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New Year Brings New Opinion Letters From DOL's Wage and Hour Division

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On January 7, 2020, the U.S. Department of Labor's Wage and Hour Division (WHD) issued three opinion letters, two of which concerned the Fair Labor Standards Act (FLSA). (The other dealt with the Family and Medical Leave Act of 1993.) These opinion letters are the first of the new year and a new decade.

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Opinion Letter FLSA2020-1

FLSA2020-1 addresses the question of how to allocate a nondiscretionary bonus under Section 778.209(b) of the FLSA. In the scenario presented in the letter, an employer will pay a $3,000 bonus to employees who successfully complete a 10-week training period and then sign up for an additional 8 weeks of training. The employees will receive the bonuses as long as they complete the 10 weeks of training and register for the additional 8 weeks, even if they do not complete the latter training.

The opinion letter begins by reviewing the well-established legal principles covering the payment of overtime: (1) employees are entitled to one-and-one-half times their regular rates for hours worked in excess of 40 in a workweek; (2) an employee's regular rate is computed using "all remuneration" paid to the employee unless excluded by Section 7(e) of the FLSA; and (3) a nondiscretionary payment is a type of remuneration that should be included in computing an employee's regular rate.

Next, the opinion letter reviews the two methods set forth in Section 778.209(b) for allocating a nondiscretionary bonus that cannot be attributed to the actual workweeks in which it was earned. The first way is to allocate such a bonus on a per-workweek basis and to assume that the employee earned an equal amount of the bonus during each workweek of the period for which the bonus is paid. In other words, the regulation presumes that an equal portion of the bonus was earned in each workweek of the relevant bonus eligibility period. The regulation further states that where the facts indicate it is *inappropriate* to allocate a bonus equally over the weeks of the relevant pay period for the bonus, an employer may assume that an equal amount of the bonus was earned during each hour worked in the pay period.

The opinion letter concludes that the nondiscretionary bonus should be allocated over the 10-week training period, which the employees had to complete in order to receive the bonus, in addition to signing up for the additional 8-week training period, regardless of how much of the latter training they attended. In addition, the opinion letter finds no factual basis for concluding that it was inappropriate to allocate the bonus on a workweek basis. Given these determinations, the employer will have to determine in which workweek(s) of the 10-week training period an employee worked more than 40 hours and compute the overtime premium due on the weekly allocation of the bonus for that workweek.

One takeaway from this opinion letter is that the two methods for allocating a bonus earned over a period of more than one workweek that cannot be allocated to the actual workweeks in which it was earned are not equal. The appropriate method is to allocate such a bonus equally over the workweeks of the bonus eligibility period. Only when the facts demonstrate that it is not appropriate to make a weekly allocation should the bonus be allocated over the number of hours worked in the bonus period. While the opinion letter does not indicate what facts would make a weekly allocation inappropriate, one scenario might be when an employee does not work each and every workweek of the bonus period.

Another takeaway is that the proper period for allocating the bonus was the 10-week training period, the completion of which, along with having signed up for the second 8-week training period, was a prerequisite to receiving the bonus, regardless of whether the employee completed or even attended the second 8-week training period. The period was not the initial 10-week training period plus however many of the additional 8 weeks of training the employee actually attended.

Opinion Letter FLSA2020-2

FLSA2020-2 addresses whether proposed payments to certain exempt administrative and professional employees constitute payments on a fee basis or salary basis under Sections 541.200(a) and 541.300(a) of the FLSA regulations.

The scenario presented in this letter involves an educational consultant who is assigned to Project One for a school district for an academic year (a 40-week duration) and will be paid a total of $80,000 for the

project on a biweekly basis, which amounts to 20 installments of $4,000 each. While working on this project, the consultant is assigned to another task, Project Two, which covers eight weeks for which the consultant will be paid $6,000 in four biweekly installments of $1,500 each. The employer seeks guidance on whether the proposed per-job payment basis is consistent with the fee basis regulations in Section 541.605(a), and if not, whether "the proposed pay method would qualify as permissible salary in accordance with the salary basis regulations found in . . . [Sections] 541.600 and 541.602."

FLSA2020-2 concluded that the compensation arrangements for both Project One and Project Two satisfied the part 541 salary basis tests for two essential reasons. One was that the consultant would receive a predetermined salary in 20 equal biweekly installments. The other was that the amount of such payment was guaranteed and not subject to a reduction based upon the quality or quantity of work performed. Further, the compensation for Project Two was permissible additional compensation allowed under Section 541.604(a).

Finally, the opinion letter concluded that even if the scope of the projects or the amount of compensation changed, the salary basis tests could still be met as long as the consultant earned the minimum salary amount of $35,568 per year or its equivalent. While the WHD has recognized that a prospective reduction in the salary of an exempt employee may not necessarily defeat exempt status, the opinion letter cautions that frequent changes could undermine such exempt status if the biweekly compensation varies by pay period such that it appears to reflect the quantity or quality of work performed.

While this opinion letter is noteworthy for its analysis of the compensation arrangements under the salary basis tests and not on a fee basis arrangement, it is also significant because it is yet another opinion letter in which the WHD has provided a "fair reading" of a statutory exemption in light of the language of the Supreme Court of the United States in *Encino Motorcars, LLC v. Navarro*. In this opinion letter, the WHD applied the statutory exemption in Section 13(a)(1) of the FLSA by interpreting its implementing regulations in part 541 to find that the salary basis test had been met and, in turn, declined to address whether the fee basis test had been satisfied.

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