

MAY 14, 2018

## DEPARTMENT OF LABOR ISSUES THREE NEW OPINION LETTERS

The Department of Labor's Wage and Hour Division recently issued three new opinion letters, the first new opinion letters published since 2010.

Opinion letters are, according to the Department of Labor, "an official, written opinion by the Wage and Hour Division of how a particular law applies in specific circumstances presented by an employer, employee or other entity requesting the opinion." Opinion letters were commonly issued by the Wage and Hour Division for more than 70 years. In 2010, the practice ceased, and instead, the DOL's Wage and Hour division began issuing broader "Administrator's Interpretations." However, **as we reported in June 2017**, the Department of Labor announced that it would reinstate the practice of issuing opinion letters. As a result, in January 2018, 17 previously withdrawn opinion letters were reissued, and on April 12, 2018, three brand new opinion letters were issued.

One of the opinion letters issued on April 12, 2018, **FLSA2018-19**, may be of particular interest to health care employers. This letter addressed whether a non-exempt employee's 15-minute rest breaks, which are certified by a health care provider as required every hour due to the employee's serious health condition and are thus covered under the Family and Medical Leave Act ("FMLA"), are compensable or non-compensable time under the Fair Labor Standards Act ("FLSA"). In considering this question, the Department of Labor noted that short rest breaks of up to 20 minutes in length primarily benefit the employer and, therefore, are ordinarily compensable. In limited circumstances, however, short rest breaks would primarily benefit the employee and, therefore, would *not* be compensable. For example, the Department of Labor points out that in *Spiteri v. AT&T Holdings, Inc.*, 40 F. Supp. 3d 869 (E.D. Mich. 2014), the court held that an employee was not entitled to compensation for frequent "accommodation breaks" that predominantly benefitted the employee, even if the breaks were each less than 20 minutes in duration. Similarly, with regard to rest breaks necessitated by an employee's serious health condition under the FMLA, the Department of Labor indicated that the breaks are given to accommodate the employee's serious health condition and, therefore, predominantly benefit the employee and are non-compensable. That said, employees who take FMLA-protected breaks in excess of the compensable breaks afforded to all employees must still receive as many compensable breaks as their coworkers receive. "For example, if an employer generally allows all of its employees to take two paid 15-minute rest breaks during an 8-hour shift, an employee needing 15-minute rest breaks every hour due to a serious health condition should likewise receive compensation for two 15-minute rest breaks during his or her 8-hour shift."

The topics addressed by the other two opinion letters are:

- The compensability of travel time for hourly technicians under the FLSA, where technicians do not work at a fixed location but instead work at varying customer locations each day (see **FLSA2018-18**); and
- Whether certain lump sum payments from employers to employees are earnings for garnishment purposes under Title III of the Consumer Credit Protection Act (see **CCPA2018-1NA**).

If you have questions about these opinion letters, please contact **Mary Kate Liffbrig** at [mliffbrig@hallrender.com](mailto:mliffbrig@hallrender.com) or (720) 282-2033 or your regular Hall Render attorney.