



**The Employment and Labor Practice
of Sidley Austin Brown & Wood LLP**

Our Employment and Labor practice has decades of experience in litigating virtually all types of employment and traditional labor claims before federal and state courts and agencies, ranging from single-plaintiff cases to complex class actions.

We also provide comprehensive counseling to our clients on a wide variety of employment and labor issues.

**For further information on the
Employment and Labor group please call.**

**Brian J. Gold (312) 853-2064
Chicago Office**

**Jeffrey A. Berman (213) 896-6655
Los Angeles Office**

**Laura H. Allen (212) 839-5975
New York Office**

**Jeffrey S. Berlin (202) 736-8178
Washington, D.C. Office**

To receive future copies of the
Employment and Labor Alert via email,
please send your name, company or
firm name and email address to
Diane Olsen at dolsen@sidley.com

This **Employment and Labor Alert** has been prepared by SIDLEY AUSTIN BROWN & WOOD LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act upon this without seeking professional counsel.

**WAGE & HOUR DIVISION ISSUES OPINION
LETTERS CLARIFYING SALARY BASIS TEST,
BONUS RULES, AND EXEMPTIONS**

The Wage & Hour Division of the United States Department of Labor ("DOL") recently made public a series of Opinion Letters it has written in response to questions it has received concerning several aspects of the salary basis test, bonus rules, and exemptions applicable under the Fair Labor Standards Act ("FLSA"). While limited to the particular facts presented and not having the force of law, DOL Opinion Letters provide guidance as to how the DOL views an issue and often generate insight as to how best to handle certain wage and hour problems.

The DOL's recent opinion letters span such significant FLSA concerns as the contours of the "administrative" exemption from minimum wage and overtime requirements in the insurance industry, who qualifies for the retail sales, vehicle dealer, and "motor carrier" exemptions, the applicability of the "professional" exemption to paralegals, partial day deductions from salary and leave banks, the permissibility of various rehabilitation programs under the salary basis test, and whether certain bonus and incentive payments are to be calculated into overtime. Although the letters break little new ground, they are the DOL's most up-to-date statements on these issues and are valuable because they provide examples of some of the first applications of the new "white collar" exemption regulations that went into effect on August 23, 2004.

1. Letters Concerning Exemptions

(a) Lower-Level Claims Adjusters Do Not Qualify For "Administrative" Exemption.

The new regulations concerning the "administrative" exemption from the FLSA's overtime and minimum wage requirements include an example stating that insurance claims adjusters "generally meet the duties requirement for the administrative exemption if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." 29 C.F.R. § 541.203(a). In an Opinion Letter dated January 7, 2005, but just recently made public, the DOL made clear that lower-level claims adjusters

who do not engage in such activities, but who instead primarily "conduct telephone interviews from a list of prepared questions in order to determine whether to accept or deny a workers' compensation claim for benefits, and fill out preprinted forms needed to make or deny payments," with little or no authority to act independently and no role in evaluating the information they gather, are not exempt. Their primary duty, in the words of the DOL, involves "applying their particular skills and knowledge rather than exercising 'discretion and independent judgment with respect to matters of significance,'" as is required for the administrative exemption.

(b) Applications of Retail, Vehicle Sales, and Motor Carrier Exemptions

Another series of Opinion Letters address the FLSA's retail establishment, vehicle sales, and motor carrier exemptions. *See* Michael R. Triplett, "DOL Offers Guidance on Classifying Workers, Employers under Sales, Motor Carrier Rules," *Daily Lab. Rep.* (BNA), Feb. 9, 2005, at A-6. In one letter, the DOL stated that a complicated corporate arrangement under which the non-retail sales of one entity were, as a result of a franchise agreement, reported on the books of two other retail entities would not compromise the retail status of the two retail establishments. The DOL stated that the sales made by the non-retail establishment would be attributed only to it, not to the other entities, even though recorded on their books. *See id.* As a result, the two retail entities would continue to be eligible for the exemption from overtime set forth in Section 7(i) of the FLSA for employees earning a regular rate of pay at least one-and-one-half times the minimum wage, where more than half of the employees' compensation represented commissions on goods or services. 29 U.S.C. § 207(i).

In a second letter, the DOL stated that an internet car sales company qualified for the vehicle sales exemption set forth in Section 13(b)(10)(A) of the FLSA. Triplett, *supra*. The employees for this employer obtained orders over the employer's Web site and then filled the orders by searching the inventory of

participating dealers. After the vehicle is sold, the employer enters into agreements with both the dealer and the customer. In the DOL's view, because the employer was not engaged in manufacturing, but instead primarily was engaged in the business of selling automobiles, the exemption applied. *Id.*

A third letter stated that sales representatives delivering displays on behalf of the employer that crossed state lines on their way to specifically designated retail establishments were exempt from overtime requirements pursuant to Section 13(b)(1) of the FLSA. Under this provision, the sales representatives were driving "commercial motor vehicles" engaged in interstate commerce and thus were exempt. If, however, at the end of a four-month period they were no longer involved in interstate commerce, they would lose the exemption and be entitled to overtime.

(c) Paralegals Generally Do Not Qualify For "Learned Professional" Exemption.

In another Opinion Letter dated January 7, 2005, the DOL reiterated its long-standing position that paralegals generally do not qualify for the FLSA's "learned professional" exemption. Even though the questioner possessed a four-year degree from an accredited university, a paralegal certificate, and had taken continuing legal education courses over 22 years as a paralegal, she was not exempt because, citing the example concerning paralegals set forth in the new regulations, *see* 29 C.F.R. 541.301(e)(7), "an advanced specialized academic degree is not a standard prerequisite for entry into the field." The learned professional exemption, according to the Opinion Letter, is restricted "to professions where specialized academic training is a standard prerequisite for entrance into the profession." The one exception, as far as paralegals are concerned, would be for paralegals who have advanced degrees in other fields, such as accounting or engineering, that they apply in the performance of their paralegal duties. Those paralegals would qualify for the professional exemption.

2. Letters Concerning the Salary Basis Test

(a) Deductions from Leave Banks and Salary.

In another Opinion Letter dated January 7, 2005, the DOL reiterated its pre-existing position, but now under the new salary basis regulations, that partial-day deductions are permissible from leave banks, but not from salary, under the salary basis test. The DOL emphasized that a partial-day deduction from the salary of an otherwise exempt employee could defeat the exemption and entitle that employee to overtime, even if the employee had exhausted his or her leave benefits.

At the same time, an employer may make deductions of one or more *full* days from an exempt employee's salary if the employee is absent for personal reasons or due to sickness or disability, provided that, in the case of sickness or disability, the deductions are made "in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability." 29 C.F.R. § 541.602(b)(2). If the employer has a bona fide plan, policy or practice providing such compensation, the regulations allow an employer to make deductions for absences of one or more full days "before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder." *Id.* Whether a sick leave plan is "bona fide" depends on its specific design and operation, but typically a "bona fide" plan would include defined benefits that have been communicated to eligible employees, it would operate as described in the plan, and it would be administered impartially—without what the DOL refers to in the Opinion Letter as a design that reflects "an effort to evade the requirement that exempt employees be paid on a salary basis."

(b) Rehabilitation Pay Programs

In a June 25, 2004 Opinion Letter, the DOL considered two pay programs meant to encourage employees recuperating from an injury or illness to return to work on a part-time basis as soon as they are medically able. Under both programs, the employees,

all otherwise exempt, received disability pay and a pro-rata share of their pre-disability salaries. Under the first program, for every hour a doctor determined that an employee was medically unable to work the employee would be paid at a reduced rate of 50-70%. Then the employee would receive his or her full pay, translated to an hourly rate, for each hour the employee actually worked in the week. The DOL determined that this approach could not be assured to comply with the salary basis test, since the amount of money the employer guaranteed to pay "would not, in many instances, satisfy the requirement that there be a reasonable relationship between the amount of pay guaranteed to the employee and the employee's actual earnings."

Under the second approach, for every hour an employee was medically unable to work, the employee would similarly receive a reduced portion of the hourly equivalent of his or her salary. In addition, though, the employee would be guaranteed the full hourly rate for every hour he or she was deemed able to work and anticipated working during the week, whether or not the employee actually worked those hours. As long as the doctor's instructions did not change, the employee's compensation would not fluctuate. The DOL determined this type of pay program to be acceptable under the salary basis test, amounting to essentially a reduced salary in response to a reduced workweek—which the DOL has previously indicated is acceptable as long as the reduction is not designed to circumvent the salary basis requirement.

The DOL also pointed out that the employer could alternatively convert recuperating employees to non-exempt status during the disability without jeopardizing the exempt status of other salaried exempt employees not on disability. As long as such changes do not reflect an attempt to evade the salary basis requirement, and are not, for example, recurrent, they will not affect the future eligibility of the disabled employee for an exemption or the eligibility of other, non-disabled employees.

3. Announced Bonus and Incentive Plans Must Be Included in Overtime.

In another series of Opinion Letters recently made public, the DOL applied to three different circumstances the rule that bonus or incentive payments promised to employees as a way to increase or sustain production were not "discretionary" and thus could not be excluded from the employees' regular rate of pay when calculating overtime. See Michael R. Triplett, "DOL Provides Guidance on Employer Bonus, Incentive Schemes Under Overtime Rules," Daily Lab. Rep. (BNA), Feb. 7, 2005, at AA-2.

In a September 21, 2004 letter, the DOL determined that a bonus plan that provided a flat \$3 per hour bonus if an employee's work group met certain production goals was invalid. Id. By paying the same bonus for both straight time and overtime hours, the employer violated the rule that in calculating overtime with bonuses, the percentage bonus given for straight time and for overtime must be same. Id. Under the employer's plan, the same dollar amount per hour meant a higher percentage of straight time pay, and a correspondingly lower percentage for overtime. Id.

Another letter, dated September 20, 2004, stated that an employer could not exclude a "piece rate bonus" when calculating overtime. See id. In that instance, the employer paid workers a guaranteed hourly rate or a piece rate, whichever was higher over a two-week period. Id. If the hourly rate was higher, any overtime would be based on that rate. Id. If the piece rate was higher, straight time and overtime would be calculated as if the guaranteed rate applied, and then the employer would pay a

"bonus" made up of the excess from using the piece rate. The DOL rejected this plan, because employers must calculate overtime using "all forms of remuneration," whether the employees were paid by piece rate or by hourly guarantee. Id. The employer here effectively was excluding the "bonus" portion from the employees' compensation when calculating their overtime.

In a letter dated September 28, 2004, the DOL found that an employer could not permissibly provide a lump-sum premium as overtime that did not reflect the number of overtime hours actually worked. The employer promised its delivery employees such a lump sum to encourage them to work weekends and make more deliveries. The DOL, citing 29 C.F.R. § 778.310, stated that, "[A] premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium under the FLSA even though the amount of the money may be equal or greater than the sum owed on a per hour basis." Id.

This thumbnail overview of some of the DOL's more recent Opinion Letters underscores how detailed, complex, and sometimes confusing the DOL's rules and regulations under the FLSA can be. At Sidley Austin Brown & Wood LLP, our employment and labor law attorney are will versed in assisting clients to navigate these complexities, both with respect to federal wage and hour issues and their state counterparts. If you have questions concerning these DOL Opinion Letters or other wage and hour issues, please contact any member of the Employment and Labor Law Group.

The affiliated firms, Sidley Austin Brown & Wood LLP, a Delaware limited liability partnership, Sidley Austin Brown & Wood LLP, an Illinois limited liability partnership, Sidley Austin Brown & Wood, an English general partnership and Sidley Austin Brown & Wood, a New York general partnership, are referred to herein collectively as Sidley Austin Brown & Wood.



SIDLEY AUSTIN BROWN & WOOD LLP
AND AFFILIATED PARTNERSHIPS

BEIJING BRUSSELS CHICAGO DALLAS GENEVA HONG KONG LONDON LOS ANGELES NEW YORK
SAN FRANCISCO SHANGHAI SINGAPORE TOKYO WASHINGTON, D.C.

www.sidley.com