



# Opinion Letters Are Good For Everybody

Insights

7.07.17

The U.S. Department of Labor's announcement that it would resume issuing opinion letters has re-invigorated criticism that recently surfaced at the mere *suggestion* that this might be done.

It is likely that most such letters will address matters arising under the federal Fair Labor Standards Act. One might think that every significant FLSA issue had been resolved since the law took effect in 1938, but this is simply incorrect.

The current attention to FLSA compliance, and the modern-day frequency of disputes invoking its provisions, are historically unprecedented. Numerous FLSA questions and areas of uncertainty that have existed for years are being driven to the surface for the first time. In addition, entirely-new concerns arise as this Depression-era legislation is applied to 21st Century workplaces.

## Criticisms Are Unfounded

The aspersions now being cast upon opinion letters can be grouped into principally three categories:

◇ *"Opinion letters mostly serve the interests of employers."*

On the contrary, the fact is that opinion letters serve the interests of *everyone* who sincerely wants to know what the FLSA's boundaries, implications, requirements, and prohibitions are in the innumerable situations to which it is or might be relevant. These interpretations may be sought by anyone, and for decades they have helped courts, employers, employees, unions, trade groups, advocacy groups, and many others.

Moreover, employer-submitted opinion requests sometimes generate employee-favoring responses, whereas sometimes the reverse is true. But whom an opinion ultimately "favors" is not the point in any event. What matters instead is the clarification of issues arising under what might seem to be – but most-assuredly is *not* – a straightforward law. The FLSA's aims are best accomplished when *all* those who are affected know what the rules are.

◇ *"Many opinion letters are incorrect."*

Substantively-flawed opinions have been the exception. More often, the allegation that a letter is "incorrect" grows out of a policy-preference-driven or litigation-position-focused dissatisfaction with the position USDOL took.

And even if the contention were true, it would not be a valid denunciation of the decision to reinstate the practice of issuing these interpretations. USDOL can and should assuage any such concerns by devoting the resources necessary to conduct substantively-sound analyses and to maintain an adequate internal process for reviewing and vetting opinions prior to their release.

Furthermore, nothing prevents concerned members of the public from writing to USDOL in an effort to make the case that a rendered opinion is supposedly "incorrect".

◇ *"Opinion letters are a 'Get Out Of Jail Free' card."*

The question this Monopoly<sup>®</sup> allusion raises is, what *should* happen if a court finds that an employer violated the FLSA by doing what USDOL said in an official opinion could be done? For example, what if the employer is figuratively "In Jail" because just *one* of the nearly 700 judges in one of the 94 federal judicial districts across the nation decided that he or she disagrees with USDOL's viewpoint expressed in such a letter?

Congress's unsurprising answer is that the employer should not be liable if management "pleads and proves" that the violation grew out of its having acted "in good faith in conformity with and in reliance upon" an official USDOL opinion. 29 U.S.C. § 259(a). In such circumstances, it would clearly be unjust for the employer nevertheless to "Go Directly To Jail" for conducting itself in accordance with what USDOL had said was consistent with the FLSA.

### **The Bottom Line**

For decades, opinion letters have been an important means by which the public has developed a better understanding of what FLSA compliance entails. Even after the process was discontinued in 2010, opinions from earlier times have continued to provide important guidance – including to the very USDOL officials who decided to stop issuing them.

The last seven years have demonstrated that there is a compelling need for authoritative USDOL answers to actual, day-to-day FLSA questions. The alternative is continued uncertainty, ambiguity, vagueness, and disputes. Everybody should welcome measures that are designed to foster clarity and compliance, and opinion letters have always been highly-ranked in that regard.