March Madness Department of Labor-style

Follow the flurry of activity at the Dept. of Labor

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While the rest of us were busy filling out our NCAA tournament brackets, the U.S. Department of Labor (DOL) was engaged in another kind of March Madness. In a flurry of activity during the month of March, the DOL issued two notices of significant Fair Labor Standards Act (FLSA) rulemaking along with three new Opinion Letters on Family and Medical Leave Act and FLSA issues.

If you were otherwise distracted by your (now busted) bracket, here's a look at the DOL's March 2019 activity.

SALARY LEVEL THRESHOLD RULEMAKING

The DOL started the rulemaking activity with a big announcement on March 7, proposing to modify the salary threshold for FLSA white-collar exempt status from the current level of $23,660 per year to $35,308 annually. Here are the rule's highlights from the DOL's website:

- The proposal increases the minimum salary required for an employee to qualify for exemption from the currently-enforced level of $455 to $679 per week (equivalent to $35,308 per year).
- The proposal increases the total annual compensation requirement for "highly compensated employees" from the currently-enforced level of $100,000 to $147,414 per year.
- Allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level.
- No changes to the job duties test.
- No automatic adjustments to the salary threshold.

The public comment period for the proposed salary threshold rule is now open and runs until May 2019.

REGULAR RATE RULEMAKING

On March 28, the DOL advanced its agenda to the next round by announcing a proposed rule intended to clarify and update the FLSA's "regular rate" requirements.

The FLSA requires that nonexempt employees receive overtime pay at 1½ times their regular rate of pay for all hours worked over 40 in a workweek. In a twist that often confuses employers, the regular rate **is not** always the same thing as an employee's hourly rate.

The difference between the hourly and the regular rate can occur because the regular rate actually includes "all remuneration for employment paid to, or on behalf of, the employee," except specific payments excluded by the FLSA. The FLSA's regulations on the regular rate spell out the types of payments employers must include in the time and one-half calculation when determining workers' overtime rates. These include things like shift differentials and non-discretionary bonuses. So, for example, an employee's hourly rate will vary from the regular rate because additional pay from a non-discretionary attendance bonus is included in calculating the regular rate.

Because determining what should be included in calculating the regular rate is sometimes difficult for employers, the DOL's proposed rule on the regular rate is intended as clarification. The proposed rule provides that employers may **exclude** the following types of payments from an employee's regular rate of pay:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services.
- Payments for unused paid leave, including paid sick leave.
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit.
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements.
- Discretionary bonuses.
- Benefit plans, including accident, unemployment, and legal services.
- Tuition programs, such as reimbursement programs or repayment of educational debt.

The proposed rule also includes additional clarification about other forms of compensation, including payments for meal periods, call back pay, and others. The public comment period for the proposed regular rate rule is also open and runs for a 60 day period.

DOL OPINION LETTERS

In between its rulemaking announcements, the DOL also found time to dispense some practical advice for employers looking for a little protection in the paint. The DOL issued three new Opinion Letters on March 14, 2019.

FMLA DESIGNATION

The DOL's FMLA Opinion Letter addresses whether an employer can delay designating FMLA leave time when it learns that an employee's absence qualifies for FMLA protection. This

situation may arise, for example, when an employer allows an employee to use accrued paid leave time before using FMLA leave time.

The DOL called foul on delayed designation. The Opinion Letter makes clear that employers **cannot** "delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave." Rather, employers must start the clock on employees' FMLA leave once they learn that an absence qualifies for federal protection.

FLSA AND STATE LAW CONFLICTS

In this Opinion Letter, the DOL addressed which law applies when the FLSA conflicts with state or local wage and hour laws. The DOL made its point by using a New York law as an example. Under New York state law, residential janitors are excluded from state minimum wage and overtime requirements, but the FLSA does not have a similar exemption.

After reviewing the tape, the DOL concluded that when a federal, 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**. In the example, New York requirements do not cover residential janitors, but the FLSA does. Accordingly, a New York employer must adhere to the FLSA's minimum wage and overtime requirements because it provides the employee the greatest protection.

EMPLOYER-SPONSORED VOLUNTEERING

In the third Opinion Letter issued on March 14, the DOL addressed employer compensation practices for employees who participate in employer-sponsored volunteer programs. Because the FLSA is intended to protect employee pay, employer-sponsored volunteer programs are subject to scrutiny to ensure that the volunteer hours are not really a form of uncompensated hours worked. The DOL recognized that hours spent on volunteer programs that are both charitable and truly voluntary are noncompensable. The DOL concluded, however, that programs that are required or where the employer directs or controls the volunteer work are not truly charitable and voluntary. In those situations, the employee must be compensated for the volunteer time.

To avoid making volunteer work compensable, employers should have a solid game plan in place based on comments in the Opinion Letter. Participation should be truly voluntary, not required (make it clear in writing); the employer should not direct and control the volunteer work; and employees who do not volunteer should not suffer adverse consequences.

THE TOURNAMENT AND THE DOL'S ACTIVITY CONTINUE

As we head into April, four teams have "punched their tickets" to the Final Four and the DOL still appears to be caught up in the frenzy. On April 1, 2019, the DOL issued new proposed rulemaking on the joint employer standard. Then, on April 2, 2019, the DOL issued three more Opinion Letters.

We will update you on these developments and any other March Madness activity at the DOL.

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