



## Court Awards Fees And Costs Against USDOL (Updated 07 16 14)

Insights

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A Texas federal court has ordered the U.S. Labor Department to pay more than \$560,000 in attorney's fees, paralegal fees, and travel expenses growing out of litigation under the federal Fair Labor Standards Act.

USDOL had alleged that a partnership and its owner violated the FLSA by treating certain workers as independent contractors rather than as employees. A federal judge ultimately rejected USDOL's claims. The defendants then sought an award of their fees and costs. While the court could not conclude that USDOL had acted in bad faith, it nevertheless ruled that the defendants were entitled to recover under the federal Equal Access to Justice Act. *Gate Guard L.P. v. Perez*, Civil Action No. V-10-91 (S.D. Tex. 2014).

### **USDOL's Position "Not Substantially Justified"**

The court noted troubling aspects of how USDOL's enforcement efforts proceeded, including (among others) that:

- The investigator appeared to have "made up his mind" before having thoroughly investigated the matter;
- He began calculating USDOL's \$6 million back-pay demand right after his initial meeting with management, at which point he had interviewed three of about 400 workers (one of whom was a "friend" from "parties" and "the bars and stuff like that");
- He shredded or burned his interview notes;
- He failed to follow the proper investigative procedures;
- USDOL eventually reduced its back-pay demand by two-thirds, acknowledging that the original one was flawed; and
- USDOL's counsel disrupted the investigator's deposition, objecting over 100 times in just 45 minutes, repeatedly instructing the investigator not to answer a question, and "coaching" the investigator in his testimony.

The court observed that almost all of the relevant factors disfavored USDOL's position on the workers' status; that more investigative effort would have shown this earlier on; and that USDOL should have abandoned its claims once the facts were revealed in discovery. In the judge's view,

USDOL "failed to act in a reasonable manner both before and during the course of this litigation," and he found that USDOL's position was "not substantially justified."

### **The Bottom Line**

The particular EAJA remedy pursued here is available only to a limited group of prevailing litigants. For one thing, most corporations seeking to invoke it cannot have a net worth of more than \$7 million and cannot have more than 500 employees.

But perhaps the larger point is that USDOL's increasingly more-aggressive enforcement posture could be provoking more push-back from employers. Moreover, there are other indications that courts are listening to these objections in the right circumstances. *See, e.g., Perez v. Pan American Berry Growers, LLC*, 21 W.H. Cases2d 1722 (magistrate recommended vacating consent judgments employers agreed to in settlement with USDOL; USDOL's actions "unfairly stacked the deck" and imposed "economic duress", leaving employers no choice but to agree), *recommendation adopted*, 22 W.H. Cases2d 840 (D. Or. 2014).

The *Gate Guard* ruling also prompted Senators Lamar Alexander (R-TN), Johnny Isakson (R-GA), and Tim Scott (R-SC) to express their concerns in correspondence to recently-confirmed Wage and Hour Administrator David Weil (link to copy below). The Senators have asked for a briefing as to how the Division "trains its investigators and how it plans to ensure the integrity of its future investigations . . . ." According to Bloomberg BNA, a USDOL representative said that officials are reviewing the Senators' letter.

Only time will tell whether, to what extent, or in what ways any of this will affect USDOL's enforcement methods.

**UPDATED 07 16 14:** Bloomberg BNA reports that Senator Alexander's office received word from USDOL that its Wage and Hour Division has "provided a staff briefing" and "conducted additional training" for investigators in the region in which this case arose. According to the same report, the Division is also evaluating whether to provide such training for investigators in its other regions.

[Senators' Letter To Wage and Hour Administrator.pdf \(434.09 kb\)](#)