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Enforcement, Remedies, Penalties, and Settlements

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Table of Contents

Enforcement, Remedies, Penalties, and Settlements

Reference Number: MTAS-961

Enforcement

The FLSA authorizes the Secretary of Labor to initiate investigations to determine whether an employer has violated the provisions of the FLSA. The Department of Labor "may investigate and gather data concerning wages, hours, payment of back wages and other employment practices. They may enter and inspect an employer's premises and records. They may also ask any question of employees to determine whether any person has violated any provisions of the act." 29 U.S.C. § 211(a).

DOL has identified the following investigative procedures (WH Publication 1340 (Rev. Aug. 1979)) for a compliance officer to use when conducting an investigation. The compliance officer will:

1. Identify himself and show the employer official credentials.
2. Confer with the employer or a designated representative, making any necessary explanation about the records that need to be seen and the approach to be taken. The compliance officer also will ask the employer's permission to conduct private interviews with some employees.
3. Ask the employer to make space available for his use and to designate some staff member who can help with questions about the employer's records and payroll system.
4. Ask to see certain records to determine what laws apply and what, if any, exemptions are available.
5. Review payroll and time records, often on a spot-check basis, and make notes or transcriptions essential to the investigation. Information from the employer's records will not be revealed to any unauthorized person.
6. Interview certain employees privately to confirm payroll or time records, identify workers' duties in sufficient detail to decide if any exemptions apply, and determine if minors are illegally employed.

When all the fact-finding steps have been completed, the compliance officer will ask to meet with the employer or representative about the investigative findings. If no violations are discovered, the employer is told. If violations were found, the employer is told what they are and how to correct them.

Remedies

Reference Number: MTAS-1533

"Employees claiming FLSA violations can sue their employer for their unpaid minimum wages or their unpaid overtime compensation and the recovery of back wages and liquidated damages (an amount equal to the wages improperly withheld)." 29 U.S.C. § 216(b). "Class action suits, however, may not be brought under the FLSA, but actions on behalf of all similarly situated employees may be brought against an employer if each party gives consent in writing to become a party and such consent is filed in the court in which the action is brought." 29 U.S.C. § 216(b).

An employee may not file a suit if:

1. The employee has received back pay for wages due under the FLSA under supervision of the Secretary of Labor,
2. The Secretary of Labor has filed suit to recover the unpaid wages or liquidated damages; or
3. The Secretary of Labor has filed suit to enjoin the employee's right to sue in his or her own name and recover liquidated damages. 29 U.S.C. § 216(c).

When an employee brings a back-pay suit on his own behalf and wins, the court may require the employer to pay the employee's reasonable attorney fees. The employee may, if successful, also recover court costs, including the employees' witness fees and other miscellaneous cost of the litigation. "The Secretary of Labor can also bring a lawsuit against an employer on an employee's behalf for the recovery of back wages and liquidated damages, or for back wages and an injunction enjoining the employer from committing any further violations of the FLSA." 29 U.S.C. §§ 216, 217. If the Secretary

seeks an injunction, the employer cannot be liable for liquidated damages; however, if the employee sues directly, the employee can recover attorney's fees while the Secretary of Labor cannot.

"The employee or the Secretary of Labor must file suit within two (2) years after a violation occurs, or three (3) years if the employer has willfully broken the law." 29 U.S.C. § 255. Willful violations occur if the employer knew that its conduct was prohibited by the act or showed reckless disregard for the requirement of the act. "Persons who willfully violate the act are subject to a fine of up to $10,000, or imprisonment for up to six months, or both." 29 U.S.C. § 216(a). The penalty of imprisonment applies only after two violations are filed by the U.S. Department of Justice. The statute of limitation for criminal prosecution is five years.

Penalties

Reference Number: MTAS-1534

The FLSA allows the U. S. Department of Labor to assess civil monetary penalties on employers who willfully violate the act's minimum wage and overtime provisions not to exceed $1,100 for each violation. 29 U.S.C. § 216(e)(2). "Civil monetary penalties of not more than $10,000 or imprisonment for not more than six months, or both may be assessed for violating section 206 or 207 (minimum wage and overtime provisions)." 29 U.S.C. § 216(a). The statute of limitation for civil money penalties is five (5) years." Field Operations Handbook § 52 f14(a)(4).

The FLSA provides that any employer who violates the child labor provisions of the act is subject to civil monetary penalties of $10,000 or $50,000 with regard to each violation that causes the death or serious injury of any employee under the age of 18. Child labor violations (29 C.F.R. § 579.3(a) and 29 C.F.R. § 579.5) include:

1. The failure by an employer to maintain and preserve records concerning the date of the minor's birth and proof of the minor's age; and
2. The failure by an employer to take action to assure compliance with all requirements concerning conditions for lawful employment of such minors.

Employers have several defenses that may be used in answering FLSA lawsuits. They include an absolute good faith defense, a defense to liquidated damages and the statute of limitation defense. DOL opinion letters also provide much of the guidance for employers with questions about DOL policies and may be an important defense in a lawsuit brought by employees alleging violations of the FLSA.

The Portal-to-Portal Act provides that "an employer will not be liable for back wages if it can establish that its actions were taken in good faith." Essentially, the absolute good faith defense in the Portal-to-Portal Act (29 U.S.C. § 259(a)) states that:

... no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wage or overtime compensation under the Fair Labor Standards Act of 1938 *... if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the act or proceeding ...*

To use the defense, the employer must establish that it acted in good faith. "Good faith is defined by the regulations as 'honesty of intention ... no knowledge of circumstances which ought to put him on inquiry'." 29 C.F.R. § 790.15(a). For an employer faced with an FLSA lawsuit, the absolute good faith defense means that the employer will not be liable for employee back pay, liquidated damages, pre- or post-judgment interest, costs, etc. Instead, the only relief available is that the employer can be enjoined from committing future violations for the FLSA but cannot be punished for past acts.

On April 29, 2010, the Department of Labor announced that it was ending its decades-old practice of issuing opinion letters explaining how the federal wage and hour law applies to specific scenarios faced by employers. The DOL instead will issue occasional broad pronouncements called 'Administrative Interpretations' that will summarize the agency's 'general interpretation' of the FLSA, but will not explain how the law applies to specific facts. On June 27, 2017, the DOL reinstated its wage and hour opinion letters. The department has established a website [1] where the public can see if existing agency guidance already addresses their questions or submit a request for an opinion.

Finally, an employer cannot retaliate against an employee for “whistle blowing”; that is, it cannot discharge an employee for filing a complaint or participating in an FLSA proceeding. The act “forbids any person, including employers, from discharging, retaliating against, demoting, harassing, or in any other manner discriminating against employees for engaging in such a protected activity.” 29 U.S.C. § 215(a)(3). Employers or others who violate the section may face fines of not more than $10,000 or imprisonment for not more than six months or both. 29 U.S.C. § 216(a). Additionally, an employee who suffers discriminatory treatment may seek an injunction ordering the employer to reinstate him.

Settlements

Reference Number: MTAS-1535

Settling FLSA cases can pose numerous traps for employers. Private settlements between employers and employees are not necessarily final. The statute provides that the Secretary of Labor “is authorized to supervise the payment of unpaid minimum wage or unpaid overtime compensation owing to any employee, and the agreement to accept such payment acts as a waiver by the employee of further rights upon payment in full.” 29 U.S.C. § 216(c). Additionally, a settlement can be submitted to a court for stipulated judgment in a lawsuit.

In certain cases, the courts have rejected non-DOL supervised settlements. Lynn’s Food Stores Inc. v. United States, 679 F.2nd 1350, 1352-54 (11th Cir. 1982). This fact makes it essential to obtain DOL supervision and blessing for any settlement of FLSA claims. Even where a settlement is rejected, the employer still may use the payments already made as a credit against potential FLSA liability. If an employer is unable, because of financial reasons, to make a full, lump-sum settlement payment for back wages, it is possible to arrange installment payments provided the employer’s agreement to pay in installments is “both reasonable and firm.” U.S. Department of Labor Field Operations Handbook § 53C15. Such installments should be made based on an agreed-upon schedule, and DOL may require the employer to waive the running of any statute of limitation.

“In the event an employee refuses to accept back wages payments or cannot be located, ‘any sums’ not paid to an employee (because of the aforementioned inabilities) within three years shall be payable into the Treasury of the United States as miscellaneous receipts.” 29 U.S.C. § 216(c). Upon settlement of an FLSA claim, the DOL may ask the employer to sign (1) an agreement that stipulates present and future compliance with the FLSA, (2) an agreement to deliver certified or cashier’s checks for back wages, and (3) a waiver of the statute of limitation. Settlement procedures for the FLSA are quite formal, and employers should confer with the city’s attorney prior to attempting any private settlements.

Damages awarded to employees as wages generally are taxable. Liquidated damages awarded to employees, however, are not considered wages for employment under 29 U.S.C. § 216(b), even though they still may be taxable. Keen v. Mid-Continent Petroleum Corp., 63 F. sup. 120 (D. Iowa 1945). The Internal Revenue Service has ruled that “such amounts are income to the employee and thus must be included in their federal income tax returns. Rul. 72-268, 1972-1 CF 313.

Conclusion

The best defense to liability under the FLSA is avoidance. Though not currently among the most litigated federal statutes governing workplace compensation, cities continue to be liable for minimum wage and overtime pay to employees who work beyond the prescribed limits. The act is like a deserted mine field waiting for the uninformed and complacent. The liabilities can be significant to any organization and affect each and every employee in some fashion. Supervisors should be advised to ensure that employees do not work over the limits. Accurate records of hours worked should be maintained.

Before dismissing the act as annoying, remember that its primary objective was to “... eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers ... without substantially curtailing employment or earning power.” In other words, hire more people and minimize your FLSA exposure.

Links:

[1] http://www.dol.gov/whd/opinion/