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Employee Benefit Plan Review

New Wage and Hour Opinion Letters on Nondiscretionary Bonuses, the Highly Compensated Employee Exemption, and Rounding Practices

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After a brief, two-month hiatus, the Wage and Hour Division of the U.S. Department of Labor (WHD) has issued another round of opinion letters answering various questions submitted by the public. Specifically, these opinion letters address the calculation of overtime pay for nondiscretionary bonuses, the application of the highly compensated employee exemption to paralegals, and rounding hours worked under the Service Contract Act (SCA). This guidance marks the first issued by the new Wage and Hour Administrator Cheryl Stanton, who has been in the seat since April.

As is usually the case, despite the fact-specific nature of the questions and resulting analysis for these opinion letters, the WHD's advice can, in certain situations, have broader applicability. Accordingly, we encourage employers to take note of these letters and consult with counsel if they have questions about their practices.

Nondiscretionary Bonuses

In Opinion Letter FLSA 2019-7,[1] the WHD addressed the calculation of quarterly and annual nondiscretionary bonuses as part of the regular rate. The specific question involved whether an employer may, when paying a nondiscretionary bonus pursuant to a collective bargaining agreement (CBA), recalculate the regular rate for each workweek of the bonus period by averaging the bonus earnings across the workweeks rather than incorporating the bonuses into the regular rate contemporaneously.

Starting with general legal principles, the WHD advised that a nondiscretionary bonus compelled by a CBA constitutes "remuneration" that an employer must include in the regular rate of pay. Citing the FLSA's implementing regulations, the WHD further advised that an employer who bases its nondiscretionary bonus on work performed during multiple workweeks may pay the bonus at the end of the bonus period (when the bonus becomes "ascertainable") and "disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained." At that time, the employer can then retrospectively recalculate the regular rate for each workweek in the bonus period and pay the additional overtime compensation due on the bonus by averaging the bonus earnings across the workweeks during which the employee had earned the bonus. Thus, for example, an employer which pays a mid-year bonus for performance over the previous six-month period can spread such bonus equally across the six-month period.

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The WHD also advised that an employer that pays a fixed percentage bonus that simultaneously pays overtime compensation due on the bonus—for example, a bonus

that is 10 percent of straight-time wages and 10 percent of overtime wages—does not need to recalculate the regular rate. This is commonly referred to as a percentage of total earnings bonus, which is intended to be inclusive of overtime. The implementing regulations provide that this form of bonus may not be used as a device to evade the overtime requirements of the FLSA. In this most recent Opinion Letter FLSA 2019-7, the WHD expressed disagreement with certain court decisions interpreting 29 C.F.R. § 778.210 to require an employer to multiply an employee's total earnings by the same percentage to satisfy the FLSA's overtime compensation requirements.

Relying on these principles, the WHD concluded that the employer may wait to include the employee's annual bonus in the regular rate calculation until the end of the bonus period and recalculate the regular rate then. With respect to the quarterly bonuses, the employer need not recalculate the regular rate for each workweek in the bonus period because the bonuses simultaneously include all overtime compensation due on the bonus "as an arithmetic fact."

Applicability of Highly Compensated Employee Exemption to Paralegals

In Opinion Letter FLSA 2019-18,[2] the WHD addressed whether the highly compensated employee exemption applies to paralegals of a global trade organization who engage in non-manual work, receive an annual salary of at least $100,000, which includes at least $455 per week paid on a salary or fee basis, and perform a number of administrative duties.

To frame its response, the WHD first reviewed the current qualifications for the administrative and highly compensated employee exemptions. In describing the highly compensated employee exemption, the WHD emphasized that the exempt duty must not be an isolated or one-time task but need not be the employee's primary duty. Here the WHD cited the U.S. Supreme Court's recent decision in *Encino Motocars, LLC v. Navarro*, which held that the statutory text of the FLSA must be given a "fair (rather than a narrow) interpretation."

The WHD ultimately concluded that the paralegals at issue appear to satisfy the highly compensated employee exemption because all of their duties are non-manual, they receive total annual compensation above $100,000, and they customarily and regularly perform at least one exempt duty of an administrative employee. On the last point, the WHD found that budgeting, auditing, assisting with finance, and legal and regulatory compliance constitute exempt, administrative duties. Because the highly compensated employee exemption applied here, the WHD did not opine on whether the employee's salary and duties independently satisfied the administrative exemption, which, it noted, would have required an analysis of the paralegals' "discretion and independent judgment."

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Notably, the FLSA's implementing regulations specifically provide that paralegals (and legal assistants) generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. The WHD has also previously concluded that paralegals do not satisfy the administrative exemption in the absence of the highly compensated employee abbreviated duties test. Thus, this opinion letter is a welcome development for employers hoping to classify paralegals as exempt under federal law. However, because the WHD has proposed an amendment to existing regulations that would increase the minimum annual compensation threshold for the highly compensated employee exemption from $100,000 to $147,414, this exemption may soon prove too expensive for some employers to invoke for paralegal positions.

Lastly, it is important for employers to take heed of state-specific laws and regulations that do not provide for the highly-compensated employee exemption, such as California, New York, Missouri, and Pennsylvania.

Rounding

In Opinion Letter FLSA 2019-9,[3] the WHD addressed whether a non-profit organization that employs individuals with disabilities under government contracts that are subject to the SCA can use payroll software that rounds each employee's daily hours by two decimal points and calculates daily pay by multiplying the rounded daily hours number by the SCA prevailing wage.

The WHD concluded that the employer's rounding practice was permissible. As a preliminary matter, the WHD noted that the SCA regulations require contractors to calculate hours worked using FLSA principles. The WHD then advised that the FLSA allows rounding as long as it "will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."[4] The WHD affirmed its policy to accept

neutral rounding in any one of the following increments: the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one one-half hour.

Notes

1. *https://www.dol.gov/whd/opinion/FLSA/2019/2019_07_01_07_FLSA.pdf.*
2. *https://www.dol.gov/whd/opinion/FLSA/2019/2019_07_01_08_FLSA.pdf.*
3. *https://www.dol.gov/whd/opinion/FLSA/2019/2019_07_01_09_FLSA.pdf.*
4. 29 C.F.R. § 785.48(b).

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