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DOL Again Offers Opinion Letters to Employers

May 15, 2018

Employers will once again have another source of guidance on wage and hour issues from the U. S. Department of Labor, which last month reinstated the practice of issuing opinion letters. The DOL stopped issuing opinion letters during the Obama administration, and instead switched to a practice of offering Administrator's Interpretations (AI), which have broader applicability. Employers, who can rely on opinion letters to establish that they acted in good faith in cases arising under Fair Labor Standards Act, were discouraged by the move. However, after Trump took office last year, the DOL announced that it would resume the practice of issuing opinion letters, and in fact, reinstated 17 letters that were written but never sent at the end of the George W. Bush administration.

The DOL has now issued its first set of opinion letters since 2009. The letters provide opinions on three topics – whether 15-minute rest breaks requested by a doctor are covered by the FMLA and are compensable under the FLSA; whether travel time under certain conditions for hourly technicians is compensable under the FLSA; and whether lump-sum payments from employers to employees are earnings for garnishment purposes under Title III of the Consumer Credit Protection Act.

With respect to the first topic, the DOL stated that employees covered by the FMLA must receive the

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same number of paid breaks as their co-workers, but 15-minute rest breaks requested by a doctor "predominantly benefit the employee" and therefore need not be paid. With respect to the second topic, the DOL advised that travel time "away from the employee's home community . . . [that] cuts across the employee's regular work day" is compensable. That is, if the employee travels on a weekend during hours that would typically constitute their normal work day during the week, such travel time is compensable. The DOL further advised that time spent commuting to and from work (whether commuting from the employee's home, or commuting from a hotel if the employee is traveling) is not compensable, but travel between work sites during the work day is compensable. The DOL also clarified that using a company-provided vehicle does not, standing alone, make an ordinary commute compensable. On the final topic, the DOL instructed that lump sum payments paid to employees for the employees' services qualify as earnings and therefore may be garnished. However, any payments that are not made for services provided by employees cannot be garnished. Examples of such payments include portions of workers' compensation payments attributable to reimbursement for medical expenses, portions of wrongful termination settlements that result from compensatory or punitive damages, or buyback of company shares.

Experts debate the usefulness of DOL opinion letters, which respond to specific facts presented by the constituent seeking the opinion. Anyone can request a DOL opinion letter, so long as the requesting party represents that they are not submitting a question related to an ongoing investigation or claim. Critics argue that DOL letters can be very narrow and can quickly become outdated. Proponents contend that without opinion letters, there is no vehicle to communicate with the DOL. Moreover, supporters of opinion letters also know that reliance on an opinion is a defense in FLSA minimum wage or overtime claims if the employer can show that "an act or

omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling approval or interpretation . . .” or if an act or omission was done in good faith and the employer had reasonable grounds for believing the action or omission was not a violation of the FLSA.

If you have questions about the new opinion letters, their potential impact on you, or the advisability of seeking your own opinion letter, contact your Akerman Labor and Employment lawyer.