USDOL's "Willful" Misdefinition

Insights
8.31.16

The U.S. Labor Department has now issued its final "Guidance" concerning President Obama's July 2014 "Fair Pay and Safe Workplaces" Executive Order. Our recent Labor Alert summarizes this lengthy Guidance, which among other things obligates prospective and existing federal contractors and subcontractors to disclose "violations" of 14 federal labor laws (and related state laws) and requires federal officials to take these "violations" into account in deciding whether to award a federal contract to a particular contractor or whether to exercise a contract option.

However, buried in this voluminous document is what might be a window into USDOL's current approach to analyzing whether violations of the federal Fair Labor Standards Act are "willful" for purposes of:

◊ Extending the normal two-year statute of limitations to three years, and/or

◊ Assessing enhanced civil money penalties for noncompliance with the FLSA's compensation requirements.

The Proper "Willful" Standard

There is no statutory definition of what is a "willful" violation in either regard. In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), the U.S. Supreme Court said willfulness is shown if "the employer either *knew* or *showed reckless disregard for* the matter of whether its conduct was prohibited by the statute . . .." *Id.* at 133 (emphasis added). The Court even indicated that an employer's actions could be unreasonable while still falling short of recklessness, such that the violation would not be "willful". *Id.* at 134 n. 13.

The Court specifically rejected the U.S. Secretary of Labor's proposed definition, which would have included an employer's acting "without a reasonable basis for believing that it was complying with the [FLSA]." *Id.* at 134. In the Court's view, such a standard would improperly permit a willfulness finding "based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption . . .." *Id.* at 135.

"Willful" Under The Guidance

The Guidance sometimes articulates the *Richland Shoe* standard, that is, here-and-there it refers to whether a contractor acted in knowing or reckless violation. But USDOL purports to *define* "willful" for purposes of reporting FLSA violations (and others) to mean that:

the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor . . . knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or *acted with plain indifference to*, whether its conduct was prohibited by one or more requirements of the Labor Laws.

[Emphasis added]. USDOL erroneously claims that this formulation is "well-established, having been applied for many years by courts and administrative agencies in the context of the . . . FLSA . . .."

On the contrary, this "plain indifference" criterion plainly encompasses an independent, third variety of act or omission that is something less than knowing or reckless. At least where the FLSA is concerned, *Richland Shoe* makes it clear that "plain indifference" is an improper standard for determining what is "willful".

The Bottom Line

USDOL has steadily become more aggressive in seeking three years' worth of payroll information in some of its FLSA investigations and in asserting civil money penalties on the premise that some FLSA violations were "willful".

The Guidance's definition has to do with the reporting required by the "Fair Pay and Safe Workplaces" Executive Order, rather than with these FLSA enforcement measures. Nevertheless, this aspect of the Guidance suggests that USDOL might well be determining the appropriateness of these steps based upon internal reasoning that is flatly inconsistent with the ruling in *Richland Shoe*.

Management should be alert for this possibility, both in dealing with USDOL FLSA investigations and in evaluating what it must do under the Executive Order where the FLSA is concerned.