

U.S. Department of Labor

Wage and Hour Division  
Washington, D.C. 20210



MAY 20 2010

Mr. John E. Thompson  
Fisher & Phillips  
945 East Paces Ferry Road  
Atlanta, GA 30326

Dear Mr. Thompson:

This is in response to your email on March 24, 2010 to Wage and Hour Deputy Administrator Nancy Leppink, and to your request dated April 13, 2010 made pursuant to the Freedom of Information Act ("FOIA") (copy enclosed). Your e-mail requests an explanation of the delegation under which the Deputy Administrator possesses the authority to issue official rulings and interpretations on behalf of the Wage and Hour Division ("WHD"). Specifically, you seek that information in respect to the Deputy Administrator's issuance of Administrator's Interpretation No. 2010-1 and the relationship of that interpretation to section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. 259 (known as the "Portal Act" defense).

The Secretary has delegated authority and assigned responsibility for carrying out the policies, programs, and activities for the Fair Labor Standards Act, as amended, 29 U.S.C. 201 et seq. ("FLSA"), to the Wage and Hour Administrator. *See* Secretary's Order 9-2009, published at 74 Fed. Reg. 58836 (Nov. 13, 2009). Encompassed within this delegation of authority and responsibility is the issuance of official departmental rulings and interpretations of the FLSA on behalf of the Secretary and WHD. The position of Wage and Hour Administrator, established at 29 U.S.C. 204, is a position that is required to be filled by Presidential-appointment and Senate-confirmation ("PAS").

The Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345, et seq. ("FVRA"), establishes a general framework for succession in connection with vacancies arising in PAS positions within the Department of Labor. In general, succession to such DOL PAS positions is established under FVRA through the designation of "first assistants." Pursuant to authority established under FVRA and 5 U.S.C. 301, the Secretary of Labor designated the incumbent in the position of Deputy Wage and Hour Administrator as the "first assistant" to the Wage and Hour Administrator. *See* Secretary of Labor Memorandum for Department of Labor Executive Staff published accompanying Secretary's Order 04-2008 at 73 Fed. Reg. 46524, 46527 (Aug. 8, 2008). In that Memorandum, the "first assistant" positions are defined as the position designated immediately below the PAS or non-PAS agency head position title. *See* 73 FR 46527 n.1. Thus, Nancy Leppink, now the Deputy Wage and Hour Administrator and, therefore, first assistant, is designated to exercise the general authorities of the Wage and Hour Administrator, such as the issuance of official departmental rulings and interpretation of the FLSA by the Administrator of WHD when an incumbent in the latter position is unavailable. Because Ms. Leppink acted within her proper delegation of authority as Deputy Administrator, Administrator's Interpretation No. 2010-1 is issued as an official ruling of the Wage and Hour Division for purposes of the

Portal Act defense. See e.g., *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990).

Your request under FOIA seeks all documents evidencing currently-in-effect delegations of authority to officials of WHD below the rank of Wage and Hour Administrator to issue opinions concerning and/or interpretations of the laws enforced by the Labor Department, including but not limited to the FLSA. The information you seek is attached. As no significant amount of staff time or resources were used to process this request, all fees and costs were waived.

As provided in 5 U.S.C. § 552 (a)(6)(A)(i) and Regulations 29 C.F.R. § 70.22 (copy enclosed), you have the right to file an appeal of this response under FOIA with the Office of the Solicitor, Department of Labor, within 90 days of your receipt of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statement or arguments. To expedite the processing of the appeal, clearly indicate "FOIA Appeal" on the appeal and the envelope. This information should be mailed to the Office of the Solicitor, U.S. Department of Labor, Room N-2428, 200 Constitution Avenue, N.W., Washington, D.C. 20210; or, if you wish, you may submit your appeal by e-mail to [foiaappeal@dol.gov](mailto:foiaappeal@dol.gov).

Sincerely,



Thomas M. Markey

Acting Deputy Administrator for Enforcement

Attachments