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BLOGS

Department of Labor; Employment Law Updates; Wage & Hour

Recent Developments in the Wage and Hour Arena – Liquidated Damage Demands in Settlement

The new federal administration continues to put its stamp on the development and enforcement of wage and hour laws under the Fair Labor Standards Act (FLSA). Recently, the Department of Labor (DOL) issued a new Field Assistance Bulletin ([Bulletin 2021](#)), revoking a Trump administration policy relating to the practice of seeking liquidated damages in pre-litigation settlement discussions.

Employers who violate the FLSA provisions relating to minimum wage, overtime compensation, and protections for tipped employees, are liable for the unpaid wages or tips as well as an equal amount as liquidated damages. In other words, the employer would be liable for double the actual amount owed to the employee.

Prior to June 23, 2020, the policy of the Wage and Hour Division (WHD) of the DOL was to seek liquidated damages in certain cases with the approval of the Regional Solicitor. On June 23, 2020, the Trump administration issued an Executive Order announcing that it would no longer be seeking pre-litigation liquidated damages except in cases where there was “clear evidence” of bad faith or a history of violations by the employer.

The Bulletin revokes the Trump administration Executive Order and provides that the WHD will seek to assess pre-litigation liquidated damages on a case-by-case basis. WHD will not make a demand for liquidated damages without first obtaining approval from the Regional Solicitor. The Bulletin makes clear that liquidated damages will not be assessed “where the employer has set forth credible evidence of a good faith defense or where [Regional Solicitor] deems the matter inappropriate for litigation.”

As a result of this change, the amount that the DOL will demand in settlement discussions may once again include liquidated damages. Therefore, it is likely that the amount and employer may pay to settle the action before litigation will increase.