Alerts and Updates

# DOL'S "Mixed Bag" Final Rule Amends Some FLSA Regulations; Leaves Intact Other Regulations Previously Slated To Change

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On April 5, 2011, the U.S. Department of Labor (DOL) issued a final rule that amends Fair Labor Standards Act (FLSA) regulations, but declines to adopt many of the changes in the proposed rule that was published in June 2008. The final rule will take effect on May 5, 2011.

Some of the more significant changes for private employers include:

- **Tip-credit provision.** The tip credit permits employers to pay a tipped employee less than minimum wage, as long as that wage and the employee's tips are at least equal to the minimum wage. The final rule increases the maximum tip credit to $5.12 per hour to reflect recent increases in the minimum wage to $7.25 per hour, with no change to employers' minimum cash-wage obligations to tipped employees of $2.13 per hour.

- **Other tipped-employee provisions.** The final rule also amends FLSA regulations to clarify that: (1) the FLSA does not impose a maximum tip-pool contribution percentage; (2) employers have to notify employees of any required tip-pool contribution amount; and (3) employers may take the tip credit only for the amount of tips each employee ultimately receives.

- **Youth opportunity wage provision.** The final rule amends FLSA regulations to reflect the statutory provision allowing employers to pay an hourly "youth opportunity" wage of $4.25 per hour to employees younger than 20 years old in the first 90 calendar days of employment. The amended regulations also clarify that employers cannot displace employees—including reducing hours, wages or benefits—to hire workers at the youth opportunity wage.

Some of the more significant non-changes for private employers include:

- **Fluctuating workweek method of calculating overtime.** The fluctuating workweek method of overtime allows an employer to pay a fixed salary to a nonexempt employee whose hours vary from week to week—and to only pay the employee at a rate of one-half the regular hourly rate for the workweek for any overtime hours worked in the workweek—because the employee is compensated for those hours at a straight-time regular rate through the fixed salary. (Note: When using the fluctuating workweek method, employees must be paid their entire fixed salary even for workweeks in which they work less than 40 hours.) The proposed rule would have stated that bonuses or premium payments would not invalidate the fluctuating workweek method, but would have to be included only in the calculation of the regular rate of pay unless otherwise excluded. The final rule, however, rejected this change.

- **Meal credit provision.** The FLSA permits employers to count the reasonable cost of a meal provided to an employee toward the employee's minimum wage. The proposed rule would have amended FLSA regulations to allow a meal credit even when the employee did not voluntarily accept the meal. The DOL did not implement this

change, out of concern for the implications of dietary or religious restrictions that would prevent employees from eating the meals and whether enough time is allocated for employees to eat.

- **Service advisors working for dealerships.** The FLSA exempts from its overtime provisions certain salespersons, partspersons and mechanics "primarily engaged in selling or servicing automobiles, trucks, or farm implements." Current FLSA regulations state that employees described as service advisors, service managers, service writers or service salesman—*i.e.*, employees who sell *services* for cars, trucks or farm implements—do not qualify for this exemption. The proposed rule would have amended FLSA regulations to clarify that employees selling these services fall within the exemption, but the DOL did not implement this change.

- **Pay for commuting in employer-provided car.** The proposed rule would have amended FLSA regulations to include examples where commuting from home to work in an employer-provided car would not be considered part of the employee's principal activities, and therefore would not be compensable time. The final rule did not adopt these changes, reasoning that an employer's obligation to compensate employees in such circumstances has to be examined on a case-by-case basis.

Some of the key takeaways for public employers include:

- **No changes to compensatory time off.** The FLSA permits state and local governments to grant employees compensatory time off, in lieu of paying overtime compensation, if agreed to by the employee or a union representing the employee. In an about-face from the proposed rule, the DOL declined to change its interpretation of the regulations: If an employee requests compensatory time off on a specific date, the request must be granted, unless it would unduly disrupt the employer's operations.

- **Change in the scope of overtime exemption for employees engaged in "fire protection activities."** Currently, FLSA regulations state that "an employee in fire protection activities" may qualify for this exemption only if the employee engages in no more than 20-percent nonexempt work. The statute, however, was amended to define the term "employee in fire protection activities" after this regulation was in place. The regulations no longer apply the 20-percent limit to employees engaged in "fire protection activities." It is important to note, however, that the 20-percent limit still applies to law-enforcement personnel.

### What This Means for Employers

Wage-and-hour compliance continues to be a sensitive area for employers, and noncompliance with the FLSA and its regulations can result in significant liability. Plaintiffs' lawyers are aware of this, and they are constantly changing their strategies and focusing on emerging areas of the law that are presenting compliance problems for employers. As a way possibly to avoid the potential for devastating exposure in an area that could be the next "hot" area for the plaintiffs' bar, employers impacted by the amendments to the FLSA regulations should consider reviewing their wage-and-hour policies and practices to ensure compliance when the amended regulations take effect on May 5. In doing so, it is vital to comply with state wage-and-hour laws, which vary widely and in many cases are more restrictive than the FLSA or impose additional requirements on employers.

## For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.