CLIENT ALERT

The New Wage and Hour Administrator of the United States Department of Labor Issued Three New Opinion Letters

Jul.15.2019

On July 1, 2019, the Wage and Hour Division of the United States Department of Labor (WHD) released three opinion letters – the first to be issued over the signature of Cheryl Marie Stanton, who was sworn in as Administrator of WHD on April 29. These letters represent official opinions from WHD on how it applies the Fair Labor Standards Act and other wage and hour laws to specific circumstances presented by individuals or entities seeking WHD's opinion.

- The first letter, FLSA20019-7, addresses the mathematically complicated issue of incorporation of a nondiscretionary bonus into an employee's regular rate. The letter draws a distinction between a bonus which is calculated such that it includes both the bonus itself any overtime owed on it – as described in 29 C.F.R. § 778.210, and discussed in WHD's FLSA2004-11, 2004 WL 3177882 (Sept. 21, 2004) and 2001 WL 1558953 (Feb. 5, 2011) – and a bonus which is based on a percentage of a straight-time hourly rate. In the former scenario, an employer need not recalculate the regular rate for each workweek in the bonus period, because the bonus amount simultaneously includes all overtime compensation due on the bonus. In the latter, after paying the bonus, the employer must recalculate the regular rate for each workweek in the bonus period and pay the overtime compensation due on that bonus. Employers should carefully consider the recalculation implications of various bonus payment structures.
- The second letter, FLSA 2019-08, presents the narrow question of whether highly paid paralegals may fall under the administrative exemption or the highly-compensated employee exemption to the FLSA's minimum wage and exemption rules. WHD advises that the paralegals, who receive total annual compensation of more than $100,000 and perform entirely non-manual duties, satisfy the highly compensated employee exemption. The letter draws a distinction between this scenario and paralegals who receive a lower level of compensation, thus not qualifying for the highly compensated employee exemption, and who therefore would only be exempt if found to be exercising discretion and independent judgment with matters of significance, as required by 29 C.F.R. § 541.200(a)(2). This letter does not represent a departure from established understanding of these exemptions, but merely clarifies that highly paid employees need only perform one or more exempt duties customarily or regularly in order for that exemption to apply. Employers may take this opportunity to re-examine their classification of highly paid administrative personnel with this principle in mind.
- Finally, the third letter, FLSA2019-9, reiterates that the rounding practice under the FLSA is applicable to the Service Contract Act (SCA). Under the FLSA, an employer may round time in determining an employee's hours worked so long as the rounding does not result in failure to compensate the employee for all hours worked. The letter describes a timekeeping software which rounds time in such a way that the rounding averages out and all employees are fully paid. The WHD opines that this rounding policy is compliant with the FLSA (and therefore the SCA, for this purpose). Employers can be confident that any FLSA-compliant hours calculation software (or other method) will also satisfy the analogous requirements of the SCA.

While WHD's opinion letters may offer employers a safe harbor defense, Employers should be cautious in relying on the opinions in these letters and must consider whether their own facts and circumstances match those described in the opinion letters. With these opinion letters, employers are reminded to review their rounding practice, exemption status of their highly compensated administrative support staff and the bonus payment practice to ensure compliance with the FLSA and other applicable laws.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Eric Su
Partner – New York
Phone: +1 212.803.4041
Email: esu@crowell.com

Jillian Ambrose
Associate – Washington, D.C.
Phone: +1 202.624.2710
Email: jambrose@crowell.com

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Ira M. Saxe
Partner – New York
Phone: +1 212.895.4230
Email: isaxe@crowell.com