More About USDOL's Liquidated-Damages Policy

Insights
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We wrote last December about our ongoing efforts to secure a copy of an undisclosed "policy" that various U.S. Department of Labor officials have referred to in insisting that an employer pay at least some amount in liquidated damages as a condition of resolving alleged federal Fair Labor Standards Act violations at the investigative level.

After more than a year, USDOL has finally responded by disclosing at least some documents. It has so far refused to release others, referring vaguely to a Freedom of Information Act exemption.

Excerpt From Internal Procedures

The agency provided to us an undated copy of Section 53c00(a) from a non-published chapter of its *Field Operations Handbook*, a manual that contains many of the U.S. Wage and Hour Division's policy guidelines. As recently as December 2013, Subsection 53c00(a)(2) referred to liquidated damages simply by saying that USDOL was authorized to file a lawsuit to recover them.

But the *newer* version now adds in pertinent part that the Wage and Hour Division "may, acting upon the advice and counsel of [the Solicitor of Labor], seek both back wages and liquidated damages . . . *in a settlement that is agreed to in lieu of litigation*." *FOH* Subsection 53c00(a)(1)(c) (emphasis added). This implicitly concedes the point we made in our prior post to the effect that neither USDOL nor its Wage and Hour Division has any statutory authority to assess or compel the payment of these sums independently of a court.

Thus, if an employer declines to pay liquidated damages as a settlement term, then the Division must decide whether to reach an agreement nevertheless or to ask the Solicitor to file a lawsuit. Of course, it is possible that the Solicitor will already have expressed a willingness to litigate under those circumstances.

Possible "Outs"

Another, very-illuminating portion of the document discusses situations in which the Division might, "in consultation with [the Solicitor]," decide not to press the point. *FOH* Subsection 53c00(a)(2) says that this could be the case where the employer has shown that "it has met the legal requirements for the good faith defense to liquidated damages under section 11 of the Portal-to-Portal Act . . .." The provision to which that sentence refers says that a court has the discretion to reduce or eliminate liquidated damages "if the employer shows to the satisfaction of the court that the act or

omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . .." 29 U.S.C. § 260.

In addressing what the defense requires, USDOL and the Division reveal some considerations that might cause them not to seek liquidated damages in a settlement. Subsection 53c00(a)(2) says that the "good faith" defense necessitates an employer's demonstrating:

◊ "a subjective belief that it was acting in good faith ([for example], it had consulted an attorney and acted upon that advice)", *and*

◊ "that its actions were objectively reasonable ([that is], it was an understandable mistake given the facts and legal factors)."

It is unsurprising that the agency would be disinclined to insist upon liquidated damages as a settlement term if it concludes that management would have a defense to them in court. Even so, knowing something about how this matter will be evaluated at the settlement stage could prove to be important.

The Bottom Line

USDOL has not been forthcoming about either exactly what information it has withheld or the specific rationale(s) according to which it believes this to be justified. We will be seeking further information.

Nonetheless, employers faced with liquidated-damages settlement demands from USDOL and/or the Division should take these latest disclosures into account in deciding how to proceed.