



DOL/ABA Lawyer-Referral Program Threatens More FLSA Litigation

Insights

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One might think that the risk of a wage-hour lawsuit couldn't get any higher, but it will soon increase even more.

Vice President Biden and the American Bar Association recently announced that, starting December 13, the U.S. Labor Department will provide a toll-free number to connect people who have made federal Fair Labor Standards Act complaints with an ABA-approved attorney-referral service to help them find a qualified lawyer to handle their claims. It appears that the Labor Department will do this on matters it concludes it cannot pursue given its limited resources.

In the past, DOL sometimes notified employees of their rights to sue under the FLSA when an employer refused to pay back-wages voluntarily but the government decided that the case was "not suitable for court action" by DOL. These so-called "16(b) letters" were careful to say that DOL neither encouraged nor discouraged a lawsuit, and that whether to take action was entirely up to the individual. It remains to be seen whether DOL's communications under this new program will be similarly restrained, but providing ready access to a lawyer might in itself be viewed as already tilting the balance in favor of suing.

Moreover, before DOL sent a "16(b) letter", it had concluded that there was an FLSA violation. Nothing we have seen to date forecloses the possibility that the new program will include situations in which DOL has no idea whether the employee's claim is valid or even has anything to do with the FLSA's requirements.

So far as we are aware, no DOL/ABA lawyer-referral program is being adopted for employers (regardless of size) faced with allegations that they have run afoul of the FLSA. Presumably, this is due to the DOL/ABA view that, as ABA President-elect Bill Warren puts it, "Wealthy people may already know or have a lawyer . . ."

It is more important than ever for employers to evaluate their compensation practices *right now* to see whether they are *fully in compliance* with the FLSA and with all applicable state or local laws. Employers should regularly train and re-train payroll employees and appropriate management personnel to ensure that they know how to comply with all wage-hour requirements in the course of doing their jobs, including as to the calculation of worktime totals and the proper amounts of pay.

Furthermore, employers should conduct regular internal wage-hour compliance audits, certainly at least once a year.

This new program will likely also affect how employers go about interacting with the U.S. Wage and Hour Division in connection with investigator inquiries and compliance audits.