Labor Department Clarifies Overtime, Medical Leave Questions in New Opinion Letters: What Employers Need to Know

Insights
1.15.26

Do employers have to classify qualified employees as exempt from overtime pay if they don't want to? Can FMLA leave be used to travel to and from medical appointments? The Department of Labor (DOL) recently released six new opinion letters offering employers guidance on these specific issues and more that arise under federal minimum wage and family leave laws. While these letters provide employers with some guidance, the responses are specific to scenarios submitted by employers, employees, and other organizations. Here's what the DOL had to say about these tricky wage and leave situations and how the answers could apply to your business.

Overtime Pay Exemptions

Quick Facts

This opinion letter considered whether a Licensed Clinical Social Worker could be classified as exempt from the Fair Labor Standards Act's (FLSA's) overtime requirements despite the employer removing supervisory responsibility and reclassifying the employee to non-exempt. The letter was requested by an employee who apparently objected to the employer's decision and wanted to keep exempt status.

DOL's Response

The Wage and Hour Division (WHD) explained that even with the removal of supervisor responsibilities, the employee's primary duty necessitated the performance of "work requiring advanced knowledge in a field of science or learning" which would qualify for the "learned professional exemption" under the FLSA. The DOL noted that state law (Utah) required a master's or doctoral degree to qualify for licensure. Although the DOL agreed with the employee that the requirements of the "learned professional" exemption were met, it noted that an employer is not required to classify an employee as exempt from overtime pay if it doesn't meet their business needs.

Employer Takeaway

WHD made clear that it is the *employer's* decision whether to utilize an available overtime exemption for a qualified employee, not the employee's. An employer is free to classify an employee

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as non-exempt even if an exemption may be available. However, keep in mind that "non-exempt" is the default status and employees who don't qualify for any of the FLSA's overtime exemptions should always be classified as non-exempt and receive overtime pay.

Excluding Bonuses from the Regular Rate

Quick Facts

An employer in the waste management industry pays drivers $12 an hour. Drivers can also earn a supplemental performance-based bonus each pay period. The employer uses a range of safety and performance criteria to pay a bonus up to $9.50 an hour along with base wages each pay period. However, the employer only uses the base $12 an hour rate to calculate overtime premiums and does not include the bonus payments.

The Question

Does FLSA section 7(e) allow the employer to exclude certain bonus payments from the "regular rate of pay" and, if not, how should it include these payments in overtime premium calculations?

The DOL's Response

Based on the facts presented in the opinion letter, the DOL found that the bonus payments need to be included in each employee's regular rate of pay for every workweek a bonus is earned. The payments do not qualify as "discretionary bonuses" that are excluded from the regular rate under the FLSA, nor do they fall under any other statutory exclusion.

It sometimes comes as a surprise to employers that the regular rate is not simply an employee's hourly rate of pay or their take home pay. It includes all types of compensation – including things like non-discretionary bonuses, commissions, payments for undesirable shifts or duties, and some non-cash payments depending on the circumstances.

The regular rate is based on "all remuneration" earned from employment with the exception of eight specific exclusions contained in FLSA section 7(e), including "discretionary bonuses."

The DOL said the bonuses described in this opinion letter are not discretionary. The decision to pay a bonus and the amount paid are not made at the "sole discretion of the employer at or near the end of the period" in which the work is performed. Rather, the bonus is part of a predetermined plan to incentivize employees to meet certain goals.

> **How is the regular rate calculated in this scenario?** If the employee works 50 hours in a workweek, is paid a base hourly wage of $12, and also receives $9.50 an hour in bonuses for all

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hours worked, the regular rate is $21.50 an hour. The employee is due $21.50 for all hours worked up to 40 and $32.25 (1.5 × $21.50) for each overtime hour.

Employer Takeaway

An incentive bonus plan announced to employees in advance typically must be included in the regular rate. In the waste management driver's case, the DOL said the employer must include these incentive bonus payments, in addition to each employee's base hourly wage, in the regular rate used to calculate overtime.

Mandatory Roll Call

Quick Facts

In this scenario, a collective bargaining agreement (CBA) covers county 911 dispatch workers. They typically work less than the standard 2,080 hours a year (40 hours a week for 52 weeks). The union and employer are considering mandating a 15-minute "roll call" before each shift that would bring employees closer to those hours. They want to count the roll call as "hours worked" but exclude it from overtime calculations. Can they do this under the FLSA?

3 Questions:

1. Whether the mandatory 15-minute roll call period may be properly classified as "hours worked" under the FLSA
2. Whether the roll call period can be used to supplement pay periods that would otherwise fall below 80 hours
3. Whether the roll call period can be excluded from the overtime calculation given that its sole purpose is to bring employees closer to 2,080 annual hours.

DOL's Response

Based on the facts presented in this opinion letter, the roll-call period counts as compensable time under the FLSA and generally must be included when calculating overtime premiums.

2 Possible Exceptions

While the roll call counts as hours worked and part of the workweek, in response to the third question, the DOL noted two partial overtime exemptions under the FLSA:

1. Under 7(b)(1), if the employee is covered by a CBA that's certified as "bona fide" by the National Labor Relations Board (NLRB), the employer can pay overtime compensation for all hours

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worked over 12 in a day or over 56 in a week, and the CBA must state that no employee will work more than 1,040 hours in any consecutive 26-week period.

2. Under section 7(b)(2), in addition to the NLRB certification and 12/56 rules noted above, a partial overtime exemption may apply if the CBA includes specific terms, such as clearly defined pay rates for all hours worked or guaranteed, a guaranteed number of hours over a 52-week period (typically between 1,840 and 2,080), a cap of 2,240 total hours, and overtime pay for hours exceeding both the guarantee and 40 in a week, as well as hours exceeding 2,080 in the 52-week period.

Therefore, if structured properly, the dispatchers' CBA could account for a partial overtime exemption.

Employer Takeaway

Employers negotiating CBAs that include pre-shift activities like roll calls should treat that time as compensable under the FLSA and generally include it in overtime calculations. If you think a valid partial overtime exemption applies under Section 7(b)(1) or 7(b)(2), note that these exceptions are nuanced, and there are certain steps you'll need to take if employees exceed the designated hours. Your best bet is to consult legal counsel to explore your options and ensure FLSA compliance.

Commission-Earning Restaurant Employees

Quick Facts

An employer operates restaurants in a state with its own minimum wage and tip credit law – and the state minimum wage is higher than the federal rate. The employer classifies servers and server assistants as exempt from overtime under FLSA Section 7(i), which applies to certain employees who are paid commissions, such as those who receive qualifying service charges for banquet work. The workers in this scenario also receive some true gratuities from customers.

The Questions

Under the FLSA's overtime exemption for commissioned employees, should employers in states with a higher minimum wage use the federal or state minimum wage to meet the minimum pay requirement of the Section 7(i) exemption? And do tips count as compensation under the requirement that more than half the employee's compensation consist of commissions?

The DOL's Response

Based on the specific facts, the DOL said in its opinion letter, that service charges qualify as commissions and that an employee of a qualifying retail or service establishment who is paid more than 1.5 times the federal minimum wage, not a higher state minimum wage, satisfies the minimum pay standard in FLSA section 7(i)(1).

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- The employee's "regular rate of pay" must currently exceed $10.875 an hour – which is 1.5 times the federal minimum wage – for any workweek the employer claims the exemption.
- Additionally, any commissions on goods or services paid to the employee must be more than 50% of their compensation for a representative period of at least a month.

As for the second question, tips may or may not count as compensation for purposes of Section 7(i)(2). A tip "is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer." In some circumstances, however, a portion of an employee's tips is considered "compensation" under Section 7(i)(2) when the employer relies on such tips to meet federal, state, or local wage obligations.

For example, under the FLSA, an employer can pay tipped employees $2.13 an hour and take a "tip credit" of up to $5.12 an hour, so long as the employee makes at least the $7.25 federal minimum wage when tips are factored in. In this context, the tip credit portion would be deemed "compensation" under FLSA Section 7(i)(2), but not any tips received by the employee in excess of the tip credit amount.

> **Note:** The 4th US Circuit Court of Appeals has reached a different conclusion, so employers in Maryland, North Carolina, South Carolina, Virginia, and West Virginia should follow the court's rule rather than this particular opinion letter.

Employer Takeaway

Compensation and commissions can vary by employee and by week. Be sure to regularly review your employees' commissions and total compensation to ensure the Section 7(i) pay requirements are being met. You should also ensure compliance with all applicable federal, state, and local laws, which vary across jurisdictions. This opinion letter should be a helpful resource in particular for restaurant employers, many of whom have begun to consider implementing a service charge pay model in lieu of the more traditional tip credit pay model.

School Closures and FMLA Leave

Question Presented

If a school is closed during a week when an employee is taking Family and Medical Leave Act (FMLA) leave, does the closure time count towards their FMLA leave? According to the opinion letter, it depends on whether the employee is expected to work through the closure, as well as how much FMLA leave they take that week.

Legal Background

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Eligible employees can take up to 12 workweeks of job-protected FMLA leave in a 12-month period. This leave can be used in full weeks or on an intermittent schedule for certain conditions.

DOL's Response

For school employees utilizing FMLA leave for less than a full workweek: If school closes for part of the week when an employee had scheduled FMLA leave, the days the school is shuttered don't count towards their FMLA leave allocation, unless they were expected to work through the closure.

The example provided by the DOL explains: If an eligible employee needs FMLA leave each Tuesday afternoon for physical therapy, but the school is closed all day on Tuesday due to inclement weather and the employee is not required to report for duty, the school should not deduct time for that day from the employee's FMLA entitlement.

For school employees taking a full workweek of FMLA leave: When a school closes for part of a week during which an employee is using a full week of FMLA leave, however, the entire week is counted as FMLA leave.

The example provided by the DOL explains: If the employee was on FMLA leave for Monday through Friday of a week, but the school is closed on Tuesday, the employee would use a full week of FMLA leave despite not being required to report to work on Tuesday.

Employer Takeaway

Whether your employee is taking FMLA leave in increments or full workweeks is key to the analysis. The guidance emphasizes that whether the closure was planned or unplanned has no impact on the amount of leave an employee uses. It also notes that if the employer's business activity has "temporarily ceased" (for example, school breaks and/or summer breaks), and employees generally are not expected to report for work for one or more weeks, those days do not count against the employee's FMLA leave entitlement.

FMLA Use for Travel to Medical Appointments

Question Presented

Can FMLA leave be utilized for time spent traveling to health care appointments, and are employees required to provide a doctor's certification?

DOL's Response

FMLA rules and regulations allow employees to use FMLA-protected leave to cover travel time to appointments for serious health conditions or those of a qualifying family member, according to this opinion letter.

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However, the DOL's Wage and Hour Division notes that FMLA-protected leave for travel time doesn't include "travel to or from, or stops for, other unrelated activities." Any time spent on activities that aren't related to the employee's (or their eligible family member's) serious health condition doesn't count against their FMLA entitlement.

Employees utilizing FMLA for this purpose also aren't required to provide a doctor's certification to estimate travel time or otherwise address trips to or from these appointments, according to the letter. While employers may request "medical facts within the knowledge of the health care provider regarding the condition" to certify an employee's request for FMLA leave, the guidance clarifies that a "healthcare provider's knowledge does not extend to the travel time necessary for a patient to get to and return from a needed appointment."

Employer Takeaway

Ensure employees are aware that only travel time to and from medical appointments can be deducted from their FMLA leave when utilizing it for these purposes. Educate your HR department about what is required on medical documentation if FMLA claims are processed in-house.

Conclusion

If you have any questions about these opinion letters, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Wage and Hour Practice Group for assistance. Fisher Phillips will continue to monitor this area and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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