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DOL Kicks Off Summer with Four New FLSA Opinion Letters: Exempt Status, Bonuses, Meals, and Compensable Time

The U.S. Department of Labor's (DOL) Wage and Hour Division issued four Fair Labor Standards Act (FLSA) Opinion Letters on May 29, 2026. This article provides an overview of the letters which address the following issues:

1. **Exempt Status (Opinion Letter FLSA2026-5):** An exempt employee will not lose exempt status, and will not be eligible for overtime pay requirements, even if the employee performs a second position at an hourly rate, *provided* the employee's overall primary duties constitute exempt work.
2. **Bonuses (Opinion Letter FLSA2026-6):** If an employer pays a non-discretionary "percentage of total earnings" bonus, the employer is not required to simultaneously pay additional overtime compensation on the bonus, provided the "total earnings" calculated for each participating employee includes both straight-time and overtime.
3. **Meals (Opinion Letter FLSA2026-7):** When an employee voluntarily leaves an employer's premises, the employer is not required to pay for the meal period, or the time spent leaving and returning to the employer's premises, provided the employer allots a 30-minute uninterrupted meal period which may be taken on premises.
4. **Compensable Time (Opinion Letter FLSA2026-8):** Three separate issues were addressed as follows:
    i. Employees should be compensated – and the *de minimis* rule will not apply – for pre-shift work performed after clocking-in and within seven minutes before the start of the shift, unless the pre-shift work is irregular and it is administratively impractical to record the time.

ii. Employees need not be compensated for time spent clocking in or out – or waiting in line to do so.
iii. An employer can have a rounding policy that permits employees to clock-in up to seven minutes prior to the start time for scheduled shift and rounds the clock-in to the scheduled start time, even if the employer prohibits employees from clocking out prior to the end of the scheduled shift time.

Last week's issuance of these new opinion letters is consistent with the DOL's announcement in June 2025 that it was relaunching its opinion letter program, which DOL claims "expands its longstanding commitment to providing meaningful compliance assistance that helps workers, employers, and other stakeholders understand how federal labor laws apply in specific workplace situations." None of these recent opinion letters significantly alter the DOL's position on the subjects covered. Instead, as summarized below, the opinion letters clarify and reaffirm the department's interpretation of the FLSA and its regulations to specific issues that frequently arise when administering minimum wage and overtime law under the FLSA.

FLSA2026-5. The DOL stated that an exempt employee will not automatically lose exempt status if the employee works a second position for the company, for which the employee is paid on an hourly basis. Rather, the employee will only lose exempt status if the employee's primary duties do not involve the performance of exempt work. In other words, to remain exempt, the substantial majority (*i.e,* roughly 40 hours per workweek, according to the DOL) of the employee's time must be spent performing exempt duties. The DOL re-confirmed this remains true even if a portion of the duties performed for the exempt position includes some non-exempt activities, provided the non-exempt activities are "directly and closely related" to the exempt work. As such, if the employee's primary duties remain exempt, the employee's hours worked are not subject to overtime pay requirements.

FLSA2026-6. In this letter, the DOL explained that an employer is not required to include federal overtime payments for a non-discretionary bonus if it is a "percentage of total earnings" bonus that is consistently calculated by comparing each employee's total earnings to the total bonus group of employees' total earnings, provided that the "total earnings" calculated for each participating employee includes all the employee's straight time earnings and overtime earnings

– without any dilution of the overtime earnings. The letter provides examples that illustrate how a "percentage of total earnings" bonus already includes payment of the overtime premium due on the bonus.

The DOL letter also provides various permissible methods to calculate a percentage of total earnings bonus: 1) a straight percentage directly applied to the employe's total straight-time and overtime earnings; 2) an employee's earnings or hours compared to all the employees participating in the bonus pool (if hours are used each overtime hour must be "boosted" to 1.5 hours); or 3) divide the bonus pool amount by all the participant's total earnings and then multiply that percentage by each employee's total earnings. The DOL also identified additional factors that may be used to determine the percentage increase an employee may receive (*i.e,* seniority, work location, job title, base pay, performance, or conduct). The key is to ensure that the resulting percentage increase to an employee's pre-bonus overtime earnings is no less than the percentage increase to the employee's pre-bonus straight-time earnings.

Finally, the DOL letter warns that if a bonus merely states that it is a "total earnings" bonus, without providing evidence that the calculation includes both the employee's total straight-time and total overtime, the DOL will consider whether the bonus is "a device to evade the FLSA's overtime requirement."

FLSA2026-7. Here, the DOL considered whether time spent voluntarily leaving and returning to an employer's premises for a meal period is considered compensable time under federal law, even if the resulting meal period is only 10 to 15 minutes. The DOL stated that if an employer allots employees a 30-minute uninterrupted meal period during which employees may remain on premises, the employer does not need to compensate employees for a shortened meal period if it is the result of the employee's voluntary decision to leave the premises. The DOL letter is consistent with prior court and DOL decisions, which have held that employers may also require employees to remain on the premises for meal periods or restrict employees' activities during meal periods.

FLSA2026-8. In this letter, the DOL addressed whether three clocking procedures require payment for "hours worked." First, the DOL stated that the general rule is that pre-shift work is compensable as "hours worked" even if the work is performed within

the seven minutes (often considered a *de minimis* time period) between the time the employee clocks in and the scheduled start of the shift. The DOL stated that pre-shift work includes equipment preparation, chart review, and other duties that are integral and indispensable to the employee's principal duties. The DOL also stated that whether the seven-minute-period is *de minimis*, and therefore not compensable, will be determined on a case-by-case basis. Generally, pre-shift work may be considered "*de minimis*" if it is administratively difficult to record, the time spent is "insubstantial or insignificant," or it occurs on an irregular basis. The DOL letter warns that employers should use caution when relying on the *de minimis* rule because technological advances make it easier to track employees' work time. As such, the DOL stated that it will "exact[] scrutiny" of any off-the-clock work that is performed with "any degree of regularity."

Second, unlike the pre-shift work described above, the DOL stated that employers are not required to compensate employees for time spent clocking in or out – or waiting in line to do so. The DOL states that if the employee clocks in before performing the first principal activity or clocks out after performing the last principal activity, that time is not compensable because it is not integral and indispensable to the employee's principal activities.

Third, the DOL letter provides that even if an employer does not allow employees to clock out before the end of their scheduled shift, employers may use a rounding policy that does not compensate employees who clock-in up to seven minutes prior to a scheduled shift and rounds up the clock-in to the scheduled start time. The DOL stated that this common rounding procedure is acceptable provided two conditions are met: 1) no compensable pre-shift work is performed during the seven minutes as described above, and 2) an evaluation of the rounding procedure over a period of time demonstrates that the policy does not systematically undercompensate employees for hours worked.

Note, the four DOL opinion letters provide guidance under the FLSA. State and local wage and hour laws may have rules and requirements that are more stringent than the FLSA's requirements.

Key Takeaways

The DOL did not announce any earth-shattering new policies or positions in the four opinion letters, but the department does provide real world examples that help clarify DOL's position on the topics that employers frequently face.

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