

HR COMPLIANCE BULLETIN



Overview of the DOL's January 2021 FLSA Opinion Letters

During January 2021, the U.S. Department of Labor issued nine opinion letters to clarify how the Fair Labor Standards Act (FLSA) applies to various employment situations.

DOL opinion letters provide the department's official position on how labor and employment standards apply in specific situations. Employers that rely on opinion letters may be able to establish a "good faith defense" under the law. As a result, employers should review the scenarios discussed in these letters and determine whether this new guidance affects their current employee classification and payroll practices.

The public can search for existing opinion letters by keyword, year, topic and a variety of other filters on the DOL's [website](#).

Action Steps

Employers should review these opinion letters to gain an insight into how the DOL applies FLSA compliance principles to specific situations.

In addition, employers should continue to monitor the DOL's Wage and Hour Division website for updates on opinion letters and the effective date of upcoming regulations addressed by these letters.

Highlights

FLSA Exemptions

Five letters address specific issues on how to apply existing FLSA exemption requirements to specific situations.

Tipped Employees

Two letters address issues regarding adequate calculation and payment of employee tips.

Withdrawn Letters

The DOL withdrew three of these letters because their publication was "premature."

Important Dates

Jan. 8 – 19, 2021

DOL published nine opinion letters.

Jan. 26, 2021

The DOL withdrew opinion letters FLSA2021-4, FLSA2021-8 and FLSA2021-9 because these letters were issued prematurely, based on rules that have not gone into effect.

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Opinion Letter Overview

The table below provides a summary of the principles outlined in the January 2021 opinion letters and a brief description of the situations where they may apply. Please note that a few of these letters were withdrawn by the DOL after a determination that their publication was premature, because they applied to requirements that are not currently in force.

Letter	Topic	Description and Status
FLSA2021-1	Administrative Employee Exemption	<ul style="list-style-type: none"> Addressing whether account managers at a life science products manufacturer qualify for the administrative employee exemption under the FLSA. To determine whether the exemption applies, the DOL uses a fair, rather than a narrow interpretation approach.
FLSA2021-2	Ministerial Exception	<ul style="list-style-type: none"> Private religious day care and preschools can pay their teachers on a salary basis under the ministerial exception. However, whether teachers “qualify as ministers depends on their duties as employees, not upon the employer’s designation.”
FLSA2021-3	Seasonal Establishments	<ul style="list-style-type: none"> Seasonal establishments are exempt from minimum wage and overtime requirements if they are (1) an establishment, (2) that is “amusement or recreational” in character or an organized camp, or a religious or nonprofit educational conference center and (3) meet the seasonality requirements set out by the FLSA. To qualify as a seasonal establishment, an entity must have a physical location that is used to satisfy the amusement or recreational requirement. Finally, under this exemption, employers cannot count bona fide charitable donations to satisfy the receipts test.
FLSA2021-4	Tip Pooling Regulations	<ul style="list-style-type: none"> On Jan. 26, 2021, the DOL withdrew this opinion letter because it was issued “prematurely ... based on rules that have not gone into effect.” Specifically, the final rule on tip regulations is scheduled to become effective March 1, 2021. However, this rule is also subject to the regulatory freeze imposed by President Biden’s administration. Addresses whether a restaurant may institute a tip pool under the FLSA that includes both servers, for whom the employer takes a tip credit, as well as hosts and hostesses, for whom a tip credit is not taken.
FLSA2021-5	Tip Calculation for Automatic Gratuities and Service Charges	<ul style="list-style-type: none"> Addresses the proper calculation of overtime pay under the FLSA when a tipped employee works as a server and bartender, and receives tips and amounts charged as automatic gratuities or service charges.

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Letter	Topic	Description and Status
FLSA2021-6	The Retail or Service Establishment Exception	<ul style="list-style-type: none"> Indicates that staffing firms qualify for the “retail or service establishment” exception if it meets all of the requirements for that exemption. Specifically, the DOL indicates that determining whether a staffing firm meets these requirements requires a case-by-case analysis.
FLSA2021-7	Journalists and the Creative Professionals Exception	<ul style="list-style-type: none"> Asserts that local, small-town and community news source journalists may qualify for the creative professional exemption under the FLSA if they satisfy the primary duties test for this exemption. When performing a duty analysis, the DOL states that previously, the agency “read the FLSA’s exemptions strictly,” but that there is no actual mandate to adhere to a strict interpretation. Instead, the agency indicates that it now gives the creative professional exemption a “fair (rather than a narrow) interpretation.”
FLSA2021-8	Worker Classification— Employee or Independent Contractor	<ul style="list-style-type: none"> On Jan. 26, 2021, the DOL withdrew this opinion letter because it was issued “prematurely ... based on rules that have not gone into effect.” Specifically, the final rule on tip regulations is scheduled to become effective March 8, 2021. However, this rule is also subject to the regulatory freeze imposed by President Biden’s administration. Addresses whether certain distributors of a manufacturer’s food products are employees or independent contractors under the FLSA.
FLSA2021-9	Worker Classification— Employee or Independent Contractor	<ul style="list-style-type: none"> On Jan. 26, 2021, the DOL withdrew this opinion letter because it was issued “prematurely ... based on rules that have not gone into effect.” Specifically, the final rule on tip regulations is scheduled to become effective March 8, 2021. However, this rule is also subject to the regulatory freeze imposed by President Biden’s administration. Addresses whether requiring tractor-trailer truck drivers to implement safety measures required by law constitutes control by the motor carrier for purposes of their status as employees or independent contractors under the FLSA and whether certain owner-operators are classified properly as independent contractors.