THE
NATIONAL LAW REVIEW

Full Speed Ahead for DOL on Wage-and-Hour Guidance and Rule Changes

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Tuesday, April 16, 2019

The U.S. Department of Labor (DOL) has kept employers on their toes this spring. During March and the early part of April, the DOL has engaged in a flurry of activity using its rulemaking authority and non-binding opinion letter function to regulate and define many aspects of the employer-employee relationship.

Proposed Regular Rate Regulations

On March 28, 2019, the DOL announced a proposed rule intended to update the "regular rate" requirements. The regular rate, which is used to calculate overtime pay for nonexempt employees under the Fair Labor Standards Act (FLSA), includes "all remuneration for employment," with certain exceptions. Qualifying employees are entitled to overtime at 1.5 times the regular rate. According to the DOL, employers have been reluctant to offer more modern perks—such as gym memberships, employee discounts on retail goods and services, and tuition reimbursement—out of concern that the cost of promulgating these programs would be considered a part of the regular rate calculation.

The proposed regulations make clear that the cost of providing gym benefits and fitness classes is not included in the regular rate. Similarly, the DOL proposal reinforces that the cost of employer-provided wellness programs such as nutrition classes and smoking cessation programs are not a part of the regular rate. Employee discounts and tuition-reimbursement programs also would be excluded, as long as

the benefit is not tied to the employee's hours worked or services rendered.

The proposed regulations also clarify that payments to employees for unused leave time, including sick time, as well as payments for working on holidays, which are in addition to pay for hours worked on the holiday, are excluded from the regular rate. The leave and sick time clarification comes in the face of some court decisions that payments under sick leave and vacation buyback programs should be included in the regular rate because they are designed to encourage employees to forego time off and work more. The DOL seeks to clarify its position that such payments should not be included in the regular rate. Similarly, the proposed regulations clarify that meal periods should not be included in the regular rate calculation, noting that there appears to be some inconsistency in the current regulations.

The DOL's regular rate proposal attempts to respond to business concerns amidst several state and local legislative trends. Several states and municipalities have passed or introduced fair workweek (also known as predictive scheduling) laws. These laws require employers in some industries to compensate employees for changing their scheduled hours within a certain prohibited timeframe. Under the DOL's proposal, only compensation paid for actual hours worked would be included in the regular rate. Therefore, if an employer pays an employee pursuant to a statutory penalty, such as for altering the employee's schedule at the last minute, that compensation would not be included in the regular rate. Additionally, "clopening" pay, which is owed in certain states if any employee closes and opens on back-to-back days, would not be considered a part of the regular rate, so long as it is not a frequent occurrence. By contrast, "on-call pay"—for employees who are scheduled for an on-call shift but are not called in—would be a part of the regular rate if the payments are "compensation for performing a duty involved in the employee's job."

Finally, the proposed regulations clarify the treatment of reimbursements for business expenses and other payments that are made to employees that are not tied to work performed. The comment period is scheduled to end on May 28, 2019, and final regulations are unlikely to be issued until at least next year.

Proposed Joint-Employer Regulations

Continuing its efforts to provide a more employer-friendly approach to areas of contention, on April 1, 2019, the DOL issued new proposed rulemaking on the joint-employer standard. The DOL's proposal adopts a four-part test that evaluates whether the alleged joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

Of particular significance, the DOL clarified that the reserved contractual right to

take these actions is not enough to find a joint-employer relationship. Instead, under the proposed rule, the potential joint employer must actually exercise at least one of these rights in order to be liable under the FLSA as a joint employer.

Additionally, the DOL proposal states that whether an employee is economically dependent on the potential joint employer is not a relevant consideration. Specifically, the following factors, the DOL explained, should not be used because they assess economic dependence:

- Is the employee in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight?
- Does the employee have the opportunity for profit or loss based on his or her managerial skill?
- Does the employee invest in equipment or materials required for work or the employment of helper?

Significant to franchisors or employers utilizing staffing agencies, the proposal specifies that an employer's business model does not make joint-employer status more or less likely. The DOL also provides numerous examples to further illustrate this point. Essentially, absent common ownership and control over aspects of employment, like setting the employee's schedule, rate of pay, or other meaningful involvement in the terms and conditions of employment, under the proposed rule, there is no joint-employer relationship. A potential joint employer's requirement that a franchisee or contractor establish sexual harassment trainings or comply with federal and state wage ordinances, the proposal clarifies, is not indicative of a joint-employer relationship. Comments on the DOL's joint-employer proposal must be submitted on or before June 10, 2019.

The DOL's joint-employer proposal, which seeks to provide guidance on which party or parties may be held responsible for misclassifications of employees or overtime-pay violations under the FLSA, is distinct from the approach taken by the National Labor Relations Board (NLRB), seeking to address the joint-employer test under the National Labor Relations Act (NLRA).

Click here for our previous briefing to learn more about the status of the NLRA's joint-employer standard. The proposed changes to the joint-employer test, first at the NLRB and now at the DOL, demonstrate how important it is for employers, especially those utilizing contractors or with franchisees, to stay informed of the latest developments in this evolving area and to ensure that their staffing and/or franchisor agreements provide the maximum protection against liability for the actions of others.

Opinion Letters Providing Guidance on Wage-and-Hour Issues

The DOL has become increasingly active in issuing opinion letters. Opinion letters are fact-specific and nonbinding, but provide critical insight to employers on issues of import. In the first of three letters issued on March 14, 2019, the DOL opined that employers cannot delay the designation of leave qualifying under the Family and Medical Leave Act (FMLA) or designate more than 12 weeks as FMLA leave. Rather,

the clock must start as soon as the employer learns that an employee's leave qualifies as FMLA leave. For more details, see our prior coverage.

The second opinion letter addresses the FLSA and conflicts between federal laws and state or local wage-and-hour laws. The DOL concluded that when a state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with both laws and meet the standard of whichever law gives the employee the greatest protection.

The final opinion letter addresses employer-sponsored volunteer programs. The DOL clarified that time spent on volunteer programs that are both charitable and truly voluntary is not compensable time, but, where participation in such programs is required, or the employer directs or controls the volunteer work, the employee must be compensated for that time. The DOL wants to ensure that employee "volunteer" hours are not merely a disguise for uncompensated hours worked, so will look closely for signs of employer coercion.

On April 2, 2019, the DOL issued three more opinion letters. The most significant relates to the so-called "8 and 80" overtime pay structure. Under the 8 and 80 model, institutions "primarily engaged in the care of the sick, the aged, or the mentally ill," agree to pay workers extra when they work more than eight hours in a day and more than 80 hours in a two-week period, rather than more than 40 hours in a one-week period. The DOL opined that only three types of facilities can use this special pay structure:

- residential care institutions that make a majority of their money by providing noncritical medical care to patients who live onsite;
- institutions that care for "emotionally disturbed persons"—a majority of whom were admitted by a qualified physician; or
- institutions with a qualified physician who provides regular therapy to more than 50 percent of the residents onsite.

Comment Period Still Open on Proposed Overtime Salary Threshold

The DOL also recently announced a proposed rule that would raise the minimum salary threshold to $679 per week, or roughly $35,000 a year, for employees to be exempt as executive, administrative, or professional employees. For fuller coverage of this proposed rule, see our earlier alert here. The public comment period will close on May 21, 2019. As we head into summer, the DOL will likely continue to be active.

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