

# COMPLIANCE BULLETIN

## DOL Reintroduces 17 Opinion Letters

### HIGHLIGHTS

- DOL opinion letters provide the agency's official opinion on how labor and employment laws apply in specific situations.
- The DOL's opinion letter may disagree with the requesting employer's practices.
- Employers that rely on opinion letters may be able to establish a "good faith defense" under the law.

### IMPORTANT DATES

#### January 5, 2018

The DOL reintroduces 17 opinion letters that were withdrawn during the Obama administration.

#### June 27, 2017

The DOL announced it would reinstate the practice of issuing opinion letters.

### OVERVIEW

On **Jan. 5, 2018**, the U.S. Department of Labor (DOL) [reintroduced](#) 17 opinion letters. The letters were introduced by the Wage and Hour Division during the George W. Bush administration in response to specific employer compliance questions, such as whether "on-call" hours for ambulance personnel are considered as compensable time under the Fair Labor Standards Act (FLSA). The letters were withdrawn in 2009, shortly after their introduction.

Addressing compliance questions through opinion letters is a more relaxed approach than the administrative interpretations issued by the Obama administration.

### ACTION STEPS

- ✓ No action steps are required of employers at this time. However, because opinion letters are fact-specific guidance, employers in similar circumstances can review the content of these 17 reinstated letters and rely on them for guidance on FLSA compliance.
- ✓ If circumstances are substantially different, employers may also [request](#) opinion letters from the DOL.

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## Opinion Letters

Opinion letters provide the DOL's official opinion on how labor and employment laws apply in specific situations.

The DOL issues opinion letters after receiving an employer's request for clarification on how the law should be interpreted in specific scenarios. For example, multiple opinion letters present the DOL's opinion on whether FLSA exemptions apply to specific employment positions.

As a result, opinion letters are fact-specific and employers can rely on them for guidance to the extent that the facts in their circumstances align with the scenarios described in the letter.

Publishing opinion letters is a labor-intensive process and employers that request one may need to wait several months to receive a response from the DOL. In addition, while the DOL reviews all opinion letter requests, it has traditionally only answered a few, at its discretion. The DOL has published instructions on how to request opinion letters on its [website](#).

## Impact on Employers

Opinion letters can be extremely helpful for employers that are trying to understand their legal responsibilities, particularly in areas where the law seems to be outdated or where compliance with one legal obligation interferes with compliance with another.

Indeed, employers that receive an answer to their request can rely on the answer they receive in their efforts to comply with their legal obligations. Employers are also encouraged to review [past opinion letters](#) and other DOL guidance to obtain a clearer understanding of their obligations.

However, an employer that seeks the DOL's opinion regarding a specific situation should understand the risk that the DOL may not agree with its practices, so employers should consider this alternative carefully.

In addition, while employers can rely on an opinion letter, employers should also remember that opinion letters are merely guidance—they are not the law, and they are not binding. This means that DOL inspectors, auditors and judges may disagree with opinion letters and find noncompliance even when the employer is following the advice given by an opinion letter.

## Good Faith Defense

However, employers that rely on opinion letters may be able to establish a good faith defense under the law. The good faith defense principle allows noncompliant employers to minimize the risk of penalties if they can prove they were making an honest effort to comply with the law.

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## Summary of Reintroduced Opinion Letters

Below are the 17 reintroduced opinion letters followed by a brief summary of the topics they cover:

Number	Guidance Summary
<a href="#">FLSA2018-17</a>	<p><b>Exempt status for construction supervisors employed by homebuilders</b>  <i>[The DOL link to actual opinion letter was defective at the time this document was created.]</i></p>
<a href="#">FLSA2018-16</a>	<p><b>Volunteer work for joint employers</b>            Individuals that work for pay as an employee of an employer cannot “volunteer” the same services for that employer, nor for any joint employer.</p>
<a href="#">FLSA2018-15</a>	<p><b>Administrative exemption status for product demonstration coordinators</b>            Clarifies how the following primary duties fall within the scope of the FLSA’s administrative exemption:</p> <ul style="list-style-type: none"> <li>• Developing and implementing strategies for recruiting and maintaining relationships with demonstrators;</li> <li>• Deciding how much effort to devote to expanding the pool of demonstrators;</li> <li>• Ensuring that a demonstrator executes a contract before conducting an event;</li> <li>• Receiving and resolving demonstrator complaints;</li> <li>• Ensuring that the appropriate number of demonstrators staff events and are fully prepared for them;</li> <li>• Determining the order in which to staff events, acting as liaison to managers of retail locations where events are scheduled; and</li> <li>• Developing a contingency plan for demonstrator no-shows or late cancellations.</li> </ul>
<a href="#">FLSA2018-14</a>	<p><b>Permissible and impermissible salary deductions for exempt, salaried employee absences</b></p> <ul style="list-style-type: none"> <li>• When absences are caused for personal reasons, the FLSA allows employers to make full-day salary deductions for exempt employees. The FLSA, however, does not allow for salary deductions for partial-day absences.</li> <li>• Deductions from salary caused by sickness or disability (including work-related accidents) must follow the rules set out by the employer’s bona fide plan, policy or practice of providing compensation for loss of salary occasioned by sickness or disability.</li> </ul>
<a href="#">FLSA2018-13</a>	<p><b>Administrative and executive exemption status analysis for fraud/theft analysts and agents</b>            Clarifies why the following primary duties fall within the scope of the administrative exemption:</p> <ul style="list-style-type: none"> <li>• Managing the collection of intelligence information;</li> <li>• Coordinating the collection efforts of area personnel; and</li> <li>• Evaluating and approving information to ensure accuracy and relevancy.</li> </ul> <p>Clarifies why the following primary duties do <b>NOT</b> fall within the scope of the administrative exemption:</p> <ul style="list-style-type: none"> <li>• Conducting investigations;</li> </ul>

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	<ul style="list-style-type: none"> <li>Collecting and analyzing data; and</li> <li>Producing analytical reports.</li> </ul>
<a href="#">FLSA2018-12</a>	<p><b>Administrative exemption status for consultants, clinical coordinators, coordinators and business development managers</b></p> <p>Clarifies why the following primary duties fall within the scope of the administrative exemption:</p> <ul style="list-style-type: none"> <li>Screening, interviewing and recommending candidates for hiring;</li> <li>Supervising and counseling to resolve issues regarding housing complaints and timeliness of payroll;</li> <li>Addressing client facility concerns regarding problems directly;</li> <li>Working with client facilities to monitor performance;</li> <li>Serving as second-line supervisors to counsel and discipline employees regarding clinical and behavioral issues;</li> <li>Analyzing existing market conditions to determine needs, competitors’ capabilities, and competitive billing and pay rates;</li> <li>Training consultants and other employees; and</li> <li>Analyzing client facilities’ staffing needs, bill rate tolerance and contract expectations.</li> </ul>
<a href="#">FLSA2018-11</a>	<p><b>Including “job bonuses” in the regular rate</b></p> <p>All remuneration paid for employment must be included in the regular rate unless it is explicitly excluded under the law.</p>
<a href="#">FLSA2018-10</a>	<p><b>Exempt status analyses for residential construction project supervisor</b></p> <p>Clarifies why the following primary duties fall within the scope of the administrative exemption:</p> <ul style="list-style-type: none"> <li>Evaluating the quality and efficiency of subcontractors’ and suppliers’ work;</li> <li>Having authority to stop subcontractor work to correct any observed deficiencies, and may require subcontractors to remove any of their employees from the worksite;</li> <li>If necessary, recommending the dismissal of subcontractors and suppliers whose work is not satisfactory;</li> <li>Providing significant input as to who will be re-contracted for future services;</li> <li>Making sure there are no conflicts between the plans and the actual construction of the home;</li> <li>Negotiating the best solution for any issue that may arise with a building inspector, subcontractor or supplier; and</li> <li>Scheduling the subcontractors and suppliers and committing the homebuilding company to pay when appropriate.</li> </ul> <p>Ordinary inspection work generally does NOT meet the duties requirements for the administrative exemption. Ordinary inspection includes inspecting the work of subcontractors to ensure compliance with the builder’s plans to schedule subcontractors and supplies to ensure they were both in place at the proper time. The fact that the work is important to the company, affecting its profitability and reputation, is not dispositive.</p>

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Number	Guidance Summary
<a href="#">FLSA2018-9</a>	<p><b>Year-end nondiscretionary bonus and the regular wage rate</b></p> <p>An employer may exclude previous payments properly excluded from the regular rate under Section 7(e) of the FLSA when calculating a year-end bonus that is based on a percentage of an employee's total straight-time and overtime earnings.</p>
<a href="#">FLSA2018-8</a>	<p><b>Administrative exemption status for client service managers</b></p> <p>Clarifies why the following primary duties fall within the scope of the administrative exemption:</p> <ul style="list-style-type: none"> <li>• Comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered;</li> <li>• Having the authority to execute insurance and finance contracts and legally bind the agency and its clients;</li> <li>• Consulting with clients to identify risk and exposure, advising on determining proper values for the clients' assets, and then recommending solutions to manage the clients' risk and exposure; and</li> <li>• Acting as an insurance advisor and consultant to the agency's clients, not selling an insurance product.</li> </ul>
<a href="#">FLSA2018-7</a>	<p><b>Exempt employee salary deductions for full-day absences based on hours missed</b></p> <p>An employer may calculate a deduction for a full-day absence based on the number of hours actually missed. However, deductions are not permissible if the employee is absent for less than one full day of work.</p>
<a href="#">FLSA2018-6</a>	<p><b>Exempt status for coaches</b></p> <ul style="list-style-type: none"> <li>• Coaches qualify for the teacher exemption if their primary duty is teaching and imparting knowledge to students in an educational establishment.</li> <li>• Coaches whose primary duties are not related to teaching—for example, performing general clerical or administrative tasks for the school unrelated to teaching, including the recruitment of students to play sports, or performing manual labor—do not qualify for the teacher exemption.</li> <li>• There is no requirement that the employee possess a teaching certificate to qualify for the exemption.</li> <li>• There is no minimum education or academic degree required under the regulations for the teacher exemption.</li> </ul>
<a href="#">FLSA2018-5</a>	<p><b>Regular rate calculation for firefighters and alarm operators</b></p> <ul style="list-style-type: none"> <li>• Under Section 7(k) and 29 C.F.R. § 553.230, firefighters may be scheduled for a work period between seven and 28 days, as long as the ratio between maximum hours worked and days in the work period bears the same relationship as 28 days bears to 212 hours, as 159 hours in 21 days does.</li> <li>• The FLSA requires pay only for hours actually worked and not for holidays or vacation time.</li> <li>• The FLSA does not dictate the method of regular rate calculation for non-overtime hours so long as the minimum wage is met for all hours.</li> </ul>

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Number	Guidance Summary
<a href="#">FLSA2018-4</a>	<p><b>Exempt status analyses for commercial construction project superintendents</b></p> <ul style="list-style-type: none"> <li>The learned professional exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.</li> <li>The following primary duties fall within the scope of the administrative exemption:               <ul style="list-style-type: none"> <li>Overseeing a commercial construction project from start to finish; and</li> <li>Securing or hiring subcontractors and overseeing the work of subcontractors.</li> </ul> </li> </ul>
<a href="#">FLSA2018-3</a>	<p><b>Exempt status analyses for helicopter pilots</b></p> <p>In general, helicopter pilots do not qualify for an administrative, executive or professional exemption under the FLSA. Aviation is not a field of science or learning, and the knowledge required to be a pilot is not customarily acquired by a prolonged course of specialized intellectual instruction.</p>
<a href="#">FLSA2018-2</a>	<p><b>Overtime exemption for plumbing sales/service technicians of retail or service establishment</b></p> <ul style="list-style-type: none"> <li>The FLSA provides an overtime exemption for any employee of a retail or service establishment, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage, and (2) more than half of the employee’s compensation for a representative period (not less than one month) represents commissions on goods or services.</li> <li>The retail concept applies to a business that provides drain cleaning and minor plumbing repair and replacement services if more than 75 percent of its annual dollar volume of sales of goods and services is not for resale.</li> <li>Computing employee compensation based on a percentage of the charge to the customer, such as the charge for labor and/or the charge for service and parts used in repair, can represent commissions on goods and services.</li> <li>For the exemption to apply, the total amount of commission payments must be more than one-half the employee’s total compensation for a representative period (not less than one month).</li> </ul>
<a href="#">FLSA2018-1</a>	<p><b>Ambulance personnel on-call time and hours worked</b></p> <p>On-call hours are compensable time if they restrict or prevent the employee from using his or her time freely. To determine whether on-call conditions are restrictive, employers should consider whether employees:</p> <ul style="list-style-type: none"> <li>Are required to carry a pager;</li> <li>Must report to work within a reasonable time;</li> <li>Are disciplined if they fail to respond during the prescribed time;</li> <li>Receive a high number or frequency of callbacks during on-call hours; and</li> <li>Have to travel a great distance to report to work or before they can use their time freely.</li> </ul>

## More Information

Please contact Scott Benefit Services for more information on how to comply with labor and employment laws enforced by the DOL, including the FLSA and the FMLA.