



## *U.S. Department of Labor Opinion Letters:* FMLA: Absences; Organ Donors. FLSA: “Wellness Activities”; Retailers; Volunteers.

“Legal Minute” – October 18, 2018

This year, the DOL has issued over 20 opinion letters covering issues under the FMLA and FLSA. Following the guidance issued in these letters may serve as a defense in litigation and can assist in handling otherwise legally ambiguous situations, even though they do not have the same force as the underlying statute or regulations themselves. Below we address two such letters interpreting the FMLA, and three interpreting the FLSA, all five of which were issued on August 28, 2018.

### **EMPLOYERS MAY “FREEZE” ABSENCES WHILE EMPLOYEE IS ON FMLA LEAVE:**

For employers who have a no-fault “points” or “occurrences” absenteeism policy, by which an employee is disciplined for accruing too many points over a 12-month period, the question arises whether the employer may “freeze” the accrual period during the time an employee is out on FMLA leave. For example, if an employee is out for two months on an FMLA leave, can the employer “freeze” its accrual period such that the employee’s points total is determined over a 14-month period (two of those 14 months of which the employee was out on FMLA leave)?

The DOL’s answer: Yes, provided the employer similarly “freezes” the accrual period for non-FMLA leave (*e.g.*, workers’ compensation leaves, disability leave, personal leave, *etc.*).

NOTE: If you adopt this “freeze” practice, be sure to include mention of it in your employee handbook and ensure consistent application.

### **ORGAN DONORS ARE PROTECTED UNDER THE FMLA:**

What if a perfectly healthy employee voluntarily decides to donate an organ? Is s/he protected under the FMLA?

The DOL’s answer: Yes, as it would fall under one or both of the FMLA leave eligibility entitlements for medical conditions involving “in-patient care” or “continuing treatment by a health care provider.”

NOTE: Consider adding such an FMLA leave qualifying event to your employee handbook FMLA policy. It likely will be infrequently used, and thus not disruptive to your operations; but acknowledging the company’s support for such courageous, selfless acts may add to the internal bank of goodwill you are trying to build.

### **TIME SPENT ON “WELLNESS ACTIVITIES” GENERALLY IS NOT COMPENSABLE:**

With all the health initiatives that have been launched by employers—“wellness” plans, health screening tests, discounts for or on-site provision of gym memberships, *etc.*—for employers who offer such initiatives, the question arises: Must the employer pay the employees for the time they spend on those activities?

The DOL’s answer: No, provided the employer does not pressure, coerce, or “strongly encourage” employees to participate.



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#### **RETAIL OR SERVICE EXEMPTION AND COMMISSIONED EMPLOYEES:**

For employers who are retailers of goods or services—that is, their goods or services are not for wholesale or resale—the FLSA’s retail or service exemption may be helpful. This exemption relieves employers of the obligation to pay overtime to certain commissioned employees.

The problem is that it is not always easy to determine whether a company is or is not a “retail or service” establishment under this exemption. Typical examples of business that qualify for this exemption are grocery stores, hardware stores, restaurants, hotels, barbershops and the like. Because the law is slow to catch up with technology and current commercial activities, it can be a bit dicey for “new age” businesses to know whether they may qualify as “retail or service” establishments.

So, what about a company that sells a “platform” to merchants that enables them to accept credit card payments from their customers’ mobile devices (whether on-line or in-person)? Is it a “retail or service” establishment, even though it sells its product directly to commercial entities, not to the general public?

The DOL’s answer: Yes, as the company’s goods and services were not being resold to any other entities.

NOTE: If you don’t clearly fall within an already recognized “retail or service” establishment, be sure to research whether your business qualifies under the FLSA before making use of this exemption.

#### **VOLUNTEERS AT NON-PROFITS: MUST THEY BE TREATED AND PAID AS “EMPLOYEES”?**

Generally, public or charitable work voluntarily engaged in by your company’s employees outside of working hours is not compensable time to your company. But what about the time an employee devotes to a non-profit organization? If your company doesn’t have to pay for it, must the non-profit pay the individual for her time?

The DOL’s answer: No, provided the individual truly is a “volunteer” under the FLSA.

NOTE: Remember that volunteers (and interns) for non-profit organizations are analyzed differently than they are for for-profit companies. In general, a person is a volunteer, and not an employee, of a non-profit where the individual freely offers her services to the non-profit and expects nothing in return. Without getting into the weeds too much, the non-profit should ask (in writing) and maintain a record of answers to the following questions, and then consult counsel if unsure of the individual’s “volunteer” status under the FLSA:

- Why are you volunteering?
- Are you employed somewhere?
- Is your employer asking you to volunteer here?
- Has someone from your organization asked you to volunteer here?
- Is anyone asking you to volunteer here?
- Are you seeking employment through our organization as well?
- Are you using this volunteering opportunity as a way to work for our organization?
- Do you understand that you will not be compensated for your time?
- Do you understand that we will not consider you for employment because of this opportunity?

Please contact BAHRA, your attorney, or Pete Bulmer (BulmerP@jacksonlewis.com) to discuss the DOL Opinion Letters or other wage-hour matters.

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