

Employers Beware! Wage and Hour and NLRB Announce More Aggressive Enforcement

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Two Federal Agencies within the Department of Labor have recently announced aggressive enforcement initiatives.

Wage and Hour: On April 9, 2021, the Wage and Hour Division issued Field Assistance Bulletin 2021-2. This bulletin announced that the Wage and Hour Division would return to the aggressive policy of seeking liquidated (double) damages when employers are found to be in violation of the minimum wage and overtime provisions of the Fair Labor Standards Act. On June 24, 2020, the Wage and Hour Division announced that it would no longer seek pre-litigation liquidated damages where there were mitigating circumstances such as no clear evidence of bad faith or willful violations or a there was a bona fide dispute. The potential for the assessment of double damages in Wage and Hour investigations is extra incentive for employers to take steps to ensure that they are in compliance with the Fair Labor Standards Act.

National Labor Relations Board: On March 31, 2021, the Acting General Counsel announced enforcement priorities in a memorandum (GC 21-03). The Acting General Counsel indicated that he would vigorously pursue “mutual aid and protection” cases. These are cases in which a group of employees (whether or not unionized) engage in activity that is considered to be for the aid or protection of a group. The Acting General Counsel indicated that this can include political and social advocacy where it has a direct nexus to employees’ interests. Generally, to be protected, an employee’s actions must be aimed at changing employer practices or policies (as opposed to obtaining only an individual benefit). The Acting General Counsel also observed that conduct is “inherently concerted” when it is “engaged in with or on the authority of other employees,” or when an employee seeks “to initiate or to induce or to prepare for group action.” The Acting General Counsel further observed that the NLRB has held that employee discussions were inherently concerted where they involved certain vital categories of workplace life, e.g. employees who share information with each other about wages or wage differentials, discussion among employees of changes in their work schedules, and discussions concerning job security. The Acting General Counsel’s memorandum also makes clear that it will be an enforcement priority to broadly apply the inherently concerted conduct doctrine in prosecuting unfair labor practice charges. By doing so, the Office of the General Counsel will attempt to side-step the requirement of proving that the alleged discriminatee was in fact attempting to raise group concerns. Employers should be careful in

disciplining employees who have or could be construed to have raised group complaints. Be sure that any discipline is grounded in good business reasons and cannot be construed to be retaliation for raising complaints.

Bodman's Workplace Law Group is available to assist should you have specific questions related to the Fair Labor Standards Act or National Labor Relations Act. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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