

What's Old Is New Again: DOL Resurrects Advisory Opinion Letters

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Employers can expect to benefit from real-life answers to some real-employer wage-and-hour questions now that the U.S. Department of Labor (DOL) reinstated 17 Advisory Opinion Letters that had been originally issued in 2009, but subsequently withdrawn during the Obama administration. Such opinion letters provide formal, detailed analysis and answers to employers who pose FLSA compliance questions to the DOL. The opinion letters are published on the DOL website, thus any employer who happens to have the same or a similar compliance issue can benefit from the guidance. While the opinion letters don't constitute law, employers and their attorneys alike applauded any "peek under the tent" afforded by them in order to preemptively address compliance issues, and sometimes relied upon them defensively, as the reasoned and analyzed legal position (i.e., more than just general policy statements) if an employer found itself in FLSA hot water. I still recall the collective moan that could be heard from the legal and employment community when the Obama administration announced it would stop issuing the opinion letters, but instead would issue broad and non-specific "Administrator Interpretations" that, frankly, didn't address actual compliance questions. No additional opinion letters were issued during the Obama administration. Now however, you can find all of the DOL opinion letters, including those reinstated this month, [here](#). Topics in the reinstated opinion letters cover matters such as whether a specific type of bonus has to be included in an employee's regular rate of pay, whether overtime exemptions apply in a specific case, and how employers should properly treat "on-call" or "waiting to engage" hours. The majority of the reinstated opinion letters address interpretation of Section 13(a)(1) of the FLSA – the so-called "administrative exemption" from overtime requirements. Because the Obama administration's attempt to raise the salary threshold for purposes of analyzing overtime exemptions was blocked, the analysis of these 2009 reinstated opinion letters, which primarily deal with the duties side of the exemption analysis in any event, should hold. Although the opinion letters are in response to industry discrete and sometimes technical issues, many provide guidance that could apply more broadly than the healthcare, staffing, construction and public safety contexts they were written for.

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