



DOL Rings in New Year with Six Opinion Letters Interpreting FLSA and FMLA

The U.S. Department of Labor's (DOL) Wage and Hour Division issued four Fair Labor Standards Act (FLSA) and two Family Medical Leave Act (FMLA) opinion letters on January 5, 2026. Please find an overview of the six opinion letters below, which address the following issues:

1. An employer has the ability to voluntarily reclassify exempt employees as non-exempt.
2. Quantifiable bonuses paid to employees, who meet specific criteria, are non-discretionary and must be included in the regular rate of pay for overtime calculation purposes.
3. A collective bargaining agreement that mandates a 15-minute roll call prior to each shift must be compensated as "hours worked" but could potentially be excluded from overtime compensation calculations.
4. For retail and service establishment employees who earn a commission and live in a state with a minimum wage rate *higher* than the federal minimum wage, to qualify for an exemption from overtime pay requirements, two conditions must be met: (a) the employee's regular rate of pay only needs to exceed one and one-half times the *federal* minimum wage rate, and (b) any commissions on goods or services paid to the employee comprises more than 50% of the employee's compensation, wherein the employee's tips are considered "compensation" only to the extent the employer relies on the tips to meet a federal, state, or other wage obligation related to the employee.
5. The amount of FMLA leave used by a school employee during a school closure of less than one week is dependent on (a) whether the employee scheduled a full or partial week of FMLA leave and (b) whether the employee was scheduled and expected to work during that period.

6. An employee may take FMLA leave for time spent at a medical appointment, as well as travel time, that is related to the employee's or a qualifying family member's serious medical condition.

FLSA2026-1. The DOL stated that if an employee meets all the requirements for a salary exemption, the employer has the exclusive right to choose whether to classify the employee as exempt. In other words, the FLSA "only prohibits the misclassification of a nonexempt employee as an exempt one." The Department also reaffirmed that an appropriately salaried, licensed clinical social worker (LCSW) typically will qualify for the learned professional exemption from minimum wage and overtime requirements under the FLSA but that upon changing the LCSW's compensation to an hourly basis, the employee would no longer qualify as exempt.

FLSA2026-2. In this letter, the DOL explained that a bonus plan that provides a formula for the amount of a bonus that is paid based upon an employee's "punctuality, attendance, consistency in completing daily safety tasks, driving safety, compliance with traffic laws, proper attire, and performance efficiency" constitutes non-discretionary incentive payments. As such, the bonus payment is required to be included in the regular rate of pay in any workweek for which the bonus payment was earned. The letter also provides examples of how to properly calculate overtime when an employee receives a non-discretionary bonus.

FLSA2026-3. Here, the DOL considered a county employer's potential decision to mandate a 15-minute roll call prior to each shift for a unit of 911 dispatch workers in order to bring the employees closer to 2,080 hours, which would equal the typical hours of a full-time work year (40 hours per week x 52 weeks). The Department stated that a mandatory 15-minute roll call prior to each shift constitutes "hours worked" under the FLSA and must be compensated. The Department also explained that the union's collective bargaining agreement could be structured to provide that the 15-minute roll call would not automatically trigger the requirement to pay overtime compensation under the FLSA if the time spent in roll call caused the employee's weekly hours to exceed 40 provided all the requirements under Section 7(b)(1) or (2) are otherwise met.

FLSA2026-4. The DOL stated that a commission-earning employee, who works for a retail or service establishment and lives in a state that requires a minimum wage

that is *higher* than the federal minimum wage, is exempt from *federal* overtime pay requirements under Section 7(i)(1) of the FLSA if the employer satisfies two steps: (a) pays the employee a regular rate of pay that exceeds one and one-half times the *federal* minimum wage rate (which is currently \$7.25 per hour) and (b) any commissions on goods or services paid to the employee comprises more than 50% of the employee's compensation for a representative period (of no less than one month). Therefore, even if the applicable state has a higher minimum wage rate, the first step of the overtime pay exemption applies if the employee's regular rate of pay exceeds \$10.875 per hour (\$7.25 x 1.5). With regard to the second step, the Department confirmed that although tips are generally not considered "compensation," the FLSA permits employers to use a portion of an employee's tips toward the amount the employer is required to pay an employee. This is commonly referred to as the "tip credit." As such, tips constitute compensation under the FLSA up to the amount of the tips that the employer relies upon to meet federal, state, or other wage obligations related to the employee. The letter also provides examples of how to properly include tips in an employee's compensation.

Note: Employers in the Fourth Circuit (which includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia) must disregard the DOL letter with respect to the second step to the extent the letter is inconsistent with *Wai Man Tom v. Hosp. Ventures*, 980 F.3d 1027, 1039 (4th Cir. 2020).

Additional Note: Even if an employee qualifies for this exemption from federal overtime entitlement, it remains possible the employee may still qualify for overtime premium pay under applicable state law.

FMLA2026-1. In this letter, the DOL addressed the impact a school closure of less than one week has on the amount of FMLA leave used by a school employee. This opinion letter will be addressed in more detail in an upcoming Spencer Fane WorksSmarts blog.

FMLA2026-2. Here, the DOL stated that the FMLA makes clear that employees are entitled to take FMLA leave for time spent by an employee at a medical appointment that is related to the employee's or a qualifying family member's serious medical condition. Although the FMLA does not specifically state that such FMLA leave may also be taken for the time traveling to or from the appointment, the Department

explained that such travel time is “part and parcel of obtaining care and continuing treatment from a medical provider.” Therefore, the Department stated that employees may take FMLA leave for the travel time as well as the time spent at the appointment. However, to the extent the employee misuses the FMLA leave and is absent for additional time that is not attributable to the serious health condition, such additional time is not protected under the FMLA. Therefore, an employer may discipline an employee who uses FMLA leave for additional time spent before or after the appointment that is unrelated to the serious health condition. The Department also explained that employers cannot require health care providers to identify necessary travel time in the medical certification form. The DOL opinion letter provides examples of the types of travel that qualify as FMLA protected leave.

Key Takeaways

The DOL did not announce any earth-shattering new policies or positions in this series of January 2026 opinion letters, but the Department does provide helpful clarification regarding its position on the topics of each opinion letter that employers frequently face.

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