DEPARTMENT OF LABOR ISSUES SIX NEW FMLA AND FLSA OPINION LETTERS

They're at it again! On August 28, 2018, the Department of Labor's Wage and Hour Division issued six opinion letters. This was the second batch of opinion letters from the Wage and Hour Division in a matter of months. The Wage and Hour Division, which hadn't published new opinion letters since 2010, previously issued three opinion letters on April 12, 2018.

Several of the August 2018 opinion letters may be of particular interest to health care employers. Specifically:

- FMLA2018-2-A relates to whether employees who request time off in order to donate an organ are eligible for leave under the Family and Medical Leave Act ("FMLA") even if the donor was in good health prior to the organ donation. The Department of Labor ("DOL") opined that organ donation *can* qualify as an impairment or physical condition that is a serious health condition under the FMLA so long as it meets the definition of a serious health condition. For instance, if the organ donation requires an overnight hospitalization (which, the DOL notes, is commonly the case), "that alone suffices for the surgery and the post-surgery recovery to qualify as a serious health condition." This is a good reminder to employers that anything that meets the definition of "serious health condition" should be treated (not surprisingly) as a serious health condition – even if the serious health condition resulted from an "elective" surgery.

- FMLA2018-1-A relates to whether an employer's no-fault attendance policy violates the FMLA. Employees accrue attendance "points" for tardiness and absences in the policy discussed by the DOL in this opinion letter. Accrued "points" then remain on the employee's records for 12 months of "active service" after accrual. Time spent on FMLA is not considered, by this employer, to be "active service." Therefore, any time spent by the employee on FMLA leave would *extend* the employee's 12-month period. The DOL stated that "[t]he FMLA does not ... entitle an employee to superior benefits or position simply because he or she took FMLA leave" and referenced a Seventh Circuit case that held that "[r]emoval of absenteeism points is a reward for working and therefore an employment benefit under the FMLA" (citing *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 750-51 (7th Cir. 2010)). As such, the DOL stated that freezing an employee's "points" during FMLA would not violate the FMLA *as long as employees on equivalent types of leave receive the same treatment*." Therefore:
  - If equivalent types of leave are also not treated as "active service," then this practice of freezing attendance points during an FMLA leave of absence is acceptable.
  - However, if equivalent types of leave are treated as "active service," then this practice may result in unlawful discrimination against employees who take FMLA leave.

  Employers should review their FMLA and attendance policies to ensure that, for purposes of no-fault attendance policies and other employment policies and applicable benefits, FMLA is treated the same as equivalent types of leave.

- Finally, a third opinion letter issued on August 28, 2018 that may be relevant to health care employers is FLSA2018-22, which addresses volunteerism for nonprofit organizations. Specifically, this letter addresses individuals who volunteer to grade a global credentialing examination for a nonprofit organization. The grading process occurs once a year for a one- to two-week period. The volunteers are "members" of the organization but are not employees of the organization (and instead continued to receive their regular salaries from their primary employers). The employer indicated that volunteers will be paid for transportation, accommodations and meals but will not otherwise be paid. The DOL opined that:

  > The FLSA recognizes the generosity and public benefits of volunteering and allows people to freely volunteer time to religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service. WHD Opinion Letter FLSA2006-18, 2006 WL 1836646, at *1 (June 1, 2006). Such a person is not ordinarily an employee under the FLSA if he or she volunteers without contemplation or receipt of compensation. *Id.* Of course, the volunteer must offer his or her services "freely without coercion or undue pressure," direct or implied, from an employer. *Id.*; *see* 29 C.F.R. § 553.101(c); *cf. Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 767 (6th Cir. 2018) ("The type of coercion with which the FLSA is concerned is economic in nature, not societal or spiritual.").

> Accordingly, the DOL determined that, based on the various factors identified, the individuals could be properly classified as volunteers. As a reminder, the DOL views volunteers in the nonprofit sphere very differently than volunteers for for-profit organizations. This opinion letter only addresses volunteers in the nonprofit realm.

The topics addressed by the other opinion letters are:

- Compensability of the time an employee spends voluntarily participating in certain wellness activities, biometric screenings and benefits fairs (see FLSA2018-20);
- The application of the commissioned sales employee overtime exemption (see FLSA2018-21); and
- The application of the movie theater overtime exemption (see FLSA2018-23).

If you have questions about these opinion letters, please contact Mary Kate Liffrig at mliffrig@hallrender.com or (720) 282-2033 or your regular Hall Render attorney.