

Trump's new boost for business revives practice lost under Obama

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The Trump administration has a new message for business leaders: We'll get it for you in writing.

The Labor Department is reviving a long-standing pro-business practice that the Obama administration buried: sending employers letters explaining exactly where the lines are drawn on federal workplace regulations. It's a potentially major boost to corporations trying to fend off lawsuits, particularly class-action cases involving workers.

Until 2009, the Labor Department's Wage and Hour Division directly responded to employer letters asking whether their current or prospective workplace policies complied with the Fair Labor Standards Act. If the department's answer was no, employers could adjust their policies accordingly. That practice abruptly stopped under the Obama administration, but it is being brought back under Labor Secretary Alexander Acosta.

The shift means that not only will employers will find it much easier to avoid lawsuits but, if they do find themselves in court, they may face fewer penalties if they lose. The Labor Department's letter becomes proof that the employer was at least trying to play by the rules even if a court finds its policies unlawful.

"The presumption in an FLSA case is that employers will have to pay both lost wages and liquidated damages [compensation]. In cases where the DOL issued a guidance letter, the employer has a 'good faith' defense and won't have to pay liquidated damages," said Eric Meyer, an attorney with the Philadelphia management-side firm of Dilworth Paxson and editor of the blog theemployerhandbook.com.

Before the Obama administration stopped the practice, employers just had to ask the Labor Department for a guidance letter. The department wasn't obligated to respond to every inquiry, but it issued dozens of the letters every year.

"You literally sent in a letter saying, 'This is our practice. Is it legal under the FLSA?' and hoped that you would get a response," said John Hyman, an attorney with the Cleveland management-side firm Meyers, Roman, Friedberg & Lewis. An official guidance letter was more likely the more widespread the practice was thought to be, he said.

Caroline Brown, a labor attorney with the Atlanta management-side firm Fisher & Phillips, noted the responses were posted online and understood to apply to employers generally.

"The letters were addressed as responses to the questioner. That said, even if a letter was addressed to a particular company, there was value in it to others. Overall, they educated everybody on what the rules were," Brown said.

The guidance letters were only advisory, so they lacked the full force of law. But they could be issued relatively quickly, often in about six months. By contrast, an official department rulemaking, which would have the force of law, could take several years.

Labor-side lawyers argue the practice allowed employers to game the system by getting the Labor Department's blessing for their workplace practices before they ever reached court. "The employer can frame the argument in the way that is best for them. The employer can then use the letter as a shield. They carried a lot of weight," said Anthony Lazzaro, a Cleveland lawyer whose namesake firm represents workers.

The Obama administration didn't like the process, either. It canceled 17 letters that had been completed but not issued before the end of the George W. Bush administration. It then replaced guidance letters with "administrator interpretations," essentially taking away employers' ability to initiate the process and instead having the Labor Department issue guidances when it deemed that necessary — which wasn't often.

The department issued seven interpretations during Obama's eight-year tenure, two of which have been rescinded by the Trump administration. The Bush administration, by contrast, released 19 guidance letters in 2008 alone.

The Trump administration has not issued any new guidance letters yet, but on Jan. 5, it formally issued the 17 Bush-era letters the Obama administration had canceled. They include responses to inquiries on when workers can be docked pay for missing work and which employee bonus practices are permissible.

Heidi Shierholz, a Labor Department official during the Obama administration, said guidance letters were dropped because the process was deemed inefficient. "The letters required a ton of time and resources, all to answer very specific questions on behalf of employers," said Shierholz, now an economist with the liberal Economic Policy Institute.

Acosta, by contrast, has argued that the department has an obligation to explain its rules. "Throughout my discussions with American job creators, they have conveyed a consistent message: They value clarity. The regulated public deserves to know how an agency interprets its regulations," Acosta told the House Education and Workforce Committee in November. His comment also indicated that business groups had lobbied the administration for the letters' return.

A Labor Department official could not be reached for comment.

Employers are getting ready to send in new inquiries. "Going forward, this is going to be an even bigger deal than it was before because FLSA litigation has only increased in the last decade," Brown noted.