LABOR & EMPLOYMENT

KEEP ROLLIN' ROLLIN' ROLLIN': DOL REISSUES 17 OPINION LETTERS THAT HAD BEEN WITHDRAWN UNDER THE OBAMA ADMINISTRATION

by Sara H. Jodka

In late June 2017, the United States Department of Labor (DOL) announced it would be reinstating Opinion Letters issued by its Wage and Hour Division, which was a practice that had ceased back in 2010. This announcement is significant from both the procedural and substantive basis. From 2010 to July 2017, Opinion Letters were replaced by Administrator Interpretations, which set forth a more general interpretation of the law and regulations as they pertained to a particular industry or set of employees. Opinion Letters, on the other hand, are official written opinions that set forth how wage and hour laws apply in very specific circumstances as presented to the DOL Wage and Hour Division via specific employer questions asking for a formal opinion to guide the employer as to how proceed. In other words, employers submit questions based on their specific factual circumstances and policies and the DOL issues a written opinion as to the legality of the employer's policies.

With Opinion Letters back, businesses have been waiting to see what the DOL would do with them. In the first week of 2018, the DOL answered that question by re-instating 17 Opinion Letters that were issued in January 2009 but withdrawn during the Obama administration. The DOL also reissued over a dozen advisory Opinion Letters that had been published during former President Bush's administration, but were also later rescinded.

Because Opinion Letters answer specific business questions related to wage and hour issues in various business segments, the 17 reinstated Opinion Letters and the dozen plus reissued advisory Opinion Letters may provide businesses specific and tailored guidance on various wage/hour issues under the Fair Labor Standards Act (FLSA).

The reinstated letters cover a wide variety of topics including, appropriate inclusions in an employee's regular pay rate, types of employment that qualify for the FLSA's minimum wage and overtime exemptions, and how ambulance service workers'"on-call" time should be treated for purposes of "hours worked" under the FLSA. Here is the full list of reinstated Opinion Letters (all dated January 5, 2018) and links:

Number	Letter Subject
FLSA2018-1	Construction supervisors employed by homebuilders and section 13(a)(1)
FLSA2018-2	Plumbing sales/service technicians and section 7(i)
FLSA2018-3	Helicopter pilots and section 13(a)(1)
FLSA2018-4	Commercial construction project superintendents and section 13(a)(1)
FLSA2018-5	Regular rate calculation for fire fighters and alarm operators
FLSA2018-6	Coaches and the teacher exemption under section 13(a)(1)
FLSA2018-7	Salary deductions for full-day absences based on hours missed and section 13(a)(1) salary basis
FLSA2018-8	Client service managers and section 13(a)(1)
FLSA2018-9	Year-end non-discretionary bonus and section 7(e)
FLSA2018-10	Residential construction project supervisor and section 13(a)(1)
FLSA2018-11	Job bonuses and section 7(e)
FLSA2018-12	Consultants, clinical coordinators, coordinators, and business development managers under section 13(a)(1)
FLSA2018-13	Fraud/theft analysts and agents under section 13(a)(1)
FLSA2018-14	Calculation of salary deductions and section 13(a)(1) salary basis
FLSA2018-15	Product demonstration coordinators and section 13(a)(1)
FLSA2018-16	Volunteer fire company contracting for paid EMTs – joint employment and volunteer status
FLSA2018-17	Construction supervisors employed by homebuilders and section 13(a)(1)

As demonstrated by the list above, there are a number of broad topics covered, i.e., Section 13(a)(1) of the FLSA, which exempts employees employed in a bona fide administrative function, and a number of extremely narrow ones, e.g., those dealing with helicopter pilots, coaches, construction supervisors employed by homebuilders.

Here is a summary of some of the noteworthy findings in the reinstated Opinion Letters:

Bonus Compensation

The DOL reviewed the issue of whether certain bonuses (or other payments) should be included in an employee's regular rate of pay under the FLSA. *See* FLSA2018-5, FLSA2018-9, and FLSA2018-11.

Exempt Employee Deductions

The DOL reviewed the issue of whether a salary deduction is permissible when an exempt employee is absent for a full day, but does not have enough leave time in the employee's leave bank to cover the entire absence. The DOL concluded that, "if the absence is one full day in duration, the employer may deduct one full day's pay or less. Therefore, in answer to your first question, if an employee is absent for one or more full days, but does not have enough time in his or her leave bank to cover the entire absence, the employer may make a deduction from the employee's pay for any portion of the

full-day absences that is not accounted for by the leave bank." *See* FLSA2018-7.

Administrative Exemption

In reviewing whether client service managers at an insurance company qualified as exempt administrative employees, the DOL focused on the "independent judgment" factor in determining that their primary duty was to use independent judgment over matters of business significance when issuing advice and, generally, without first seeking upper-level management approval.

On-Call Hours

The DOL concluded that on-call hours of ambulance service personnel are not compensable time under the FLSA for purposes of the regular rate and overtime calculations. The issue arose from an ambulance service's unwritten policy that required on-call employees to arrive for service at the ambulance garage within five minutes of being notified. The DOL determined the five-minute requirement was "not a significant hindrance" to the employees that would require the employer to convert their one-call time to compensable hours worked. Notably, the scope was an ambulance company servicing a small city of approximately 4,000 individuals.

Takeaways:

1. **Nothing New a**s the DOL Returns to the Prior Opinion Letter Process. The important news is the return to the more focused, less-sweeping means to establishing DOL-interpation policy. Otherwise the information provided in the reinstated Opinion Letters is not new; it has been available to businesses for years and, as such, most businesses with issues relevant to the topics in the reinstated Opinion Letters are likely already complying. The reinstated Opinion Letters do not take on any topics that had been severely altered during the Obama administration. We addressed this rolling-back issue in our All Things HR in a post titled "The Way We Were: The NLRB's Time Machine Resets the Clock on Employer Work Rules and Joint Employer Status" demonstrating this is not just a NLRB mantra, it looks to be the DOL's too.

2. **Ranging Applicability**. As the ambulance-employer DOL Opinion Letter demonstrates, some of the reinstated Opinion Letters will have very limited applicability as Opinion Letters are only as good as the overlapping facts in the circumstances presented in them and the business seeking to use them as guidance. Nevertheless, while many Opinion Letters focus on specific legal issues specific to certain employers/businesses/industries, they are still valuable resources and may provide answers or guidance in many areas in wage and hour law.

3. **More Defenses Available to Businesses**. Opinion letters were and continue to be another tool businesses have in their arsenal to help ensure compliance with the FLSA, and another tool in their defense arsenal. Specifically, Section 10 of the Portal-to-Portal provides businesses an affirmative defense to all monetary liability if the business can demonstrate it acted "in good faith and in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the DOL Wage and Hour Division. *See* 29 U.S.C. § 259 and 29 C.F.R. Part 790.

   In addition, Opinion Letters can be used to prove the "good faith" defense against the double liquidated damages penalty available under the FLSA, and the third-year of damages in the case of willful violations, of which the bar is extremely low. *See* 29 U.S.C. § 260. The availability of newly-issued Opinion Letters means that a business can request and obtain an Opinion Letter addressing a specific practice, policy, and/or factual circumstance for guidance and rely on a favorable Opinion Letter in response to a charge or lawsuit on the same issue.

4. **This is a Good Thing**. This is good news for businesses because it demonstrates two things: (1) businesses will be able to have and rely on additional resources to meet their statutory and regulatory wage and hour obligations; and (2) the Trump administration seems intent on turning back the clock to a time pre-Obama administration, but not necessarily instituting new guidance or interpretations (not in the labor and employment context at least). This means that businesses are likely already familiar with what they should be doing and have been doing it.

If you have any questions about any of these reissued Opinion Letter or if you are interested in obtaining an Opinion Letter from the DOL or additional information about risks associated with and/or compliance requirements of DOL Opinion Letters, please contact one of our wage and hour attorneys.

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