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New Wage and Hour Opinion Letters Provide Guidance to Employers

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On August 28, 2018, the U.S. Department of Labor, Wage and Hour Division issued six new Opinion letters. Four of these opinion letters relate to the Fair Labor Standards Act ("FLSA"), and two of the letters involve the Family and Medical Leave Act ("FMLA"). As we noted in April (WHD Opinion Letters), Secretary of Labor Alex Acosta announced in 2017 that the agency would soon re-start the practice of issuing opinion letters, which the Obama Administration had discontinued. The new opinion letters are summarized below.

COMPENSABLE TIME

Opinion Letter FLSA2018-20 addresses whether the time employees spend in voluntarily participating in wellness activities, health screenings and benefits fairs should be considered compensable time under the FLSA. The activities considered in the Opinion Letter occurred both during and outside regular business hours, were entirely voluntary, and did not relate to the employees' job responsibilities. The employer involved in this inquiry also stated that it received no direct financial benefit as a result of employee participation in any of the events. The specific activities addressed were: a) participation in "biometric screening," such as testing of cholesterol levels, blood pressure, and nicotine usage; b) participation in "wellness activities," such as attending health education classes, receiving telephonic health coaching, and attending fitness classes; and c) attendance at a benefits fair to learn about topics such as employer-provided benefits, financial planning, and other benefits available to employees. The Opinion Letter concluded that because the activities in question were primarily for the benefit of the employee, and because the employees were relieved of all job duties during the time they participated in the activities in question, the time spent in these activities is not compensable time. However, the DOL stated in a footnote that work breaks up to 20 minutes in length are ordinarily compensable, regardless of how the employee spends the break time.

RETAIL OR SERVICE ESTABLISHMENT EXEMPTION

Opinion Letter FLSA2018-21 discusses the exemption from overtime for commission-based sales employees who work for a "retail or service establishment" under 29 U.S.C. § 207(i) (commonly referred to as the "7(i) Exemption"). This opinion letter was requested by an employer that sells a "technology platform to merchants" which enables both online and brick-and-mortar companies to accept credit card payments from customers. The company sought guidance from DOL about whether its sales representatives could appropriately be classified as exempt from overtime under the 7(i) Exemption. In addressing the requested opinion, the Opinion Letter noted that the employer's question was primarily whether the company would qualify as a retail or service establishment, as it sells its platform to merchants. Noting that a recent Supreme Court case held that exemptions under the FLSA deserve a "fair" rather than "narrow" interpretation, the Opinion Letter found that the business in question was entitled to claim the exemption. The analysis concluded that the business was a retail business as defined by the applicable regulation because it: a) sells to the "general public" by selling to a variety of purchasers; b) serves the "everyday needs of the community"; c) is at the end of the "stream of distribution" in that its customers do not resell the product; and d) sells its product in "small quantities" because it does not sell large quantities of the platform to any single customer. Opinion Letter FLSA2018-21 (citing 29 C.F.R. § 779.318(a)). The Opinion Letter further noted that the fact that the platform is sold to commercial entities "does not change this conclusion" and cited to a number of court decisions in which business-to-business sales have been construed as within the retail or service establishment exemption. The Opinion Letter also addressed whether a physical location is necessary for a business to qualify as a retail or service establishment, and concluded that a business that sells its platform primarily online could still qualify for the exemption.

VOLUNTEERS

Opinion Letter FLSA2018-22 addresses whether individuals who grade exams for a non-profit organization must be compensated for their work grading the exams over a two-week period. The organization asked whether it could

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appropriately consider the graders as volunteers rather than employees, even if it paid expenses for the graders to travel to perform the grading services. The organization in question noted that the graders provided the services in question for a number of reasons, including a desire to give back to their profession, to promote the highest standards of the profession, and to serve others in the professional community. Previously, the organization had paid a fee for the grading services, but intended to discontinue that practice, while continuing to pay travel and other expenses to the graders. The Opinion Letter noted that because the services were being provided by the graders freely and voluntarily, and for service-oriented reasons, they could appropriately be treated as volunteers rather than employees.

MOVIE THEATERS

Opinion Letter FLSA2018-23 addresses whether employees who work for full-service restaurants that operate within a movie theater are exempt from overtime under the FLSA. The FLSA contains an exemption from overtime for any employee "employed by an establishment which is a motion picture theater." 29 U.S.C. §213(b)(27). The Opinion Letter found that the restaurant operations of the movie theater in question were part of a single "establishment" under the FLSA. In reaching this conclusion, the Opinion Letter considered that nearly all patrons purchased movie tickets, and that the food service operations were part of the movie theaters. Further, the same employees worked in the restaurant and performed other functions in the movie theater, such as acting as a cashier or usher in the theaters. As a result, the Opinion Letter concluded that the movie theaters and restaurants were part of a single "establishment," and the employer could appropriately qualify for the exemption.

ORGAN DONATION

Opinion Letter 2018-2-A addresses whether organ donation constitutes a serious health condition for purposes of FMLA if the individual donating the organ was in good health prior to making the donation. The Opinion Letter addresses that organ donation can constitute a serious health condition, like any other condition, if it requires inpatient care (e.g. an overnight stay in a hospital) or continuing treatment by a healthcare provider. The Opinion Letter also highlighted that organ donation surgeries typically require an overnight stay in the hospital.

NO-FAULT ATTENDANCE POLICIES

Opinion Letter 2018-1-A addresses whether an employer's no-fault attendance policy violates the FMLA. In the no-fault attendance policy in question, employees receive points for absences and tardiness. Employees do not receive points for approved leaves of absence, including FMLA leave. If an employee reaches 18 points, the employee's employment is automatically terminated. The points will remain on the employee's record for 12 months of "active service." The policy does not define "active service." However, the employer's practice is that FMLA leave time, and other approved leaves of absence, are not counted as "active service."

The Opinion Letter highlighted the FMLA regulation stating that employees' benefits while on FMLA leave (other than group health benefits) are "determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). 29 C.F.R. § 825.209(h). Because the employer did not count other approved leaves as "active service" under the no-fault attendance policy, the employer was not required to count FMLA leave as "active service." The no-fault attendance policy at issue did not violate the FMLA.

KEY TAKEAWAYS

1. The Opinion Letters issued on August 28 provided helpful—and employer-friendly—guidance for the employers who sought the DOL's opinion.
2. Employers who rely in good faith on an interpretation of the FLSA contained in an official DOL Opinion Letter may have the ability to limit exposure to overtime or minimum wage claims, or to limit liquidated damages. 29 U.S.C. §§ 259, 260. As a result, employers may wish to evaluate whether the recent guidance may be of assistance as they review and analyze compensation practices.

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