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WAGE AND HOUR

US Department of Labor 'Beefing Up' Enforcement Efforts

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In recent months, the U.S. Department of Labor (DOL) has announced multiple compliance initiatives. With the Consolidated Appropriations Act recently signed into law by President Joe Biden allocating a 14% increase in funding to the DOL—and $2.1 billion designated specifically to worker protection agencies under its purview—the DOL is "beefing up" its enforcement efforts with additional resources.

On March 10, the DOL announced that one of its top enforcement priorities is retaliation, and it is particularly focused on retaliation under the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA), among other statutes, orders and trade agreements. As part of this initiative, the DOL launched a new webpage dedicated to providing retaliation-related information and resources. In addition, the DOL issued field assistance bulletin (FAB) No. 2022-02 titled "Protecting Workers From Retaliation," which provides guidance on retaliation claims under its jurisdiction.

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This comes on the heels of increased coordination efforts with other agencies, including the National Labor Relations Board (NLRB), the Department of Justice Antitrust Division (DOJ Antitrust Division), and the Equal Employment Opportunity Commission (EEOC), among others. In addition, the Occupational Safety and Health Administration (OSHA) recently issued an enforcement memorandum titled "COVID-19 Focused Inspection Initiative in Healthcare" aimed at ensuring compliance and preparedness at hospitals and skilled nursing care facilities. During this three-month initiative, OSHA will assess COVID-19 mitigation strategies and conduct walkarounds at facilities previously cited or facilities where complaints were received but no inspections previously were conducted. OSHA also is reopening the COVID-19 health care rulemaking record April 27, to allow for additional comments as the agency prepares to promulgate a final standard following its emergency temporary standard for health care organizations (ETS).

Employers should be aware of this uptick in enforcement, particularly in light of the steep penalties, including potential criminal liability for FLSA violations.

DOL RAMPS UP ON HIRING ENFORCEMENT STAFF, COORDINATION WITH OTHER AGENCIES

In early February 2022, the DOL announced that the Wage and Hour Division (WHD) is looking to hire 100 new investigators (which represents a nearly 13% increase in its ranks), signaling an increased focus on enforcement. According to the DOL's 2022 budget in brief, the WHD expects that its $30 million funding increase in the 2022 fiscal year "will enable WHD to aggressively combat worker misclassification, along with fully enforcing the other areas under its purview like prevailing wages and family and medical leave." With the WHD collecting over $230 million in back wages in the 2021 fiscal year, employers should anticipate an even more vigorous pursuit by the DOL of those suspected of running afoul of employee wage-and-hour laws.

While the DOL increases its investigative focus in the WHD, it is simultaneously coordinating efforts with various agencies to bolster its resources. On Jan. 6, the DOL and NLRB signed a memorandum of understanding (MOU), strengthening the agencies' partnership and outlining procedures on information sharing, joint investigations and enforcement activity, as well as training, education and community outreach. On March 10, the DOL and DOJ Antitrust Division executed a similar MOU, stating that they "share an interest in protecting competition in labor markets and promoting the welfare of American workers." The DOL and DOJ Antitrust Division's MOU also contains an express directive that each agency will refer potential violations to the other, opening the door for a potential increase in criminal wage-and-hour investigations.

RETALIATION AT FOREFRONT OF ENFORCEMENT INITIATIVES

A significant focus of the Biden administration's enforcement efforts relates to retaliation claims. More than half (55.8%) of all charges of discrimination filed with the EEOC in 2020 contained allegations of retaliation, a percentage that has steadily increased over the past two decades.

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On Nov. 17, 2021, the DOL, EEOC, and NLRB announced a joint initiative to raise awareness of retaliation claims. In speaking about this initiative, Solicitor of Labor Seema Nanda emphasized that, "this collaboration among federal enforcement agencies will form a bulwark against unlawful retaliation."

While the FAB issued by the DOL on March 10, does not materially change the existing law, it highlights specific examples of what constitutes unlawful retaliation, perhaps signifying certain types of conduct that the DOL intends to target. Examples of unlawful retaliation provided in the FAB include:

- Terminating an employee for contacting WHD to ask about overtime pay.
- Disciplining an employee for attempting to exercise her rights to express breastmilk in the workplace.
- Assigning attendance points to an employee under a no-fault attendance policy where the employee took approved FMLA leave to care for his child.
- Reducing an employee's hours after the employee utilized intermittent FMLA leave for her own medical condition.

The FAB reiterates that complaints qualifying as protected activity may be made orally or in writing, in line with the U.S. Supreme Court's 2011 ruling in *Kasten v. Saint-Gobain Performance Plastics*. Significantly, the FAB also provides that both internal complaints to an employer, as well as external complaints to the WHD, constitute protected activity under the FLSA, a question left open by the court in *Kasten* (although many courts have since ruled that internal complaints qualify as protected conduct). The FAB states that even complaints made by a third party on an employee's behalf constitutes protected activity.

While certain conduct that qualifies as materially adverse actions are

obvious—for example, a termination or demotion—the FAB emphasizes that even subtle conduct can trigger a finding of retaliation. This includes "icing" an employee out by excluding the employee from regularly scheduled meetings. The FAB provides that such actions also can be overt, for example intimidating employees to return back wages awarded to them. The guidance concludes with an emphasis on the WHD's commitment to vigorously investigate and remedy two types of materially adverse actions: constructive discharge, and immigration-based threats, including actions to frighten or prevent workers from exercising workplace rights due to their immigration status. The FAB specifically states that the WHD, "will consider all remedies and sanctions available to protect workers and change behavior," including injunctive relief, compensatory damages and make-whole relief, such as lost wages and payment for economic losses that resulted from the retaliatory conduct, as well as punitive damages where appropriate.

STEEP PENALTIES FOR EMPLOYERS

The DOL's focus on retaliation is not all talk. In February, a New Hampshire retailer was ordered to pay $50,000 in punitive damages to a worker terminated in retaliation for asking for owed overtime wages (in addition to $2,177 in back pay and $1,348 in overtime wages) following a WHD investigation. This month, a federal court ordered a Massachusetts employer who threatened a former employee who participated in a WHD investigation to pay $25,000 in punitive damages. The consent order entered into by the court also enjoins the employer and company owner from threatening or retaliating against any employee, former employee, or their families. In Connecticut, a restaurant was forced to pay $150,000 in damages, including $90,000 in punitive damages, after using threats of retaliation to coerce nine workers to return thousands of dollars of back wages and liquidated damages previously recovered by WHD to the employer.

Beyond retaliation claims, recent WHD investigations have resulted in substantial judgments against employers in Pennsylvania. Just this month, the U.S. District Court for the Eastern District of Pennsylvania ordered a home health care agency to pay over $4.5 million in back wages and liquidated damages, in addition to over $150,000 in civil money penalties for willful violations. A Pennsylvania landscaping company also recently was ordered to pay $150,000 in back wages and civil money penalties following a WHD investigation related to failure to pay overtime wages.

TAKEAWAYS FOR EMPLOYERS

With the DOL's increased enforcement efforts, employers should evaluate their compliance programs and make necessary modifications, particularly with respect to the retaliation provisions of the FLSA and FMLA by:

- **Revisiting policies and consistently enforcing them:** Given the transformation of many workforces during the pandemic combined with the uptick in enforcement, employers should assess whether to make modifications to existing policies and should be mindful to be consistent in enforcing their policies.
- **Educating and training managers and employees:** Employers should clearly communicate to all employees that there is zero tolerance for any form of retaliation and explain what qualifies as retaliation by providing examples. Managers should be trained on what to do in the event they receive a complaint from an employee.
- **Investigating and remedying any violations:** When an employee complains about a potential violation or retaliation, employers should promptly and fully investigate. Of course, where appropriate, employers should take remedial action to address any problematic behavior or rectify any pay issues.
- **Auditing worker classification and overtime:** Employers should work to ensure that workers are properly classified and are paid for all hours worked under the FLSA and state law, including all overtime hours.

Over the last two years, employers have weathered myriad challenges. As we continue to re-emerge following the fog of the pandemic, employers should ready themselves for the uptick in enforcement heading their way. •