New DOL opinion letters address Fair Labor Standards Act issues

The U.S. Department of Labor under the Obama administration suspended issuing opinion letters in response to employer requests for legal clarification. The Trump administration has renewed the opinion letter process in an attempt to keep employers informed of their obligations and protect employee rights.

Opinion letters apply to specific situations but provide some guiding principles to similarly situated employers. As always, consult your attorney before assuming any particular FLSA exemption applies to your situation.

THE LAW The Fair Labor Standards Act establishes the federal minimum wage, defines what tip credit employers may claim when paying tipped employees and requires employers to pay overtime for nonexempt workers who work more than 40 hours in a week. The FLSA regulatory framework allows the DOL great leeway in interpreting regulations.

WHAT'S NEW The DOL issued four opinion letters in early November in response to employer requests.

The most noteworthy letter dealt with administering tip credits to tipped employees. The new letter is a reissue of a rescinded 2009 letter that helped define how employers may apply tip credits when employees only spend part of their shift performing tipped work. The letter also clarifies how to pay when an employee holds two jobs, one tipped, one not.

A nonprofit volunteer firefighting organization asked whether it could use a partial overtime exemption available to public fire departments.

The DOL also opined on the relationship between salary paid to workers and their actual earnings.

Finally, a pool management company requested clarification on whether it was qualified for a "seasonal amusement" exemption to overtime requirements.

HOW TO COMPLY All the letters dealt in some way with how to comply with the FLSA.

Tip credits, non-tipped duties

Opinion Letter FLSA2018-27 changes the current rule regarding employer tip credits. Employers may pay tipped employees $2.13 per hour and take a tip credit for the difference between the applicable minimum wage (federal or state) and $2.13 as long as the employee actually receives the difference in tips. FLSA regulations define a tipped employee as any employee engaged in an occupation in which he or she customarily and regularly receives not less than $30 a month in tips.

Employees who only perform work on tipped jobs for part of their shift or who had "dual jobs" where one was tipped and the other was not have posed logistical problems for employers. The DOL previously attempted to solve the problem through an 80/20 rule that stated that employers could only take the tip credit if non-tipped activities took no more than 20% of the employee's time. The rule led to confusion and numerous court cases.

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In response, the DOL has developed the Occupational Information Network (online.onetcenter.org), which lists the core and supplemental duties directly related to tip-producing duties for many tipped occupations.

Employers may take the tip credit as long as those duties "are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties." Time spent exclusively on non-tipped duties is not eligible for the tip credit.

Calming the firestorm

A nonprofit fire department that often assisted and was paid by local governmental entities requested a limited governmental exemption to the FLSA's overtime requirements.

Opinion Letter FLSA2018-24 said the department did not qualify for the exemption because it operated independently of local governments and was independently run.

Relationship issues

Employers sometimes wonder if they jeopardize an exempt status if they pay an exempt employee a salary computed on an hourly, daily or shift basis.

The FLSA regulations allow that if two conditions are met: The arrangement includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked *and* a reasonable relationship exists between the guaranteed amount and the amount actually earned.

The question answered in **Opinion Letter FLSA2018-25** is what does "reasonable relationship" mean.

According to the letter, a reasonable relationship exists when the amount actually earned is no more than 1.5 times the guaranteed amount. An employee receiving $1,500 per week on a guaranteed base of $1,000 meets the test. Someone being paid $1,800 on a $1,000 guaranteed base would not. This is not a bright line rule, but rather guidance for employers. Should that ratio be higher, employers should consider raising the guaranteed amount.

Seasonal amusements

A pool company that managed various pools for hotels, apartments and condominiums requested clarification on whether it qualified for the FLSA's exemption for seasonal amusements. **Opinion Letter FLSA2018-26** stated the company could meet the exemption if the pool was separate from the hotel or other entity, managed separately and "frequented by the public." Pools restricted only to residents would not qualify.

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