



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210



June 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-2

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Cheryl M. Stanton
Administrator

SUBJECT: Practice of Seeking Liquidated Damages in Settlements in Lieu of
Litigation

This Field Assistance Bulletin provides guidance to WHD field staff regarding the practice of seeking liquidated damages in settlements in lieu of litigation.

Background

President Donald J. Trump signed Executive Order (E.O.) 13924, *Regulatory Relief to Support Economic Recovery*, requiring the Department to continue removing certain regulatory and enforcement barriers to economic prosperity as America strives to defeat the economic effects of COVID-19. Administrative Fair Labor Standards Act (FLSA) investigations involving liquidated damages take 28 percent more time than those involving back wages only. In response to E.O. 13924, and to reduce the time needed to conclude FLSA administrative cases to return back wages to employees more quickly, WHD will no longer pursue pre-litigation liquidated damages as its default policy from employers in addition to any back wages found due in its administratively resolved investigations.

Enforcement Guidance

Effective July 1, 2020, the Department will not assess pre-litigation liquidated damages if any one of the following circumstances exist:

- there is not clear evidence of bad faith and willfulness;
- the employer's explanation for the violation(s) show that the violation(s) were the result of a bona fide dispute of unsettled law under the FLSA;
- the employer has no previous history of violations;
- the matter involves individual coverage only;

- the matter involves complex section 13(a)(1) and 13(b)(1) exemptions; or
- the matter involves State and local government agencies or other non-profits.

Furthermore, each request for pre-litigation liquidated damages under the FLSA must be submitted to and approved by both the WHD Administrator and the Solicitor of Labor (or either of her designees) on an individual basis.

See the Memorandum dated June 23, 2020, Practice of Seeking Liquidated Damages in Settlements in Lieu of Litigation, attached, from Patrick Pizzella, Deputy Secretary of Labor, to Cheryl M. Stanton, Administrator of the Wage and Hour Division, for further details.

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C. 20210

JUN 23 2020

MEMORANDUM FOR: CHERYL M. STANTON
Administrator of the Wage and Hour Division

KATE S. O'SCANNLAIN
Solicitor of Labor

FROM: PATRICK PIZZELLA 

SUBJECT: Practice of Seeking Liquidated Damages in
Settlements in Lieu of Litigation

Pursuant to President Trump's Executive Order (E.O.) 13924, *Regulatory Relief to Support Economic Recovery*, signed on May 19, 2020, the Department is required to continue removing certain regulatory and enforcement barriers to economic prosperity for Americans.

E.O. 13924 acknowledges that American workers have been adversely impacted by business closures and other economic effects of COVID-19 and, therefore, instructs agencies to waive certain regulations and other requirements in order to "give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication." *See* § 1, E.O. 13924.¹ E.O. 13924 also directs the heads of all agencies to "consider the principles of fairness in administrative enforcement and adjudication," in light of the policy principles outlined in Section 1 of the E.O. and in accordance with existing law, and "revise their procedures and practices" accordingly. *See id.* § 6. Such principles of fairness include that procedural rules are "public, clear, and effective." *See id.* § 6(e). Further, penalties imposed in the course of administrative enforcement "must be proportionate, transparent, imposed in adherence to consistent standards and only as authorized by law." *See id.* § 6(f).

The Department has long been authorized, through the Solicitor of Labor, to "bring an action *in any court* of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and *an equal amount as liquidated damages.*" 29 U.S.C. § 216(c) (emphases added). I understand that since approximately 2011, in a departure from its long-standing prior policy, the Department has engaged in the practice of recovering liquidated damages as part of a pre-litigation negotiated settlement of alleged Fair Labor Standards Act (FLSA) liability for unpaid wages where the Department has yet to file a complaint in court (hereinafter "pre-litigation liquidated damages"). I further understand that while no applicable guidance has been published to date specifically concerning pre-litigation liquidated damages, the Department has often pursued this approach as the default *de facto* rule, rather than as an exception. Finally, I understand that

¹ "Administrative enforcement" is defined in E.O. 13924 to include "investigations, assertions of statutory or regulatory violations, and adjudications . . ." *See* § 2(c), E.O. 13924.

FLSA administrative cases take longer to conclude—and thus delay workers’ receiving back wages—in cases where liquidated damages are assessed.

Continuing to recover pre-litigation liquidated damages as the rule, rather than the exception in limited cases, appears to be an administrative enforcement practice that E.O. 13924 describes as potentially inhibiting economic recovery in these challenging times for American workers. In particular, this rigid enforcement policy does not appear to sufficiently allow for “the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances.” *See* § 1, E.O. 13924. This is especially true as employers face novel and practical challenges in applying the FLSA to new conditions in response to the coronavirus pandemic. These efforts should ensure that those employers who genuinely work to understand their obligations under the FLSA and are generally in compliance, and who elect cooperatively to resolve alleged violations without litigation and, therefore, return unpaid wages to workers expeditiously, are not also saddled with doubled damages designed for the litigation context that might jeopardize the ongoing existence of these employers and, as a result, the jobs of American workers. When coupled with the lack of “public, clear, and effective” guidance, this enforcement practice appears to be precisely the type of practice that E.O. 13924 requires the Department to revise to ensure proportionality, transparency, and consistency. *See* § 6, E.O. 13924.

Therefore, pursuant to E.O. 13924, I hereby direct that the Department modify its existing administrative enforcement policy so that recovery of pre-litigation liquidated damages is instead considered the exception, not the rule, such that the Department will not assess pre-litigation liquidated damages if any one of the following circumstances exist:

- (1) there is not clear evidence of bad faith and willfulness;
- (2) the employer’s explanation for the violation(s) show that the violation(s) were the result of a bona fide dispute of unsettled law under the FLSA;
- (3) the employer has no previous history of violations;
- (4) the matter involves individual coverage only;
- (5) the matter involves complex section 13(a)(1) and 13(b)(1) exemptions; or
- (6) the matter involves State and local government agencies or other non-profits.

The framework outlined above will apply to all cases in which WHD has not conducted a final conference with the employer. I also direct that each request for pre-litigation liquidated damages under the FLSA be submitted to and approved by both the WHD Administrator and the Solicitor of Labor (or either of her designees) on an individual basis.

This Memorandum is effective July 1, 2020.

Thank you for your cooperation.