



"Wage Theft"/"Wage Recovery" Bills Introduced

Insights

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Pending proposals would radically transform the federal Fair Labor Standards Act and the related federal Portal-to-Portal Act. Entitled the "Wage Theft Prevention and Wage Recovery Act" in both the House (H.R. [3467](#)) and the Senate (S. [1652](#)), under this legislation employers would face substantially-increased compliance burdens and significantly-expanded potential liabilities.

A "Deal Enforcement" Provision

The most-remarkable change would essentially turn the FLSA into a means for enforcing wage arrangements. Currently, the FLSA simply requires employers to pay non-exempt workers not less than the prescribed minimum-wage rate and overtime compensation. The U.S. Department of Labor and the courts have said that this law is not a vehicle for enforcing compensation understandings.

But the pending bills would create an FLSA "Right to Full Compensation" if remuneration at higher than the minimum wage is supposedly promised:

In the case of an employment contract or other employment agreement, including a collective bargaining agreement, that specifies that an employer shall compensate [a covered employee] at a rate that is higher than the [minimum wage], the employer shall compensate such employee at the rate specified in such contract or other employment agreement.

This would also affect the FLSA's overtime requirements, because those obligations are predicated upon the underlying wages that a worker receives. Subject to how such a provision was ultimately construed, FLSA remedies could then be in play if management allegedly failed to pay what it purportedly said it would.

Additional Requirements

Other new employer obligations would include:

- ◇ Providing disclosures of prescribed information within 15 days after (i) hiring, or (ii) "any" of the initially-provided information changes; and
- ◇ Detailed "paystubs" for each pay period.

Furthermore, a terminating employee's final wages and "benefits incurred" would have to be paid by the *earlier* of:

- ◇ The payday for the pay period in which the termination occurs; or
- ◇ 14 days after the employment ended.

If an employer failed to meet the applicable deadline, compensation at the individual's "regular rate" would accrue for up to another 30 days.

Employees could also "request" to inspect USDOL-required records, including time records, covering a period of up to five years. Employers would then have 21 days to provide copies. An employer's failure to maintain "complete" records of hours worked or wages due would trigger rebuttable presumptions favoring an employee's claims regarding hours worked, unpaid wages, and resulting FLSA violations. These presumptions could be rebutted only by "clear and convincing" evidence.

Enforcement Changes

The present limitations periods for FLSA claims are two years for most violations and three years for "willful" ones. The bills would extend these to four years and five years, respectively. Moreover, for the first time, these periods would be suspended during a USDOL investigation.

Other draconian revisions would include these:

- ◇ Instead of the current add-on "liquidated damages" of an amount *equal* to the unpaid wages, the additional damages would be *two times* the unpaid wages (plus interest), or *three times* the unpaid wages (plus interest) for unlawful retaliation;
- ◇ Civil penalties would be increased to as much as \$2,000 per employee for monetary violations, or up to \$10,000 per employee for repeated or willful violations of those kinds;
- ◇ For the first time, violations of USDOL's recordkeeping requirements would be punishable by fines of up to \$1,000 per-affected-employee for first offenses, increasing to as much as \$5,000 per-affected-employee for subsequent ones;
- ◇ Violations of the disclosure or "paystub" requirements would be subject to fines of up to \$50 per-affected-employee for first offenses, increasing to as much as \$100 per-affected-employee for subsequent ones;
- ◇ FLSA arbitration agreements apparently would be foreclosed as a practical matter;
- ◇ The criminal fine would be changed from a maximum of \$10,000 to a maximum of \$10,000 *per-affected-employee*, and USDOL would be required to refer cases for prosecution under certain circumstances.

The proposals also provide for grants to "community partners" to promote collaborative

enforcement of federal wage-hour laws. "Community partners" would include (among others) an "employee or advocate of employees", certain kinds of "academic institution[s]", and "consulate[s]".

The Bottom Line

The enactment of these proposals, or even of some of them, would represent a major shift in federal wage-hour requirements and enforcement.

Employers should not assume that the passage of one or more of these measures is out of the question. Instead, management should be alert for any signs that they will, for example, become tied to otherwise-unrelated legislative dealmaking.