What To Know About DOL's New FLSA, FMLA Opinion Letters

By **Leah Stiegler and Fred Schutt** (January 22, 2026)

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The U.S. Department of Labor kicked off 2026 with a loud bang, releasing six new opinion letters on Jan. 5 that cover the Fair Labor Standards Act and the Family and Medical Leave Act.

We'll discuss four of the letters that cover wage and hour and medical leave requirements, along with the highlights that are most relevant to all employers.

Wage and Hour Opinions

FLSA2026-1: Choosing to Classify Employees as Nonexempt

In this opinion letter, the DOL addressed whether the employer, which such letters don't name, could reclassify a licensed clinical social worker from salaried exempt to hourly nonexempt, even though the social worker met the elements to be an exempt employee and had been working as a salaried exempt employee for a period of time. The employee's duties did not change much, aside from losing some supervisory responsibilities.

The DOL explained that, even if the employee could no longer meet the requirements of the executive or management exemption due to the loss of supervisory responsibility, the employee likely satisfied the requirements for the learned professional exemption, because the social worker's duties required the requisite advanced knowledge in a field of science and learning.

Nevertheless, the DOL concluded that employers are not required to classify employees as exempt — even when all exemption criteria are met — and may lawfully choose to treat such employees as nonexempt, provided they comply with minimum wage and overtime requirements.

As employers know, there may be good reasons to classify an employee who could qualify for an exemption as nonexempt. We typically see this when, for example, the employee moves to a part-time position or works a reduced schedule. It may no longer make sense to pay them a salary that meets the FLSA's salary threshold and salary basis tests.

That said, employers that move employees to nonexempt status must be mindful of how they classify other employees in the same position. They could make it more difficult later to classify the employees as exempt. They could also risk discrimination claims if they cannot establish that their reasons are legitimate for treating employees in the same position differently.

FLSA2026-2: Including Nondiscretionary Bonuses in Overtime Calculations

In this opinion letter, the DOL addressed whether an employer was properly excluding performance-based incentive bonuses paid to nonexempt employees from overtime calculations. It determined that nondiscretionary bonuses that include some subjective elements must be factored into the regular rate of pay for overtime calculations.

The employer, a waste management company, paid drivers $12 per hour and provided a "Safety, Job Duties, and Performance" bonus that could be earned each pay period.

Under the plan, drivers could earn up to $9.50 per hour in bonus pay for all hours worked during the pay period, based on their punctuality and attendance, completion of daily safety tasks, safe driving, compliance with traffic laws, proper attire, and overall performance efficiency, with adjustments tied to issues such as vehicle or property damage.

The employer paid overtime based on the driver's base rate of pay without factoring in any incentive bonuses that they earned in the pay period.

The DOL determined that, even if some of the criteria for an incentive bonus are left to the employer's discretion — for example, if the employer determines whether a vehicle is returned in a clean condition — the bonus is nondiscretionary, because by setting the conditions to meet the incentive, the employer abandoned its discretion to not award the bonus.

In this scenario, the criteria for earning the incentive bonus were set in advance based on specific formulas and communicated to employees. Once employees met those criteria, they earned the corresponding bonus amount and were paid the bonus with their regular wages.

Thus, the bonus was nondiscretionary, and the employer violated the FLSA by failing to include the bonus in calculating overtime pay for employees.

The lesson for employers is to carefully scrutinize any bonuses or incentive plans that they pay to nonexempt employees that are not included in the employee's regular rate of pay.

It does not protect employers that had discretion as to whether to offer the bonus in the first place. If it is based on certain criteria that an employee can meet, the bonus is likely nondiscretionary.

Employers should also be mindful, particularly when an incentive bonus may be earned over a period encompassing many pay periods, to ensure that they are calculating overtime payments correctly.

Medical Leave Opinions

FMLA2026-1: How the Length of Business Closures Affects FMLA Leave

In this opinion letter, the DOL addressed how a workplace closure of less than a full week — such as a closure due to inclement weather — affects an employee's use of FMLA leave. It found that the amount of FMLA leave burned differs when a workplace is closed for a full week, depending on whether the employee was scheduled to work that week.

The specific facts at issue involved a school. Some employees were on FMLA leave intermittently — for example, a partial day each week for medical treatment — and some were out on continuous, full-week blocks.

The DOL explained that when an employee is using less than a full workweek of FMLA leave, the days when the school is closed and the employee is already scheduled to be on leave cannot be counted against the employee's FMLA entitlement.

By contrast, if the employee is on FMLA leave for the entire workweek, a partial week school closure does not reduce the amount of leave charged, and the employer may count the full week as FMLA leave.

Whether the closure is planned or unplanned, and whether the school later schedules makeup days, does not change the analysis.

Employers should be mindful of how they are implementing their FMLA leave policies in light of this DOL opinion, and would be wise to clarify the rule in their written policies to set expectations for when employees will use FMLA leave during workplace closures for holidays or inclement weather.

FMLA2026-2: Factoring in Commute Time to Medical Appointments

In this opinion letter, the DOL clarified that the time an employee spends commuting to and from FMLA-certified medical appointments counts as FMLA leave time.

For example, if a provider certifies an employee's need for cancer treatment for three hours per week, and the treatment center is one hour away, then the employee's travel to and from the treatment center is also FMLA-covered time.

This issue becomes more critical as providers become more specialized. It is rare for employees on FMLA leave to receive only regular treatment from their family practitioner. Rather, employees on qualifying FMLA leave are more likely to seek out specialized providers, such as endocrinologists or fertility specialists, and may have to travel great distances for those appointments.

In addition to ensuring implementation of the FMLA that is consistent with this DOL guidance, employers should communicate with employees during the certification process to set expectations for intermittent FMLA leave days and determine the employees' need to travel to and from their medical appointments.

Conclusion

While DOL opinion letters do not carry the force of law, they provide valuable insight into how the agency interprets and enforces key compliance requirements under the FLSA and FMLA.

These new letters are a helpful reminder that relatively common practices — such as reclassifying employees, paying incentive bonuses and administering intermittent leave — can create significant risk if they are handled inconsistently or without careful documentation.

Employers should use this guidance as an opportunity to review exemption classifications, confirm that overtime calculations properly include any nondiscretionary bonuses, and ensure that FMLA policies and tracking methods accurately account for workplace closures and travel time tied to medical appointments. Proactive review now can help avoid employee disputes and costly enforcement issues later in the year.

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