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### DOL Clarifies Fluctuating Workweek Hours Requirement and Other Issues in New Opinion Letters

The U.S. Department of Labor's Wage and Hour Division (WHD) recently issued four opinion letters addressing various exemption and compensation requirements under the Fair Labor Standards Act (FLSA), including standards for reasonable approximation and reimbursement of business-related expenses and eligibility requirements for the fluctuating workweek method of calculating overtime pay. Though opinion letters are not binding in court, employers may rely on letters issued by the administrator as a good faith defense and bar to liability for wage claims arising under the FLSA.

#### **Summaries of the Four Opinion Letters**

In [FLSA2020-11](#), the WHD analyzed whether the FLSA's "retail or service establishment" overtime exemption applies to an employer whose truck drivers transport fluid waste from customer oilfield locations to disposal facilities. The WHD stated that, assuming the employer's waste removal services are recognized in the industry as retail and its services are not different than the services provided by the employer *or any company* to the general public, the employer could qualify as a retail or service establishment eligible to claim an overtime exemption for its truck driver employees. In so doing, the WHD specifically noted its May 19, 2020, withdrawal of a list of categorical industry exclusions from the retail or service establishment exemption, including waste removal contractors, purportedly due to their per se absence of a "retail concept." (A summary of this rule can be found on Perkins Coie's [COVID-19 blog](#).) "With the withdrawal of the list, WHD now applies the same analysis to all establishments to determine their 'retail concept,' thus reading [the exemption] more consistently."

[FLSA2020-12](#) addresses FLSA's minimum wage requirements for the reimbursement of business-related expenses incurred by delivery drivers who use their personal vehicles while on the job. Refusing to endorse a universal methodology to calculate reasonable business expenses, the WHD noted the FLSA does not limit "the sources an employer may consider or the methods it may use" and, instead, requires only that a method reasonably approximate employees' actual expenses. Whether a data source and methodology reasonably approximates employees' actual expenses "depends on a myriad of particulars" and, thus, may be proper in some instances but not in others. Upon the adoption of a reasonable methodology in a specific case, whether and to what extent expenses should be reimbursed depends on whether the cost incurred is primarily for the benefit of the employer. Importantly, while the IRS business standard mileage rate is presumptively reasonable, it is not legally mandated for use by the WHD's regulations for reimbursement.

[FLSA2020-13](#) analyzes whether part-time employees who provide corporate-management training and are paid a day rate with additional hourly compensation for curriculum development meet certain elements of the Learned Professional and Highly Compensated Employee overtime exemption. WHD stated that the trainers met the learned professional duties test because they were required to have advanced knowledge in business finance and adult education, and their work primarily involved "teaching advanced, finance- and business-related materials to executives, and evaluating and quantifying the executives' work." However, the trainers were nonetheless nonexempt because their compensation was not based on a predetermined amount and, instead, depended on the number of days worked.

On determining the applicability of the Highly Compensated Employee exemption, the WHD found that payments to part-time employees that would proportionally meet the compensation threshold for full-time employees do not satisfy the highly compensated employee exemption analysis. "The regulations include no exception for part-time employees—neither in the sense of working fewer than 40 hours per week nor in the

sense of working during some weeks but not others. An employee satisfies the highly compensated employee test only by satisfying in full the weekly and annual compensation requirements." In other words, regardless of full- or part-time status, an exempt, highly compensated employee must receive at least \$684 per week on a salary or fee basis and annual compensation of at least \$107,432.

In [FLSA2020-14](#), the opinion letter with perhaps the broadest application of the four, the WHD clarified that employers may use the fluctuating workweek method of overtime compensation even when employees' hours fluctuate above but not below 40 hours per workweek. The letter also reiterates the limited instances in which deductions from employees' pay for absences are proper.

An alternative method for computing overtime pay, the fluctuating workweek method allows an employer to pay a non-exempt employee an overtime rate of one-half the employee's regular rate, rather than the standard "time-and-a-half." For an employer to use the fluctuating workweek method for calculating overtime, five elements must be met:

1. The employee's hours of work fluctuate from week to week
2. The employee receives a fixed salary that does not vary with the number of hours worked
3. The amount of the fixed salary is sufficient to satisfy the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is the greatest
4. The employee and the employer have a clear and mutual understanding that the fixed salary is compensation for the total hours worked each workweek regardless of the number of hours
5. The employee receives, in addition to the fixed salary and any other payments, compensation for all overtime hours worked at a rate of not less than one-half of the employee's regular rate of pay for that workweek

29 C.F.R. § 778.114(a)(1)–(5).

In response to the employer's inquiry of whether an employee's hours must fluctuate both above and below 40 hours per week to qualify for the fluctuating workweek method of overtime calculation, the WHD concluded, "the fluctuating workweek method of calculating overtime pay requires only that an employee's hours worked fluctuate from week to week, not that they fluctuate above and below 40 hours worked per week." Therefore, "assuming all of the other conditions for using the fluctuating workweek method are satisfied, an employee may qualify for the fluctuating workweek method if their hours fluctuate only above 40 hours per week."

Though indicating that "WHD has long held that the fluctuating workweek method does not require that an employee's hours of work fluctuate below 40 hours per week," WHD noted that it recently reaffirmed and solidified this interpretation in the preamble to the [fluctuating workweek final rule](#), which was published on June 8, 2020, and took effect on August 7, 2020.

Separately, though not specifically requested by the employer to which the letter was addressed, the letter sets forth the limited circumstances under which an employer may make deductions from a nonexempt employee's salary without disqualifying the employer from using the fluctuating workweek method of overtime calculation. Generally, an employer may not deduct pay for absences occasioned by the employee even, for example, if the employee has "not yet earned sufficient sick leave to cover an absence due to illness." However, "occasional disciplinary deductions" may be made from an employee's salary for willful absences or tardiness, or for infractions of major work rules.

Though used far less often than the typical "time-and-a-half" method for overtime payments, employers' use of the fluctuating workweek method may increase, for example, upon employees' gradual return to the workforce and employers' issuance of a modified work schedule to accommodate the ramp-up of business operations and the gradual reintegration of a downsized workforce caused by COVID-19.

Employers with questions about these new DOL Opinion Letters should consult experienced counsel with any questions.

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