

Employee Benefit ■ Plan Review

Department of Labor Opinion Letters Provide Employers a Roadmap to FLSA Compliance

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The Wage and Hour Division of the U.S. Department of Labor (“DOL”) has recently issued two new opinion letters that clarify how employers should calculate the overtime rate when employees are paid lump-sum bonuses and when employers can pay consultants on a per project basis while avoiding overtime requirements under the Fair Labor Standards Act (“FLSA”).

While DOL opinion letters are not binding on any court, they are helpful guidance, particularly for employers, on how the DOL applies the law to the circumstances at hand.

OPINION LETTER FLSA 2020-1

Under the FLSA, non-exempt employees must be paid overtime at a rate of one and one-half times their regular rate of pay for hours worked over 40 in a week. For purposes of calculating overtime pay, non-discretionary bonus payments received by employees must be included in the employee’s regular rate of pay.

In Opinion Letter FLSA 2020-1,¹ the DOL provided guidance on how to calculate the regular rate when a lump sum non-discretionary bonus is paid for work conducted over a specific period of time, but is not tied to a specific pay period.

Opinion Letter FLSA 2020-1 was issued in response to an inquiry by an employer offering

employees a non-discretionary lump sum bonus of \$3,000, in addition to their regularly hourly rate, if the employee completed a 10-week training program. In the scenario posed by the employer, the employees worked overtime in two of the weeks during the 10-week training program. The employer asked the DOL how to properly determine the regular rate of pay.

As an initial matter, the DOL explained that the lump sum bonus must be included in the employees’ regular rate of pay “as it is an inducement for employees to complete the 10-week training period.” Next, the DOL explained that it is appropriate for the employer to allocate the lump sum bonus equally to each week of the 10-week training period, that is, the \$3,000 bonus should be divided into 10 \$300 increments to be added to the employees’ pay for each week of the training program for purposes of calculating overtime pay. The DOL then went on to state that its Field Operations Handbook 32c03(c) is being revised to reflect that allocating bonuses equally to each week of the bonus period is the appropriate method for computing overtime pay on bonus earnings that cannot be identified with particular workweeks.

OPINION LETTER FLSA 2020-2

Employees employed in a bona fide administrative or professional capacity are exempt

from the FLSA's minimum wage and overtime requirements, so long as certain conditions are satisfied, including when the employee is paid on a salary, as opposed to an hourly, basis.

In Opinion Letter FLSA 2020-2,² the DOL addressed the issue of whether payments to employees on a per-project basis qualify as salary for the purpose of determining whether the employees are exempt (assuming the employees otherwise qualify for the exemptions).

According to the Opinion Letter FLSA 2020-2, the employees, educational consultants, are paid a set amount to complete projects for the employer's clients, including on-site at the client's location, and that the employees may be assigned to work on more than one project at a time. According to the first example provided by the employer, the employee is assigned to Project 1, a 40-week project, for which he or she is paid \$80,000 for the project in 20 biweekly installments of \$4,000 regardless of the quantity or quality of the work performed. In the second example provided by the employer, during the course of Project 1, the employee is assigned to Project 2, an 8-week project, for which he or she is compensated an additional \$6,000, paid in 4 biweekly installments of \$1,500. During the four biweekly periods when Projects 1 and 2

overlap, the employee will be paid \$5,500 biweekly (\$4,000 + \$1,500), thereby increasing the employee's compensation. The employer also indicated that on "unusual occasions" the employee's compensation might decrease if the employer and client renegotiated the employee's compensation due to prospective changes in the scope of a project.

Under both scenarios, the DOL determined that the employer's payment method satisfied the salary basis requirement for purposes of the overtime exemptions. The DOL reasoned that the payment for Project 1 satisfies the salary basis requirements because the biweekly payments do "not vary from week to week or month to month based on the number of hours worked" by the employee on the project, or depend on the quality of work performed.

In the second example, the DOL explained that the salary basis test was met because the employee received a guaranteed minimum amount that was in excess of the salary threshold and amounts above that minimum likely satisfy the requirements for "extra" compensation, which is allowed under the FLSA. Stated differently, the additional compensation, even in the form of a weekly lump sum, is paid for additional work beyond the normal workweek (that is, beyond the

scope of Project 1), and can be paid on any basis. The fact that the total amount of compensation might change several times throughout the year depending on the particular projects to which the employee was assigned does not matter, according to the DOL, so long as the employee's compensation satisfies the salary basis and extra compensation requirements.

Lastly, regarding the possibility that the employee's pay might decrease moving forward should the employer renegotiate its agreement with its client, the DOL stated that the exemption would remain as long as the employee's compensation did not fall below the minimum salary threshold, and the changes are not so frequent that the employee's pay is rarely the same or amount to circumstances suggesting the amount of the payment is actually based on the quantity or quality of work performed. 🌀

NOTES

1. <https://www.hrdefenseblog.com/files/2020/01/Opinion-Letter-FLSA-2020-1.pdf>.
2. <https://www.hrdefenseblog.com/files/2020/01/Opinion-Letter-FLSA-2020-2.pdf>.

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