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DEAR ABBY: WHAT'S YOUR OPINION ON DOL OPINION LETTERS? A BRIEF PRIMER ON OPINION LETTERS AND WHY THE NEW ADMINISTRATION SHOULD CONTINUE TO ISSUE THEM

Insights
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An often-overlooked free resource available to employers and practitioners, the Department of Labor's opinion letters provide guidance to interpret federal wage and hour law. However, just as the Obama administration placed the practice of issuing opinion letters on hold during a seven-year window, many have speculated the Biden Department of Labor (DOL) will again end the practice. Doing so would deprive courts, employers, employees, unions, trade groups, practitioners, and the public at large of an invaluable resource. This article aims to provide a brief overview of what opinion letters are and the history behind them, how they provide a valuable resource, and why the Biden DOL should continue the practice.

What Are Opinion Letters And Why Are They Valuable?

The DOL Wage and Hour Division's practice of issuing opinion letters regulations began in 1938, at the inception of the Fair Labor Standards Act (FLSA). Those who have attempted to interpret the FLSA and apply the law and regulations to the modern workplace know this is not always an easy task. In some ways, the FLSA is antiquated when applied to different business models that did not exist and could not be contemplated 80 years ago.

Unfortunately, there is an inherent presumption that if an employer can run a business, they should know and understand how to apply this complicated body of law. This is particularly problematic when you consider that small

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businesses (those with fewer than 500 employees) make up 99% of the U.S. businesses and employ about 47% of private sector employees. 98% of small businesses have fewer than 100 employees; 89% have fewer than 20. Laws and regulations that are often passed and developed with the large employer in mind do not contemplate the level of legal sophistication required to administer them and the impact on small employers.

The reality is that the FLSA is murky, filled with potential pitfalls, and often fails to provide clear answers. As a shining light in this darkness, the DOL website describes opinion letters as "official written explanations of what the FLSA or the FMLA requires in fact-specific situations" and "serve as a means by which the public can develop a clearer understanding of what FLSA and FMLA [Family and Medical Leave Act] compliance entails."

Put simply, if an employer, or anyone for that matter, has a compliance question under the FLSA or the FMLA that is not addressed clearly in the existing regulations, the employer can ask the DOL for guidance. In response, the DOL may provide official written explanations of the intent and application of the law under the facts presented by the employer. The DOL exercises discretion in determining which requests for opinion letters it responds to and which type of opinion letter it will issue in response.

Generally, the DOL is less likely to respond to a run-of-the-mill issue or answer questions which may be found in prior opinion letters, existing regulations, field guidance or case law. Whereas the agency is more likely to issue opinion letters in response to new or hot-topic issues or nuanced questions to which it has not previously provided clear and unambiguous guidance. Additionally, the DOL will not provide opinion letters in response to requests that "raise questions about current open compliance evaluations or ongoing litigation in which the requester is involved." In providing the written response, the DOL also will publish the opinion letter so others can use it as guidance in similar situations.

Additionally, if an employer is investigated or sued under the FLSA (or FMLA) but relied on a DOL opinion letter in developing the disputed practice, that employer may have an affirmative good faith defense to liability. Put simply, if an opinion letter applies and an employer relied upon the opinion in good faith, that employer may get a "pass" even if

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a court, or the DOL, later determines the opinion was incorrect. Therefore, opinion letters have been widely used for decades and serve not only to limit liability, but perhaps more importantly, provide employers assurance that their pay practices are consistent with the nuanced provisions of the FLSA.

2010 – 2017: When The DOL Abandoned The Practice In Favor Of "Administrator Interpretations"

The practice of issuing opinion letters continued for over 70 years until it was temporarily suspended by the Obama administration from 2010 to 2017. In support of ending the practice, the DOL contended that it was not an efficient or productive use of its resources to "provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the facts may result in a different outcome." Likewise, in 2015, a DOL administrator defended its cessation of the practice, claiming opinion letters were somehow neither "transparent" nor "fair" in light of their fact-specific nature.

Instead, the DOL chose to issue "Administrator Interpretations," which require fewer resources and provide broad guidance on a topic to the public at large, as opposed to specific guidance tailored to an individual situation. However, Administrator Interpretations failed to prove a viable replacement for opinion letters, whether viewed in terms of content or the nature or number topics addressed. Opinion letters may be requested by *anyone, at any time, for any issue*. In contrast, Administrator Interpretations only are issued when "it is determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate."

During the practice's seven-year hiatus, the DOL issued only seven Administrator Interpretations. By comparison, the DOL issued 318 opinion letters between 2003 and 2009. This sharp decline in regulatory guidance essentially left employers, employees, practitioners, and others stranded in limbo on several important issues for nearly a decade, even though compliance questions and issues of interpretation neither fell in number nor become less complex or important.

Ironically, the very first Administrator Interpretation issued in 2010 cited and relied upon opinion letters from prior

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administrations. This illustrates that, despite the nature of opinion letters as focusing on particular facts, situations, employers, employees, or industries, they provide far-reaching guidance on a broad range of analogous situations, even if an issue at hand was not addressed specifically or the opinion letter was issued many years prior. This is perhaps why the DOL maintains opinion letters on its website stretching back to 2001 and employers, employees, and practitioners alike continue to reference opinion letters when current disputes arise, even where there are no opinion letters precisely on-point or the opinion was issued decades prior.

Unfounded Criticism

Following the seven-year hiatus, the Trump administration breathed new light into the practice, issuing 69 opinion letters since resuming in 2018. These letters addressed a wide range of topics – from broad gig economy questions to narrow guidance on which types of compensation should be factored into the regular rate for an overtime calculation. However, the value and practicality of DOL Wage and Hour Division opinion letters has remained a hotly debated issue.

Criticism of opinion letters from those outside of the DOL itself are based on faulty understanding on the process and purpose of opinion letters. For example, some believe DOL opinion letters apply only to the specific facts and situations presented in the letter, exist to mostly serve the interests of employers, or are simply incorrect. However, these aspersions could not be further from the truth.

Opinion letters may be requested by and serve the interest of *everyone*, providing guidance on the FLSA's boundaries, implications, requirements, and prohibitions in innumerable situations. Although opinion letter topics generally are raised by a specific person or entity, many of the situations they present have broad applicability to a range of employers. The benefit of receiving clarification of issues arising under a less than straightforward law is shared by all, and the FLSA's aims are best served when all affected by the law understand what the rules are and how to comply.

Frankly, if the law and regulations were clearly written, there would be no need for the additional sources of guidance. The reality is, however, the facts make the law walk and talk. Absent opinion letters, the resources provided by the DOL (such as its Fact Sheets and Field Operations Handbook)

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leave a lot to be desired in providing clarity in the more complicated fact patterns.

The Final Opinion On DOL Opinion Letters

President Biden recently tapped Boston Mayor Marty Walsh to head the DOL. Upon Walsh's nomination, Fisher Phillips forecasted that the Biden/Walsh DOL would "rescind several Trump administration letters covering a wide range of topics, including certain employees' exempt status, determining non-exempt employees' hours worked, and calculating the regular rate for overtime purposes." This was according to Matt Simpson, a member of the firm's Wage and Hour Law Practice Group. His words were prescient. The Biden DOL made quick work to make this prediction come true on January 26, revoking three opinion letters on independent contracting and tip-pooling rules that were published in the Trump administration's final hours.

Whether this move is a signal that the Biden-era DOL will once again decline to issue opinion letters remains to be seen. After all, Walsh has not yet even assumed leadership of the agency, so it may be premature to speculate about whether early administration actions fall in line with his thinking. However, no one in the employment law community would be surprised if we learn soon after Walsh's confirmation that opinion letters are once again shelved for the foreseeable future.

Since their inception, DOL opinion letters have proved an invaluable resource. The new administration should welcome any practice that is designed to provide clarity on complicated laws like the FLSA and foster broad compliance therewith. Opinion letters do just that and are well-worth the DOL's efforts. It's a win-win-win for employers, employees, and the government. We urge the new administration to continue to use of opinion letters, recognizing the benefit outweighs any burden on agency resources.

Fisher Phillips will continue to monitor the situation related to DOL opinion letters and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Wage and Hour Law Practice Group.

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