



USDOL's Liquidated-Damages "Policy" Remains Obscure

Insights

12.16.16

The federal Fair Labor Standards Act has long authorized the U.S. Department of Labor to sue to recover unpaid minimum-wage and overtime compensation due to current and former employees *plus* "an equal amount as liquidated damages". 29 U.S.C.A. § 216(c).

For decades, USDOL rarely sought liquidated damages at the administrative phase of an FLSA investigation. Instead, ordinarily these amounts were not on the table until the agency had filed (or at least until the U.S. Solicitor of Labor had specifically threatened to file) a lawsuit.

A Shift In Approach

But over the last several years, and with increasing frequency, USDOL investigators and/or their supervisors have begun to insist that an employer pay at least some amount in FLSA liquidated damages as a condition of resolving alleged violations asserted at the conclusion of the investigator's compliance analysis. Some investigators have said that they are doing so under a written policy USDOL adopted within the last couple of years and conveyed to the field as being mandatory.

Of course, the FLSA itself confers no authority upon the agency to assess or compel the payment of these sums independently of a court. Instead, USDOL's current stance is ultimately based upon its increasingly-aggressive imposition of tough settlement terms.

What Exactly *Is* This "Policy"?

The contents of USDOL's "policy" and the exact nature of its implementation are uncertain in light of on-the-ground experience. Among the things that remain unclear are in what circumstances and according to what principles and standards USDOL decides to insist upon full or partial liquidated damages in one investigation as compared to another.

Consequently, almost eleven months ago, we sent USDOL a Freedom of Information Act request asking for a copy of this "policy". To date, we have received no substantive response.

We are told only that there is "a large backlog" of FOIA requests, and that a further update will be forthcoming after a search for unspecified documents has been completed. There has been no explanation as to why any time-consuming search for a specific, clearly-identified document of recent vintage would be necessary, or why USDOL has been able to provide responses to more-recent, more-involved FOIA requests.

The Bottom Line

Perhaps the truth is that USDOL does not intend to disclose any such "policy" document at all before the current administration ends on January 20. It is of course also possible (but by no means assured) that the coming Trump Labor Department will return to the longstanding past practice.

In any event, we will continue to pursue our FOIA request or will renew it, if necessary.