



More on FLSA . . .

Employers Beware: Punitive Damages May Be Available for FLSA Retaliation Claims

by Andrea Richard

The new overtime regulations in the Fair Labor Standards Act (FLSA) intend to restore the overtime protections originally afforded by the Act and to reflect current workplace conditions. Undoubtedly, these changes will spur new questions and concerns from employees. Should an employee raise questions or concerns, it is important for employers to remain prudent.

Under the FLSA, in addition to attorneys' fees, punitive damages may be available against employers who retaliate. The retaliation penalties section states that any employer who violates the anti-retaliation provision of the FLSA "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the anti-retaliation provision], including without limitation, employment, reinstatement, promotion, and the payment of wages lost, and an additional equal amount as liquidated damages." 29 U.S.C. 216(b) (emphasis added). Some courts have interpreted this language to include punitive damages.

The U.S. Court of Appeals for the Seventh Circuit, for example, has allowed punitive damages for FLSA retaliation claims even when it did not award compensatory damages. The court reasoned that the FLSA provision "legal relief" was a term generally understood to include punitive damages. The court also determined that the language

"without limitation" in the penalties section of the FLSA was broad enough to include punitive damages for retaliation.

Finding the Seventh Circuit's ruling persuasive, although affirming on other grounds, the Ninth Circuit affirmed a punitive damages award against an employer and a COO and CEO individually. In that case, former employees sued their employer, alleging retaliatory discharge for internally challenging their overtime pay. The jury awarded \$12 million in punitive damages for the employees' FLSA retaliation claim. While the punitive damages award was remitted to \$4.1 million, the district court also awarded plaintiffs \$389,117.50 in attorneys' fees. Moreover, the jury deemed the COO and CEO individually liable because, due to their economic and operational control, they were considered "employers" within the meaning of the FLSA. The Ninth Circuit joined seven other circuits, including the Tenth Circuit, in finding that internal complaints are sufficient to trigger FLSA protections.

However, there is a split on the issue. The U.S. Court of Appeals for the Eleventh Circuit has held that punitive damages are not available under the FLSA for retaliation claims. The Eleventh Circuit based its decision on three main arguments: (1) the relief available under the FLSA for retaliation claims was compensatory in nature, rather than punitive;

(2) the availability of fines for criminal violations elsewhere in the penalties provision of the FLSA foreclosed the possibility of punitive damages in private enforcement actions; and (3) by analogy to the ADEA, punitive damages should also be precluded under the FLSA. *Id.* at 934-35, 938.

For now, the Tenth Circuit—which presides over Colorado and Wyoming—has yet to address the issue. However, a federal judge in at least one U.S. District Court of Colorado has considered it. In *Cork v. ACZ Laboratories*, Judge John Kane allowed punitive damages to go to the jury on an FLSA retaliation claim.

Practical Significance

Employers must take great care to avoid retaliating against employees who challenge overtime laws or risk being subject to punitive damages under the FLSA. In addition, individuals must be aware that they too may be held liable under the FLSA definition of "employer."

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The author would like to thank Rebecca Hasse for her contribution to this article.

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Practical Significance

The DOL has indicated that one of the goals of these changes was to make it simpler for employers to determine who in their workforce is a white-collar employee and who is not. It will take some time working with these

new regulations before we know whether the DOL has achieved this goal. Employers should seek legal assistance in determining specifically how these new regulations are going to impact their existing employees.

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ed issues and has tried cases in both state and federal courts, before federal administrative agencies, and before arbitration panels in disputes involving the Americans with Disabilities Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act. She can be reached at 303-628-9563 or by e-mail at ssperber@rothgerber.com.