Department of Labor Releases Three New Opinion Letters

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Earlier this year, the Department of Labor (the "DOL") resumed its long-dormant process of issuing Opinion Letters. Opinion Letters serve to answer employers' questions on issues where the relevant federal laws do not provide a complete answer for a given scenario. The DOL's Opinion Letters are not laws or regulations, but they are strong indicators of the DOL's current policy and position regarding similar issues. On April 12, 2018, the DOL issued three new Opinion Letters: these Opinion Letters concern the Fair Labor Standards Act ("FLSA"), the Family Medical Leave Act ("FMLA") as it relates to the FLSA, and the Consumer Credit Protection Act ("CCPA").

1 Opinion Letter FLSA 2018-18 – When Is Employee Travel Time Compensable?

In this Opinion Letter, the DOL outlines three different scenarios involving non-exempt employee compensation for travel time. *See* Op. Ltr. FLSA 2018-18 at 1. In the first scenario, an employee with an ever-changing work schedule travels on Sunday evening by airplane to attend company training beginning on the following morning. In addressing this scenario, the DOL first notes the general rule that "compensable worktime generally does not include time spent commuting to or from work." *See id.* at 2. However, where an employee must travel in the course of employment, his or her travel time is compensable, as long as the travel occurs during the employee's "normal working hours" (which include weekends, even if the employee only works weekdays). In contrast, travel time by the employee *outside* of his or her normal working hours (i.e. overnight, where the employee typically works days) *is not* compensable if that travel occurs "as a passenger on an airplane, train, boat, bus, or automobile." *Id.*

Here, this question is complicated by the employer's claim that its employee has no normal working hours due to a wildly fluctuating schedule. However, the DOL advises employers that it generally will not accept such claims. *See id.* Instead, to determine an employee's normal working hours, the DOL suggests the employer review the employee's last month of time records, even if they are highly varied, and to treat these hours as the employee's normal work hours in computing compensable travel time. *Id.* at 3. Alternatively, the employer may set the employee's work start and end times prospectively and consider those hours to be the employee's normal work hours for this purpose. *Id.* In addition, employers and employees "may negotiate and agree to a reasonable amount of time or timeframe in which travel outside of employees' home communities is compensable." *Id.* at 4.

Further, the DOL was asked whether an employee who is working at a remote location must be paid for the travel time between the remote location and the employee's hotel. *Id.* In response, the DOL said it would consider such time as no different from work-to-home travel, which is non-compensable. *Id.*

The Opinion Letter also involves a scenario where hourly technicians, using a company vehicle, travel from their homes to the office to get job itineraries before traveling to the customer location. *See Id.* at 4. The question here is whether such technicians who "drive from home to multiple different customer locations on any given day" should be compensated for the time spent going and coming from their homes. *Id.* In its response, the DOL first re-states the general rule that "compensable worktime generally does not include time spent commuting between home and work, even when the employee works at different job sites." *Id.* However, the DOL noted that an employee's travel from jobsite-to-jobsite is definitely compensable time. *See Id.* at 5.

TIPS FOR EMPLOYERS: Remember that, for hourly employees, travel time is compensable if it falls within the employee's normal working hours, regardless of the day of the week. If you are not sure how to account for an employee's normal working hours, review that employee's time entries for the past month and try to set an average working schedule for that employee – even if that schedule may vary going forward. For new employees, establish start and end times for work to establish normal working hours. Remind employees that travel to and from home, whether in company vehicles or not, is not compensable time, even if "home" is a hotel near a remote worksite location

2 Opinion Letter FLSA 2018-19 - Must 15-minute Rest Breaks Required Every Hour by an Employee's Serious Health Condition be Compensated?

In this Opinion Letter, the DOL is asked whether "a non-exempt employee's 15-minute rest breaks, which are certified by a health care provider as required every hour due to the employee's serious health condition and are thus covered under the FMLA [Family and Medical Leave Act], are compensable or non-compensable time under the FLSA [Fair Labor Standards Act]." *See* Op. Ltr. FLSA 2018-19 at 1.

In answering this question, the DOL first turns to the baseline test for what is or is not compensable break time, which it describes as "[w]hether [the time] is spent predominantly for the employer's benefit or for the employee's." *Id.* In its discussion, the DOL noted that short breaks up to 20 minutes are often beneficial to the employer, as they promote employee efficiency. *Id.* On the other hand, the DOL recognized that "accommodation breaks," or several breaks taken during a workday to address an employee's medical issues, are not compensable, as these breaks benefit the employee. *Id.* at 2. However, the DOL stated that the FMLA employee is entitled to paid breaks to the same extent that other employees are provided paid break time. *Id.* at 3.

TIPS FOR EMPLOYERS: This section relates only to the compensability for medically-required break times and does not affect whether an employee is entitled to reasonable accommodations for medical conditions. The key point here is to provide paid breaks for employees who need numerous breaks in the same fashion that paid breaks are given to other employees. However, in the case noted above, where an employee needs many additional breaks per day, the FLSA does not entitle the employee to compensation for those additional breaks, even if they are a required accommodation or otherwise required by FMLA.

3 Opinion Letter CCPA 2018-1NA – Which Lump-Sum Payments to Employees are Considered "Earnings" for Garnishment Purposes Subject to Limitation by the Consumer Credit Protection Act?

In this final Opinion Letter, the DOL addresses the question of which lump-sum payments to employees are considered "earnings" for garnishment-limitation purposes under the Consumer Credit Protection Act ("CCPA"). *See* Op. Ltr. CCPA 2018-1NA. The impetus of this Opinion Letter arises from widespread uncertainty in various states regarding which types of payments the CCPA garnishment limits apply to, or whether they are applicable to lump-sum payments from employers to employees. *See id.* at 1. The CCPA provides limitations on amounts that can be garnished from payments made to employees and is enforced by the DOL.

In addressing this topic, the DOL notes that under the CCPA, "earnings" are defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." *See id.* at 3. That is, the relevant test regarding CCPA coverage is "whether the payment is for services provided by the employee, rather than the frequency of the payment." *Id.* at 3.

The DOL specifically lists the types of lump-sum payments that, as "earnings," fall within the protections of the CCPA: commissions, discretionary and nondiscretionary bonuses, productivity or performance bonuses, profit-sharing, referral or sign-on bonuses, moving or relocation incentive payments, attendance, service, or safety awards, cash awards, retroactive merit pay increases, holiday pay, termination pay (where tied to the length of the employee's service), signing bonuses, and severance pay. *Id.* at 5.

The DOL further outlined a second category of lump-sum payments that may only partially be subject to the CCPA limits. These include workers' compensation payments that are not attributable to reimbursement for medical expenses and the back- or unpaid wage portion of any settlement with an employee. *Id.* at 5. Only one of the many types of lump-sum compensation reviewed in the Opinion Letter is clearly noted as *not* being subject to the CCPA limits: the DOL provides that "[p]ayments to employees resulting from buybacks of company shares do not appear to be compensation for the employee's personal services." *Id.*

TIPS FOR EMPLOYERS: Based on the guidance from the DOL above, it is clear that the frequency or "lump-sum" nature of a payment to an employee has no bearing on whether those funds are subject to the garnishment limitations provided in the CCPA. The primary question, instead, is whether the funds are "earnings" – that is, whether they are paid in exchange for the employee having done something of value for the employer. As noted above, the list of these types of payments that are not considered earnings is extremely limited, and most payments (periodic or otherwise) to employees in the employment context are likely considered earnings in some respect.

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