Insights: Alerts

BREAKING: Department of Labor Ends Pursuit of Pre-Litigation Liquidated Damages

JUNE 26, 2020 Written by Christopher M. Caiaccio, Diane L. Prucino and Kayla M. Lazarus

In a Field Assistance Bulletin released on Wednesday, June 24, 2020, the U.S. Department of Labor Wage and Hour Division announced that it would no longer pursue pre-litigation liquidated damages in enforcement actions against employers for minimum wage and overtime violations under the Fair Labor Standards Act (FLSA). The announcement marks an end to the Department's policy, begun under the Obama administration, of seeking both back wages owed to an employee plus an equal amount as liquidated damages in any pre-litigation negotiated settlement with an employer. The previous policy resulted in employers being assessed "double damages" for any failure to pay wages owed under the FLSA. Effective July 1, 2020, the Department will not assess pre-litigation liquidated damages in settlements with employers if any of the following circumstances is present:

- There is no clear evidence of bad faith and willfulness;
- The employer's explanation for the violations show that the violations were the result of a bona fide dispute of unsettled law under the FLSA;
- The employer has no previous history of violations;
- The matter involves individual coverage only;
- The matter involves complex section 13(a)(1) exemptions (applicable to bona fide executive, administrative, professional, and outside sales employees) and 13(b)(1) exemptions (applicable to motor carriers whose qualifications and maximum hours are established by the Secretary of Transportation) ; or
- The matter involves State and local government agencies or other non-profits.

The policy shift is a response to Executive Order 13924, *Regulatory Relief to Support Economic Recovery*, issued by President Trump on May 19, 2020, in which the President instructed executive branch agencies to review their existing regulatory standards and take appropriate action to mitigate regulations and policies that could impede economic recovery in the wake of COVID-19. The announcement was accompanied by a memorandum from Deputy Labor Secretary Patrick Pizzella noting that the double damages policy resulted in a slower resolution of administrative cases and that rigid of enforcement of the policy did not sufficiently allow for the good faith efforts of businesses to comply with the FLSA. He noted that is especially the case "as employers face novel and practical challenges in applying the FLSA into new conditions in response to the coronavirus pandemic." Going forward, requests for pre-litigation liquidated damages will need to be approved by the Wage and Hour Division Administrator and the Solicitor of Labor.

While the Department's new policy may provide some relief to employers in administrative actions, it does not insulate employers from the significant costs that can result from wage and hour violations. Notably, the new policy does not affect the Department's authority to pursue liquidated damages against an employer in court. Similarly, employees may pursue liquidated damages in a private actions against employers. Many state laws offer greater

protection to employees, with some states allowing employees to recover triple the amount of unpaid wages as liquidated damages. Employers should conduct routine audits of their wage and hour practices to identify and correct any areas of noncompliance to reduce their potential exposure resulting from wage-hour violations.

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