



Possible Impact of Obama's Immigration Initiative: More FLSA Claims

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Lurking among the numerous considerations raised by President Obama's "immigration accountability" initiative are the prospects that this action will result in more allegations by or on behalf of the affected individuals that they have not been paid in compliance with the federal Fair Labor Standards Act.

This could come in the form of lawsuits or administrative complaints by the workers themselves, or through enforcement measures by the U.S. Department of Labor in collaboration with other federal agencies and even with foreign governments.

Undocumented workers under the FLSA

As we have written previously, the Labor Department's current policy continues to be that it will enforce the FLSA even as to work performed by undocumented workers.

Agency officials are of the view that employers must pay not less than the required FLSA minimum-wage and overtime compensation for the work performed by these individuals in the U.S., even if they were not legally authorized to do that work.

Moreover, as recently as last year, the Eighth U.S. Circuit Court of Appeals in St. Louis and the Eleventh U.S. Circuit Court in Atlanta ruled that undocumented workers may sue to recover the wages the FLSA requires to be paid for their work.

Cooperation among agencies and governments

The Labor Department participates in an "Interagency Working Group" the stated purpose of which is "to identify policies and procedures that promote the consistent enforcement of [worker-protection] laws and protect all workers in the U.S."

This group includes the U.S. Department of Homeland Security, with whom the DOL has a memorandum of understanding that is designed in part (i) to eliminate disincentives and impediments that could cause workers not to report violations; and (ii) in some circumstances even to forestall the deportation of an undocumented worker who is a witness in connection with a Labor Department enforcement proceeding.

The Labor Department also maintains a “Consular Partnership Program,” under which it has entered into agreements with Mexico and some Central and South American countries “to educate workers and their employers about vital information on lawful payment of wages . . .” As a part of this effort, DOL maintains a “Resources for Foreign Nationals” page on the Wage and Hour Division’s website.

A reasonable surmise is that Labor Department will be pursuing and perhaps expanding these contacts and resources with renewed energy in an effort to promote and secure tips, leads, and other information relevant to the laws it enforces, including the FLSA.

The bottom line

Of course, these circumstances are not new, so why anticipate an upsurge in associated FLSA claims now? Because it seems probable that:

- Workers affected by the President’s initiative are likely to be less fearful of making FLSA claims than in the past, and they might even be emboldened to do so (or encouraged to do so) once they begin the process leading to their being allowed to remain in – and to work in – the U.S.; and,
- By undertaking investigations driven not only by complaints, but also by tips and leads of other kinds and by its experience in what it calls “low wage” industries, USDOL will mount a vigorous enforcement campaign where these workers are concerned.

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