

DALA/GJU STANDING ORDER 23-001:
Penalty Issues in Wage and Hour Law Cases

When the Attorney General seeks to enforce the various wage and hour laws contained in G.L. c. 149 and G.L. c. 151, the Attorney General may elect civil enforcement, through citations, which may include orders for payment of restitution and penalty assessments. When assessing a penalty for civil citations issued under the enforcement authority contained in G.L. c. 149, §27C, the Attorney General must consider the statutory factors described in G.L. c. 149, § 27C(b)(2), but is not limited to those factors. When assessing a penalty for civil citations issued under the enforcement authority contained in G.L. c. 149, § 78A, the Attorney General must consider the statutory factors described in G.L. c. 149, § 78A(a), but is not limited to those factors. Employers may appeal from the Attorney General's determinations to DALA, a state administrative agency formed pursuant to G.L. c. 7, § 4H, which is authorized to hear and decide appeals from the Attorney General's citations pursuant to G.L. c. 149, § 27C(b)(4) and G.L. 149 §78A(b). When such a matter is filed at DALA, this Standing Order shall apply.

1. DALA will inform any employer/petitioner who challenges a civil citation under the wage and hour laws about the substance of this procedure, as described below, as soon as practical and no later than at the pre-hearing stage of the proceedings. The employer/petitioner shall state the grounds for any challenge to the penalty during the pre-hearing stage of the proceedings. If the penalty amount is at issue, the Attorney General will provide information about the factors it relied upon when assessing the particular penalty amount during the pre-hearing stage of the proceedings.
2. In reviewing penalty assessments challenged as erroneously issued, DALA will apply this procedure when DALA finds there is evidence of a violation, but determines during the

hearing that the Attorney General did not establish all the material evidence which the Attorney General claims it relied upon when assessing the penalty or the employer established different facts material to the penalty assessment. This situation may arise when, for example, the amount of restitution is less than the amount in the citation or when DALA finds insufficient evidence of intent in a citation for intentional conduct. The purpose of this process is to determine the penalty that the Attorney General should have assessed if the Attorney General had relied on DALA's different factual findings when issuing the citation.

3. In such circumstances, if in DALA's view, a reduction in the penalty may be warranted, DALA will issue a decision (including findings of fact and law) with a tentative modified penalty.
4. In modifying the penalty, DALA will endeavor to make the modification reflect what DALA understands to be the Attorney General's penalty assessment policy, as set forth in the record, and DALA will address that policy in its decision.
5. Some nonexclusive factors DALA may consider relevant to a penalty modification include: the nature and severity of the violation; whether there is a corresponding restitution order; whether or not the employer prevented the Attorney General from accurately determining the amount of restitution prior to the issuance of the citation due to lack of cooperation in the investigation; whether or not the employer failed to maintain proper payroll records and/or to furnish them to the Attorney General; and whether or not the employer engaged in prior violations involving the same or similar conduct.

6. If DALA makes factual findings during the proceedings that are material to the Attorney General's penalty determination and that differ substantially from the facts on which the Attorney General relied when assessing the penalty, a party may request, or DALA may order sua sponte, that the matter be remanded to the Attorney General for penalty modification or for determination that no penalty modification is warranted.
7. When issuing the decision containing a tentative modified penalty, DALA will notify the parties that the modified penalty will become final unless a party moves for reconsideration, with its own proposed penalty, within 15 days (or such additional time as permitted, if a reasonable request for an extension to respond is made).
8. A party's submission to address the modified penalty must rely on evidence previously introduced during the proceedings, unless the necessity to introduce some new evidence could not have been reasonably foreseen. The opposing party may submit a reply or opposition to the motion for reconsideration, within 10 days of receipt of the motion (or such additional time as permitted, if a reasonable request for an extension to respond is made).

SO ORDERED effective June 27, 2023.

James P. Rooney
James P. Rooney
Acting Chief Administrative Magistrate

Dated: June 27, 2023