Recent DOJ Wage & Hour Opinion Letters: Navigating the FLSA & FMLA

April 23, 2018 • Legal Updates & Insights

On June 27, 2017, the Wage and Hour Division of the United States Department of Labor (the "DOL") resumed its practice of issuing formal opinion letters concerning its interpretations of applicable wage and hour laws. Recently, on April 12, 2018 the Department of Labor issued two such opinion letters concerning the Fair Labor Standards Act ("FLSA") and the Family Medical Leave Act ("FMLA"), which are discussed here.

The Purpose of DOL Opinion Letters

Historically, employers or employees would write to the DOL requesting its opinion on a specific factual scenario and the employer's possible exposure under the wage and hour laws. The DOL would then promulgate formal opinion letters to provide both employers and employees written guidance concerning the DOL's official interpretation of such laws as applied to the factual situation posited by the individual or organization.

The DOL stopped issuing such opinion letters in 2010, instead replacing them with more general Administrator Interpretations. Whereas Opinion Letters set forth the DOL's official interpretation of the law as applied to specific circumstances, the Administrator Interpretations were intended to provide a more general interpretation of laws and regulations as applied across a broad swath of industries and categories of employees.

Employers were especially affected by this change in the DOL's policy as their reliance on the interpretations set forth in these Opinion Letters are an affirmative defense to all monetary damages under the Portal-to-Portal Act, 29 U.S.C. §259, and a possible defense to liquidated damages under the FLSA generally. 29 U.S.C. §260. While the DOL does not respond to every request for an Opinion Letter, employers are permitted to draw analogies to the situations that they face.

The April 12, 2018 Opinion Letters

The first Opinion Letter issued by the DOL, FLSA 2018-18, deals with the question of to what extent an employee's travel time is considered compensable under the FLSA. Generally speaking, time spent commuting to or from work is not considered compensable work time under the law. However, where that travel occurs during the employee's normal working hours, such as when the employee is traveling between job sites during a work day, such time *is* considered work time and the employee must therefore be compensated for such time.

Additionally, if an employee is required to travel during his or her normal working hours, such time is considered work time, even if it occurred on a day in which the employee would not otherwise be working. In Opinion Letter FLSA 2018-18, the DOL addressed the issue of an employee who had to travel for work on a Sunday for a conference that began on the following Monday, finding that, to the extent

that such travel "cuts across the employee's regular workday," it is compensable time. Thus, for an employee who regularly works from 9 AM to 5 PM, any travel time during those hours would be considered work time, even if occurring on a Sunday.

Opinion Letter FLSA 2018-18 also addresses the issue of how to determine what constitutes compensable work time when the employee does not have a regular workday. In that instance, the DOL offers three alternatives to allow the employer and employee to determine the employee's regular work hours:

- Examine the employee's time records during the most recent month of employment to discern whether such records reveal regular start and end times.
- If the employee's time records do not reveal such regular hours, the employer can then use the average start and end times in the time records to calculate the regular working hours.
- In what the DOL referred to as the "rare case" in which the employee's time records do not reveal any regular working hours, the employer and the employee can negotiate and agree upon a reasonable time or timeframe during which travel is compensable.

The second Opinion Letter issued by the DOL, FLSA 2018-19, discusses whether an employee must be paid for hourly 15 minute breaks required under the FMLA. Whether an employee's break is compensable turns on the question of whether it "primarily benefits" the employer or the employee. Whereas generally speaking, such short breaks (less than 20 minutes in length) benefit the employer in that they keep the employee fresh and therefore more productive, the DOL has found that when the breaks are for the purposes of addressing the employee's medical condition, they are primarily for the benefit of the employee. Such breaks, even if required under the FMLA, are not compensable time for which the employer must compensate the employee. The DOL further cautioned employers that to the extent that they provided paid breaks to any employees, they were required to provide the same number of paid break to employees who needed breaks for FMLA-related reasons.

If you have questions about these or other wage and hour issues, call (212) 257-6800 to speak to an attorney who can advise you of your legal rights and answer any questions you may have.

Renan F. Varghese
Senior Associate
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
rvarghese@wigdorlaw.com
wigdorlaw.com