



A Cost Of Getting "Caught" - FLSA Civil Money Penalties

Insights

1.25.19

This week the U.S. Department of Labor published increases in the civil money penalties (CMPs) it can impose for certain violations of the federal Fair Labor Standards Act. These new levels apply to any penalties assessed after the effective date of January 23, 2019, including with respect to predicate violations that already have occurred.

A Trade Off When Facing An Investigator Instead Of An Attorney

Sometimes the one silver-lining to a USDOL investigation is that the investigator does not charge the employer the way a plaintiff's lawyers does (employers often paying fees for both parties in private litigation), but that is offset somewhat by the possibility of CMPs. If an investigator informs an employer that it has been "caught", it is important to understand the standards for CMPs and the narrow window for opposing them, particularly if no violation occurred or any violation was inadvertent.

Minimum Wage/Overtime Penalties

The FLSA's Section 16(e)(2) authorizes USDOL to impose a monetary penalty for a "repeated" or "willful" violation of that law's minimum-wage or overtime requirements. In accordance with the enactment of the Civil Penalties Inflation Adjustment Act Improvements Act of 2015, agencies now adjust penalties annually. The newest increase, effective immediately, permits USDOL to impose a monetary penalty of up to \$2,014 for a violation.

The agency normally imposes these assessments "per-person" based upon the number of employees an employer paid unlawfully. Notably, an employer's transgression can be considered a "repeated" one for penalty purposes even if it is not factually or legally the same as an earlier one. Additionally, USDOL can assert a penalty for a "willful" violation if the employer knew that it was in violation or acted with *reckless disregard* for whether it was in violation.

Child Labor Penalties

Now, USDOL can assess a monetary penalty of up to \$12,845 for each worker under 18 years old who was employed in violation of the FLSA's child-labor restrictions set forth in the agency's related regulations. A child-labor violation that results in a minor's serious injury or death will be punishable by a civil penalty of up to \$58,383. This sum could be doubled to \$116,766 as the result of a "repeated" or "willful" violation.

Recordkeeping

Notably, there is no civil monetary penalty for recordkeeping generally. But proper recordkeeping, and timekeeping in particular, can be the lynchpin to demonstrating compliance with the above requirements. In other words, recordkeeping can be a costly violation in that a failure can lead to minimum wage and/or overtime violations (and thus trigger CMPs). So employers should find no comfort in that the FLSA does not provide a separate penalty for non-compliance with this underlying requirement.

The Bottom Line

While these figures are the *maximum* that USDOL can impose, and in isolation the increases appear minor, it is entirely possible for civil money penalties to be substantial. Employers should assume that USDOL will impose penalties of at least some significant amount when an investigator finds child labor violations regardless of the absence of back wages due. Moreover, as the agency's news releases remind us regularly, it will assess penalties in other matters where it deems appropriate.

Even if management has looked into FLSA compliance in the past, it is always wise to conduct a regular check-up and to bear in mind that the cost of non-compliance continues to rise. If you view the CMPs as a deterrent now, you can focus on achieving compliance before potentially facing them as a penal measure later.

Of course, should you find yourself being investigated, consider getting assistance from counsel at the outset or at least before agreeing to any findings.

Service Focus

Wage and Hour