

Source: Daily Labor Report: News Archive > 2014 > January > 01/28/2014, Special Report > Labor Department > Awaiting New Head, Wage and Hour Division Focuses on Targeted Enforcement

18 DLR S-19

WAGE AND HOUR DIVISION

Even though the Labor Department's Wage and Hour Division is still without an administrator, it is forging ahead with its enforcement and wage collection activities as it awaits the outcome of the confirmation process for David Weil, who has been nominated to head the division. The WHD says it's planning to continue existing initiatives, such as working with foreign consulates to help foreign workers, rather than launch bold new initiatives. On the regulatory front, it is redefining the definition of "spouse" under the FMLA and implementing the new home care worker rule that took effect Jan. 1.

Awaiting New Head, Wage and Hour Division Focuses on Targeted Enforcement



By Gayle Cinquegrani

Jan. 28 — The Labor Department's Wage and Hour Division is focusing on its ongoing enforcement and rulemaking activity while awaiting the arrival of an official head.

Deputy Administrator Laura Fortman has been running the division while David Weil, who was nominated as the wage and hour administrator in September, goes through the confirmation process.

In written responses sent Jan. 7 to questions from Bloomberg BNA, the WHD indicated that it isn't poised to undertake any bold new initiatives but is forging ahead with a robust sense of mission in protecting workers' wages.

"Our core compliance priorities will continue to be the protection of the most vulnerable workers in the workplace and providing customer-oriented and quality service to workers, to employers, and to the public," the division said.

The DOL said it recovered \$249,954,412 in back wages for more than 269,250 workers in fiscal year 2013.

The WHD noted that a third of the back wages came from only nine industries—agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial, and temporary help.

"The Wage and Hour Division will continue to focus on these and similar industries where workers have been historically exploited and denied their rights to the minimum wage, overtime, and other worker protections," the division said.

Locating Workers Who Are Owed Back Wages

"One of our top priorities is to ensure that the money we collect is rightfully and expeditiously paid to the workers who earned it," the WHD said. The division said it is "working to improve the process of locating workers due back wages" and working on a new interface for its Back Wage Employee Locator System (in English and Spanish), which will be "more user-friendly" and in a more prominent location on the department's website.

Furthermore, the division said, it continues "to work with stakeholders, such as foreign consulates, to help locate and identify those workers entitled to back wages that have already been collected."

"The Department has signed formal partnerships with the embassies of the Dominican Republic, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Philippines and Mexico to assist us with protecting migrant workers employed in the U.S. and to help communicate with workers whom the Department may not have otherwise been able to reach," the WHD said.

Under the agreements, the DOL's Occupational Safety and Health Administration and appropriate WHD district offices cooperate with the consulates of the partner countries. This facilitates complaint referrals, training of consular staff, and restitution of wages owed to workers, the WHD said.

The division also teams up with states to protect workers, primarily by sharing information and coordinating enforcement efforts to fight misclassification.

Misclassification refers to the practice by which some employers incorrectly label employees as independent contractors to skirt minimum wage, workers' compensation and unemployment insurance laws. So far, 15 states have

signed memorandums of understanding with the DOL, and "the Department is actively pursuing MOUs with additional states as well," the WHD said.

The Wage and Hour Division said it continues "to work with stakeholders, such as foreign consulates, to help locate and identify those workers entitled to back wages that have already been collected."

"These collaborations are making a difference," the WHD said. "Since September 2011, when the Wage and Hour Division began entering into MOUs with states and announced a similar partnership with the [Internal Revenue Service], our investigations have resulted in nearly \$18.3 million in back wages for over 19,200 workers where the primary reason for minimum wage or overtime violations under the [Fair Labor

Standards Act] was that workers were not treated or classified as employees," the division said.

Revising Definition of 'Spouse.'

On the regulatory front, the WHD is working to revise the definition of "spouse" under the Family and Medical Leave Act to comply with the U.S. Supreme Court's June decision in *United States v. Windsor*, 133 S. Ct. 2675, 118 FEP Cases 1417 (2013).

Windsor struck down the Defense of Marriage Act's exclusion of state-sanctioned, same-sex marriages from the federal definition of marriage. The WHD told Bloomberg BNA that it already has revised several of its guidance documents to remove provisions that denied federal benefits to legally married, same-sex couples.

The division also said it plans to "to work closely with the Department of Health and Human Services, the states, and other stakeholders" to implement the home care worker rule that took effect Jan. 1. The rule, issued in September 2013, extended the minimum wage and overtime provisions of the FLSA to approximately 2 million home health and personal care workers.

Opponents of the highly controversial rule predicted that higher wages would cause layoffs for home care workers and institutionalization for patients who no longer could afford home care. The WHD said it will work to "ensure Medicaid participants and their families continue to have access to the critical community services on which they rely, and which support innovative models of care that help the elderly and people with disabilities live in the community."

The WHD also said it has been helping "various stakeholders, including disability, veteran, worker, and elderly groups, to educate them about the new rule and work with them in developing additional materials for their members."

Payroll Debit Cards

Payroll debit cards are emerging as an issue to watch, but the WHD has not announced any plans to regulate the practice. In a payroll card system, an employer electronically transfers a worker's wages to a payroll card that the worker uses as he would a bank debit card, except that the payroll card draws down his wages rather than his bank account.

Supporters of the practice point out that workers don't need to open a bank account or wait for their paychecks to clear before using their payroll debit cards. Some employees, however, have complained about unexpected fees for using automatic teller machines or checking the balance of their card.

When asked if it is considering a rulemaking, the WHD told Bloomberg BNA it is analyzing the use of payroll debit cards and is "working in collaboration with the Consumer Financial Protection Bureau on the issue."

In September, the CFPB, an independent federal agency, issued a bulletin reminding employers that they can't force their employees to use a payroll card and that the payroll debit card users have rights under the Electronic Fund Transfer Act. These include the right to information about fees and limited liability for unauthorized use of the card, the CFPB said.

"What needs to be clear, however," the WHD said, "is that an employer's use of any unconventional payment method must not reduce a worker's hourly earnings below the federal minimum wage."

The division is continuing its rollout of new smartphone apps to help workers and the public. The WHD said it's working with the winner of the DOL's Fair Labor Data Challenge to launch a software application this spring designed to "integrate the department's current data with consumer ratings websites, geo-positioning and other relevant data sets, enabling consumers, employees and other users to check if a hotel, restaurant, shop, or retail location has been investigated by the Wage and Hour Division and whether labor violations were found."

In reality, most employers "try to comply with the law, but sometimes the law is just unclear," attorney and chair of the Wage and Hour Defense Institute Robert Boonin said.

The division said the DOL Timesheet App was downloaded more than 32,000 times as of December 2013. The app is available in both Spanish and English and enables users to calculate the wages they are owed by tracking their work hours, break time and any overtime hours for one or more employers.

Outside Observations

Groups that work with wage and hour issues also weighed in on WHD's likely activity during 2014, but they focused on different aspects of the division's authority.

Catherine Ruckelshaus, general counsel for the National Employment Law Project, said she would like the division to publish guidance on several topics. She hopes the WHD will "issue guidance on independent contractor abuses," such as calling employees "franchisees" or requiring them to create LLCs as a condition of getting a job, she told Bloomberg BNA Dec. 18.

"There is federal legislation pending to address the problem, but the WHD could issue guidance on the scope of the FLSA and how to interpret employment relationships," she said.

Ruckelshaus said she also would like the WHD to "issue guidance on when multi-tiered employment structures (like supply chains, or networks, and temp and staffing arrangements) create joint employment relationships with more than one responsible party." She also recommended that the WHD issue regulations that permit workers to know the terms and conditions of their pay and hours when they're hired.

By contrast, Robert Boonin, chair of the Wage and Hour Defense Institute and a partner at the Dykema law firm in Detroit, said he would like the WHD to retrench somewhat from its tough stance on regulatory compliance.

"The recent trend—and one which we hope will fade—makes it appear that the DOL assumes the employers wish to violate the law," Boonin told Bloomberg BNA Jan. 7. In reality, Boonin said, most employers "try to comply with the law, but sometimes the law is just unclear."

In particular, he said, the defense bar is concerned about "DOL's general position that certain penalties may be assessed without formal adjudication." He said the DOL "is taking the position with respect to many of its investigations lately that employers must pay liquidated damages in addition to unpaid overtime in order to resolve an adverse administrative finding," even though under the FLSA "liquidated damages may only be assessed by a court."

"Settlements would be easier to work out if liquidated damages weren't on the table," Boonin said, adding that "many claims do not warrant liquidated damages since employers who find out that there may be overtime due were unaware of the overtime having been incurred."

He lamented that "the WHD—particularly in light of the background of the likely new Administrator—appears primed to short-circuit the adjudication process and impose penalties normally reserved for after there's been a full adjudication of the matter."

Boonin added, however: "Hopefully in 2014 the DOL will view employers through a more understanding and cooperative lens."

To contact the reporter on this story: Gayle Cinquegrani in Washington at gcinquegrani@bna.com

To contact the editor responsible for this story: Susan J. McGolrick at smcgolrick@bna.com

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 2156-2849

Copyright © 2014, The Bureau of National Affairs, Inc. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy.
<http://www.bna.com/corp/index.html#V>