Department of Labor Offers New Guidance on Whether Employee Training is Compensable “Work” Under the Fair Labor Standards Act

Introduction

The Fair Labor Standards Act (FLSA) is a US federal statute that establishes minimum wage, overtime pay, recordkeeping and youth employment standards for employees in the private sector and in federal, state, and local governments. Under the FLSA, employers must pay employees for all “hours worked.” Work may loosely be defined as any physical or mental exertion (whether burdensome or not), controlled or required by the employer, and pursued necessarily and primarily for the benefit of the employer and its business. Yet precisely what constitutes compensable “work” is a surprisingly thorny question, which has plagued employers for years.

Over the years, the Department of Labor (DOL) has provided guidance regarding this question by promulgating regulations and by issuing interpretative guidelines and opinion letters. In March of 2009, the DOL released 40 such opinion letters, signed during the final days of the Bush Administration, which interpret various provisions of the FLSA. Although 20 of these letters were promptly withdrawn, several that remain will be of particular interest to employers who require their employees to attend training outside of normal work hours, or who require employees to perform homework or self-study in conjunction with training offered during normal work hours. The particularly noteworthy opinion letters are discussed below.

Opinion Letter FLSA 2009-15: Outside study is compensable if required, but employers may limit the amount of study

Previous DOL opinion letters support the long-standing general proposition that outside study time is not compensable under the FLSA if it is not required by the employer. In contrast, if completion of homework is a requirement of a compensable training class, time spent completing assignments must be compensated.

In a recent letter, the DOL was asked for the first time whether an employer may limit the amount of time employees engage in required self-study. The employer presented the DOL Administrator with the following factual scenario:

The city requires certain employees to attend and pass various training programs intended to help the employees
become more proficient at their jobs. The city employees attend training during normal work hours. During the training, the instructor informs the employees that they must read and/or study selected material and be prepared to discuss this material during the next class. Employees leave the classroom and go home or to their hotel (if the training is out of town) to study or read the assigned material. In its opinion, the DOL confirmed that “time spent outside the classroom and after normal work hours completing required assignments, such as the required reading and studying of materials . . . is compensable hours worked.” Importantly, however, the DOL also acknowledged that the employer has the ability to limit this work, and “may establish a specific amount of time to be spent completing assignments outside the classroom and after normal work hours.”

The DOL warned that an employer’s ability to limit such time is not absolute, for if the employee were to exceed the amount of time allowed by the employer, this additional self-study time may also be compensable. This is because “it is the duty of management to exercise its control and see that work is not performed if it does not want it to be performed.” An employer “cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.”

The DOL’s opinion letter puts employers in a difficult position: While an employer may direct employees to spend no more than a certain amount of time on homework or other activities, if the employee is performing such activity away from the work premises, the employer is arguably powerless to regulate how much time the employee actually spends engaged in the activity. Were the employee to invest additional time, the employer could find itself liable for “suffer[ing] or permit[ting]” the employee to perform uncompensated work if the employer knew or should have known that the employee spent more than the allotted time on the assignment. There are defenses to such allegations, but it is undoubtedly preferable to avoid a claim in the first place.

So what is an employer in this position to do? The DOL suggests that the employer “control the study time by allowing the employees a realistic time to complete their reading and study assignment within the class period or within the normal work day.”

Opinion Letter FLSA 2009-13: Outside study that is a prerequisite to training is compensable if the classes are directly related to the employee’s job

In another training inquiry, the DOL was presented with the following scenario: the employer offered advanced training on certain equipment to its employees. While time spent in the training classes was compensable, employees first were required to complete four Web-based courses on their own time, i.e., without compensation. The employer represented that while employees who do not take the training will nonetheless be able to perform their current job duties, employees who complete the training will be able to perform some of their present job duties more proficiently. The employer asked if it was legally obliged to compensate the employees for the time spent taking these voluntary prerequisite classes.

Generally, when attendance at training is voluntary, an employer may be relieved from compensating the employee if the program satisfies four criteria:

(a) Attendance is outside of the employee’s regular working hours;
(b) Attendance is, in fact, voluntary;
(c) The course, lecture or meeting is not directly related to the employee’s job; and
(d) The employee does not perform any productive work during such attendance.13

The DOL applied these criteria to the facts presented, and determined that although the prerequisite classes appeared to satisfy (a), (b) and (d), because the classes were designed to make the employee more proficient, they directly related to the employee’s job and were thus compensable.

Opinion Letter FLSA 2009-1: Training directly related to an employee’s job may not be compensable in “special situations”

In the third opinion letter issued by the DOL regarding employee training, the DOL clarified that there remain certain scenarios where training that directly relates to an employee’s job is not compensable.

First, an employee’s voluntary participation in training outside of working hours need not be compensated if the training “corresponds to courses offered by independent bona fide institutions of learning.”14 For example, in its recent opinion letter, the DOL opined that child-care center employees need not be compensated for attending continuing education classes offered by the employer, even though the employees were required by the state to take part in this training in order to maintain their state certifications. The DOL reasoned that because the employees “may also attend training offered by other organizations that meet the state mandated training requirements[,]” the time spent in the courses offered by the employer was not compensable because the employer’s courses “correspond to those offered by independent bona fide institutions of learning.”15

The DOL identified a second exception in the opinion letter tackling required self-study, which pertains to state and local government employers.16 These employers are not required to compensate their employees for attending required training outside of regular work hours, even if the cost of the training is borne by the employer, if the training is “required by law for certification of public and private sector employees within a particular governmental jurisdiction.”17 For example, training required to obtain certification of public and private emergency rescue workers would not be compensable work under the FLSA. Compensation also is not required if the training is “required for certification of employees of a governmental jurisdiction by law of a higher level of government,” such as where state or county law imposes a training obligation upon public employees.

Conclusion

As these recent opinion letters illustrate, the FLSA is a complex statutory scheme with many potential pitfalls, even for the most well-intentioned employer. Employers seeking to offer voluntary training, or to provide training programs with self-study requirements, are advised to review these opinion letters carefully and to seek advice of counsel before implementing these types of training programs. Employers may also want to consider seeking a written opinion from the DOL Administrator to assess whether their training programs and requirements are FLSA compliant. Additional information is available from the Department of Labor Web site, at www.dol.gov.
Endnotes
1 See 29 U.S.C. §§ 201 et seq.
3 Wage and hour opinion letters are based exclusively on the facts and circumstances presented by the inquiring parties, and are not binding precedent. However, they provide valuable insight into the DOL’s reasoning and the positions that it may take in investigations or litigation.
4 See W-H Opin. Ltr. (Sept. 27, 1984); W-H Opin. Ltr. (July 17, 1980); W-H Opin. Ltr. (July 27, 1971). These letters are not available online, but are referenced in W-H Opin. Ltr. FLSA 2009-15, 2009 WL 649017 (Jan. 15, 2009).
7 Id. at 3.
8 Id.
9 29 C.F.R. § 785.13.
10 Id.
13 29 C.F.R. § 785.27.
14 29 C.F.R. § 785.31.
17 29 C.F.R. § 553.226(b)(1)–(3).

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