U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

WHD-OL-1998-0011

July 20, 1998

NAME*

You have requested our opinion as to whether the failure to pay state employees covered by the Fair Labor Standards Act ("FLSA" or "the Act") on their regular payday constitutes a violation of the Act if the State later pays the employees all wages due, plus liquidated damages. You note that the State has taken the position that it must pay State employees on their regularly scheduled payday for the work performed, and that failure to do so would be in violation of Federal law.

As you know, the U.S. Court of Appeals for the Ninth Circuit held in Biggs v. Wilson, 1 F.3d 1537, 1539-41 (1993), cert. denied, 114 S. Ct, 902 (1994), that the FLSA requires prompt payment of the wages due under the Act at the time of the employees' normal payday. The court further held that the application of the FLSA is not precluded by the Tenth Amendment to the Constitution. 1 F.3d at 1543. Subsequently, in Caldman v. State of California 852 F. Supp. 898, 902 (E.D. Cal. 1994), the court awarded liquidated damages to the employees where the State, subsequent to the district court decision in Biggs, 828 F. Supp. 774 (E.D. Cal. 1991), again failed to make timely wage payments during a budget impasse.

The Wage and Hour Division fully agrees with the decision of the Ninth Circuit. It has been our longstanding position that an employer is required to pay employees the full minimum wages and overtime due on the regular payday for the workweek in question. See, for example, Opinion Letter 63 (Nov. 30, 1961), and the Department's interpretative regulations at 29 CFR 778.106 and 790.21(b). As the Supreme Court observed in Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945). "failure to pay the statutory minimum on time may be …detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the flow of commerce…."

That the FLSA subjects employers who violate the Act to liability for liquidated damages in the amount of the unpaid wages does not alter the fact that wages are required to be paid when due. It is axiomatic that liquidated damages are due only for violations of the Act. The court noted in Biggs that the potential liability for liquidated damages is intended to "deter employers from 'gamb[ling] on evading the Act" in the first place. 1 F.3d at 1541. Furthermore, failure to pay wages due can result in other penalties beyond liquidated damages.

In sum, we believe that failure to pay employees required minimum wage and overtime premiums when due -- i.e., on the regularly scheduled payday for the work performed –

constitutes a violation of the FLSA, notwithstanding an employer's later payment of all wages due plus an equal amount a liquidated damages.

We hope that this fully answers the questions you have raised.

Sincerely,

Culis L. Sellers for

John R. Fraser
Acting Administrator

*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).