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The Department of Labor Reinstates Seventeen Bush Era Opinion Letters

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Earlier this year, the United States Department of Labor ("DOL") reinstated seventeen George W. Bush Era opinion letters which were issued in January 2009, but later withdrawn by the Obama Administration. Opinion letters are official guidance from the DOL's Wage and Hour Division that provide employers with detailed responses to fact-specific questions pertaining to the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Davis-Bacon Act (DBA).

In 2010, the DOL stopped issuing opinion letters and instead began issuing "administrative interpretations," which offered a more general interpretation of the law rather than a response to specific questions posed by employers or employees.

The reinstated opinion letters cover a wide variety of topics, including salary deductions, on-call time, bonuses, and employee classifications. While some of the opinion letters are based on specific positions in specific industries (*e.g.*, the exempt status of home building project supervisors, insurance client service managers, and civilian helicopter pilots), others have broader applicability.

For example, two of the reinstated opinion letters address whether certain bonuses should be included in calculating employees' regular rate of pay. The FLSA requires that all overtime be paid at one and one-half times an employee's regular rate, which includes all remuneration for employment paid to the employee subject to the certain exceptions (such as discretionary bonuses). In Opinion Letter FLSA2018-11, the DOL confirmed that a bonus paid for each day worked and not conditioned on any other factor (*i.e.*, a non-discretionary bonus) must be included in the calculation of regular rate for overtime purposes. Similarly, Opinion Letter FLSA2018-11 clarified that previous payments properly excluded from the regular rate, such as travel expenses and discretionary bonuses, may be excluded when calculating year-end non-discretionary bonuses based on a predetermined percentage of an employee's total straight time and overtime earnings for the year.

Opinion Letter FLSA 2018-7 is another example of a reinstated opinion letter with broad applicability. In that letter, the DOL clarified that a salary deduction is permissible when an exempt employee is absent for one or more full days due to personal reasons. Likewise, salary deductions are permissible for full day absences if such deductions are made "in accordance with a bona fide plan, policy or

practice.” Conversely, salary deductions for partial day absences generally violate the FLSA.

The return of opinion letters is a welcome development for employers, as they provide another tool to ensure compliance with federal wage and hour laws. In addition, in some circumstances, reliance on an opinion letter may establish a good faith defense against liability. The Portal-to-Portal Act provides employers with an affirmative defense to liability if an employer acted “in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation” of the DOL Wage and Hour Division. It is well established that a DOL opinion letter may serve as a written ruling for purposes of the good faith defense. Reliance on a DOL opinion letter may also establish a good faith defense against liquidated damages and damages for willful violations. However, given the fact-sensitive and individualized nature of DOL opinion letters, employers should seek legal counsel before relying exclusively on their guidance.

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