The Advent of FLSA Guidance

Insights
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It has been a busy month for the U.S. Department of Labor (USDOL) with respect to, among other things, the federal Fair Labor Standards Act (FLSA). From enforcement programs to compliance resources, the agency has stepped up and provided timely guidance that ultimately can benefit everyone, if employers understand what the various materials do and do *not* say.

Variety of Resources
As previously mentioned, in promoting its new PAID program, the USDOL has added engaging videos educating employers on their FLSA obligations. It also has updated some of its fact sheets and issued a timely enforcement policy with respect to the recent tip changes.

Naturally many of these materials take a high-level view though. As we have observed in the past, the shortcoming is that employers analyzing such materials on their own might be left without guidance when it comes to proper application. As the recently released opinion letters demonstrate, summarized below, employers must understand the statements in both the context of the FLSA principles not fully discussed therein and the context of the employer's actual policies and practices.

New USDOL Opinion Letters
FMLA Rest Breaks

While not earth shattering, employers will appreciate that in opinion letter FLSA 2018-19 the USDOL has summarized the current case law and its position that *extra* rest breaks provided to accommodate an employee typically can be excluded from the employee's "hours worked", unlike most rest breaks.

***Tip*:** An employer wanting to exclude rest breaks under these circumstances will want to consider how it will administer this, particularly with respect to any rules within its timekeeping system.

Garnishments and Lump-Sum Payments

The USDOL also published a non-administrator letter regarding the application of the Consumer Credit Protection Act (CCPA) with respect to garnishments and lump-sum payments. In CCPA2018-1NA, the agency addresses whether a variety of lump-sum payments are considered "earnings"

under the CCPA and, as such, are subject to the protections of the Act that limit how much of an employee's earnings can be garnished. With respect to many of the payments, there seemed little basis for doubt that the amounts were deemed "earnings", but employers will find the guidance useful (particularly the extent to which any payments were found to be outside of the Act) when faced with an odd payment, lump sum or otherwise, that is not on this list.

***Tip*:** An employer will want to consider what process it has in place for identifying payments that might be outside of the protection of the CCPA. Given the broad range of payments that the letter sets forth as "earnings", we recommend as a best practice that employers start their analysis from the basis of the payment being "earnings" unless it has reason to conclude otherwise as opposed to vice versa (similar to a common error made with respect to the FLSA's "regular rate").

Travel Time

The more extensive FLSA opinion letter released relates to travel time. Travel time principles can be among the most difficult to apply and any useful guidance is certainly welcomed, but this letter also illustrates why any agency guidance must be carefully evaluated.

In opinion letter FLSA 2018-18, the USDOL tackles the problem of "commuting" where an employee does not work at a fixed location. Ultimately, whether the time must be included as "hours worked" will depend on the intersection of various factors. Unfortunately, a reader not already familiar with the FLSA's "travel time" principles might apply this letter in an overbroad fashion, due to the lack of explanation of which facts are relevant (or irrelevant) under different sets of circumstances.

This is particularly so with respect to the first scenario presented specific to *overnight*, *out-of-town* travel as a *passenger*, as well as the day-to-day driving of a company vehicle presented in the second and third scenarios.

Tip: An employer might tackle its analysis in a logical order to avoid needlessly grappling with some of these principles. Here is one approach to consider for analyzing a day when an employee is *driving* to/from *home* and *not* out-of-town, as was presented in the second and third scenarios:

- Does the "commuting" analysis even apply?

1. 1. • Is the employee performing other work while driving?
   2. • Is the employee driving a vehicle that, due to the difficulty of driving the particular vehicle, precludes an employer from excluding the time from "hours worked"?
   3. • Is the employee driving a company vehicle with respect to which the parties failed to reach the necessary terms for it to be equated, for these purposes, to a personal vehicle?
   4. • Only to the extent that *none* of the above apply does one reach the question: Is the time involved in traveling between home and the first designated place (or the last designated place) "extraordinary"?

Unfortunately the USDOL provides no analysis of "extraordinary" time or what to do if the time *is* "extraordinary", except by reference to an earlier opinion letter where, in *those* circumstances, some portion of four hours was found to be extraordinary. Of course the new letter is useful in that it provides recent guidance reminding for employers that there are a multitude of factors, which is a benefit in and of itself; but an employer must conduct a structured analysis to determine which factors are relevant in which circumstances.

The Bottom Line

It is encouraging to see the USDOL providing guidance in an effort to educate employers so that they might avoid violations from the outset. Nevertheless, the law is too cumbersome to tie up nice and neat in a video, fact sheet, or even opinion letter. Employers would be best served to remember that and, in consultation with knowledgeable legal counsel, focus as much attention on what the guidance does *not* say, as what it does say.

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