KUTAKROCK

July 16, 2020

DOL Issues New Guidance on Long-standing Wage and Hour Questions

On June 24, 2020 the U.S. Department of Labor ("DOL") issued four opinion letters that provide important guidance for employers regarding the Fair Labor Standards Act ("FLSA"). Two opinion letters address the outside salesperson exemption from minimum wage and overtime requirements. One opinion letter addresses whether an employer can count third-party incentive payments toward its minimum wage obligation. The final opinion letter addresses the application of commissions for new employees or new retail stores in the context of the inside sales exemption under Section 7(i) of the FLSA.

FLSA2020-6 and FLSA2020-8 – Outside Salesperson Exemption

In FLSA2020-6 and FLSA2020-8, the DOL considered whether certain employees qualified as outside salespersons for purposes of the outside sales exemption under the FLSA. This exemption applies when a salesperson's primary duty is to make sales or obtain orders or service contracts away from the employer's place of business on a "customary and regular" basis.

In FLSA2020-6, the employees at issue marketed and sold their employer's products while using their employer's "stylized trucks." The salespeople spent roughly 80% of their worktime traveling to different high-population areas and public events, such as concerts, where they demonstrated and sold the employer's products, receiving "credit" for such sales. The salespeople spent their remaining worktime at their employer's job site, managing inventory and planning the dates and places for upcoming sales travel. The salespeople were trained by the employer and paid a salary plus a commission tied to their own sales.

After reviewing the facts, the DOL concluded that the employees bore the indicia of outside salespeople. For example, they received incentive compensation in the form of commissions—one of the hallmarks of outside sales. While selling, they were under little supervision by their employers. The DOL likened the facts in FLSA2020-6 to the facts considered by the U.S. Court of Appeals for the Second Circuit when it held that the employees at issue were exempt outside sales employees because they "targeted community locations" and "community events" to solicit applications for mobile-phone service. *See Vasto v. Credico (USA) LLC*, 767 F. Appx. 54 (2d Cir. 2019). Thus, the DOL determined the outside sales exemption applied to the facts in FLSA2020-6 because the primary duty of the position was to make sales away from the employer's place of business

Similarly, in FLSA2020-8, the salespeople regularly traveled to home and garden shows, state and county fairs, other trade shows and big-box retailers to perform product demonstrations and to make sales. The DOL found that the sales at these events likely qualified as outside sales because the salespeople were making their own sales, rather than relying on third parties. They spent 80% of their worktime demonstrating and pitching their products at the shows, and their remaining worktime on sales activities such as buying demonstration materials and participating in sales-related meetings. In addition, the salespeople received commissions and were eligible for bonuses based on purchases made by customers during assigned shows. Thus, the DOL considered those employees' primary duties to be making sales, customarily and regularly, away from their employer's place of business.

FLSA2020-7 – Incentive Payments Can Satisfy Minimum Wage Requirements

In FLSA2020-7, the DOL found that direct payments by an automobile manufacturer to an automobile dealership's employees could count toward the dealership's minimum wage obligation to its employees.

The payments at issue were paid by automobile manufacturers directly to dealership employees under incentive programs in which the dealership participated. Drawing on similarities in other industries, such as tips from customers at restaurants and "push money" payments from manufacturers or distributors to a retail store's employees, the DOL noted that it is common for wages under the FLSA to include payments received from third parties. The DOL found that these incentive program payments were potentially no different, and could be counted as wages.

Yet the DOL emphasized that *not all* payments from a third party are wages under the FLSA. There must be an explicit or implicit understanding between the parties that the third-party payments will count toward wages in order for the employer to apply such payments. So, before counting any third-party payments as wages for purposes of a minimum wage obligation, employers should closely examine all circumstances surrounding such payments. Most importantly, the employer must ensure the employee is aware that the third-party payments he or she receives are considered wages for purposes of satisfying minimum wage.

FLSA2020-10 – Retail or Service Commissions Sales Exemption

In FLSA2020-10, the DOL examined the retail or service commissions sales exemption under Section 7(i) of the FLSA. That section creates an exemption from overtime where three conditions are met: (1) the employee is employed by a retail or service establishment; (2) the employee's regular rate of pay exceeds one and one half times the minimum wage for every hour worked in a workweek in which overtime hours are worked; and (3) more than half of the employee's total earnings in a representative period (not less than one month) consist of commissions.

In the opinion letter, the DOL examined new retail stores and new retail employees. With new stores or new employees in existing stores, sales volume is not yet known for a representative period, and salespersons lack any record of sales performance. Thus, employers face a challenge in knowing whether half of the employee's total earnings consist of commissions during this early time in employment. The DOL took a wait-and-see approach in the opinion letter. Essentially, if the new employee earns enough commissions during the initial representative period to allow the exemption, then overtime will not be owed. If the employee does not earn enough commissions, overtime would be owed and could be paid retroactively. The employer could then commence a new representative period.

While each of the opinion letters discussed above provides useful guidance, employers must be careful when attempting to rely on them. Employers are entitled to a "good faith" defense to liability for violations under the FLSA if they can show that the acts or omissions complained of were in good faith, in conformity with, and in reliance on any administrative interpretations, including DOL opinion letters. But employers are nevertheless cautioned to conduct individualized analysis before claiming wage and hour exemptions.

Before acting upon any of the opinion letters discussed, employers should review them in their entirety as applied to individualized situations, and consult with a member of Kutak Rock's FLSA Litigation and Wage and Hour Defense Group, a member of the Employment Law Group, or your Kutak Rock attorney. You may also visit us at www.KutakRock.com.