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New WHD Opinion Letters Provide Guidance to Employers

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Last week, the U.S. Department of Labor's Wage and Hour Division (WHD) issued three new opinion letters for the first time since 2010. The Obama administration had ceased the practice of issuing opinion letters – which answer specific questions from employers or other parties – in favor of general administrative interpretations. Last June, Secretary of Labor Alex Acosta announced that he was reinstating the practice of issuing opinion letters for the Trump administration. This announcement was praised by businesses and employment lawyers because the opinion letters apply the law to a specific set of facts and represent official statements of agency policy. In addition to the new letters, WHD republished 17 letters the Obama administration rescinded following their original publication late in the Bush administration.

The three new opinions involve the following topics, with summaries below:

- What counts as work time under the Fair Labor Standards Act ("FLSA") when employees travel for work;
- Whether 15-minute rest breaks required every hour by an employee's serious health condition must be paid or may be uncompensated; and
- Whether certain lump-sum payments from employers to employees are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act.

Opinion Letter FLSA2018-18 – Compensability of Travel for Hourly Technicians

The request in this letter involves hourly workers who travel, sometimes overnight, to perform their jobs. Three scenarios are presented where the employee is traveling (1) from his/her home state to another location for training, not during normal work hours, (2) from his/her home to an office to retrieve work orders and then between customer locations, and (3) between customer locations, but in a company vehicle.

WHD discussed the general principle that compensable working time under the FLSA does not generally include time spent commuting to and from work, regardless of whether the employee works at a fixed location or at different job sites. However, travel between job sites during the workday must be counted as hours worked. The use of a company-provided vehicle does not change this analysis, provided that the use of such vehicle is within the normal commuting area of the employer's business.

Regarding travel away from the employee's home community, such time is compensable if it cuts across the employee's regular workday. If the employee truly does not have any regular work hours, the employer may review the prior months' time records to determine a typical schedule, or the employer may reach some agreement with the employee regarding whether travel falls in or out of the normal workday.

Opinion Letter FLSA2018-19 – Compensability of Medically-Necessitated Break Time

Here, the requester inquired as to whether a non-exempt employee's 15-minute rest breaks, which are medically required and covered by the FMLA, are compensable time. The Supreme Court has held that the compensability of

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an employee's time depends on whether it was spent predominantly for the benefit of the employer or the employee, and since the Court issued that decision in 1944, breaks of 20 minutes or less are typically found to be compensable because they benefit the employer by allowing employees to re-energize.

However, in this situation the employee needs to take a 15-minute break every single hour due to a medical condition. WHD found that these breaks predominantly benefit the employee instead of the employer, and that the breaks are not compensable time. The Family Medical Leave Act ("FMLA") reinforces this determination by stating that employees are not entitled to compensation for FMLA-protected breaks. However, employees who take FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive on an equivalent shift.

Opinion Letter CCPA2018-1NA – Earnings Under Consumer Credit Protection Act

The inquiry focuses on various types of lump-sum payments an employee may receive, and whether these payments are considered "earnings" and subject to child/spousal support garnishment limits under the Consumer Credit Protection Act (CCPA). Title III of the CCPA allows up to 60 percent of a worker's disposable earnings to be garnished, but if the worker is supporting another spouse or child, this limit is reduced to 50 percent.

The requester provided a long list of types of lump-sum payments to inquire whether they were considered earnings. The vast majority of the list is considered earnings and subject to the CCPA limits. WHD provided the following opinion in response:

The following are earnings under the CCPA: commissions; discretionary and nondiscretionary bonuses; productivity or performance bonuses; profit sharing; referral and sign-on bonuses; moving or relocation incentive payments; attendance, safety, and cash service awards; retroactive merit increases; payment for working during a holiday; workers' compensation payments for wage replacement; termination pay; severance pay; and back/front pay from insurance settlements.

The following are not earnings under the CCPA: worker' compensation payments for medical reimbursements; wrongful termination insurance for compensatory or punitive damages; and buybacks of company shares.

Key Takeaways

- The WHD Opinion Letters may provide employers with guidance that may be of assistance when determining compensability of travel time and employee breaks.
- The WHD Opinion Letters clarify that most payments to employees are "wages" under the CCPA, with a few exceptions.
- Despite the helpful guidance, employers should rely on Opinion Letters sparingly, because they are by their nature very fact-specific.

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