

DOL Reissues 17 Previously Withdrawn Opinion Letters

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On January 5, 2018, the Department of Labor ("DOL") Wage and Hour Division re-issued 17 previously withdrawn DOL Opinion Letters addressing over a dozen topics under the Fair Labor Standards Act ("FLSA"). The DOL originally issued these Opinion Letters in January of 2009 (at the end of former President Bush's administration), but they were subsequently withdrawn after former President Obama took office. However, the "new" DOL is bringing the "old" DOL back, with a wave of clarity for employers across all industries.

These re-issued Opinion Letters do not provide new information *per se*, stating that they are re-issued "verbatim text" of each formerly withdrawn Letter. Despite this, they provide clarity on the DOL's position on numerous issues. While some of the topics addressed by these Letters are tailored to specific job positions and discrete industries, others are more general, such as bonus payments under section 7(e) and the application of the FLSA's joint employment standard.

What does this mean for Employers?

Simply put, Opinion Letters can be an invaluable resource. Most employers would agree that FLSA issues are, to put it mildly, a challenge. These DOL Opinion Letters provide *reliable, actual* guidance for employers with the same or similar FLSA issues and can be used as a guide to avoid misclassification mistakes and even minimize the risk of DOL investigations -- *if* they apply to your facts.

Through Opinion Letters, employers can ask the DOL for *formal* answers to their specific FLSA compliance questions, and rely on such answers. In addition, any employer with the same facts can also rely on the published Letters and utilize their advice as a good faith defense to any challenged action. The Portal-to-Portal Act of 1947 amended the FLSA to provide an employer with an affirmative defense that protects it from liability when the employer takes a certain action in reliance upon any written regulation, ruling, or interpretation by the Department of Labor, including published Opinion Letters. 29 U.S.C.A. §§ 258, 259. Unfortunately, the past eight years did not yield any such Opinion Letters, as former President Obama's administration provided broad guidance in lieu of the narrow, specifically tailored guidance provided by DOL Opinion Letters (Opinion Letters are available from 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and then skip to 2018). However, the 2018 DOL is bringing the "old" DOL back, as current Labor Secretary Alex Acosta announced DOL would be returning to the practice and, return they did, with 17 letters published on one day:

Overview¹ of the Re-Issued Opinion Letters:²

1) **FLSA2018-17 Construction supervisors employed by homebuilders and section 13(a)(1)**

The DOL discussed whether employees of homebuilders who supervise construction of multiple new homes, townhomes, and/or condominiums each year qualified for an exemption under section 13(a)(1) of the FLSA.³

2) **FLSA2018-16 Volunteer fire company contracting for paid EMTs – joint employment and volunteer status**

The DOL opined that emergency medical technicians (EMTs) paid by a volunteer fire fighter company's contractor could not continue to "volunteer" as EMTs for the volunteer fire company without compensation if the volunteer fire company was an employer (along with the contractor) of the employees in question. If the volunteer fire company was a joint employer, then the EMTs could not "volunteer" to the volunteer fire company services that they perform for pay for the contractor. The letter stated that there were not enough facts to determine whether the volunteer fire company was a joint employer of the EMTs pursuant to the "economic realities" test.

3) **FLSA2018-15 Product demonstration coordinators and section 13(a)(1)**

The DOL opined out-of-town coordinators for a product demonstration company who performed functions such as establishing/maintaining relationships with a large number of freelance product demonstrators and engaging them to staff company events qualified for the administrative exemption under section 13(a)(1) of the FLSA because of their primary duties.

4) **FLSA2018-14 Calculation of salary deductions and section 13(a)(1) salary basis**

The DOL opined that an employer's salary deduction proposals under the salary-basis rules set forth in 29 C.F.R. Part 541 were permissible:

- a) a salary deduction is permissible for 13(a)(1) exempt employees when an exempt employee is absent for a full day, but does not have enough leave time in his or her leave bank to cover the entire absence; and
- b) a salary deduction using an hourly equivalent of the time missed is permissible for 13(a)(1) exempt employees who incur a full day absence on a day in which an employee is scheduled to work fewer or greater than eight hours, but deductions are not permissible if the employee is absent for less than one full day of work.

¹ This overview is merely a summary provided for informational purposes only, and does not fully describe the facts and circumstances of the DOL's Opinion Letters. Employers should **not** rely on any summary herein without fully discussing your specific facts and circumstances with legal counsel. **This overview is not legal advice**, and should not be taken as such.

² For full text of each letter, see United States Department of Labor, Wage and Hour Division, *Opinion Letters - Fair Labor Standards Act*, available at <https://www.dol.gov/whd/opinion/flsa.htm>

³ As of the date of this update, the link referenced in the DOL's Opinion Letter did not work.

5) **FLSA2018-13 *Fraud/theft analysts and agents under section 13(a)(1)***

The DOL provided guidance on whether five positions qualified for exemption under 13(a)(1) of the FLSA. Based on the information provided, the DOL found the Field Information Analyst and Supervisory Special Agent positions qualified for the administrative and executive exemptions, but the Analyst 1, Analyst 2, and Special Agent positions did not qualify for the administrative exemption. They found Analyst 1 and Analyst 2 positions did not qualify for the administrative exemption as they provide ongoing, day-to-day gathering, analyzing, and reporting of information rather than performance of administrative functions. Similarly, the DOL found the Special Agent's activities related to the ongoing, day-to-day investigative services, rather than administrative functions directly related to managing the client's business or of the client's customers.

6) **FLSA2018-12 *Consultants, clinical coordinators, coordinators, and business development managers under section 13(a)(1)***

The DOL determined that a hospital system's Consultants, Clinical Coordinators, Coordinators, and Business Development Managers qualified for exemption under section 13(a)(1) of the FLSA as exempt administrative employees.

7) **FLSA2018-11 *Job bonuses and section 7(e)***

The DOL determined that job bonuses should be included in the regular rate under section 7(e) of the FLSA. The company wanted to pay its equipment operators, in addition to hourly wages, a "job bonus," consisting of a flat dollar amount per day (e.g., \$100.00 for each day worked). The "job bonus" would be paid for each day worked, and did not appear to be conditioned on any other factor.

With limited exceptions, the FLSA provides that the "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). The DOL determined that the proposed job bonus did not meet any of the exceptions for being excluded from an employee's regular rate of pay and, therefore, must be included in the regular rate..

8) **FLSA2018-10 *Residential construction project supervisor and section 13(a)(1)***

The DOL determined project supervisors in the residential homebuilding industry qualified for an exemption under section 13(a)(1) of the FLSA under the administrative exemption, and were therefore exempt from the minimum wage and overtime requirements of the FLSA.

9) **FLSA2018-9 *Year-end non-discretionary bonus and section 7(e)***

The DOL determined an employer may exclude previous payments properly excluded from the regular rate under section 7(e) when calculating a year-end bonus which is based on a percentage of an employee's total straight-time and overtime earnings.

10) FLSA2018-8 *Client service managers and section 13(a)(1)*

The DOL determined client service managers at an insurance company qualified for the administrative exemption under section 13(a)(1) because they met all three requirements of the exemption.

11) FLSA2018-7 *Salary deductions for full-day absences based on hours missed and section 13(a)(1) salary basis*

In this Letter, the DOL determined that a hospital may take deductions from the salary of an exempt Registered Nurse for absences of one or more full days, but based on the number of work hours missed, without running afoul of the requirements for the professional exemption under section 13(a)(1) of the Fair Labor Standards Act because when an employee misses an entire day of work, an employer may make deductions based upon the number of work hours missed.

12) FLSA2018-6 *Coaches and the teacher exemption under section 13(a)(1)*

The DOL determined that coaches volunteering for a public school were teachers under the Act and are therefore eligible for the exemption for teachers in section 13(a)(1) of the FLSA and 29 C.F.R. § 541.303, exempting them from the FLSA's minimum wage and overtime pay provisions.

13) FLSA2018-5 *Regular rate calculation for fire fighters and alarm operators*

The DOL provided guidance on acceptable pay methods/formulas for firefighters and alarm operators employed by the City. The DOL opinion provided guidance on 29 C.F.R. Part 778, stating the regular rate of pay under the FLSA must be calculated each workweek based on the hours worked.

14) FLSA2018-4 *Commercial construction project superintendents and section 13(a)(1)*

The DOL opined project superintendents employed by a commercial construction company qualified for exemption under section 13(a)(1) of the FLSA as exempt administrative employees because their primary duty related directly to the management or general business operation of the client, as they were responsible for overseeing a commercial construction project from start to finish.

15) FLSA2018-3 *Helicopter pilots and section 13(a)(1)*

The DOL opined civilian helicopter pilots employed by the Division of State Police did not qualify for the executive, administrative, or professional exemptions under section 13(a)(1) of the FLSA. They did not meet the executive administration because their primary duty was not managing the department or subdivision in which they were employed; they were not exempt administrative employees because their primary duty was piloting a helicopter, which did not qualify as "office or non-manual" work; and pilots did not qualify for the professional exemption.

16) FLSA2018-2 Plumbing sales/service technicians and section 7(i)

The DOL opined the client's drain cleaning and other minor plumbing repair and replacement services constituted a "retail establishment" and their wage payment plan could qualify as commission compensation per 7(i). See FOH § 21h04(a). They cautioned in order for the exemption to apply, the total amount of commission payments must be more than one-half the employee's total compensation for a representative period (not less than one month). See 29 C.F.R. §§ 779.415-.417.

17) FLSA2018-1 Ambulance personnel on-call time and hours worked

The DOL opined that "on-call" hours of ambulance personnel were not compensable under the FLSA because, under the facts at issue, the ambulance personnel were able to use time effectively for their own purposes even when they carried the on-call pager and were required to report to work within 5 minutes, as the restrictions were not so burdensome and the call-backs so frequent as to prevent the free use of their time.

Conclusion

If any of the 17 topics above relate to your workplace, rest assured knowing that these Letters apply and may provide reliable guidance (assuming the same facts). If these Letters do not address your concerns, employers and their counsel should consider whether submitting questions to the DOL is appropriate.

To discuss further, please contact:

Meryl Cowan in Birmingham at mcowan@burr.com or (205) 458-5261
or the Burr & Forman attorney with whom you regularly work.

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