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The DOL's Back At It with New FLSA Opinion Letters and Regular Rate Guidance, Part 2

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This is the second installment of a two-part update on the recent regulatory liveliness over at the Department of Labor (DOL). In part one, we discussed the DOL's new proposed rule on regular rate exclusions and a clarifying opinion letter on how to factor in nondiscretionary bonuses to employees' overtime wages. In this post, we will take a look at two new opinion letters relating to the calculation of employees' work hours.

Neutral Rounding Practices are Permissible when Calculating Total Work Hours.

On July 1, 2019, the DOL released Opinion Letter FLSA2019-9, which provides new guidance on rounding practices when determining an employee's hours worked. The DOL examined whether the company's payroll software, which used a formula for rounding off employee clock-in and clock-out times, properly compensated employees for all hours worked under the Fair Labor Standards Act (FLSA).

The FLSA requires all non-exempt employees be paid for all hours worked in a workweek. Therefore, employers must keep precise track of employees' hours worked each week. The FLSA recognizes that in computing an employee's total hours worked, it is common and acceptable for employers to round time provided that doing so "will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R § 785.48(b). The DOL's long-standing policy is to accept rounding to the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one-half hour as long as the rounding averages out so that the employees are compensated for all the time they actually work.

In this case, the software converted the amount of worktime an employee recorded each day into a numerical figure in decimal form extended out to six decimal points. The software then rounded that number to two decimal points. If the third decimal was .005 or greater, the second decimal was then rounded up to .01. The software then calculated daily pay by multiplying the rounded daily number by the employee's pay rate.

The DOL determined that the organization's method of calculating hours worked complied with FLSA regulations because the practice was facially neutral and appeared to average out employee hours so that it fully paid employees for all time actually worked. Because the rounding practice would not result in a repeated underpayment of wages, it was permissible under the FLSA.

This DOL opinion letter provides a helpful reminder to employers that the FLSA permits employers

to round employees' work hours for payroll purposes so long as the rounding practice is neutral and does not result in underpayment of wages. Businesses seeking to use neutral rounding practices should nevertheless consult with legal counsel to ensure continued compliance with the FLSA, state, and local wage and hour laws. State laws on rounding practices may be more restrictive than the FLSA. Wisconsin, for example, only permits a seven-minute rounding period.

Truck Drivers Do Not Need to be Paid for Off-Duty Sleep Time on Trips.

On July 22, 2019, the DOL reversed its prior guidance on whether truck drivers are entitled to compensation for time spent in sleeping berths. In Opinion Letter FLSA 2019-10, the DOL was once again asked whether a truck driver's time spent in a sleeper berth compensable working hours under the FLSA. In the past, the DOL took the position that while sleeping time could be excluded from hours worked if the employer provided "adequate facilities," only up to 8 hours of sleeping time could be excluded in a trip 24 hours or longer, and no sleeping time could be excluded for trips under 24 hours. Thus, even if drivers spent over 8 hours of time sleeping on multi-day trips, employers were required to compensate them for that time.

The letter addressed a fact pattern where during multi-day trips, a company's truck drivers spent a substantial amount of time not working in the truck's sleeper berth. For example, on one trip, a driver spent 55.84 hours driving and performing other work-related tasks but spent 49.96 hours of the trip sleeping. Responding to the concern that a significant amount of time spent by drivers was sleep time where the drivers were completely relieved from work duty, the DOL reversed its previous position and concluded its old standard was "unnecessarily burdensome for employers."

The DOL abandoned its old precedent and concluded that if a driver is completely relieved of duty and is provided with adequate sleeping facilities by the employer (which includes the truck's sleeping berth), time spent in the sleeping berth is not working hours, and employees are not entitled to compensation for that time. This is true regardless of how long the trip is or how much duty-free time the driver has on the trip. 28 C.F.R. § 785.41. The DOL stated this is a clearer and plain reading of the regulation.

This letter provides much needed clarification for those in the transportation industry regarding what time is and is not compensable for truck drivers during trips. The DOL has set a clear, bright-line rule that if a truck driver is completely relieved from work duties and provided an adequate sleeping facility by the employer, that time is presumed to be non-working, off-duty time that non-compensable.

Employers seeking to review their wage and hour policies in light of the DOL's new interpretation should consult with their attorney to ensure continued compliance with all federal, state, and local wage and hour regulations.