"On Second Thought, Maybe I Will Give You My Opinion": USDOL To Reinstate Opinion-Letter Process

Insights
6.28.17

TLDR: The U.S. Department of Labor will resume the practice of issuing wage-and-hour opinion letters. This is a big development for employers who are seeking authoritative guidance on their pay practices under the federal Fair Labor Standards Act and other federal wage-hour laws.

The U.S. Department of Labor has announced that its Wage and Hour Division will once again issue opinion letters interpreting the federal Fair Labor Standards Act and other federal wage-hour laws. This has been high on our "wish list" since the practice was stopped in 2010. Readers will recall Secretary Acosta's confirmation-hearing testimony in which he said that he was open to taking this step.

Clarifying Rights And Responsibilities
These letters have served as part of the Division's compliance function from the FLSA's earliest days. They have provided USDOL's official, written positions regarding the application of that law's requirements to specific circumstances presented by interested members of the public.

USDOL's press release expressed Labor Secretary Acosta's view that opinion letters "will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes" by providing guidance on specific issues at the request of employers, employees, advocacy groups, or others.

This has long been our view, also. For decades, opinion letters have been invaluable to courts, employers, employees, unions, trade groups, and anyone else who is genuinely interested in knowing how the FLSA applies to certain sets of facts.

"Administrator Interpretations" Not A Substitute
For reasons that many saw at the time as being misguided, the prior administration brought the practice to a halt in 2010. The Wage and Hour Division claimed that it was not an efficient or productive use of the agency's 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." Instead, the Division said, it would henceforth issue

"Administrator Interpretations" when it "determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate."

From then until now, despite the existence of innumerable areas of uncertainty, the Division saw fit to issue only eight FLSA-related Administrator Interpretations (two of which have already been withdrawn). The six still-outstanding ones cover the narrow topics of joint-employment in certain home-care settings, shared-living arrangements in home-care settings, the meaning of the word "clothes" under an FLSA exception relating to collective bargaining, the exemption status of mortgage loan officers, matters arising in the "Pine Straw Industry", and the effect of state laws on the payment of sub-minimum wages to individuals with disabilities.

Although USDOL's announcement has no immediate impact on any of the Administrator Interpretations now in effect, it might well be that subsequently-issued opinions will modify or amend the positions taken in one or more of them.

The Bottom Line

USDOL's re-instituting the opinion-letter process is certainly welcome news. But employers should note that whether to seek an opinion, and how to go about doing so, can implicate a number of important considerations that should be evaluated carefully in advance.

Also, it remains to be seen whether and to what extent future opinions will be signed by or on the authority of the Wage and Hour Division's Administrator (an office that is currently vacant), or whether many or most will instead be rendered by subordinate officials. Who issues an opinion can affect the weight and impact of the interpretation it contains.

Related People

Marty Heller
Partner
404.231.1400
Email