

Client Alert

Employment Law



DOL Issues Opinion Letters About Compensation for Volunteer Work and Expansion of FMLA Leave Entitlements

On March 14, 2019, the Wage and Hour Division of the Department of Labor (“DOL”) issued two opinion letters of interest to many employers—one concerning compensation for non-exempt employees who perform community service work and another concerning certain employers’ efforts to expand leave entitlements under the Family and Medical Leave Act (“FMLA”).

Voluntary Participation in an Employer-Sponsored Community Service Program is Generally Not Hours Worked

Under the Fair Labor Standard Act (“FLSA”), unless exempt, employees must receive at least minimum wage for all hours worked and one and one-half times their regular rate of pay for all hours over 40 in workweek. Employers promoting volunteer or community service opportunities to their employees are generally required to pay employees for their participation in such programs where (1) employers request or direct employee participation in such activities; (2) participating employees are under the employer’s direction or control; or (3) employees are required to be on the employer’s premises (i.e., during working hours). However, under the DOL’s regulations, time spent voluntarily in such activities outside of the employee’s normal working hours is not hours worked.

In an [opinion letter](#), the DOL concluded that awarding a bonus to the highest performing group of employees participating in an employer’s optional community service program did not render such time compensable. The DOL reasoned that such time was not hours worked because (1) the

work was charitable and voluntary, and not controlled or directed by the employer; (2) employees did not suffer adverse consequences in their working conditions or prospects for not participating in the program (and, participants, significantly were paid for volunteer work during normal working hours); and (3) the employer did not guarantee participating employees a bonus.

While the DOL's opinion letter is a welcome development for employers hoping to incentivize employees to participate in charitable endeavors, employers should still take care to promote such activities as purely voluntary and compensate employees for their participation in such activities during normal working hours. In addition, employers should consider whether the DOL's guidance is consistent with and complies with applicable state law.

Employers Cannot Expand FMLA Leave Entitlements

Under the Family and Medical Leave Act, eligible employees are typically entitled to 12 weeks of unpaid, job-protected leave for certain medical or family-related reasons, or 26 weeks of such leave in the case of military caregiver leave. Some employers have endeavored to enlarge the FMLA's protections by either (1) permitting employees to utilize paid time off before the employer designates any leave as FMLA leave; or (2) allowing employees to stack 12 weeks of unpaid leave on top of a paid leave, resulting, purportedly, in an enlarged FMLA-protected leave.

The DOL [opined](#) that neither practice was lawful. On the front end, the DOL explained that once employers are aware of that leave is for an FMLA-qualifying purpose, employers must, absent extenuating circumstances and consistent with FMLA regulations, designate such leave as FMLA leave within 5 business days. Given this, DOL stated that it was unlawful to delay designation of FMLA leave, even if the employee preferred such a delay. On the back end, the DOL reasoned that the use of paid time off during an FMLA-protected leave counts toward the applicable FMLA entitlement. Accordingly, in the DOL's view, employers could not designate more than 12 weeks (or 26 weeks in the case of military caregiver leave) as FMLA-protected leave.

Although the DOL's opinion letter strictly polices the FMLA's statutory leave entitlements, employers may provide employees additional, job-protected leave once an FMLA leave has concluded. They just cannot treat such leave as FMLA-protected, according to the DOL.

For More Information

For additional information or compliance assistance, please contact Charlotte Petilla or any other HRW attorney.