



July 17, 2020

## Double Damages Is Now the Exception, Not the Rule, in Pre-Litigation Settlements for FLSA Violations

On May 19, 2020, President Trump signed Executive Order 13924, *Regulatory Relief to Support Economic Recovery* (“E.O. 13924”), to combat the economic consequences of COVID-19. E.O. 13924 directs federal agencies to “address the economic emergency by rescinding, modifying, waiving or providing exemptions from regulations and other requirements that may inhibit economic recovery ...” and to “give businesses, especially small businesses the confidence they need to reopen by providing guidance and recognizing the efforts of businesses to comply with complex regulations in complicated and swiftly changing circumstances.”

On June 24, 2020, the United States Department of Labor (“DOL”) responded to E.O. 13924 by issuing Field Assistance Bulletin 2020-2 (“Bulletin”). The Bulletin announces a shift in the DOL’s previous policy of pursuing liquidated (or double) damages in pre-litigation settlements. The DOL, in response to E.O. 13924, reviewed its policy on liquidated damages and recognized that investigations involving liquidated damages take 28% more time than those involving back wages only.

Deputy Secretary of Labor Patrick Pazzille, in his memorandum directing such policy change, noted that “[c]ontinuing 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.” Citing Section 1 of E.O. 13924, the Deputy Secretary stated that the rigid policy would not sufficiently allow for “the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances.”

Under the new policy, the DOL will not assess pre-litigation liquidated damages if any one of the following circumstances is present:

- 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.

The directive against liquidated damages applies only to cases where the DOL’s Wage and Hour Division (“WHD”) has not conducted a final conference with the employer. In addition, each request for pre-liquidated damages must be submitted to and approved by both the WHD and the Solicitor of Labor (or either of her designees) on an individual basis. Employers should also be mindful that the new policy does not apply when either the Secretary of Labor or an employee/plaintiff files a lawsuit and seeks liquidated damages in court.

If you wish to visit with us about the impact of these DOL changes, please contact a member of Kutak Rock’s [FLSA Litigation and Wage and Hour Defense Group](#), a member of the [Employment Law Group](#), or your Kutak Rock attorney. You may also visit us at [www.KutakRock.com](http://www.KutakRock.com).

This Client Alert is a publication of Kutak Rock LLP. It is intended to notify our clients and friends of current events and provide general information about labor and employment issues. This Client Alert is not intended, nor should it be used, as specific legal advice, and it does not create an attorney-client relationship.

© Kutak Rock LLP 2020 – All Rights Reserved. This communication could be considered advertising in some jurisdictions. The choice of a lawyer is an important decision and should not be based solely upon advertisements.