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CLIENT ALERT: Federal Wage and Hour Compliance: U.S. Department of Labor Issues Four New Opinion Letters Addressing Dual-Role Exempt Employees, Bonus Calculations, Meal Breaks, and Other Issues

On May 28, 2026, the United States Department of Labor's Wage and Hour Division ("WHD") issued four new opinion letters – FLSA 2026-5, FLSA 2026-6, FLSA 2026-7, and FLSA 2026-8 – addressing questions under the Fair Labor Standards Act ("FLSA") of dual-role exempt employees, bonus calculations, meal breaks, and other wage related issues. Although these opinion letters are not binding on courts, they provide helpful guidance to employers on how the WHD views FLSA compliance.

1. FLSA 2026-5: Exempt Employees May Perform Some Non-Exempt Work

In this letter, the WHD analyzed whether an exempt employee can perform additional work in a secondary, non-exempt role, and if so, whether any overtime implications arise. The WHD answered that an exempt employee will not lose their overtime exempt status if they perform work in a secondary, non-exempt role, so long as the employee's "primary duty" continues to be "the performance of exempt work."

In reaching its conclusion, the WHD emphasized that "primary duty" means the "principal, main, major or most important duty that the employee performs…" (see 29 C.F.R. § 541.700(a)). Further, the factors considered when evaluating where a role is an employee's primary duty include, "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee…" *Id.*

As a practical matter and in light of this guidance, it is permissible under the FLSA for an employer to assign an otherwise exempt employee some limited, non-exempt work. However, risks still remain. Employers should of course be certain that the employee's primary duty truly meets one of the applicable overtime exemptions (*e.g.,* the executive, administrative, or professional exemptions). Moreover, employers permitting exempt employees to perform non-exempt work must ensure that such non-exempt work is comparably incidental to the exempt role and consider whether some additional pay for non-exempt work is prudent. Employers should also maintain documentation sufficient to support the exemption analysis.

2. FLSA 2026-6: Quarterly Bonuses Calculated as a Percentage of Total Earnings

In this letter, the WHD responded to a technical question regarding whether a quarterly bonus should be included in the calculation of an employee's "regular rate of pay" for overtime calculation purposes.

Under the FLSA, non-discretionary bonuses must be included in the calculation of the "regular rate," while discretionary bonuses are not required to be included. The WHD here confirmed that where a non-discretionary bonus is calculated as a percentage of total earnings, the employer is not required to recompute and pay additional overtime compensation, so long as the "total earnings" already include both straight-time and overtime compensation. This principle is consistent with 29 C.F.R. § 778.210, which provides that percentage-based bonuses tied to total earnings inherently account for overtime premiums.

3. FLSA 2026-7: Voluntary Travel Through a Facility During an Unpaid Meal Break Is Not Compensable

In this letter, the WHD addressed whether time spent during a meal break voluntarily traveling through an employer's premises and/or passing through an employer entry and exit is compensable under the FLSA. The WHD answered in the negative; a meal period of 30 minutes or more typically is not compensable under the FLSA so long as the employee is completely relieved from duty for the purpose of eating a regular meal.

The FLSA does not require "absolute freedom" during a break for it to be non-compensable. For example, it is the WHD's position that employees can be required to remain on the premises during a break without rendering the time

compensable. Consistent with that position, WHD further clarified that under the FLSA, time voluntarily spent traveling within or through the employer's facility before or after a meal need not be excluded from a bona fide meal period or treated as compensable work time. The key inquiry continues to be whether the employee is performing work or remains on duty during the meal period.

4. FLSA 2026-8: Pre-Shift Work, Time Waiting to Clock-in, and the "De Minimis" Rule

In this letter, the WHD addressed several, separate issues, including:

1. Regular pre-shift work performed before an employee's scheduled shift start time is compensable when it is "integral and indispensable" to the employee's principal work activities;
2. Time spent waiting to clock-in, walking from a time clock to a workstation, changing clothes where doing so is merely for the employee's convenience, and other pre- or post-shift activities not integral and indispensable to an employee's principal activities are not compensable if they occur before or after an employee's first or last principal activities; and
3. The *de minimis* rule – which provides that employers may not be required to compensate employees for "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes" – does not apply where the work at issue is regular or recurring.

Taken together, these four opinion letters provide helpful, fact-specific guidance to employers as to when and how much employees must be compensated under the FLSA under the circumstances described in the letters, as interpreted by the current administration. Employers should be mindful, however, that the Massachusetts Wage Act, G.L. c. 149, §§ 148, 150, and other state laws may impose additional or more stringent requirements, particularly with respect to meal breaks, overtime calculations, and the consequences of underpayment.

Should you have any questions about these opinion letters or their implications for your workplace and existing policies, please contact your Morgan, Brown & Joy attorney.

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