Labor Dept. Says Again: No More Opinions For Employers on the FLSA

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From the federal Fair Labor Standards Act's inception in 1938, employers sought, and officials of the U.S. Department of Labor's Wage and Hour Division provided, official written explanations of how that law works in particular situations.

These "opinion letters" served as an important means by which the public could develop a clearer understanding of what FLSA compliance entailed.

The then-over-70-year practice of issuing opinions ended in March 2010. Now, in a presentation to the American Bar Association, current Wage and Hour Administrator David Weil has said that the Division will not resume the issuance of opinion letters.

The Rationale ...
In 2010, the Wage and Hour Division contended that it was not an efficient or productive use of its resources to "provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the facts may result in a different outcome."

Instead, the Wage and Hour Division said, it would henceforth issue "Administrator Interpretations" when "it is determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate." Division officials also remarked that an opinion letter was typically provided to a single employer, whereas "Administrator Interpretations" would not be.

Administrator Weil (who in fairness assumed his post just last May) embraces this approach.

In his view, opinion letters were somehow neither "transparent" nor "fair" in light of their fact-specific nature. He also feels that the resources required to issue them are disproportionate when compared to those devoted to Administrator Interpretations. The Wage and Hour Division will, he says, continue to publish Administrator Interpretations when it believes that there is a persistent problem to be addressed.

... and the Results
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Over the last five years, during which time difficult, across-the-board FLSA compliance questions of nationwide, multiple-industry import have neither fallen in number nor become less complex or important, the Division has released a total of five Administrator Interpretations dealing with or including FLSA matters. They involve what the Division apparently saw as persistent problems relating to the pine-straw industry, joint-employment in certain home-care settings, shared-living arrangements in home-care settings, the meaning of the word "clothes" under an arcane FLSA exception relating to collective bargaining, and the exemption status of mortgage loan officers.

These interpretations delve into detailed facts, scenarios, and assumptions, variations from which might well lead to different conclusions. It is also worth noting that the very first Administrator Interpretation cited and relied for support upon opinion letters from prior administrations.

The Bottom Line

The fact is that opinion letters are well worth the effort and resources necessary to produce them. They promote FLSA compliance much more broadly than the Division apparently realizes, and the Division could significantly leverage its resources by reviving them.

For one thing, although opinions from years or even decades ago might have been directed to particular employers, those letters provide guidance to many other current-day employers, either directly or through their advisers. Presumably, this is why the Division's website still maintains an archive of such letters dating back to 2001, and why publishers in the relevant legal fields reproduce incomparably more.

And by dealing with specific requests, the Division can be sure that it is responding to actual, day-to-day compliance questions of general application that are on the minds of employers and others.

The Division has in the past made it plain that the views it expressed were tailored to the facts presented and/or to the factual assumptions it stated in replying; it could easily continue to do so.

Administrator Interpretations have by no means ended-up being an adequate alternative to opinion letters, whether viewed in terms of either content or the nature or number subjects addressed. The need for reinstituting the former practice is likely to become all-the-more urgent later this year, when revised "white collar" exemption regulations will probably become final.

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