

Department of Labor opinion letters are back

For more than 70 years, it was standard practice for the U.S. Department of Labor to issue official, written answers to employers' specific questions about wage-and-hour issues, the FMLA and other laws. Those documents, called opinion letters, were discontinued in favor of more general guidance in 2010. Now, however, the DOL has again begun issuing opinion letters.

THE LAW As part of fulfilling its mission to enforce the Fair Labor Standards Act, the FMLA and other laws—and in recognition of their complexity—the DOL allows employers to ask specific questions about how to comply. The employer describes its unique situation, proposes how it believes the law should apply and asks for an official interpretation.

If the DOL chooses to answer a question, it issues an opinion letter, citing the facts the employer presented and stating whether the employer's interpretation of the law is consistent with the department's interpretation.

For example, if an employer were to ask if its practice of not paying overtime violated the FLSA, the DOL's opinion letter would bind the agency to its interpretation.

Opinion letters also serve another function: Employers can learn how the current administration interprets laws it administers by reviewing opinion letters.

WHAT'S NEW The DOL has already issued quite a few opinion letters since it resumed the practice, tackling both common and unique employer questions. Some recent examples:

Any circumstances when FMLA breaks might be paid?

The DOL responded to an opinion letter about hourly workers who have FMLA certifications entitling them to 15-minute breaks each hour of an eight-hour shift. The employer wanted to know whether the breaks were paid or unpaid.

The DOL noted that ordinarily, breaks up to 20 minutes are paid because they benefit the employer. It then said because the 15-minute breaks benefit the employee, they need not be paid. However, the DOL also noted that any paid breaks the employer gave other workers during a shift would have to be paid to all workers, including those who might be using them as part of their FMLA breaks.

How to pay for travel time when employee has no regular schedule?

The DOL was asked what hours should be counted as paid travel time if a worker had no regular schedule and was asked to travel on a plane to training at headquarters.

Ordinarily, the DOL said, traveling during one's regular worktime is paid, but outside one's regular worktime is not if one is traveling on public transit such as an airplane. It then said that with an irregular schedule, the employer needs to review the most recent month and, if a regular pattern emerges, use that. If the schedule appears irregular, then the employer can use an average.

Pay for participating in voluntary wellness activities?

An employer wrote that its employees—entirely voluntarily—may participate in screening tests for blood pressure, cholesterol levels and nicotine usage. In exchange, they may pay lower health insurance premiums. Employees also had the opportunity to attend benefit seminars on retirement planning and the like.

The employer asked if employees should be paid for the time they spend participating in the programs.

The DOL concluded that such activities do not have to be paid because they primarily benefit the employee and not the employer, are voluntary and are performed when the employees are fully relieved of duty. They may be unpaid whether offered on-site or at some other location.

Online resources Read DOL opinion letters at www.dol.gov/whd/opinion/guidance.htm.

- Employers and others can submit a request for an opinion letter at www.dol.gov/whd/opinion/opinion-request-1.htm.
- The DOL has also created a search function so that users can search opinion letters by topic or keyword or year, among other filters. You can begin your search at www.dol.gov/whd/opinion/search/fullsearch.htm.

A few guidelines and rules apply. Before submitting a request for an opinion letter to the DOL:

- Consult with your attorney regarding the question and facts you want to include in your opinion letter request. He or she may be able to answer your question without the need for an opinion request or suggest specific language.
- Opinion letter requests must include a statement that the requesting party is not subject to a pending lawsuit and that the answer isn't being sought for use in pending litigation.
- Remember that the DOL is only bound by its answer if you provided all the relevant facts. Be thorough and upfront.
- If your attorney suggests that the opinion letter may point to a violation of the FLSA, consider instead participating in the DOL's Payroll Audit Independent Determination program, which allows employers to disclose wage-and-hour mistakes and fix them by promptly paying back pay to affected employees. The PAID program allows employers to avoid all the penalties that may accrue if DOL investigators cite you for the violation or employees sue and win. Learn more about the PAID program at www.dol.gov/whd/paid.