



USDOL Opinion Letters Remind All That Nuances Matter

Insights

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Despite most of the government being occupied with the "shutdown" dilemma, the unaffected USDOL has remained busy and gifted us with two opinion letters today: an enlightening one regarding certain volunteers and a simple reminder that for FLSA purposes the rate is all about the math.

Volunteers

Briefly, while the scope of the FLSA2018-29 letter regarding volunteers is limited, it will be of great interest to some non-profit organizations regularly grappling with "where the line is" between volunteers and employees. The opinion letter discusses the USDOL's approach to coverage, employment, and the operation of non-profit ventures that potentially compete with other enterprises. While favorable to all parties (the organization and the well-meaning worker), readers should carefully evaluate in each situation: the activity, the benefits to all involved, and the surrounding circumstances.

It's the Average Rate That Matters

Much has been made in recent years of certain states rejecting an "average hourly wage" approach to calculating an employee's rate for purposes of wage-hour compliance. Today's opinion letter FLSA2018-28, confirms that the FLSA principles call for, not a rate-at-the-time analysis by default, but rather a mathematical computation based on the employee's total wages for the workweek and the employee's hours worked for the workweek. When particular activities do not have rates assigned, the law recognizes that does not mean the employee was paid a rate of zero for certain hours worked. Long standing FLSA principles establish the averaging approach as the default, though it would behoove employers to remind employees that they are being paid [whatever rate/structure] for *all* hours worked.

At the same time, a word of caution was offered to the employer, regarding assumptions about that rate. Particularly when it comes to overtime, an employer must be sure to calculate the rate for *each* workweek based on the relevant pay and hours. In other words, you have to apply the law and do the math. Though the law has been well established with respect to these principles, employers will appreciate the confirmation wrapped up in this nice and neat package.

The Bottom Line

As with any authority, employers must pay attention to the details. Indeed, the rate letter, illustrates just how careful one must be when applying FLSA principles and carefully distinguishes between an

employee's "regular"/average rate for the workweek and an employee's typical/average rate over time. We would add that, though the letter is correct in stating that the FLSA only establishes a "minimum floor" with respect to the overtime premium due, employers should consult with legal counsel if increasing or structuring additional overtime premiums not specifically required by state law.

Service Focus

Wage and Hour