

De Facto Liquidated Damages Policy Defunct: A New U.S. Department of Labor Policy Changes the Game in Pre-Suit FLSA Settlements

On June 24, 2020, the U.S. Department of Labor (the "DOL") published a Field Assistance Bulletin indicating that it will no longer pursue pre-litigation liquidated damages in settlements pursuant to the Fair Labor Standards Act ("FLSA") in lieu of litigation. This monumental change benefitting employers comes after an Executive Order signed by President Trump in May 2020. The Order was aimed at helping businesses recover from the economic effects of COVID-19 by requiring federal agencies to lift certain regulations and enforcement procedures.

In the wake of COVID-19, businesses were forced to adjust to new and rapidly changing circumstances. The DOL expressly acknowledges that these changes created challenges for businesses in applying the FLSA to new conditions created by the ongoing COVID-19 pandemic. As such, the DOL determined that employers who worked to understand their obligations and are generally in compliance with the FLSA, should no longer be burdened with double damages that are recoverable in litigation.

Since approximately 2011, it has been the DOL's de facto policy to seek liquidated damages, in an amount equal to the unpaid wages assessed against an employer, as part of a pre-litigation negotiated settlement for unpaid wages under the FLSA.

However, effective as of July 1, 2020, the DOL will no longer pursue liquidated damages for settlements prior to the DOL filing a complaint, if one of the following conditions exists:

1. If there is not clear evidence of bad faith and willfulness;
2. If the employer explains the violations were the result of a "bona fide dispute of unsettled" FLSA law;
3. If the employer doesn't have a history of violations;
4. If the case only involves individual coverage;
5. The matter involves complex exemptions; or
6. If State and local government agencies or other non-profits are involved.

The DOL notes that investigations into alleged FLSA violations involving liquidated damages takes 28% more time to complete than those involving back wages only. By reducing the time spent investigating these claims, employees may be more willing to settle at the pre-litigation stage if it means expeditiously receiving money. In turn, employers can avoid the burden of double damages if the employer opts to settle the matter prior to the DOL filing a complaint in court. Given the economic struggles imposed on employers by COVID-19, this change could prevent unnecessary expenses and could help employers keep their businesses open. Thus, this new policy incentivizes employers to settle with the DOL before a claim makes it way to court.

Despite the positive news for business owners, employers must still be aware that liquidated damages are possible, and in fact likely, when none of the above conditions are met. Therefore, it is critical that employers make sure their wage and hour practices are compliant with the FLSA.

If you have questions about these developments, complying with the FLSA, or are in need of representation with a wage and hour matter, please contact one of the experienced employment attorneys at Kaufman, Dolowich & Voluck.