

The Return of Wage & Hour Opinion Letters

By Ronald D. "Scott" Williams

August 2017

Employers with fact-specific questions arising under the Fair Labor Standards Act ("FLSA"), the Family Medical Leave Act ("FMLA"), and other federal wage and hour laws may once again seek guidance directly from the U.S. Department of Labor. On June 27, 2017, U.S. Secretary of Labor Alexander Acosta announced that the Department will reinstate the issuance of opinion letters. An opinion letter is an official, written opinion by the Wage and Hour Division of how the law applies to specific facts presented by an employer. The identity of the employer requesting the opinion letter remains anonymous in the response, which is made publicly available on the Department's webpage. Importantly, opinion letters may be relied upon as a good faith defense to wage and hour claims arising under the FLSA.

After seventy years of issuing opinion letters, the Wage and Hour Division discontinued the practice in 2010 in favor of Administrative Interpretations. Unlike opinion letters, Administrative Interpretations are not fact-specific and only provide general guidance on wage and hour compliance. Administrative Interpretations were expected to be published more frequently than opinion letters; however, to date, only seven Administrative Interpretations have been issued by the Department--two of which (providing guidance on joint employment and independent contractors) were withdrawn effective June 7, 2017.

One of the major drawbacks about the opinion letter process was the Department's delay in responding to an employer's request for an opinion letter. The Department's fiscal year 2018 budget request included \$230 million for the Wage and Hour Division, including a funding increase of \$3 million to educate employers on how to comply with the law. Any increased budget would hopefully position the Department with staff and resources to respond to requests for opinion letters in a timely manner.

The return of opinion letters allows the Wage and Hour Division more flexibility in issuing preventative guidance to the public. The Wage and Hour Division will continue to exercise discretion in determining which requests for opinion letters will be responded to, and the appropriate form of guidance to be issued in response.

When navigating the opinion letter process, employers should consider the following tips:

- Do not seek an opinion letter on subjects of active audits or pending litigation
- Do not include trade secret or confidential information
- Do not include any personal privacy information
- Be prepared for a delay and engage in active follow-up

To discuss this further, please contact:

Ronald D. "Scott" Williams in Birmingham at scwilliams@burr.com or 205-458-5436; a member of our [Labor & Employment practice](#), or the attorney with whom you regularly work.