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What Six New DOL Opinion Letters Mean for Employer Pay and Leave Practices

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January 23, 2026

In June 2025, Deputy Secretary of Labor Keith Sonderling revived the Department of Labor's (DOL) opinion letter program, signaling a renewed focus on compliance guidance. Although not binding, these letters offer a clear look at how the DOL interprets – and is likely to enforce – key wage, hour, and leave laws. On January 5, 2026, the agency released six new letters: four under the Fair Labor Standards Act (FLSA) and two under the Family and Medical Leave Act (FMLA).

Collectively, the letters underscore the DOL's technical approach to compliance, especially around bonuses, pre-shift work, intermittent leave, and commission-based pay. They highlight issues that commonly trigger wage-and-hour disputes and audits – making them especially important for employers in industries with complex scheduling and pay practices, including retail, hospitality, manufacturing, healthcare, and education. Below is a brief summary of each of the opinions issued this month.

Two FMLA Opinion Letters

FMLA2026-1: This opinion clarifies how partial-week business closures – such as weather-related school closures – affect FMLA entitlement. Although the facts involved a school district, the guidance applies to all covered employers. The general rule is FMLA leave is calculated on a workweek basis, and employers cannot deduct more leave than the employee actually uses.

- **Holidays.** If an employee is taking *less than* a full week of FMLA leave, a holiday within that week does not count against their entitlement unless they were scheduled to work that day and used FMLA leave. If the employee is taking a *full* workweek of FMLA leave, the entire week – including the holiday – counts.

- **Business Closures.** If the employer shuts down operations for one or more full weeks and employees are not expected to work, those closure days do not reduce the employee's FMLA entitlement.

- **Partial-Week Closures.** If a business closes for part of a week and the employee is using intermittent FMLA leave, employers cannot deduct FMLA leave for closure days when the employee was not required to report to work.

  Example: If an employee normally takes FMLA leave on Tuesday afternoons but the employer is closed all day Tuesday due to weather, the employer may not count that day (e.g., 1/5 of a workweek) toward the employee's FMLA usage.

FMLA2026-2: This opinion clarifies that time to and from medical appointments for a qualifying serious health condition is FMLA-protected and may be counted against an employee's FMLA entitlement – even if the medical certification does not expressly mention travel. However, only the time reasonably needed to travel to and from the appointment is protected. Time spent on personal detours or unrelated activities (*e.g.*, errands, shopping, stopping for coffee, failing to return to work) is not FMLA-protected and cannot be charged as FMLA leave.

Four FLSA Opinion Letters

FLSA2026-1: This opinion addresses whether employers can classify employees as non-exempt even if they meet the requirements for an exemption, confirming that employers may do so provided that the employer pays the requisite minimum wage for all hours worked and overtime for any hours worked over 40 in a workweek. In sum, the FLSA prohibits misclassification of non-exempt employees as exempt, and not vice versa.

FLSA2026-2: This opinion reaffirms that non-discretionary, performance-based bonuses must be included in the regular rate when calculating overtime, consistent with the FLSA and its regulations. The opinion provides a detailed explanation and a calculation example. Because employers commonly make mistakes when handling bonuses and overtime, the DOL underscores the need for employers to review their pay practices to ensure proper regular rate treatment.

FLSA2026-3: This opinion clarifies that mandatory pre-shift activities, such as a required 15-minute roll call, are compensable work and must be included in overtime calculations. Even if a collective bargaining agreement attempts to exclude this time, the FLSA controls: any period when an employee is required to be on duty, on the employer's premises, or at a designated worksite generally counts as hours worked. Employers and unions cannot contract around FLSA-mandated pay obligations.

FLSA2026-4: This letter clarified how the "retail or service establishment" overtime exemption applies. To qualify, employees must:

1. earn a regular rate more than 1.5 times the federal minimum wage, and
2. receive over 50 percent of their compensation from commissions during a properly designated representative period.

Importantly, the DOL clarified the federal minimum wage – not higher state or local rates – controls the first criterion. For the second criteria, tips count as compensation only when the employer takes a tip credit under federal, state, or local law. Employers must also separately confirm that they meet the threshold definition of a "retail or service establishment" to qualify for this exemption from overtime.

The DOL's 2026 opinion letters underscore the agency's focus on day-to-day compliance issues that often trip up employers – regular-rate calculations, compensable pre-shift time, commission and bonus structures, and proper FMLA use tracking. .. Employers should review their current wage, hour, and leave practices – particularly bonuses, shift-start procedures, and intermittent FMLA tracking – to ensure policies align with the DOL's interpretation and minimize future risk.

If you have any further questions related to the DOL's opinion letters and day-to-day compliance regarding FLSA or FMLA, please reach out to Donna M. Glover or a member of Baker Donelson's Labor & Employment Group.