

DOL OFFERS GUIDANCE ON SEVERAL FLSA PROVISIONS

For the first time since revising the “white collar” overtime pay exemptions under the Fair Labor Standards Act (“FLSA”) last year, the U.S. Department of Labor (“DOL”) has released a series of noteworthy opinion letters in response to questions about the application of overtime pay rules. The DOL uses opinion letters to answer specific inquiries and, at the same time, to provide general guidance to employers and employees.

The new opinion letters address three general issues: using bonus and incentive plans to compensate non-exempt employees, making deductions for partial days from the paid-time-off (“PTO”) banks of exempt employees, and defining the term “interstate commerce” under the motor carrier exemption. Analyzing these opinion letters may help employers avoid potential costly FLSA mistakes.

Including Bonus and Incentive Payments When Calculating Overtime

Under the FLSA, overtime pay for non-exempt employees is calculated at a rate of one-and-a-half times an employee’s regular hourly rate. In three recently released opinion letters, the DOL reaffirmed that all compensation—including non-discretionary bonuses and incentive pay—must be included in the regular rate of pay to calculate overtime.

In a September 20, 2004 letter, the DOL stated that a “piece rate bonus” could not be excluded from the calculation of overtime. The Department addressed a security company’s practice of paying employees either a piece rate or \$6 per hour guaranteed, whichever was higher. Regardless of which method was used, the company calculated overtime on the \$6 per hour wage. The DOL rejected this methodology, explaining that the employer must include the piece rate bonus when determining each employee’s regular rate and calculating overtime.

Similarly, in a September 21, 2004 letter, the DOL reasoned that a \$3 per hour bonus used as an incentive for increasing productivity could not be excluded from employees’ base pay when calculating overtime. The DOL stated, “Bonus payments that are promised to employees as an incentive for increased or sustained productive efforts are not the types of payments that may be excluded from the regular rate.” The Department explained that an incentive or bonus plan may qualify for exclusion from FLSA overtime requirements only if the bonus is paid without a prior contract, promise, or announcement, and the bonus amount is calculated at the end rather than the beginning of the pay period.

In its final letter on this subject, dated September 28, 2004, the DOL advised that premiums paid in the form of a lump sum would not meet FLSA standards if they do not take into account the actual number of overtime hours worked. According to the letter, the employer paid a guaranteed salary of \$600 per week for all hours worked, but offered a bonus to employees who made more deliveries and worked overtime. The bonus was based on the volume of deliveries, not on one-and-one-half times the base salary, and could result in less overtime pay than required by the FLSA.

Partial-Day Deductions From Leave Banks

To qualify as an exempt executive, administrative, or professional employee under the FLSA, an employee must generally be paid on a salary basis. This means the employee must receive a predetermined amount of pay for each week of work, regardless of the number of

hours worked or the quality or quantity of the work performed.

There are exceptions to this rule. For example:

- Deductions can generally be made from salaries for absences of a full day or more for personal reasons other than sickness or accident.
- A salary may be reduced for a full day or more due to sickness or accident if “made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability.”
- A salary may be reduced on an hour-by-hour basis for FMLA absences, but no other partial day deductions from salary can be made without compromising the employee’s exempt status.

The FLSA regulations do not explain whether making a partial day deduction from an employee’s accrued PTO violates the salary basis requirement. But in a January 7, 2005 opinion letter, the DOL indicates that employers may reduce an exempt employee’s accrued vacation or sick leave hours for partial day absences as long as the employee’s pay is not reduced.

According to the Department, payment of the employee’s guaranteed salary must still be made even if the employee has no more PTO hours remaining or there is a negative balance in the employee’s PTO account. Also, an employer may not reduce an employee’s final salary to make up for an employee’s taking more PTO than he or she had accrued.

Truck Drivers Delivering Products Within the Same State and the Motor Carrier Exemption

Under the FLSA’s “motor carrier exemption,” the law’s overtime pay provisions do not apply to employees whose qualifications and maximum hours of service are subject to regulation by the U.S. Department of Transportation.

In a January 11, 2005 opinion letter, the DOL revised its definition of “interstate commerce” for purposes of the motor carrier exemption. Withdrawing four previous opinion letters that addressed activities constituting interstate commerce, the DOL concluded that truck drivers moving petroleum products from terminals or storage facilities to other points in the same state still qualify for the exemption. In this case, the products had previously moved across state lines, and the shipments were made to customers designated on original orders, or they were made for no specific customer but resulted from standing orders and historic demands.

The DOL reasoned that the “intrastate” portion of an interstate trip is still “interstate commerce” if it forms a part of a practical continuity of movement across state lines from the point of origin to the point of destination. The DOL based its revised position on relatively new U.S. Department of Transportation guidelines addressing interstate commerce.

General Employer Considerations

In light of these new opinion letters, employers should consider evaluating their current overtime compensation practices to ensure compliance with the FLSA. Failure to include bonuses in overtime calculations, making improper wage deductions from salaried employees’ wages, and misclassification of exempt employees present fertile ground for employee claims for unpaid wages under the FLSA and could result in expensive litigation and damages.

BENEFITS ALERT

USERRA Amendments Extend Continuation Coverage And Require New Notice To Employees

On December 10, 2004, President Bush signed into law the Veterans Benefits Improvement Act of 2004 ("VBIA"), which amends parts of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA applies to all employers and provides reemployment protection and other benefits for employees who take leave to perform military service.

The VBIA extends the period of group health plan continuation coverage for those on military leaves of absence from 18 months to 24 months. This 24-month period must be available to any employee electing on or after December 10, 2004 to continue group health coverage during the period of military service.

Employers should review their continuation coverage elections for those on military leaves of absence and make any necessary recordkeeping adjustments to reflect that 24 months of continuation coverage is available for employees electing such coverage on and after the December 10 date. They also should review and revise their group health plan documents, along with their administrative forms and employee communications, to reflect this extension.

The VBIA also requires employers to notify employees of their military rights, benefits, and obligations under USERRA. This requirement, which becomes effective March 10, 2005, can be met by posting a notice of USERRA rights in locations where other employee notices are posted. The Department of Labor is formulating a new model notice that will be available on its website at <http://www.dol.gov/vets/programs/userra/poster.pdf> on or around March 10, 2005.

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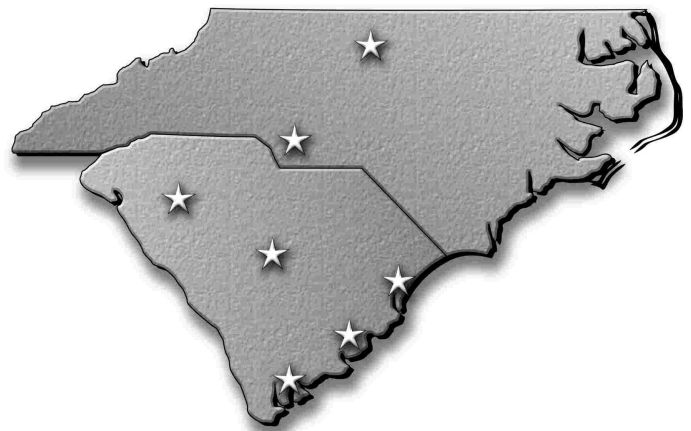
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