

USDOL Reissues 17 Opinion Letters That Were Withdrawn in 2009

On January 5, 2018, the U.S. Department of Labor's Wage and Hour Division [reissued 17 opinion letters](#) that were withdrawn in 2009, shortly after President Obama began his first term in office. The USDOL under the Obama administration withdrew the 17 opinion letters on March 2, 2009, stating that they were being withdrawn "for further consideration" and that it would "provide a further response in the near future." However, it does not appear that the USDOL actually revisited any of the opinion letters that had been withdrawn, so the USDOL under the Trump administration has now reissued those opinion letters and has renumbered them as FLSA2018-1 through FLSA2018-17.

The reissued opinion letters cover a variety of topics. Each opinion letter is briefly summarized below.

- [FLSA2018-1](#) addresses whether on-call hours of county ambulance personnel constituted compensable hours worked under the Fair Labor Standards Act. According to the USDOL, such on-call hours were not compensable hours worked, because employees were not required to remain at or around the ambulance garage or at home during on-call hours, and because the relative lack of frequency of calls did not prevent employees from using their on-call time for personal pursuits. Even though employees were required to report to the ambulance garage within five minutes of being paged, the USDOL found that the city where the ambulance service was located was small enough that driving anywhere in the city limits "takes only a few minutes."
- [FLSA2018-2](#) addresses whether a drain cleaning and minor plumbing repair and replacement business qualified as a "retail or service establishment" for purposes of the Section 7(i) overtime exemption. According to the USDOL, it did. This particular exemption applies to any employee of a retail or service establishment if: (1) the regular rate of pay 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 represents commissions on goods or services.
- [FLSA2018-3](#) addresses whether civilian helicopter pilots employed by the Division of State Police qualified for a white collar exemption. According to the USDOL, these employees did not qualify for a white collar exemption and were eligible for overtime pay.
- [FLSA2018-4](#) addresses whether project superintendents at a commercial construction company qualified for a white collar exemption. According to the USDOL, the particular project superintendents at issue qualified for the administrative exemption because they exercised discretion and independent judgment with respect to matters of significance by, among other things, hiring subcontractors and overseeing the work of subcontractors.
- [FLSA2018-5](#) addresses whether certain collective bargaining agreement wage payment provisions properly calculated the regular rate of pay for firefighters and alarm operators employed by a municipality. The USDOL found that the CBA provisions did not properly calculate the regular rate for the firefighters, but did compute overtime correctly for the alarm operators.

- [FLSA2018-6](#) addresses whether community members who coach athletic teams for a public school were exempt from the FLSA's minimum wage and overtime pay requirements as teachers. The USDOL concluded that the particular coaches at issue were exempt under the teaching exemption because their primary duty was instructing student athletes in the rules and fundamentals of their respective sports.
- [FLSA2018-7](#) addresses whether a hospital could take deductions from the salary of an exempt Registered Nurse for absences of one or more full days based on the number of hours the RN missed on that particular day. The USDOL found that these deductions for personal absences in a full-day increment, based on the particular number of hours the RN was scheduled to work on that day, were permissible deductions.
- [FLSA2018-8](#) addresses whether client service managers at an insurance company qualified for the administrative exemption. Under the particular facts set forth in the opinion letter, the USDOL found that the client service managers qualified for the administrative exemption because they exercised significant discretion and independent judgment in advising clients about their insurance needs.
- [FLSA2018-9](#) addresses whether a year-end non-discretionary bonus based on a percentage of straight-time and overtime earnings from the preceding year was permissible if it excluded from the calculation payments earned by the employee that were not part of the regular rate computation. According to the USDOL, such a bonus was permissible.
- [FLSA2018-10](#) addresses whether a project supervisor in the residential homebuilding industry qualified for an exemption to the FLSA overtime requirements. According to the USDOL, the particular project supervisors at issue were exempt under the administrative exemption because they exercised significant discretion and independent judgment by, among other things, adjusting the construction process as necessary, negotiating solutions to issues raised by the building inspector, and hiring and terminating subcontractors.
- [FLSA2018-11](#) addresses whether job bonuses consisting of a flat dollar amount per day were required to be included in the regular rate for overtime purposes. The USDOL found that the bonuses were required to be included in the regular rate.
- [FLSA2018-12](#) addresses whether consultants, clinical coordinators, coordinators, and business development managers employed by a company that supplies temporary medical professionals to hospitals qualified for the administrative exemption. The USDOL found that, based on their job duties, the employees in all of these classifications exercised sufficient discretion and independent judgment to qualify for the administrative exemption.
- [FLSA2018-13](#) addresses whether certain positions in a business that combats fraud and theft in the insurance industry qualified for the administrative exemption. The USDOL found that two positions qualified for the administrative exemption, and three did not.
- [FLSA2018-14](#) addresses whether salary deductions from an exempt employee's salary in full-day increments were permissible when an exempt employee was absent for a full day, but did not have enough paid leave time to cover the entire absence. According to the USDOL, such deductions were permissible.
- [FLSA2018-15](#) addresses whether out-of-town coordinators for a product demonstration company qualified for the administrative exemption. The USDOL found that the particular coordinators at issue qualified for the administrative exemption.

- [FLSA2018-16](#) addresses whether an individual could volunteer to perform unpaid services for a not-for-profit entity if the individual was also employed by a contractor of that entity to perform similar services. According to the USDOL, if the not-for-profit entity was considered to be a joint employer of the individual, then the individual could not volunteer to perform the same type of services for which he or she received payment as a contractor.
- [FLSA2018-17](#) addresses the same issue addressed in FLSA2018-10 (whether employees of homebuilders who supervise residential construction qualified for the administrative exemption).

It is important to understand that each opinion letter was issued in response to a specific request that was submitted to the USDOL, and that the opinion set forth in each letter is therefore based on the particular facts and circumstances described in the request. Before relying on a USDOL opinion letter for guidance, an employer should consult with counsel to determine how closely the employer's circumstances resemble the circumstances set forth in the opinion letter, and to ensure that there are no other inconsistent judicial rulings that might be relevant to the analysis.

If you have any questions about this Information Memo, please contact [Subhash Viswanathan](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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