

Insights, News & Events

LABOR DEPARTMENT ANSWERS REAL-WORLD WAGE AND HOUR QUESTIONS IN 4 NEW OPINION LETTERS: KEY TAKEAWAYS FOR EMPLOYERS

Insights
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Labor Department Answers Real-World Wage and Hour Questions in 4 New Opinion Letters: Key Takeaways for Employers

The US Department of Labor's Wage and Hour Division just issued four opinion letters on May 28 answering real-world questions about employer practices and whether they comply with federal wage and hour law. These responses are specific to scenarios submitted by employers, employees, and other organizations, but the answers provide employers with a roadmap for compliance with the federal Fair Labor Standards Act (FLSA). A word of caution: the USDOL guidance is limited to interpretation of the FLSA and does not impact state law in jurisdictions that have more robust wage and hour laws. Here's what the USDOL had to say and the key takeaways for your business.

OPINION LETTERS: WHAT ARE THEY AND DO THEY MATTER?

Opinion letters are formal, written guidance from DOL officials explaining to the public how the agency would apply the law to a specific set of facts. While the letters are not binding on courts, they do serve as a powerful compliance tool and can be used as persuasive authority in defending a claim under the FLSA or to demonstrate good faith to avoid liquidated damages. Anyone can request an opinion letter, and they've been used since the 1930s as a compliance lifeline for employers, unions, and workers alike. [You can read more about the benefits here.](#)

Related People



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“Opinion letters aren’t binding on courts, but they carry significant weight. They can serve as persuasive authority when you’re defending against an FLSA claim, and **relying on one in good faith can bolster your defense to liability** and help reduce or avoid liquidated damages.”



**KATHLEEN
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– Partner and Co-Chair,
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IS AN EMPLOYEE’S LONG WALK TO TAKE A MEAL BREAK OFF PREMISES COMPENSABLE?

- **Question:** Should the time spent by an employee walking through a large facility or going through security to take their meal break off premises be treated as compensable time under the FLSA?
- **DOL Answer:** No, an employer doesn’t have to compensate employees for time spent leaving the premises during their unpaid meal break, so long as the employee is not required to work and is freed from duties during that time, [according to this new opinion letter](#).

Facts of the Inquiry: An employee wrote to the DOL asking whether their employer’s unpaid 30-minute meal break policy complied with the FLSA’s minimum wage requirements. They spent a significant amount of their break time traveling through the worksite and security to get to their car. The employee felt discouraged from taking meal breaks off-site since the travel time counted against the allotted 30-minute break.

DOL’s Call: Based on relevant case law, travel time spent during the meal break isn’t compensable because the employee had been fully relieved of their duties during that time. The FLSA doesn’t require “absolute freedom” for an unpaid meal break, and an employer may place certain

limitations on an unpaid meal break of 30 minutes or more, including requiring employees to remain on the premises.

The core inquiry for unpaid meal break compliance under the FLSA is whether the employee was actually relieved from their work duties and tasks. The employee in this scenario had the option to stay on campus or leave during the meal period, but the voluntary choice to leave doesn't convert travel time into compensable time, according to the DOL.

Key Employer Takeaway: The FLSA generally does not require employers to provide meal periods, but when they do, meal breaks of at least 30 minutes can typically be unpaid, you can require employees to stay on the premises, and you don't have to pay for time they voluntarily spend traveling off-site. Just be sure employees aren't doing any work during that time, and check your state and local laws, which can be stricter than federal law.

OFF-PREMISES MEAL BREAKS



QUESTION:

Should the time spent by an employee walking through a large facility or going through security to take their meal break off premises be treated as compensable time under the FLSA?

DOL ANSWER:

No, an employer doesn't have to compensate employees for time spent leaving the premises during their unpaid meal break, so long as the employee is not required to work and is freed from duties during that time.



DOES AN EMPLOYEE LOSE THEIR EXEMPT STATUS WHEN THEY PICK UP SHIFTS DOING NON-EXEMPT WORK?

- **Question:** Can a business employ a worker in separate overtime-eligible and overtime-exempt positions without affecting their exempt status?

- **DOL Answer:** Yes, if their **primary duty** is in the overtime-exempt position, [according to this opinion letter](#). Overtime-exempt employees may work in additional and separate, non-exempt hourly roles at the same business without losing their exemption status, so long as their primary job is overtime-exempt work.

Facts of the Inquiry: An employee asked the DOL whether their work as an hourly Staff Nurse would have any overtime implications for their work in an overtime-exempt Specialist position. The employee explained that specialists pick up shifts as Staff Nurses, sometimes making up about 23%, and occasionally up to 38%, of the hours they worked per week.

DOL's Call: In this scenario, the employee's choice to take on extra Staff Nurse shifts at an hourly rate doesn't impact their exempt status. The employee's primary duty is the Specialist role, because most of their time is spent in that position. The fact that the Staff Nurse shifts are picked up as a supplement further indicates that the Specialist role is the employee's primary duty.

The DOL added that employers may offer additional pay to exempt employees without violating the salary-basis compensation requirement. To be eligible for the white-collar overtime exemptions, an employee must be salaried, make more than a specified amount each year, and have certain executive, administrative, professional, or other specific job duties.

Key Employer Takeaway: Under federal law, an exempt employee can pick up extra hourly shifts in a non-exempt role and be paid hourly for that extra work, so long as their primary duty is exempt work and you pay them the full guaranteed salary each week. Be sure the exempt role is the primary duty in actual practice, not just in their job description, since the USDOL and courts will look at the actual work performed.

QUESTION:

Can a business employ a worker in separate overtime-eligible and overtime-exempt positions without affecting their exempt status?

DOL ANSWER:

Yes, if their **primary duty** is in the overtime-exempt position. Overtime-exempt employees may work in additional and separate, non-exempt hourly roles at the same business without losing their exemption status, so long as their primary job is overtime-exempt work.



WHEN ARE PRE-SHIFT ACTIVITIES COMPENSABLE?

- **Question:** Do a hospital's timekeeping policies comply with the FLSA if they don't pay non-exempt employees for certain pre-shift work performed after clocking in, treat short pre-shift periods of work as "de minimis" time, and round early clock-ins up to the scheduled start time while barring early clock-outs?
- **DOL Answer:** These practices raise substantial questions about whether all compensable hours are being paid. For example, some pre-shift activities are integral to the job and must be paid, whereas waiting in line to clock in or out is generally not compensable. The question of whether time is *de minimis* is fact intensive. Rounding time may violate the FLSA if employees are actually working during the time that's rounded away.

Facts of the Inquiry: An employee at a public hospital with about 18,000 non-exempt employees says the hospital lets workers clock in up to seven minutes early to avoid bottlenecks at timekeeping stations, then rounds those times up to the scheduled start time. It also bars employees from clocking out early at the end of the shift. Additionally, some employees, including respiratory therapists, routinely do pre-shift tasks right after clocking in, but the employee claims the hospital's rounding system doesn't always pay for

this time. The employee asked the DOL whether these practices are permitted under the FLSA.

DOL's Call: While the Wage and Hour Division couldn't make a clear call on all the issues addressed [in this opinion letter](#) without additional information, it did provide some practical pointers under the FLSA:

- **Pre-shift work** that is integral and indispensable to the job is compensable. For respiratory therapists, receiving patient handoff reports and locating assignments fall within the compensatory category, because they can't safely begin care without them.
- **Waiting in line to clock in** before the employee performs their first principal activity of the shift isn't compensable even on the employer's premises. The same rule applies to time spent waiting to clock out after the last principal activity is performed.
- As to **rounding**, the law allows employers to round time to the nearest fraction of an hour (such as the nearest 5 minutes, 6 minutes or quarter-hour). This practice is only lawful if, in the aggregate, it is not more favorable for the employer than the employee. Again, the DOL said there were not enough facts to conclude that the employer's practice was unlawful.
- On the issue of **whether certain off-the-clock work is *de minimis*** – meaning it's too brief to make tracking practical – the USDOL said regularly performed compensable work is unlikely to qualify as *de minimis*, especially given modern systems that record exact times. The key is that a neutral rounding policy should not systematically undercompensate employees for hours worked.
- The DOL said it **couldn't draw broad conclusions** across 18,000 hospital employees about the compensability of administrative activities without further analysis.

Key Employer Takeaway: If employees perform integral and indispensable job duties before a shift starts, employers should be counting that time as hours worked and paying appropriately. Moreover, rounding practices should be carefully scrutinized to make sure that the time averages out – and use of rounding can be problematic when using sophisticated timekeeping systems that capture exact times. Time spent waiting at

a timekeeping station due to bottlenecks, however, does not constitute compensable work time. As a best practice, clearly communicate and enforce your policies against off-the-clock work to limit exposure.

PRE-SHIFT ACTIVITIES



QUESTION:

Do a hospital's timekeeping policies comply with the FLSA if they don't pay non-exempt employees for certain pre-shift work performed after clocking in, treat short pre-shift periods of work as "de minimis" time, and round early clock-ins up to the scheduled start time while barring early clock-outs?

DOL ANSWER:

These practices raise substantial questions about whether all compensable hours are being paid. For example, some pre-shift activities are integral to the job and must be paid, whereas waiting in line to clock in or out is generally not compensable. The question of whether time is *de minimis* is fact intensive. Rounding time may violate the FLSA if employees are actually working during the time that's rounded away.



DOES CALCULATING BONUSES AS A PERCENTAGE OF PROFIT REQUIRE RECALCULATION OF THE "REGULAR RATE" FOR OVERTIME PURPOSES?

- **Question:** Can a quarterly bonus tied to a pool of sales revenue qualify as a "percentage of total earnings" bonus if it is calculated from both straight-time and overtime pay earned that quarter, so no additional overtime is owed when it's paid out?
- **DOL Answer:** Under the facts described, yes. The employer's quarterly bonus payment includes overtime compensation due on it, which satisfied the FLSA's overtime pay requirement. So, the employer didn't need to recalculate the "regular rate" or pay additional overtime compensation.

Facts of the Inquiry: At the end of each quarter, the employer set a bonus pool based on sales revenue and counted the eligible employees. It pulled a gross earnings report covering straight-time and overtime pay for the quarter, then set each employee's share based on how their

total pay compared to the combined pay of all eligible employees. That percentage was multiplied by the pool to set each bonus. No extra overtime was added on top, since the calculation already included straight-time and overtime pay.

DOL's Call: When an employer pays a nondiscretionary bonus, like the quarterly bonus in this scenario, the amount is generally calculated well after the pay period in which it's earned. The employer then has to go back and recompute each employee's "regular rate of pay" to add in the bonus, then pay any extra overtime that results from the adjusted rate.

But there's an exception for a "percentage of total earnings" bonus because it factors in both the straight-time and overtime pay in that period, so the appropriate overtime amount is already built in. The FLSA doesn't require employers to add more and essentially pay overtime on overtime. Notably, the DOL's conclusion in this opinion letter assumes the earnings used in the formula didn't include items excluded from the regular rate, like gifts, discretionary bonuses, expense reimbursements, or benefit contributions – and that the employer used the correct overtime calculations and applied its quarterly method consistently.

Key Employer Takeaway: If your bonus pool formula includes an employee's overtime earnings in the calculation, you likely don't owe additional overtime on the bonus. Legal compliance on this can be complicated. So, it is wise to have your FP attorney review bonus plans before they are implemented.

BONUS CALCULATIONS AND OVERTIME PAY



QUESTION:

Can a quarterly bonus tied to a pool of sales revenue qualify as a “percentage of total earnings” bonus if it is calculated from both straight-time and overtime pay earned that quarter, so no additional overtime is owed when it’s paid out?

DOL ANSWER:

Yes. The employer’s quarterly bonus payment includes overtime compensation due on it, which satisfied the FLSA’s overtime pay requirement. So, the employer didn’t need to recalculate the “regular rate” or pay additional overtime compensation.



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.