached 9%. In June, 2008, she voted for the 13-week extension of unemployment benefits for workers who lost their jobs in our nation’s struggling economy.

Spending Federal Funds For “Green-Collar” Jobs and Training Programs

She has been a strong supporter of investment in “green collar” jobs. These jobs include green building, energy-efficiency retrofit and service, and renewable energies such as wind, solar and bio-fuels.

She authored legislation to provide \$125 million for green-collar job training, with an emphasis on impoverished communities.

Preventing Corporate Corruption

Solis believes that corporate fraud and mismanagement has resulted in massive layoffs. Therefore, she supports further legislation to hold executives accountable and to impose governmental restrictions on corporations and the capital markets.

Conclusion

Employers should read President Obama’s selection of Solis as Labor Secretary as a clear signal of changes to come at the Department of Labor. Her positions on increasing the minimum wage and unemployment, favoring unions in the workplace, opposing free trade, spending federal monies for training programs and generally imposing more restrictions on employers and management rightfully should cause concern for employers.

Change is coming and employers would be well advised to get their houses in order now to avoid becoming the target of more aggressive regulations and enforcement strategies in the near future.

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E-Mails, Memos, and Other Smoking Guns

By Tillman Coffey (Atlanta)

Hopefully, nothing in this article about the dangers of e-mails, memorandums, etc. will be news to you. You may even say to yourself “Who didn’t know that?” Well, apparently some folks “forget” from time to time that information in e-mails, memorandums, and other documents is discoverable in litigation and may be the basis for large amounts of money changing hands. The information in them may or may not convey the author’s actual beliefs or motivations – but it may be a jury who decides.

Tales From The Crypt

By way of example, a company undergoing a recent reorganization asked its managers to evaluate employees being considered in the reduction in force. In response, one manager wrote in an e-mail that one of her employees was not performing as well as others because that employee was older and had health problems. The e-mail went on to note that the younger employees had more energy and production.

Upon further inquiry, the manager defended her recommendation of this person for layoff by noting that she told this employee during her last performance evaluation that she, the manager, had concerns that the employee’s health and age were issues and affecting her performance. The manager even wrote words to that effect in the evaluation – which also is discoverable.

In another situation, managers evaluating employees for potential layoff made a number of comments in writing that could be interpreted as establishing discriminatory intent. Issues such as race, sex, and age were

discussed prominently in the written evaluations and employee comparisons.

A Few Simple Reminders

Remember that when litigation is threatened, you have a duty to preserve information whether stored electronically or in hard copy. Also keep in mind that even deleted e-mails may be recovered from the company’s server, and that recipients may have printed copies of these e-mails. “Smoking gun” e-mails often are the centerpiece of harassment claims but may be equally damaging in other cases.

Train all your managers that before sending any e-mail, especially those concerning employees, they should consider whether they would want the e-mail read on television (or in court) or printed in the newspaper. Recently politicians from two major cities found themselves in trouble based on information contained in e-mails sent to and received by them.

The lesson (or reminder) is that when evaluating, or even discussing, employees for any reason, your managers should be aware that their words may not break their bones, but they can hurt them and your company. Take a few minutes today to remind your managers and supervisors to be careful in their written communications.

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The Vacation Nobody Wants

By John Thompson (Atlanta)

The difficult financial environment is causing many employers to consider cost-savings in the area of employee compensation. The ideas sometimes include a temporary or intermittent scheduling of unpaid days off for employees whom the employer classifies as exempt executive, administrative, or professional employees under the federal Fair Labor Standards Act.

As employers consider what to do, they should be careful not to undercut the “salary basis” of payment that is necessary in order to treat most such employees as exempt. Hard times will not be a defense to the substantial liability that usually results when employees no longer qualify for an FLSA exemption.

What’s Required

Paying on a “salary basis” means that an employee regularly receives each pay period a fixed, predetermined amount of money (of at least \$455 per week) for every workweek in which the person performs any work. U.S. Labor Department rules provide that, with some exceptions, this amount cannot be subject to reduction based upon the number of hours or days the employee works. More to the point, the salary may not be docked for absences during a workweek caused by the employer or by the organization’s operating needs.

For example, DOL has considered situations in which employers facing business downturns curtailed operations by shutting down for a day or two in one or more workweeks. In its view, the “salary basis” rules did

not permit docking exempt employees’ salaries for those unworked days. It did not matter that the employers were trying to avoid layoffs or to preserve the employees’ job security.

Finding A Workaround

But employers do have at least some options. One of them is to reduce exempt employees’ salaries (temporarily or otherwise) on a *going-forward* basis, such as in connection with implementing a shortened work schedule. To meet the exemption rules, each employee’s new salary rate still must be at least \$455 per week and must still be paid consistently with the “salary basis” rules. That is, the lowered salary could be docked only when those rules allow it, which would not include days off in a workweek due to shutdowns.

Another possibility grows out of the principle that the salary need not be paid for any workweek in which the exempt employee performs no work. If the employee is furloughed for one or more entire workweeks, then the “salary basis” rules do not require that he or she be paid any of the salary in those instances.

Of course, you can’t say that employees have performed no work if they take work home to do it there instead, handle matters by telephone, log-in remotely by computer to perform duties from outside the office, and so on. And remember, the relevant time period is the seven-day *workweek* the employer has established and documented for the employees as is required under the FLSA; this is not necessarily the same as a calendar week or a scheduled week.

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- Make sure that information about position openings and developmental opportunities are accessible to all employees through an organization-wide posting system;
- Create a mentoring program that matches new employees with those who are more seasoned. Not only will new employees get to learn first-hand from successful employees, both mentors and protégés have the opportunity to develop trusting relationships that will enhance the work experience;
- Provide continuous training. When a company invests in its employees, they are more inclined to feel valued and believe they have genuine opportunities for advancement;
- Listen and be flexible. The key to retaining skilled employees from different backgrounds and generations is flexibility. Before a new idea is summarily dismissed it should be considered whether the idea is dismissed because it is truly implausible or simply because it is different from the way the company has previously operated.

The Bottom Line

There are clear benefits associated with a diverse workforce. Diversity brings to an organization the varied experiences and thoughts of

persons of dissimilar backgrounds. It increases creativity and promotes the growth of the workforce that is absolutely critical to today's employers. Employing a diverse workforce, particularly one that reflects the community in which you provide your services, opens up business opportunities and allows you to maintain a competitive edge.

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Getting DOL Backup

Whether you pursue one of these avenues or others, implement such arrangements only after careful, advance planning. For one thing, in today's supercharged wage-hour litigation environment, it can be important that an employer documented its reliance upon DOL authorities in doing what it did. DOL opinion letters have approved some downturn-related measures employers adopted in the past.

And state or local laws might impose their own additional requirements or limitations curtailing your alternatives. For instance, a jurisdiction might require advance notice of a particular content and length before an employee's pay is reduced, or it might interpret its own salary-based exemptions so as to preclude steps the FLSA's versions allow.

The bottom line is this: even if the pressure is on, resist the temptation to act in haste where these matters are concerned.

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Firm News

Fisher & Phillips expanded its already broad national scope by adding two new offices last month in Louisville, Kentucky and Portland, Maine. We now have more than 225 attorneys in 21 offices throughout the country, all representing management in labor and employment matters.

The Louisville office was founded by Jeff Savarise, Tom Birchfield, Craig Siegenthaler, George Adams and Katherine Hessenbruch. They were quickly joined by Todd Logsdon and William Vail. All were formerly with the Louisville-based law firm of Greenebaum Doll & McDonald PLLC. Tom Birchfield is the managing partner of the office. Jeff Savarise will chair Fisher & Phillips' Automotive Manufacturing Practice Group.

The Portland, Maine, office consists of attorneys who were formerly the firm of Moss Shapiro, a prominent labor and employment boutique in Maine. Jonathan Shapiro is the managing partner, joined by Eric Uhl, Melinda Catherine, David Strock, Philip Moss and Jennifer Sawyer Norvell.

We are delighted that we will be able to service our clients even more effectively and economically with these outstanding new lawyers.