Labor Department Announces Double Damages Reprieve For Employers

Insights
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The U.S. Department of Labor just announced that, effective July 1, it will not seek liquidated damages in wage and hour investigations against employers as a matter of course. This is a welcome development for those employers otherwise facing the prospect of a double damages finding in the pre-litigation stages of an FLSA dispute with the federal agency.

The June 24 announcement provides the specific circumstances under which the Department of Labor will forego seeking pre-litigation liquidated damages in its wage and hour investigations. Liquidated damages are imposed as a multiplier of any back wages the agency finds owing. For every dollar of back wages the agency finds an employer owes, the FLSA includes provisions allowing for an additional dollar of liquidated damages to be added. Under the new policy just announced, the agency has said it will not seek such double damages when:

- there is not clear evidence of bad faith and willfulness;
- the employer's explanation for the violation(s) show that the violation(s) were the result of a bona fide dispute of unsettled law under the Fair Labor Standards Act (FLSA);
- the employer has no previous history of violations;
- the matter involves individual coverage only;
- the matter involves complex section 13(a)(1) and 13(b)(1) exemptions; or
- the matter involves state and local government agencies or other non-profits.

Additionally, the agency indicated that its representatives will need to receive approval from both the WHD Administrator and the Solicitor of Labor in order to seek pre-litigation liquidated damages.

This change in enforcement is in response to the President's May 19, 2020 Executive Order on Regulatory Relief to Support Economic Recovery in response to the COVID-19 pandemic. Included in the EO was the following directive: "The heads of all agencies shall identify regulatory standards that may inhibit economic recovery and shall consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as provided for in enforceable agreements with respect to those requirements, for the purpose

of promoting job creation and economic growth, insofar as doing so is consistent with the law and with the policy considerations identified in section 1 of this order."

Potential Basis for Not Reverting Post-Pandemic

Notably, this is not the first time the USDOL has swapped its position on the assessment of liquidated damages in an investigation. Yesterday's bulletin is more in line with the position the agency took prior to the Obama administration - the first to seek liquidated damages in administrative matters.

The imposition of liquidated damages during USDOL investigations has long been a source of contention and frustration for businesses and attorneys who advise and represent them. Technically, the law states a court should decide whether and to what extent an employer must actually pay liquidated damages, not the USDOL. 29 U.S.C. § 260. The FLSA does not include authority for the USDOL to impose FLSA liquidated damages on its own authority; these sums can only be the outgrowth of a judgment in a lawsuit. 29 U.S.C. § 216(b) and § 216(c).

The trouble has been that, when faced with a low dollar back wage finding, the costly prospect of litigation, business disruption, and potential negative media coverage, businesses have often been pressured by the USDOL to simply pay liquidated damages instead of fighting them.

The Bottom Line

Yesterday's bulletin is a much more measured position. It reserves to the USDOL the right to seek pre-litigation liquidated damages when a business that had previously been found to be out of FLSA compliance continues to willfully disregard the law, or when the violations uncovered are knowingly egregious and committed in bad faith.

While this news is welcomed by many employers, this should serve as a reminder to all businesses that the federal and state wage and hour laws still apply, even during these unparalleled times of economic uncertainty. Businesses must continue to be vigilant and ensure their wage and hour practices are compliant. Ignorance of the law does not suffice as a valid defense. Assuming that an accountant, payroll provider, or bookkeeper knows the ins and outs of these complicated laws is a mistake made by many employers. It is key for businesses to engage seasoned wage and hour counsel to audit and advise on these practices, including attorneys from our Wage and Hour Practice Group.

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