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The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies

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ABSTRACT

Opinion letters are a highly beneficial vehicle for federal and state agencies to provide meaningful guidance for courts, businesses, workers, unions, trade groups, practitioners, advocacy groups, and the public at large. This Article examines the benefits and criticisms of opinion letters issued by employment and labor agencies. For more than seventy years the Department of Labor ("DOL") provided employers, workers, and others with guidance regarding the interpretation and application of the Fair Labor Standards Act and related regulations through opinion letters. Indeed, opinion letters have been issued during both Democratic and Republican administrations. Unfortunately, in more recent years, opinion letters have become increasingly – and unnecessarily – politicized. Significantly, DOL under the Obama Administration stopped the practice of issuing opinion letters and thereby denied the public the opportunity for significant and timely guidance. Fortunately, in 2017, DOL announced that it would resume its practice of issuing opinion letters. At the time of this publication, it is unclear what the current administration will do.

This Article begins by exploring the genesis of opinion letters, including their early history and original purpose. This Article also provides an overview of opinion letters used at different agencies and

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examines the way that courts have treated and used opinion letters in litigation. Against this backdrop, the Article then explores the myriad of benefits that opinion letters provide. The Article also discusses the continued value of withdrawn opinion letters and contends that they are still markedly helpful notwithstanding their rescinded status. Finally, this Article offers some positive suggestions on how to improve opinion letters in the future.

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I. INTRODUCTION

Opinion letters are an often overlooked yet highly beneficial vehicle for federal and state agencies to provide meaningful guidance for the public, especially in labor and employment law.[1] In a nutshell, an opinion letter is an official written opinion from an agency on how a statute, its implementing regulations, and related case law apply to a specific situation presented by the person or entity requesting the opinion.[2] Opinion letters do not establish new standards, requirements, obligations, or duties. Instead, they enable businesses, employees, labor groups, or any other interested entities to seek guidance from the relevant enforcement agency regarding how governing laws apply to particular circumstances that may give rise to complex or perplexing legal issues that were previously unanswered.[3]

The U.S. Department of Labor's Wage and Hour Division ("WHD") is perhaps the most well-known agency for issuing opinion letters, particularly in response to questions regarding the Fair Labor Standards Act ("FLSA").[4] A number of other agencies also issue opinion letters, including the U.S. Equal Employment Opportunity Commission ("EEOC") and DOL's Office of Federal Contract Compliance Programs ("OFCCP").[5] Opinion letters are a valuable resource for courts, employers, employees, unions, trade groups, practitioners, advocacy

[1] Sarah N. Turner, *Opinion Letters – A Valuable but Often an Underutilized Tool by Employers: The Department of Labor Authors Six New Opinion Letters Responding to Unique FMLA and FLSA Employment Issues*, GORDON & REES (Sept. 2018), https://www.grsm.com/publications/2018/opinion-letters-a-valuable-but-often-an-underutilized-tool-by-employers-the-department-of-labor-authors-six-new-opinion-letters-responding-to-unique-fmla-and-flsa-employment-issues [https://perma.cc/JQ9X-F5P9].

[2] *See* Michelle Anderson & Marilyn Higdon, *Dear Abby: What's Your Opinion on DOL Opinion Letters? A Brief Primer on Opinion Letters and Why the New Administration Should Continue to Issue Them*, JD SUPRA (Jan. 21, 2021), https://www.jdsupra.com/legalnews/dear-abby-what-s-your-opinion-on-dol-4530737/ [https://perma.cc/AE6V-TTZ6].

[3] *Id*.

[4] 29 U.S.C. §§ 201–219.

[5] *See, e.g.*, *Formal Opinion Letters*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ofccp/opinion-letters [https://perma.cc/B6T3-HAAR] (last visited Aug. 28, 2021).

groups, and the general public.[6] Opinion letters are intended to be fact-specific in that they are based on the particular facts presented in the individual inquiry; but the explanation set forth in them provides valuable insight into how an agency interprets the laws it is responsible for enforcing. Not surprisingly, these interpretations are frequently cited by courts when deciding cases, most notably in wage and hour lawsuits.[7] From a more functional perspective, opinion letters also are proactive and provide a guidepost for human resource professionals, business owners, and practitioners to structure their payroll practices to comply with the operative regulations and applicable case law.[8] Typically, although not required by law, agencies such as WHD only require that the request for an opinion is not being requested to respond to an agency investigation or for any litigation that was initiated prior to making the request.[9] The respective agency has discretion as to which requests it will respond to and how it will respond.[10]

The benefits of opinion letters find considerable support in the purpose, intent, and history of the Portal-to-Portal Act.[11] In the wake of the FLSA's enactment in 1938, a series of Supreme Court decisions regarding the law triggered a flood of litigation.[12] Congress responded by declaring the situation to be an emergency and passed the Portal-to-Portal Act in 1947.[13] In addition to limiting the retroactive effect of the FLSA

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[6] Anderson & Higdon, *supra* note 2; *see Final Rulings and Opinion Letters*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance [https://perma.cc/Y89A-2VUV] (last visited Mar. 25, 2021) (noting that "opinion letters are provided to help employers, employees, and other members of the public understand their rights and responsibilities under the law.").

[7] *See, e.g.*, Hultgren v. Cnty. of Lancaster, 913 F.2d 498, 503 (8th Cir. 1990); Marshall v. Emersons, Ltd., 598 F.2d 1346, 1348 (4th Cir. 1979).

[8] *See U.S. Department of Labor Issues Two Wage and Hour Opinion Letters*, U.S. DEP'T LAB. (Nov. 30, 2020), https://www.dol.gov/newsroom/releases/whd/whd20201130-1 [https://perma.cc/ZPC4-BU8S] (opinion letters FLSA2020-17 and FLSA2020-18).

[9] *Request an Opinion Letter*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/opinion-letters/request [https://perma.cc/7QFM-BYXP] (last visited Mar. 25, 2021).

[10] *Id.*

[11] *See generally* Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251–262; *see* 29 U.S.C. § 251.

[12] *See* Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 ABA J. LAB. & EMP. L. 363, 363 (2011).

[13] Steiner v. Mitchell, 350 U.S. 247, 253 (1956).

and redefining its statute of limitations,[14] the Portal-to-Portal Act provides employers with a liability shield if the employer can show that an action that violates the FLSA was nonetheless taken in good faith reliance on a written administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy.[15] The Portal-to-Portal Act provides the express statutory authority for WHD opinion letters and for the majority of EEOC opinion letters.[16]

For more than seventy years after the enactment of the FLSA, DOL issued opinion letters during both Democratic and Republican administrations to provide guidance to employees and employers.[17] In more recent years, however, opinion letters inexplicably have become a rather contentious political topic.[18] Moreover, for the first time in history, DOL under the Obama Administration abruptly ceased the practice of issuing opinion letters in favor of more generalized – and far less frequent – topic-based sub-regulatory guidance known as Administrator's Interpretations.[19] Oftentimes, opinion letters were the only guidance available to both employees and companies that were attempting to comply with the FLSA and its numerous complex regulations.[20] Fortunately, shortly after the change in presidential administrations, DOL announced in 2017 that it would return to its historical practice of issuing opinion letters.[21]

Opinion letters are one of the most effective and efficient ways of providing meaningful guidance to the public and afford incentives to employers who conscientiously undertake efforts to understand and

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[14] *See* 29 U.S.C. § 252 (limiting retroactive effect); 29 U.S.C. § 255 (defining the statute of limitations).

[15] 29 U.S.C. § 258.

[16] *See* 29 C.F.R. § 1626.20–21 (codifying the EEOC's authority to issue formal opinion letters under the Age Discrimination in Employment Act); *see also* 29 U.S.C. § 259.

[17] *See, e.g.*, Sarah H. Jodka, *Keep Rollin' Rollin' Rollin': DOL Reissues 17 Opinion Letters That Had Been Withdrawn Under the Obama Administration*, DICKINSON WRIGHT CLIENT ALERT (Jan. 11, 2018) https://www.dickinson-wright.com/-/media/files/news/2018/01/keep-rollin-rollin-rollin-dol-reissues-17-opinion.pdf [https://perma.cc/6V5E-N6UK].

[18] *See, e.g.*, *id.*

[19] Amy J. Traub & Amanda Van Hoose Garofalo, *How DOL Opinion Letters Are Of Value To Employers*, LAW 360 (July 26, 2017), https://www.law360.com/articles/947545/how-dol-opinion-letters-are-of-value-to-employers [https://perma.cc/UZA9-3CWX]; *see also infra* Part I.C (discussing the key difference between opinion letters and Administrator's Interpretations).

[20] Traub & Garofalo, *supra* note 19.

[21] *Id.*

comply with the law.[22] Opinion letters benefit both employers and workers by providing important assurance regarding how to satisfy statutory and regulatory requirements.[23] In the event that an employer is not in compliance, opinion letters might serve to provide instructions on how employers can adjust course and come into compliance.[24] As noted above, opinion letters also provide a liability shield whereby employers who receive an opinion letter can assert a good faith defense against liability.[25] In fact, the law provides that any purported violation of the FLSA's minimum wage and overtime requirements can be excused if the employer relied in good faith upon "any written administrative regulation, order, ruling, approval, or interpretation" provided to the particular employer by WHD.[26] Moreover, opinion letters often aid courts and practitioners by providing a legal roadmap—directions from the agency charged with construing and enforcing the law regarding its conclusion about how the law applies.[27] Opinion letters thereby can promote uniformity and consistency in the application of the law and regulations to new situations and contexts, especially in the wage and hour arena.[28] In addition, the FLSA is often described as a textbook example of an anachronistic statute that was passed before World War II, which effectuated technological and demographic transformations in the American economy.[29] Opinion letters helped account for these broad changes and provide topical guidance regarding the modern economy and workforce.[30] Some lesser-known benefits of opinion letters are that they

[22] *See* Jourdan Day, *The Return of Department of Labor Opinion Letters*, PORTER WRIGHT (July 5, 2017), https://www.employerlawreport.com/2017/07/articles/labor-relations/the-return-of-department-of-labor-opinion-letters/ [https://perma.cc/X56T-NTLG].

[23] *See, e.g.*, Lisa Nagele-Piazza, *More Opinion Letters Issued in Final Days of Trump Administration*, SOC'Y FOR HUM. RES. MGMT. (Jan. 25, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/more-opinion-letters-issued-in-final-days-of-trump-administration.aspx [https://perma.cc/F6NZ-EGHF].

[24] Traub & Garofalo, *supra* note 19.

[25] 29 U.S.C. §§ 259, 260; *see also Final Rulings and Opinion Letters*, *supra* note 6.

[26] 29 U.S.C. § 259.

[27] *See, e.g.*, Traub & Garofalo, *supra* note 19.

[28] *See, e.g.*, Anderson & Higdon, *supra* note 2.

[29] *See The Fair Labor Standards Act: Is it Meeting the Needs of the Twenty-First Century Workplace? Hearing Before the Subcomm. on Workforce Protections of the H. Comm. On Education and the Workforce*, 112th Cong. (2011) (statement of Richard Alfred, Esq., Seyfarth Shaw LLP).

[30] *See* Traub & Garofalo, *supra* note 19.

have helped to ensure that certain programs comply with applicable laws, including employment programs benefiting military service members and tax programs benefitting underprivileged communities.[31] They have likewise helped the regulated community comply with relevant labor and employment laws and have also helped clarify the scope and breadth of religious liberty in recent years.[32]

Meanwhile, critics argue that opinion letters largely serve employers' interests, predominantly because those letters provide employers with a good faith defense.[33] Opponents of opinion letters often refer to them as "get out of jail free cards" because the agency will not necessarily initiate enforcement proceedings on that issue against a company with a favorable letter.[34] Critics further contend that opinion letters could burden federal agencies' resources by creating "a cottage industry" of parties wanting agencies to weigh in on disputes.[35] These arguments are wrong. Opinion letters do not purport to change the law—they seek to clarify it. And clarifying the law as written cannot promote violations of the law. Furthermore, because opinion letters are the most efficient and direct means of providing guidance, they are a great use of agency resources.

This Article argues that opinion letters are highly beneficial for courts, employers, workers or employees, unions, trade groups, practitioners, individuals, and the public at large. This Article largely focuses on WHD opinion letters because they furnish a helpful lens through which to examine the value of opinion letters and have been a reliable resource since the 1940s. However, this Article also discusses the value of opinion letters issued by other federal agencies and by some state

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[31] *See U.S. Department of Labor Issues Opinion Letters to Enhance Military Service Members' Ability to Succeed in Civilian Workforce*, U.S. DEP'T LAB., https://www.dol.gov/newsroom/releases/whd/whd20191108 [https://perma.cc/VR75-HSBB] (last visited Sept. 1, 2021).

[32] *See, e.g.*, *Legal Protections for Religious Liberty in the Workplace*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ofccp/opinion-letters/ReligiousLiberty [https://perma.cc/7D4B-8LLC] (last visited Mar. 25, 2021).

[33] *See* Bruce S. Levine & Wendy M. LaManque, *Labor & Employment Law*, 68 SYRACUSE L. REV. 953, 959 (2018).

[34] Noam Scheiber, *Labor Dept. Says Workers at a Gig Company Are Contractors*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/business/economy/gig-economy-workers-contractors.html [https://perma.cc/7C4R-7QFP].

[35] Paige Smith, *EEOC to Issue First Opinion Letter on Job Bias in Over 30 Years*, BLOOMBERG TAX (Apr. 29, 2019), https://news.bloombergtax.com/daily-tax-report/eeoc-to-issue-first-opinion-letter-in-over-thirty-years?utm_source=rss&utm_medium=DTNW&utm_campaign=00000171-c76e-d896-a5fb-df6e04520001 [https://perma.cc/FN2P-ETUU].

agencies. Part II of this Article discusses the background of the opinion letters, including their history and purpose. Specifically, it highlights the history of the Portal-to-Portal Act, an emergency statute enacted to curb out-of-control liability rulings, in order to demonstrate the wide-ranging benefits of opinion letters. Part III provides an overview of opinion letters and explores the deference that they generally receive in the courts. Part III also discusses opinion letters issued by state agencies. Part IV then explores the myriad benefits that opinion letters provide. This Part examines specific opinion letters to demonstrate their widespread categorical benefits. Part V discusses the value of withdrawn opinion letters and contends that they are still highly beneficial notwithstanding their rescission. Finally, Part VI offers some positive suggestions on how to improve the opinion letter practice in the future.

II. BACKGROUND

In order to understand the value of opinion letters, it is important to establish a baseline understanding of their history. This Part reviews the history of the FLSA and how the statute was amended due to concerns stemming from out-of-control liability. Additionally, this Part sets forth background information concerning the history of opinion letters.

A. Early History of the FLSA

The FLSA was enacted in 1938 and established a minimum wage and overtime compensation for each hour worked in excess of forty hours in each workweek.[36] Within DOL, the FLSA is enforced by WHD, led by an Administrator who is appointed by the President and confirmed by the Senate.[37] WHD has a number of important functions, including enforcement and compliance assistance.[38]

Generally speaking, an employer who violates the FLSA may be held civilly liable for unpaid minimum and overtime wages, an additional equal amount in liquidated damages, and attorney's fees and costs.[39]

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[36] *Today in 1938: The Fair Labor Standards Act Takes Effect*, THOMSON REUTERS (Oct. 24, 2019), https://legal.thomsonreuters.com/blog/fair-labor-standards-act/ [https://perma.cc/5PH4-PFQ3]; *see also* 26 U.S.C. § 206 (minimum wage); 26 U.S.C. § 207 (overtime).

[37] 26 U.S.C. § 204(a).

[38] *About Us*, U.S. DEP'T. LAB. WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/about [https://perma.cc/DEW6-CULY] (last visited Nov. 10, 2021).

[39] 26 U.S.C. § 206.

Problematically, the FLSA did not originally define such basic terms as "work" or "workweek," and the Supreme Court subsequently interpreted those terms broadly. For example, in a 1944 case, the Supreme Court defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[40] Two years later, the Court defined work in "the statutory workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace."[41] Applying these expansive definitions, the Court found in *Tennessee Coal v. Muscoda Local 123* that time employees spent traveling between mine portals and underground work areas was compensable work time.[42] And, in *Anderson v. Mt. Clemens Pottery*, the Court held that time employees spent walking from timeclocks to work benches was compensable.[43]

These Supreme Court decisions provoked a flood of litigation, which proved costly for employers.[44] In the six months following the Supreme Court's decision in *Anderson*, unions and employees filed more than 1,500 lawsuits under the FLSA.[45] Taken together, Congress estimated that these lawsuits sought nearly $6 billion in back pay and liquidated damages; for perspective, this amount is $117 billion in 2021 dollars.[46] Hundreds of the cases filed did not list a specific amount, so the dollar value for these cases was likely even higher.[47] Moreover, the $6 billion figure does not include recoveries sought in similar state cases.[48]

In response to growing concerns of mounting liability for employers, Congress held hearings to consider solutions.[49] At these hearings, officials

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[40] Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944), *superseded by statute*, 29 U.S.C. § 251(a), *as recognized in* Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27 (2014).

[41] Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–91 (1946).

[42] *Tennessee Coal*, 321 U.S. at 598; *Anderson*, 328 U.S. at 691–92.

[43] *Anderson*, 328 U.S. at 691–92.

[44] Alfred & Schauer, *supra* note 12, at 366.

[45] *Integrity Staffing Solutions*, 574 U.S. at 31–32. Using the Consumer Price Index in 2020, $6 billion in estimated back pay and liquidated damages in 1938 equals $117,697,446,808 in 2021. *See U.S. Inflation Calculator*, COIN NEWS, https://www.usinflationcalculator.com [https://perma.cc/MXN2-8K2P] (last visited Nov. 10, 2021).

[46] *Id*.

[47] Christine D. Higgins, *Can I Get Paid for That? The Compensability of Commuting Time Post-IBP, Inc. v. Alvarez, 546 U.S. 21 (2005)*, 86 NEB. L. REV. 208, 211 n. 17 (2007).

[48] *Id*.

[49] *Id*.

of the Navy, Army, and IRS testified that the numerous lawsuits would adversely impact government finances.[50] Congress found that federal courts had misinterpreted the FLSA by ignoring long-established practices between employers and employees, thus "creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers."[51] Congress declared an emergency and found that if such interpretations were permitted, "the payment of such liabilities would bring about financial ruin of many employers" and "employees would receive windfall payments."[52]

In 1947, Congress addressed this emergency by amending the FLSA via the Portal-to-Portal Act.[53] President Harry Truman explained that the Act's primary purpose was "to relieve employers and the Government from potential liability for billions of dollars in so-called 'portal-to-portal' claims."[54] The statute took its name from the basic question that prompted its enactment: When does the workday begin and end?[55] In addition to limiting the retroactive effect of the FLSA and redefining its statute of limitations,[56] the Portal-to-Portal Act provided that employers would not be liable if they could show that an action that violated the FLSA was taken in good faith reliance on a written administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy.[57] Accordingly, there is a complete defense to liability under the FLSA if an employer can plead and prove it acted "in good faith conformity with and in reliance on any written administrative regulation, order, ruling approval, or interpretation" of the WHD.[58] Under the Portal-to-Portal Act, in circumstances where an opinion letter is not a complete defense it can still form the basis of a good faith defense against liquidated damages available

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[50] *Id*.

[51] 29 U.S.C. § 251(a).

[52] 29 U.S.C. § 251(a)–(b); *see also* IBP, Inc. v. Alvarez, 546 U.S. 21, 26 (2005) (recognizing that the Portal-to-Portal Act is "[b]ased on findings that judicial interpretations of the FLSA had superseded 'long-established customs, practices, and contracts between employers and employees . . . .'" (quoting 29 U.S.C. § 251(a))).

[53] 29 U.S.C. §§ 251(a)–(b), 254(a).

[54] *Special Message to the Congress Upon Signing the Portal-to-Portal Act*, NAT'L ARCHIVES (May 14, 1947), https://www.trumanlibrary.gov/library/public-papers/93/special-message-congress-upon-signing-portal-portal-act [https://perma.cc/EM6P-4ATS].

[55] Lonny Hoffman & Christian J. Ward, *The Limits of Comprehensive Peace: The Example of the FLSA*, 38 BERKELEY J. EMP. & LAB. L. 265, 275 (2017).

[56] *See* 29 U.S.C. § 252 (limiting retroactive effect); 29 U.S.C. § 254 (defining "activities not compensable"); 29 U.S.C. § 255 (defining the statute of limitations).

[57] 29 U.S.C. § 258.

[58] 29 U.S.C. § 259(a).

under the FLSA and the third year of damages for willful violations.[59] Congress also explicitly noted that the statute applies to the Walsh-Healey Act and the Davis-Bacon Act.[60]

The Congressional Record indicates that Congress contemplated that opinion letters would be broadly used. Specifically, Congress intended for the legislation to combat wide-ranging uncertainty arising from employers and employees, and that agencies would provide the guidance to ensure orderly business conduct within the workplace.[61] President Truman reiterated this point in his message to Congress by stressing that the Portal-to-Portal Act was deliberately designed with the goal of "relieving the business community of a heavy burden of doubt."[62] Another driving factor behind the legislation was a concern that U.S. courts would be excessively burdened with needless litigation.[63] Congress intended that the Portal-to-Portal Act "curtail employee-protective interpretations of the FLSA" and provide security for employers.[64]

The Portal-to-Portal Act grants WHD and other federal agencies the express legal authority to issue opinion letters.[65] Notably, the Portal-to-Portal Act authorizes the EEOC to issue opinion letters under the Age Discrimination in Employment Act of 1967.[66] Congress also recognized the value of opinion letters when it provided the EEOC with the express authority to issue them under the Title VII of the Civil Rights Act of

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[59] 29 U.S.C. § 260; *see* discussion *infra* Part III.B (discussing good faith defenses).

[60] 29 U.S.C. § 252(a). The Walsh-Healey Act establishes minimum wage, maximum hours, and safety and health standards for work on contracts in excess of $10,000 for the manufacturing or furnishing of materials, supplies, articles, or equipment to the U.S. government or the District of Columbia. *See* 41 U.S.C. § 6502. The Davis-Bacon Act requires that each contract over $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. *See* 40 U.S.C. § 3142.

[61] 29 U.S.C. § 251.

[62] *Special Message to the Congress Upon Signing the Portal-to-Portal Act*, *supra* note 54.

[63] 29 U.S.C. § 251.

[64] Anderson v. Cagle's, Inc., 488 F.3d 945, 958 (11th Cir. 2007) (discussing how the fact that the FLSA was amended two years later reinforced that Congress's goal was to curtail employee-protective interpretations of the FLSA and provide employers with more protections).

[65] 29 U.S.C. § 259.

[66] 29 U.S.C. § 626(e); *see also* 29 C.F.R. § 1626.20–21 (codifying the EEOC's authority to issue opinion letters under the ADEA).

1964.[67] An EEOC opinion letter issued pursuant to Title VII may provide a defense to liability for the employer who "pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission."[68] The EEOC began issuing opinion letters very shortly after the agency was created in 1965.[69]

B. The George W. Bush Administration and the Expansion of Opinion Letters

During the George W. Bush Administration, WHD issued a record-breaking 318 opinion letters.[70] The final months of the George W. Bush administration witnessed a concerted effort to finalize several policy priorities before the change in administrations.[71] Among these were pending WHD opinion letters on a number of questions, including tip credits, bonuses, salary deductions, and exempt duties.[72] In January 2009, a substantial backlog of draft WHD opinion letters finally made their way through DOL's clearance process and returned to WHD for final editing and issuance.[73] Between January 7th and 16th, 2009, the then-Acting WHD Administrator signed thirty-six administrator letters, and career staff signed four non-administrator letters.[74] In the days leading up to President Barack Obama's inauguration, the then-Acting WHD Administrator signed eighteen opinion letters, but they were never

[67] 42 U.S.C. § 2000e-12(b); *see also* 29 C.F.R. § 1601.91–93 (codifying the EEOC's authority to issue opinion letters under Title VII).

[68] 42 U.S.C. § 2000e-12(b).

[69] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142 (1976) (discussing a 1966 opinion letter regarding whether the exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII).

[70] Anderson & Higdon, *supra* note 2.

[71] Paul DeCamp, *'This Opinion Letter is Withdrawn': Whatever Happened to Those January 2009 Opinion Letters?*, 15 NO. 5 PUB. EMPS. GUIDE FLSA EMP. CLASSIFICATION NEWSL. 3 (Thompson Publishing Group, Inc.), Jan. 2010.

[72] *Id.*

[73] *Id.*

[74] *Id.* "Career employees" (also known as career staff) are purportedly hired based on merit and experience. They theoretically serve in an impartial and apolitical capacity across changes in administration and may only be terminated in limited circumstances. In contrast, "political appointees" generally serve at the pleasure of the current administration. *See* Lauren Mendolera, *How to Stop a Mole: A Look at Burrowing in the Federal Civil Service*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 643, 644 (2010).

mailed.[75] Two letters were faxed to the parties that requested them, but the status of the remaining letters was unknown.[76]

C. The Obama Administration and the Cessation of Opinion Letters

On January 21, 2009, under new political leadership, the Obama DOL determined that any opinion letters not already placed in the mail were not to be mailed even though they had been signed before the change in administrations.[77] For several weeks, the status of those opinion letters was unknown.[78] Finally, in March 2009, in response to a Freedom of Information Act request, DOL posted on its website the text of the eighteen WHD Administrator and two non-administrator wage and hour letters that the agency had concluded had not been – and would not be – mailed.[79] On the WHD website, these opinion letters were marked with an asterisk and the following annotation:

> Some of the posted opinion letters, as designated by asterisk, were not mailed before January 21, 2009. While the [WHD] is making these letters available to the requestor and to the public, the agency has decided to simultaneously withdraw these letters for further consideration. A final response to these opinion letter requests will be provided in the future.[80]

The final response was never provided. Each withdrawn letter was accompanied by a cover letter alleging that the opinion letter was officially withdrawn and "may not be relied upon."[81] In addition, each withdrawn letter was marked in red type at the top: "This Opinion Letter is withdrawn."[82] One former WHD Administrator stated that many viewed the withdrawal of these opinion letters as "nothing more than a naked and unjustified power grab."[83]

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[75] Paul DeCamp & Gregory K. McGillivary, *FLSA Developments: DOL and the Courts*, PRAC. LAW., Feb. 2019, at 1.

[76] *Id.*

[77] DeCamp, *supra* note 71.

[78] *Id.*

[79] *Id.*

[80] *Id*.

[81] *Id.*

[82] *Id.*

[83] *Id.* (noting that, in contrast, workers' advocates seem to be of the view that this is not at all like reversing recent precedent, because an administrator always has the power to take back an unmailed letter).

The Obama DOL officially stopped issuing WHD opinion letters that answered questions from the regulated community in 2010.[84] In 2015, a DOL administrator defended WHD's cessation of the practice, claiming opinion letters were somehow neither "transparent" nor "fair" because of their fact-specific nature.[85] This same Obama DOL official later defended the discontinuation by arguing that opinion letters "are a capricious tool for settling complicated regulatory questions."[86] The Obama DOL replaced opinion letters with "Administrator's Interpretations" which were intended to set forth a general interpretation of the law and regulations as they related to an entire industry, a category of employees, or to all employees.[87] Unlike opinion letters, the interpretation does not respond to a particular inquiry by an employee or employer.[88] Instead, it responds to a "perceived" general need – as identified by the WHD Administrator – for "further clarity regarding the proper interpretation of a statutory or regulatory issue."[89] The Obama DOL allegedly created the shift towards Administrator's Interpretations to address issues on a broader scale and reach a wider audience.[90] This was viewed by both supporters and critics as an effort by the Obama DOL "to exert greater influence over development of the law without" resorting "to time-consuming rulemaking or the legislative process."[91] The Obama DOL issued only seven interpretations between 2010 and 2016.[92] Ironically, many of these interpretations relied on opinion letters.[93] These interpretations were also used as a backdoor vehicle to withdraw previously published opinion

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[84] Traub & Garofalo, *supra* note 19.

[85] John E. Thompson, *"No Opinion Letters" Policy Reaffirmed*, FISHER PHILLIPS (Mar. 16, 2015), https://www.fisherphillips.com/news-insights/wage-and-hour-laws-blog/no-opinion-letters-policy-reaffirmed.html [https://perma.cc/797X-WDXW].

[86] Scheiber, *supra* note 34.

[87] *See* Chance Hill, *The More Things Change . . . The More They Stay the Same*, JD SUPRA (Jan. 10, 2018), https://www.jdsupra.com/legalnews/the-more-things-change-the-more-they-48455/ [https://perma.cc/9Z53-NTYG].

[88] Alfred & Schauer, *supra* note 12, at 369.

[89] *Id*.

[90] DeCamp & McGillivary, *supra* note 75, at 52.

[91] Bill Pokorny, *Opinion Letters Are Back!*, FRANCZEK (June 27, 2017), https://www.wagehourinsights.com/2017/06/opinion-letters-are-back/ [https://perma.cc/9W9F-M4H3].

[92] Anderson & Higdon, *supra* note 2.

[93] *See, e.g.*, Nancy J. Leppink, *Administrator's Interpretation No. 2010-1*, U.S. DEP'T LAB. WAGE & HOUR DIV. (Mar. 24, 2010), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FLSAAI2010_1.pdf [https://perma.cc/6NED-Y5YK].

letters that the Obama DOL disagreed with as allegedly inconsistent with the applicable regulations.[94]

The Obama DOL's replacement for WHD opinion letters did not consist solely of these sparse interpretations. Rather, it announced policy by filing amicus briefs in private litigation.[95] As one legal scholar remarks, this aggressive amicus strategy often resulted in "wild flip-flops in the DOL's position on certain issues during a short period of time."[96] Notably, as with its interpretations, the Obama DOL often relied on opinion letters as support for its amicus briefs.[97]

D. The Trump Administration

On June 27, 2017, DOL announced that WHD opinion letters would be reinstated as one of its methods for furnishing guidance to employees and employers regarding federal wage and hour laws.[98] In the news release, the then-Labor Secretary explained that "[r]einstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes."[99] The then-Secretary further noted, "The U.S. Department of Labor is committed to helping employers and employees clearly understand their labor responsibilities so employers can concentrate on doing what they do best: growing their businesses and

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[94] *See, e.g., id.*; s*ee also* Alfred & Schauer, *supra* note 12, at 369–70 n.43; Interview with Patrick Pizzella, former Deputy Sec'y, U.S. Dep't. of Lab., Washington, DC (May 21, 2021) (on file with author).

[95] *See* E.I. DuPont De Nemours & Co. v. Smiley, 138 S. Ct. 2563, 2564 (2018) (Gorsuch, J., respecting the denial of certiorari) (noting DOL's "aggressive" attempts to establish policy via amicus briefs in private litigation).

[96] Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1243–50 (2013) (summarizing DOL campaign to define the FLSA via interpretations advanced in amicus briefs).

[97] *See, e.g.*, Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at 12, Polycarpe v. E&S Landscaping Serv., Inc., 616 F.3d 1217 (11th Cir. 2010) (Nos. 08-15290, 08-15154) (citing opinion letters issued in 1982 and 1997); Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellees, Perez v. Mountaire Farms, Inc., 650 F.3d 350, 365–67 (4th Cir. 2011) (citing opinion letters issued in 1973, 1993, 2001, 2006, and 2007); Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant at 15, 23, Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010) (citing eight opinion letters).

[98] *US Department of Labor Reinstates Wage and Hour Opinion Letters*, U.S. DEP'T. LAB., https://www.dol.gov/newsroom/releases/whd/whd20170627 [https://perma.cc/D6BJ-5YJ2] (last visited Mar. 25, 2021).

[99] *Id.*

creating jobs."[100] The news release explained that WHD had established a webpage where the public could see whether existing agency guidance already addressed their questions.[101] The public could also submit a request for an opinion letter online.[102] The webpage explained what to include in the request, where to submit the request, and where to review existing guidance.[103] In the news release, DOL stated that the WHD would exercise discretion in determining which requests for opinion letters would receive a response and in determining the appropriate form of guidance to be issued.[104]

On January 5, 2018, DOL reinstated seventeen opinion letters that had previously been published under the George W. Bush Administration but were later withdrawn by the Obama Administration.[105] The Trump Administration's WHD prioritized issuing opinion letters and issued them consistently from 2018 until the final days of the Administration.[106] Ultimately, the Trump Administration's WHD published eighty opinion letters during that period.[107]

The Trump Administration prioritized opinion letters at other agencies as well. One notable example is DOL's OFCCP, the agency that enforces the non-discrimination and affirmative action requirements of federal contractors and subcontractors to the federal government. Historically, OFCCP never issued opinion letters.[108] Recognizing that other DOL agencies had long issued opinion letters, in 2018, OFCCP issued a directive that established an opinion letter program whereby a contractor could ask OFCCP for fact-specific guidance and rely on the

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Alfred B. Robinson, Jr. & Steven F. Pockrass, *An Early Groundhog Day: DOL Reissues 17 Opinion Letters That Had Been Withdrawn in 2009*, OGLETREE DEAKINS: WAGE & HOUR (Jan. 8, 2018), https://ogletree.com/insights/an-early-groundhog-day-dol-reissues-17-opinion-letters-that-had-been-withdrawn-in-2009/ [https://perma.cc/99J6-2YGT].

[106] *U.S. Department of Labor Issues Four Wage and Hour Opinion Letters*, U.S. DEP'T. LAB. (Jan. 19, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210119 [https://perma.cc/G9NN-XCHC].

[107] *Id.* (this number includes the reinstated opinion letters issued at the end of the George W. Bush Administration).

[108] *About Us*, U.S. DEP'T. LAB. OFF. FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/about [https://perma.cc/7BYZ-U86C] (last visited Mar. 25, 2021).

guidance provided in the opinion letter to comply with its equal employment opportunity obligations.[109] OFCCP issued five opinion letters between 2017 and 2021.[110] In 2020, the EEOC issued its first opinion letter in over three decades, confirming that employers can use a particular tax credit for hiring individuals with disabilities, veterans, and other underrepresented workers without violating anti-discrimination laws.[111] In fact, the last time EEOC issued an opinion letter was during the leadership of now-U.S. Supreme Court Justice Clarence Thomas, who chaired the EEOC from 1982 to 1990.[112] In 2020, the EEOC unveiled a new process and website for requesting opinion letters in order to make it easier and more straightforward.[113] The then-EEOC Chair explained that "[o]ne of [her] priorities has been for the Commission to provide clear and accurate guidance to the public" and that "[t]he new process for requesting formal opinion letters is a significant step toward allowing the Commission to address areas of the law that may be unclear."[114]

E. The Biden Administration

On January 26, 2021, WHD's first action under the Biden Administration was the withdrawal of three opinion letters issued during the end of the Trump Administration.[115] WHD explained that it withdrew the opinion letters because they were issued "prematurely . . . based on rules that have not gone into effect."[116] Both Final Rules were purportedly

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[109] *Opinion Letter Frequently Asked Questions*, U.S. DEP'T. LAB. OFF. FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/faqs/opinion-letters#Q6 [https://perma.cc/3F4S-WRAK] (last visited May 19, 2021).

[110] *Opinion Letters*, U.S. DEP'T. LAB. OFF. FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/opinion-letters [https://perma.cc/846A-9GH3] (last visited Mar. 25, 2021).

[111] Paige Smith, *supra* note 35.

[112] *Id.*

[113] *EEOC Announces New Process for Requesting Formal Opinion Letters*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 8, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-new-process-requesting-formal-opinion-letters [https://perma.cc/8LRR-DZY4].

[114] *Id.*

[115] Lisa Nagele-Piazza, *DOL Withdraws Three Opinion Letters on Wage and Hour Rules*, SOC'Y HUM. RES. MGMT. (Feb. 1, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-withdraws-three-opinion-letters-on-wage-and-hour-rules.aspx [https://perma.cc/89R4-7WTV].

[116] *Id.* These rules included the Final Rule on Independent Contractor Status Under the Fair Labor Standards Act which was scheduled to take effect on March 8,

subject to President Biden's January 20, 2021 regulatory freeze memo, which aimed to suspend pending rules and policies issued during the Trump Administration.[117] The three opinion letters were then completely removed from the DOL's opinion letter website.[118] On February 19, 2021, the Biden DOL rescinded two more WHD opinion letters– one regarding whether workers were independent contractors and one regarding the compensability of time spent in a truck's sleeper berth.[119] In contrast to the Obama DOL, which kept withdrawn opinion letters publicly available on the WHD website, the Biden DOL summarily purged these withdrawn opinion letters.[120]

Although withdrawn letters may not be cited as an official statement of current WHD policy entitled to heightened deference, they remain available as reasoned analyses at least on par with a law review article or an unpublished judicial decision.[121] In addition, withdrawn opinion letters evidence prior constructions of the WHD Administrator and thus may further inform different and subsequent views.[122]

2021 and the Final Rule on Tip Regulations Under the Fair Labor Standards Act which was scheduled to take effect on March 1, 2021. *Id.*

[117] Memorandum from Ronald A. Klain, Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/ [https://perma.cc/Q2CN-SPLR]. In pertinent part, the regulatory freeze memorandum directed the heads of executive departments and agencies to ensure that the new administration's appointees or designees had an opportunity to review any new or pending rule. *Id.*

[118] Nagele-Piazza, *DOL Withdraws Three Opinion Letters on Wage and Hour Rules*, *supra* note 115.

[119] Katharine C. Weber & J. Greg Coulter, *DOL Withdraws Opinion Letters Regarding Sleeper Berth Time, Independent Contractor Status*, JACKSON LEWIS (Feb. 22, 2021), https://www.wageandhourlawupdate.com/2021/02/articles/states/uncategorized/dol-withdraws-opinion-letters-regarding-sleeper-berth-time-independent-contractor-status/ [https://perma.cc/X94Y-JRQK].

[120] Nagele-Piazza, *DOL Withdraws Three Opinion Letters on Wage and Hour Rules*, *supra* note 115.

[121] DeCamp, *supra* note 71; *see also infra* Part IV (discussing the value of withdrawn opinion letters).

[122] *See* Jon Steingart, *Despite Biden's Brush-Off, DOL Opinion Letters Still Matter*, LAW 360 (Oct. 15, 2021), https://www.law360.com/employment-authority/articles/1431301/despite-biden-s-brush-off-dol-opinion-letters-still-matter [https://perma.cc/USU8-TNG4] (noting that opinion letters can be considered one data point in legal analysis).

F. The Future of Opinion Letters

Many practitioners have speculated that the Biden Administration will follow the Obama Administration's position and cease issuing opinion letters.[123] As some legal commentators have explained: "Doing so would deprive courts, employers, employees, unions, trade groups, practitioners, and the public at large of an invaluable resource."[124]

III. OVERVIEW OF FEDERAL OPINION LETTERS, STATE AGENCY OPINION LETTERS, AND DEFERENCE

This Part provides an overview of opinion letters and explores the nuances distinguishing opinion letters issued by various agencies. Because of their importance at the state level, this Part also discusses opinion letters issued by state agencies. Finally, this Part briefly discusses the level of deference that opinion letters generally receive.

A. Opinion Letters in a Nutshell

WHD issues guidance primarily through regulations, opinion letters, ruling letters, Administrator's Interpretations, and field assistance bulletins.[125] Put simply, opinion letters are a legal roadmap.[126] They are not treatises or restatements, but concise explanations of how a federal agency interprets a particular position of the law it enforces based on the facts provided.[127] As such, these crucial compliance assistance documents help the public understand their rights and duties under federal law.[128] Opinion letters can be requested by an employer, employee, or any other party.[129] For example, in a 2018 opinion letter, WHD responded to the spouse of an employee with a child with special needs regarding FMLA

[123] Anderson & Higdon, *supra* note 2.
[124] *Id.*
[125] *Final Rulings and Opinion Letters*, *supra* note 6.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Request an Opinion Letter*, *supra* note 9.

protection.[130] Historically, opinion letters have even been issued to congresspeople and senators.[131]

During the Trump Administration, WHD began formatting opinion letters similar to federal court opinions in that they include a background section, a legal standards section, and an opinion section.[132] More recent opinion letters also rely more on case law than earlier opinion letters.[133] Although not required by law, WHD also added the requirement that the requestor represent that the opinion letter is not being sought by any party that the WHD is currently investigating or for use in any ongoing litigation in order to prevent the national office from unduly impacting a matter by opining on an ongoing lawsuit or investigation.[134]

If the WHD Administrator's position remains vacant, WHD retains discretion in its choice of signatory for all rulings and interpretations.[135] These choices can include the Acting Administrator, Deputy Administrator, or Deputy Administrator for Program Operations.[136] Non-administrator letters, which entail rulings and interpretations signed by other WHD officials, are denoted by an "NA" following the ruling or interpretation number.[137] They are official statements of WHD policy but

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[130] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2019-2-A (Aug. 8, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_08_08_2A_FMLA.pdf [https://perma.cc/CBG8-EH99].

[131] *See, e.g.*, EEOC Opinion Letter from William Carey to Senator Frank Church (Mar. 17, 1975), *reprinted in* Harold Levy, Note, *Civil Rights in Employment and the Multinational Corporations*, 10 CORNELL INT'L L.J. 87 at 104 (1976) (stating that "[i]f [the alien exemption provision] is to have any meaning . . . it is necessary to construe it as expressing a congressional intent to extend the coverage of Title VII to include . . . citizens in overseas operations of domestic corporations . . . .").

[132] Interview with Patrick Pizzella, former Deputy Sec'y, U.S. Dep't. of Lab., Washington, DC (May 21, 2021) (on file with author) (explaining that the goal of WHD was to use federal court opinions as a template for opinion letters).

[133] Allan Bloom, *Trump DOL Issues Two More "Lame Duck" Opinion Letters, on Home-to-Office Travel Time and Live-In Caregivers*, PROSKAUER: LAW AND THE WORKPLACE (Jan. 5, 2021), https://www.lawandtheworkplace.com/2021/01/trump-dol-issues-two-more-lame-duck-opinion-letters-on-home-to-office-travel-time-and-live-in-caregivers/ [https://perma.cc/YS4H-ZQDW].

[134] Margaret Carroll Alli & Robert R. Roginson, *DOL Opinion Letters and Local Laws*, OGLETREE DEAKINS: WAGE & HOUR UPDATE (Nov. 10, 2018), at 21-4, https://events.ogletree.com/app/uploads/2018/10/Section-21-Wage-and-Hour-Update.pdf [https://perma.cc/GS7K-RB8M].

[135] *See Final Rulings and Opinion Letters*, *supra* note 6.

[136] *Id.* (such a signature under these circumstances is considered authoritative and constitutes an official ruling of WHD).

[137] *Id.*

do not constitute rulings or interpretations under the Portal-to-Portal Act.[138] Although such a letter may offer insight into how DOL interprets or enforces a law, it should be regarded as guidance and is not a formal ruling or interpretation that an employer is entitled to rely on as an absolute defense in a lawsuit.[139] Nevertheless, following a non-administrator letter may be evidence of good faith intent to comply with the law and therefore may insulate the employer from liquidated (double) damages.[140]

B. Opinion Letters at Other Federal Agencies

Opinion letters issued by other federal agencies are different from those issued by DOL in certain ways, mainly procedurally. For instance, an EEOC opinion letter must be approved by a formal vote by the EEOC commissioners and then signed by the Commission's Legal Counsel.[141] The EEOC requires that the request contain a concise statement of the issues, the names and addresses of the person making the request and of other interested persons; a statement of all known relevant facts and law; and a statement of reasons why the Title VII or Age Discrimination in Employment Act ("ADEA") opinion letter should be issued.[142] Generally, in contrast to WHD and OFCCP, no other federal agency that issues opinion letters requires that the requestor represent that the opinion letter is not being sought by any party that the agency is currently investigating or for use in any ongoing litigation.[143]

The EEOC has also issued non-binding informal discussion letters on a variety of employment antidiscrimination topics.[144] The informal discussion letters do not require a vote by the full EEOC Commission, and do not express the official opinion of the agency.[145]

A handful of federal employment and labor agencies offer more limited opinion letters. For instance, DOL's Occupational Health and

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[138] *Id.*

[139] DeCamp, *supra* note 71.

[140] *Id.*

[141] *Formal Opinion Letters*, *supra* note 5.

[142] *Request a Formal Opinion Letter*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/request-formal-opinion-letter [https://perma.cc/B9LR-3TTE] (last visited Mar. 25, 2021).

[143] Alli & Roginson, *supra* note 134, at 21-4. However, state opinion letters sometimes include this requirement. For example, the California Division of Labor Standards Enforcement requires that opinion letters include this disclaimer. *See id.*

[144] *Informal Discussion Letters*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/informal-discussion-letters [https://perma.cc/FT6R-RABN] (last visited Mar. 25, 2021).

[145] *Id.*

Safety Administration ("OSHA") issues "Standard Interpretations" which are letters or memos responding to public inquiries or field office inquiries about the enforcement and interpretation of OSHA standards and regulations.[146] These letters may clarify established OSHA standards, policies, or procedures, but may not establish or revise OSHA policies or procedures, nor interpret the Occupational Health and Safety Act.[147]

Some federal employment and labor agencies offer advisory opinions which are markedly comparable to opinion letters. For instance, DOL's Employee Benefits Security Administration issues advisory opinions in response to questions from individuals and organizations. These advisory opinions apply the law to a specific set of facts "which merely call attention to well established principles or interpretations."[148]

C. State Agency Opinion Letters

Many states have their own wage and hour laws and other employment laws. Accordingly, state labor agencies regularly issue opinion letters dealing with state-specific labor and employment issues.[149] For instance, the California Division of Labor Standards Enforcement ("DLSE") has issued opinion letters regarding wage and hour issues since at least 1983.[150] The DLSE requires that a request for a legal opinion must be submitted by letter to the Chief Counsel of the Labor Commissioner.[151] DLSE also requires a statement that there is no California decision or prior DLSE opinion on point and that the requestor has actively researched the subject matter on the DLSE website, including the DLSE Enforcement Policies and Interpretations Manual available on its website.[152] Like WHD, DLSE also requires that the opinion letter request contain a statement that the opinion is not sought in connection with anticipated or pending private litigation concerning the issue addressed in the request and

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[146] *Standard Interpretations*, U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/laws-regs/standardinterpretations/publicationdate/2021 [https://perma.cc/REP5-NC76] (last visited Apr. 4, 2021).

[147] *Id.*

[148] *Advisory Opinions*, U.S. DEP'T LAB. EMP. BENEFITS SEC. ADMIN., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions [https://perma.cc/9NTR-KVPP] (last visited Apr. 4, 2021).

[149] *See, e.g.*, *Opinion Letters: By Date*, CAL. DEP'T INDUS. RELS., DIV. LAB. STANDARDS ENF'T., https://www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm [https://perma.cc/EMJ5-DT6X] (last visited Mar. 25, 2021).

[150] *Id.*

[151] *Id.*

[152] *Id.*

that the opinion is not sought in connection with an investigation or litigation between a client or firm and the agency.[153]

The Massachusetts Department of Labor Standards also issues opinion letters regarding fact-specific interpretations of the minimum fair wage law.[154] The Massachusetts Department of Labor Standards has published at least seventy opinion letters since 2000.[155] Some state agencies have stopped issuing opinion letters in recent years, notably the New York State Department of Labor.[156] Specifically, the New York State Department of Labor announced that it would no longer issue opinion letters but instead would "generally respond by providing references to statutes, regulations, interpretations and cases without an analysis of the specific facts presented."[157] The Department stated that these general responses would be posted on Counsel's Frequently Asked Questions page.[158] The New York State Department of Labor did note that existing opinion letters would remain in effect and serve as interpretive guidance unless they conflict with subsequent guidance.[159]

D. Deference

Courts generally defer to DOL opinion letters in accordance with the United States Supreme Court's decision in *Skidmore v. Swift & Co.*, under which "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[160] In *Christensen v. Harris County*, the Court applied *Skidmore*,

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[153] *Id.*

[154] *Minimum Wage Opinion Letters*, MASS. DEP'T LAB. STANDARDS, https://www.mass.gov/service-details/minimum-wage-opinion-letters [https://perma.cc/5TBG-KKZM] (last visited Mar. 25, 2021).

[155] *Id.* This number includes a few rescinded opinion letters. *Id.*

[156] *Counsel Opinion Letters*, N.Y. DEP'T LAB., https://dol.ny.gov/labor-standards-0 [https://perma.cc/QX3F-D2BJ] (last visited Mar. 25, 2021).

[157] N.Y. DEP'T LAB., *Labor Standards*, https://dol.ny.gov/labor-standards-0 [https://perma.cc/32RF-KNVY] (last visited Mar. 25, 2021). It should be noted, the New York State Department of Labor has since deleted these statements regarding opinion letters.

[158] *Id.*

[159] *Id.*

[160] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* Gonzales v. Oregon, 546 U.S. 243, 269 (2006) ("[U]nder *Skidmore*, we follow an agency's rule only to the extent it is persuasive."); Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc., 204 F.3d 673, 677 (6th Cir. 2000) (applying *Skidmore* deference to

rather than *Chevron* deference to a DOL opinion letter interpreting the FLSA's compensatory time provision.[161] The Court noted that the interpretations provided in opinion letters are "entitled to respect" under the *Skidmore* deference regime.[162]

The United States Supreme Court's subsequent decision in *United States v. Mead Corp*. affirmed *Christensen*'s applicability in this area.[163] The subject matter of *Mead* did not concern opinion letters but did involve the highly analogous "classification rulings" of the United States Customs Service.[164] Affirming *Christensen*, the *Mead* Court found that "classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.'"[165] Citing in part the agency's "specialized experience," the Court applied *Skidmore* deference and reversed the Federal Circuit, which had given the agency's rulings no deference at all.[166]

Some courts have noted that even where opinion letters are inconsistent or represent a change in DOL policy, opinion letters may nevertheless receive deference if they "are more thorough and based on a more sound interpretation of the statute" than previous letters.[167] The Eleventh Circuit, for instance, explained in one case that the opinion letter before the court provided "a far more detailed rationale for its conclusion than the previous opinions" and thus "is a great deal more persuasive than the earlier ones."[168]

IV. BENEFITS OF OPINION LETTERS

The benefits of issuing opinion letters are legion. This Part examines a variety of opinion letters to illustrate these considerable benefits.

opinions of DOL and finding that such opinions have "persuasive value if the position of the Administrator is well-considered and well-reasoned"); Sisk v. Sara Lee Corp., 590 F. Supp. 2d 1001, 1008 (W.D. Tenn. 2008).

[161] *See* Christensen v. Harris Cnty., 529 U.S. 576 (2000).

[162] *Id*. at 587 (quoting *Skidmore*, 323 U.S. at 140).

[163] U.S. v. Mead Corp., 533 U.S. 218, 234 (2001).

[164] *Id.*

[165] *Id.* (quoting *Christensen*, 529 U.S. at 587).

[166] *Id.*

[167] Sisk v. Sara Lee Corp., 590 F. Supp. 2d 1001, 1009 (W.D. Tenn. 2008).

[168] Anderson v. Cagle's, Inc., 488 F.3d 945, 956–57 (11th Cir. 2007).

A. Opinion Letters: An Efficient and Effective Way of Providing Guidance

Opinion letters are a more effective and efficient way to provide meaningful guidance to the public in contrast with other forms of guidance used by many agencies. In this day and age, opinion letters enable agencies to furnish significantly more guidance to the public in a more transparent and direct fashion than alternative forms of guidance.[169]

Opinion letters are vastly superior to the Administrator's Interpretations that were the preferred choice of guidance used by the DOL during the Obama Administration.[170] As noted earlier, the Obama DOL ended WHD opinion letters and replaced the opinion letter process by issuing Administrator's Interpretations, which contained general guidance on wage and hour issues.[171] Interestingly, most of these Administrator's Interpretations relied on WHD opinion letters.[172] Opinion letters provide feedback specific to the requesting employer's employment practices.[173] By contrast, Administrator's Interpretations set forth highly generalized guidance regarding an entire industry, a category of employees, or all employees.[174] As one practitioner explained: "Given the general nature of these interpretations, they provided employers with little to rely on when it came to the details of their employment practices."[175] Unlike opinion letters, these interpretations did not respond to a particular inquiry by an

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[169] Anderson & Higdon, *supra* note 2 (noting DOL issued only seven Administrator Interpretations in contrast to the 318 opinion letters issued by DOL between 2003 and 2009).

[170] *Id*. (arguing that "Administrator Interpretations failed to prove a viable replacement for opinion letters, whether viewed in terms of content or the nature or number topics addressed."); see also Kate Tornone, DOL Opinion Letters: Flawed, but the Best Option Available?, HR DIVE (Mar. 1, 2018) https://www.hrdive.com/news/dol-opinion-letters-flawed-but-the-best-optionavailable/517777/ [https://perma.cc/X8XV-SZCW] (explaining that with Administrator's Interpretations there "was no vehicle for the employer community to communicate with DOL constructively.").

[171] *Id*.

[172] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, Administrator's Interpretation No. 2016-1 (Jan. 20, 2016), *available at* https://www.hallrender.com/wp-content/uploads/2016/01/DOL_Joint_Employment_1_20_16.pdf [https://perma.cc/77UZ-DK8A].

[173] *Department of Labor Reinstates Opinion Letters*, SMITH GAMBRELL RUSSELL, https://www.sgrlaw.com/department-of-labor-reinstates-opinion-letters/ [https://perma.cc/D4Z3-N5BE] (last visited Sept. 2, 2021).

[174] *Id.*

[175] *Id.*

employer or employee but instead responded to a "perceived general need" as identified by the WHD administration.[176] The Obama DOL used Administrator's Interpretations as a way to reverse positions taken in prior opinion letters without waiting for the issue to actually arise in the real world.[177] In other words, Administrator's Interpretations fail to respond to actual, day-to-day compliance questions that employers are interested in.[178] As one practitioner explained:

> Administrator [I]nterpretations do not tend to provide the same benefit to employers, particularly given how generic they are in comparison to opinion letters.[179] Indeed, FLSA cases . . . are so fact-specific that a recitation of the law without much context is not as helpful as commentary and question and answer on specific circumstances and questions raised by employers.[180]

In addition, opinion letters are considerably superior to Administrator's Interpretations because they restate existing law and do not create new law. The Obama DOL deliberately used Administrator's Interpretations to create new law and enforcement standards.[181] Often these interpretations did so by rejecting dictionary definitions of terms used in the relevant statutes and instead relied on a "superficial and inaccurate" analysis of legislative history.[182] These interpretations were often contrary to the majority of circuit court decisions on the particular subject.[183] One notable example of these interpretations being used to create new law and enforcement standards involved an Administrator's Interpretation issued in 2016, which established new standards for determining joint employment under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act.[184] This Administrator's

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[176] Alfred & Schauer, *supra* note 12, at 366.

[177] *Id*. at 369-70 n.43.

[178] John E. Thompson, *"No Opinion Letters" Policy Reaffirmed*, *supra* note 85.

[179] Traub & Garofalo, *supra* note 19.

[180] *Id.*

[181] *See* Tammy McCutchen & Michael J. Lotito, *DOL Issues Guidance on Joint Employment under FLSA*, LITTLER (Jan. 20, 2016), https://www.littler.com/publication-press/publication/dol-issues-guidance-joint-employment-under-flsa [https://perma.cc/ER6R-9NSG].

[182] Alfred & Schauer, *supra* note 12, at 372; The Administrator's Interpretation admits that it discards dictionary definitions by explaining that "[d]ictionary definitions offer little useful guidance here." U.S. Dep't Lab., Wage & Hour Div., Opinion Letter (June 16, 2010).

[183] *See* Alfred & Schauer, *supra* note 12, at 373.

[184] *See* McCutchen & Lotito, *supra* note 181, at 126.

Interpretation was specifically designed "to expand statutory coverage of the FLSA to small businesses and collect back wages from larger businesses."[185]

Another unprecedented feature of this particular Administrator's Interpretation was that – for the first time ever – WHD introduced the concepts of "horizontal" joint employment and "vertical" joint employment, and provided guidance on each category.[186] DOL never used these categories in the past. Another notable example of Administrator's Interpretations being used to create and expand the law was an Administrator's Interpretation issued in July 2015 that addressed the classification of independent contractors as employees under the FLSA.[187] In this Administrator's Interpretation, WHD took an expansive view of employment and effectively changed the employee versus independent contractor test from the historic economic realities test to one that focused on economic dependence.[188] The interpretation also created a presumption of employment for workers.[189] Ultimately, these two Administrator's Interpretations represented a stunning departure from the agency's standards and attempted to expand who could be considered an employer

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[185] *Id.*

[186] *Id.*; *see also* Michael Fucci, *WHD Issues Another Momentous Interpretation, Mapping Joint Employer Status on Horizontal and Vertical Planes*, SEYFARTH SHAW (Jan. 20, 2016), https://www.wagehourlitigation.com/joint-employment/another-momentous-ai/ [https://perma.cc/5QHW-WBRH] (noting that WHD had not previously used the standards regarding horizontal and vertical employment scenarios).

[187] Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, LITTLER (June 7, 2017), https://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance.

[188] Bruce M. Steen, et al., *New Guidance: DOL Asserts Most Independent Contractors Are Employees*, MCGUIREWOODS (July 15, 2015), https://www.mcguirewoods.com/client-resources/Alerts/2015/7/DOL-Asserts-Most-Independent-Contractors-Employees [https://perma.cc/943V-89DM]. Under the economic realities test, no single factor is determinative and courts generally consider the following factors: (1) the extent to which the work performed is integral to the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; and (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. *Id.*

[189] Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, *supra* note 187 (the Administrator's Interpretation stated that "most workers are employees under the FLSA's broad definitions").

for liability purposes without going through the notice-and-comment process required for formal agency rulemaking.[190]

Opinion letters also enable agencies to furnish significantly more guidance to the public.[191] Because there will never be enough resources for DOL to investigate every workplace issue, opinion letters are the most efficient vehicle to increase compliance in the workplace by addressing specific scenarios.[192] An opinion letter addressing a discrete scenario is clearly the cleanest method for answering these complex questions.[193] Critics contend that the Obama DOL's shift to Administrator's Interpretations denied the public significant and timely guidance.[194] Indeed, the Obama DOL issued only seven Administrator's Interpretations between 2010 and 2016.[195] Two legal commentators have argued that the steep decline in regulatory guidance essentially left employers, employees, and practitioners "stranded in limbo" on important legal questions for almost a decade, despite the fact that compliance questions and issues of interpretation remained the same.[196] In striking contrast, WHD issued 318 opinion letters between 2003 and 2009 and eighty opinion letters between 2017 and 2021, increasing the amount of public guidance documents by an order of magnitude.[197] The Trump DOL's issuance of eighty denser opinion letters is especially noteworthy since the Trump DOL's WHD contemporaneously issued several high-profile final rules.[198]

Opinion letters are also superior to the amicus strategy used during the Obama Administration.[199] Pursuing policy, and especially changes in policy, through court filings rather than a rulemaking or public guidance

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[190] *Id.*

[191] Tammy McCutchen & Lee Schreter, *DOL: Opinion Letters Are Back!*, LITTLER (June 27, 2017), https://www.littler.com/publication-press/publication/dol-opinion-letters-are-back [https://perma.cc/H4ZB-8UPB].

[192] *Id.*

[193] *Id.*

[194] Pokorny, *supra* note 91.

[195] Anderson & Higdon, *supra* note 2.

[196] *Id.*

[197] *US Department of Labor Issues Four Wage and Hour Opinion Letters*, U.S. DEP'T LAB., https://www.dol.gov/newsroom/releases/whd/whd20210119 [https://perma.cc/B4DM-JMVJ] (last visited Mar. 25, 2021); Anderson & Higdon, *supra* note 2.

[198] Interview with Patrick Pizzella, former Deputy Sec'y, U.S. Dep't Lab., Washington, D.C. (May 21, 2021) (on file with author). These rules include the overtime rule, the joint employer final rule, the regular rate final rule, the fluctuating workweek final rule, the independent contractor final rule, and the Family First Coronavirus Response Act temporary rule. *Id.*

[199] Eisenberg, *supra* note 96, at 1225.

document "undermine[s] the democratic values of accountability, transparency, public participation, and reflective, reasoned decision making embodied in the Administrative Procedure Act."[200] Due to the lack of public scrutiny or the compromises inherent in deliberative processes like rulemaking, an amicus strategy can lead to "wild flip-flops . . . on certain issues during a short period of time."[201] These fluctuations are contrary to good governance and stability in industries. Furthermore, amicus policy making can result in sharper political fluctuations that are not subjected to public scrutiny or the compromises inherent in deliberative processes like rulemaking.[202]

Justice Gorsuch recently summarized these concerns in criticizing this approach.[203] He noted that those attempting to follow the law cannot know whether their conduct "is permissible when … the agency will only tell them later during litigation[.]"[204] Unlike proposed and final rules, which must be published in the Federal Register, amicus briefs need not be made public except as entries in a court's docket—and it is unreasonable to expect the public to track ongoing private litigation to determine when the government is announcing, and particularly changing, its policy positions. Opinion letters, on the other hand, are publicly announced and published – usually in a searchable manner – on the agency's respective website at this point.[205] Opinion letters are also written for the public at large, while amicus briefs may be highly technical and speak to an audience of judges.[206] While nothing prevents an agency

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[200] *Id.* at 1225.

[201] *Id.* at 1250.

[202] *Id.* at 1274; *see also* E.I. Du Pont De Nemours & Co. v. Smiley, 138 S.Ct. 2563, 2563–64 (2018) (Gorsuch, J., respecting the denial of certiorari) (noting DOL's "aggressive" attempts to establish policy via amicus briefs in private litigation).

[203] *Smiley*, 138 S. Ct. at 2563–64.

[204] *Id.* at 2564.

[205] *Opinion Letters – A Valuable but Often an Underutilized Tool by Employers: The Department of Labor Authors Six New Opinion Letters Responding to Unique FMLA and FLSA Employment Issues*, GORDON & REES SCULLY MANSUKHANI, https://www.grsm.com/publications/2018/opinion-letters-a-valuable-but-often-an-underutilized-tool-by-employers-the-department-of-labor-authors-six-new-opinion-letters-responding-to-unique-fmla-and-flsa-employment-issues [https://perma.cc/QWT2-RUCN] (last visited Mar. 18, 2021).

[206] U.S. Supreme Court Rule 37 provides that an amicus brief "that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help *to the Court*." SUP. CT. R. 37(1) (emphasis added). *See also* Eisenberg, *supra* note 96, at 1273 (explaining that amicus briefs are most helpful for courts and noting that courts "often specifically request agency amicus participation to help them make sense of complex and technical laws.").

from publicly announcing the filing of an amicus brief and describing the policy announcement and changes being made in that brief, as a practical matter, the impulse that leads agencies to prefer filing briefs in private litigation to announcing policy determinations in public also leads them to describe those briefs in only the most cursory manner—if they do so at all.[207] For example, while DOL's Office of the Solicitor makes many amicus briefs available on its webpage, it does not describe the briefs' contents except to state which statute the underlying case concerned.[208] And, as Justice Gorsuch importantly highlights, "serious equal protection concerns arise when an agency advances an interpretation only in litigation," where there is no question "who would benefit and who would be harmed[.]"[209] One underlying assumption of the Administrative Procedure Act is that regulators, like legislators crafting and enacting legislation, will attempt to balance competing interests to determine the best policy to be applied to the public as a whole.[210] Policy announced through amicus brief, however, is policy that explicitly states whom the regulator favors and whom it does not.[211]

Finally, opinion letters promote, rather than undermine, rulemaking. First and foremost, opinion letters allow federal agencies to preview a variety of positions and receive stakeholder input as part of proposing a rule and then issuing a final rule. This previewing is particularly important since rulemaking on an important topic represents a major commitment by an administration, especially since notice-and-comment procedures are expensive, time consuming, and resource-intensive.[212] Opinion letters are a complementary force for rules since they help clarify murky areas of regulations. WHD often issues opinion letters shortly after finalizing rules in order to provide more clarity.[213] For instance, on December 12, 2019, DOL issued a final rule that clarifies what perks and benefits may be included in and excluded from an employee's regular rate.[214] Shortly after the final rule was published, WHD issued three opinion letters regarding

[207] *See* Eisenberg, *supra* note 96, at 1226–27

[208] *Id.* at 1243.

[209] *Smiley*, 138 S. Ct. at 2564.

[210] Administrative Procedure Act, 5 U.S.C. § 706.

[211] *See, e.g.*, *Smiley*, 138 S. Ct. at 2564.

[212] Eisenberg, *supra* note 96, at 1274.

[213] Anderson & Higdon, *supra* note 2.

[214] *See, e.g.*, *Final Rule: Regular Rate under the Fair Labor Standards Act*, U.S. DEP'T LAB. WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/overtime/2019-regular-rate [https://perma.cc/HL7H-7NYX] (last visited Mar. 25, 2021).

the regular rate that provided further clarity.[215] The three opinion letters involved different types of income and whether they must be included in the regular rate of pay for the purpose of calculating overtime pay.[216] These opinion letters were especially important since many employers in essential industries thereafter implemented or considered a variety of innovative compensation strategies for their employees during the COVID-19 pandemic.[217] Opinion letters may thus also allow agencies to preview a variety of positions and receive stakeholder input before finalizing a proposed rule, in many cases streamlining the time consuming and resource-intensive notice-and-comment process.[218] Indeed, many regulatory preambles relied on opinion letters for justifying the rules.[219]

B. Liability Shield

For employers who actively seek to understand, and take steps to comply with, their legal obligations, careful monitoring of and compliance with applicable opinion letters may afford one or more defenses in litigation relating to such reliance under federal laws, including the FLSA, ADEA, and Title VII.[220] An employer may avoid liability if it can demonstrate that an action that may be deemed to violate the FLSA was nonetheless undertaken in good faith reliance on a written administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy issued by any agency of the United States concerning the class of employers to which it belongs.[221] There is also a complete defense to liability under the FLSA for reliance on administrative guidance if an employer can plead and prove that it acted "in good faith conformity with and in reliance on any written administrative regulation, order, ruling approval, or interpretation" of the WHD Administrator.[222]

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[215] Bruce B. Deadman, *What's in the Regular Rate? December 2019 DOL Rules and March 26, 2020 Opinion Letters Provide Clarification for the COVID-19 Era*, NAT'L LAW REV. (Apr. 9, 2020), https://www.natlawreview.com/article/what-s-regular-rate-december-2019-dol-rules-and-march-26-2020-opinion-letters [https://perma.cc/T2JB-EU7V].

[216] *Id.*

[217] *Id.*

[218] *See generally* 29 U.S.C. 251(a).

[219] *See, e.g.*, Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (proposed Sept. 25, 2020).

[220] *Final Rule: Regular Rate under the Fair Labor Standards Act*, *supra* note 214.

[221] 29 U.S.C. § 258.

[222] 29 U.S.C. § 259(a); *Final Rulings and Opinion Letters*, *supra* note 6; *see, e.g.*, Marshall v. Emersons, Ltd., 598 F.2d 1346, 1347 (4th Cir. 1979) (finding that an

Furthermore, compliance with WHD opinion letters may prevent liquidated damages under both the FLSA and the Family and Medical Leave Act ("FMLA") as it may demonstrate that the employer acted in good faith and that it had reasonable grounds for believing that its act or omission was not in violation of the law.[223] Specifically, reliance on an opinion letter can also form the basis of a good faith defense against the double liquidated damages available under the FLSA, 29 U.S.C. § 260, and the third year of damages for willful violations.[224] Under the FLSA, courts have discretion to deny liquidated damages, in whole or in part, whenever an employer's violation occurred in "good faith" and when the employer had "reasonable grounds" for believing that it was not violating the FLSA.[225] However, ignorance and clerical mistakes are not reasonable grounds.[226] Still, reliance on the advice of counsel may demonstrate good faith sufficient to avoid imposition of liquidated damages.[227]

Section 10 of the Portal-to-Portal Act provides a complete affirmative defense to all monetary liability if an employer can plead and prove it acted "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the WHD Administrator.[228] A similar, but narrower defense is also available under section 11 of the Portal-to-Portal Act.[229] More specifically, if the employer can persuade the court that its act or omission giving rise to an overtime pay action was in good faith, and the employer had reasonable grounds for believing that the act or omission complied with the FLSA, "the court may, in its sound discretion, award no liquidated damages or

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opinion letter by DOL's Wage and Hour Administrator "is the type of administrative pronouncement upon which good faith reliance can be placed under [29 U.S.C. § 259]."); Kuebel v. Black & Decker Inc., 643 F.3d 352, 361 (2d Cir. 2011) (affirming the district court's grant of summary judgment in part because the employer had established a good-faith defense to liability under 29 U.S.C. § 259(a) by virtue of its reliance on a DOL opinion letter); *cf.* Hultgren v. Cnty. of Lancaster, 913 F.2d 498, 507–08 (8th Cir. 1990) (holding that the employer would have otherwise been entitled to good faith defense based on its reliance on two WHD opinion letters had it been able to show that its actions actually conformed with letters).

[223] 29 U.S.C. § 260; 29 U.S.C. § 2617(a)(1)(A)(iii).

[224] 29 U.S.C. § 260.

[225] *Id.*

[226] *See* Thomas v. Howard Univ. Hosp., 39 F.3d 370, 372 (D.C. Cir. 1994).

[227] Dalheim v. KDFW-TV, 712 F. Supp. 533, 541–42 (N.D. Tex. 1989); *see also* Zachary v. ResCare Okla., Inc., 471 F. Supp. 2d 1183, 1188–89 (N.D. Okla. 2006) (letter from Wage and Hour investigator advising employer that investigation was closed, and no violations were found defeated claim of willfulness).

[228] 29 U.S.C. § 259; *see also* 29 C.F.R. § 790.13(a).

[229] 29 U.S.C. § 260.

award any amount thereof not to exceed the amount specified in [section 216(b)]."[230] A section 260 defense is available even where an employer does not have a complete defense to liability under section 259.[231]

Generally, an employer carries the burden of proving that it is entitled to either defense.[232] To satisfy this good faith requirement, an employer must demonstrate that it appropriately acted to satisfy both objective and subjective good faith.[233] This good faith element is a requirement for both 29 U.S.C. § 259 and § 260.[234] In order to establish good faith, "an employer must show more than its subjective state of mind."[235] The regulations governing this statutory section provides that good faith is an objective test where the employer must have acted reasonably given the circumstances.[236] Furthermore, good faith requires that the employer have "honesty of intention and no knowledge of circumstances which ought to put him upon inquiry."[237] However, unlike 29 U.S.C. § 259, which offers a simple affirmative defense to liability, the 29 U.S.C. § 260 defense merely offers an avenue for liable defendants to obtain an exception to the normal rule that they must also pay liquidated damages.[238]

The defenses provided by the Portal-to-Portal Act also apply to EEOC opinion letters issued pursuant to the ADEA, which is codified with the FLSA in Title 29.[239] Similarly, Title VII includes a highly analogous liability shield: An EEOC opinion letter issued pursuant to Title VII may provide a defense to liability for the employer who "pleads and proves that the act or omission complained of was in good faith, in conformity with,

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[230] *Id.* However, "[f]or the court's discretion to be invoked . . . the delinquent employer must sustain a plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict." McClanahan v. Mathews, 440 F.2d 320, 322 (6th Cir. 1971).

[231] Nelson v. Ala. Inst. for Deaf & Blind, 896 F. Supp. 1108, 1115 (N.D. Ala. 1995).

[232] Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1272 (11th Cir. 2008); Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150, 1163 (11th Cir. 2008).

[233] *Rodriguez*, 518 F.3d at 1272; *Alvarez Perez*, 515 F.3d at 1163.

[234] *See* Scott v. Chipotle Mexican Grill, Inc., 67 F. Supp. 3d 607, 612–14 (S.D.N.Y. 2014).

[235] *Id.* at 612.

[236] 29 C.F.R. § 790.15(a).

[237] *Scott*, 67 F. Supp. 3d at 612–13 (quoting 29 C.F.R. § 790.15(a)).

[238] *Id.* at 613.

[239] *Formal Opinion Letters*, *supra* note 5.

and in reliance on any written interpretation or opinion of the Commission."[240]

Opinion letters are useful even where Congress did not provide a statutory good faith defense.[241] For instance, the FMLA was enacted in 1993 to guarantee leave for employees to address family and serious health issues without fear of losing their job.[242] Because of the complexity of FMLA issues and the law's similarity to the FLSA, WHD has issued opinion letters on a variety of FMLA issues since it was enacted.[243] EEOC opinion letters are equally beneficial in the absence of a statutory good faith defense. More specifically, EEOC opinion letters that address other EEOC-enforced laws, including the Americans with Disabilities Act ("ADA"), or Genetic Information Nondiscrimination Act ("GINA"), serve as the EEOC's official position on the matter.[244] However, while these laws do not extend a defense to employers who comply with the terms of EEOC opinion letters, they can still provide useful guidance to employers seeking solutions to their employment problems.[245] Furthermore, a former WHD administrator has noted that these opinion letters may provide reasoned analysis and explanation of an agency's position regarding the construction or application of a statutory provision or regulation that is valuable in much the same way that a law review article or an unpublished judicial opinion may be.[246]

In more recent years, some federal agencies have recognized the value of the good faith defense to incentivize employers to understand and

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[240] *Id*.

[241] Traub & Garofalo, *supra* note 19.

[242] *See generally* 29 U.S.C. §§ 2601–2654; Paula G. Ardelean, et al., *The Development of Employment Rights and Responsibilities from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 449, 460 (2010).

[243] *DOL Opinion Letters May Provide a Useful Defense in FMLA Actions*, 4 No. 10 Fam. & Med. Leave Handbook Newsl. 5. The newsletter explains that because of the general incorporation of the FLSA enforcement provisions into the FMLA and the fact the law is administered by WHD "it certainly would be reasonable for an employer to assert the same defense in an appropriate fact situation." *Id.*

[244] *Final Rule: Regular Rate under the Fair Labor Standards Act*, *supra* note 214.

[245] *Formal Opinion Letters*, *supra* note 5; *see* Traub & Garofalo, *supra* note 19 (noting that "[o]ftentimes these opinion letters were the only guidance available to a company desperately attempting not to run afoul of the Fair Labor Standards Act and its myriad complex regulations."); Anderson & Higdon, *supra* note 2 (finding that many of the individualized situations raised by employer requesting the opinion letter have broad applicability and utility to a wider range of employers).

[246] DeCamp, *supra* note 71.

comply with their legal obligations.[247] For example, in 2018, OFCCP issued a directive implementing an opinion letter program whereby a contractor could ask OFCCP for fact-specific guidance and rely on the guidance provided in the opinion letter to comply with its equal employment opportunity obligations.[248] The OFCCP directive, and its accompanying frequently asked questions section, specifically states that, as a general agency rule, "a contractor would not later be found in violation of OFCCP regulations for following the guidance set forth in the opinion letter in good faith."[249] Additionally, the OFCCP directive explains that "as a matter of prosecutorial discretion, OFCCP also would consider whether a contractor acted consistently with an Opinion Letter, Directive, FAQ or Help Desk answer when determining whether to cite a violation for related actions."[250]

Critics of opinion letters take issue with their role in statutory defenses, contending that opinion letters are tantamount to "get out of jail free cards" for employers.[251] This argument, however, is categorically inaccurate and misleading. The existence of an opinion letter does not excuse an employer's violation of the law.[252] Rather, an employer must have relied in good faith on that letter's explanation of its obligations.[253] An employer that procured an opinion letter in bad faith – one that falsely informed WHD that it was not involved in an investigation or ongoing litigation, for example – could not rely on such a letter.[254] Neither could an employer that procured such a letter while leaving out relevant facts in its letter request to WHD, nor an employer whose practices involve facts that differ in material ways from those described in the opinion letter.[255] In each case, the employer's reliance on such a letter is a fact it must prove

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[247] *See, e.g.*, Laura A. Mitchell, *OFCCP Continues Increased Transparency and Certainty by Announcing Use of Opinion Letters and Help Desk*, NAT'L LAW REV. (Dec. 5, 2018), https://www.natlawreview.com/article/ofccp-continues-increased-transparency-and-certainty-announcing-use-opinion-letters [https://perma.cc/LL36-JSRD].

[248] *Opinion Letter Frequently Asked Questions*, *supra* note 109.

[249] *Id.*

[250] *Id.*

[251] *See, e.g.*, John E. Thompson, *Opinion Letters Are Good for Everybody*, JD SUPRA, https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=943d59b7-077e-4ed5-bc2b-bc92063f2647 [https://perma.cc/FH94-P7MZ].

[252] *Id.*

[253] *See, e.g.*, Hultgren v. Cnty. of Lancaster, Neb., 913 F.2d 498, 508 (8th Cir. 1990).

[254] *Opinion Letter Frequently Asked Questions*, *supra* note 109.

[255] Bollinger v. Residential Cap., LLC, 863 F. Supp. 2d 1041, 1052 (W.D. Wash. 2012).

as a defense to an enforcement action or complaint; it is not incumbent on DOL or a private plaintiff to disprove that reliance as part of its case.[256] Additionally, the criticism ignores, contrary to the facts, that opinion letters often conclude that employers' practices may not comply with the law.[257]

The "get out of jail free card" criticism also misses the point. Opinion letters do not purport to change the law, they seek to clarify it—and clarifying the law and related regulations cannot promote violations of the law.[258] To characterize an opinion letter as a "get out of jail free card" is not to criticize opinion letters or the opinion-letter process but to criticize the scope of the underlying law or regulation. An employer that comports itself in accordance with an opinion letter is necessarily comporting itself with WHD's interpretation of the law; if that comportment itself violates the law, that indicates a problem with WHD's interpretation of the law, not with a particular employer's practices. And those criticisms themselves are, at base, criticisms of the underlying law–or of the Portal-to-Portal Act. Indeed, the history of the Portal-to-Portal Act provides strong support for the broad use of opinion letters for liability shield purposes.[259] Specifically, the subsequent legislation was intended to combat "extended and continuous uncertainty on the part of industry, both employer and employee . . . ."[260]

Another driving factor behind the legislation was a concern that "the courts of the country would be burdened with excessive and needless litigation."[261] The Portal-to-Portal Act was deliberately drafted to ensure the "sound and orderly conduct of business and industry."[262] Moreover, the Portal-to-Portal Act was purposely designed "to curtail employee-protective interpretations of the FLSA" and intended to be "employer-protective."[263] In a message to Congress when signing the Portal-to-Portal Act, President Truman specifically responded to critics that alleged the

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[256] 29 U.S.C. § 259.

[257] John E. Thompson, *Opinion Letters Are Good For Everybody*, *supra* note 251.

[258] *Final Rule: Regular Rate under the Fair Labor Standards Act*, *supra* note 214.

[259] 29 U.S.C. § 251.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] Anderson v. Cagle's, Inc., 488 F.3d 945, 958 (11th Cir. 2007) (discussing how the fact that the FLSA was amended two years later reinforced that Congress's goal was to curtail employee-protective interpretations of the FLSA and provide employers with more protections).

good faith provisions of the Act would "make each employer his own judge of whether or not he has been guilty of a violation" by arguing that "this view fails to take into account the safeguards which are contained in [the Act]."[264]

C. Aid to the Courts

Courts regularly note that the FLSA and related statutes are difficult to understand and apply.[265] Because opinion letters provide valuable guidance to courts about the specific statutory scheme at issue, these interpretations are regularly cited by courts when resolving lawsuits, especially in the wage and hour context.[266] Opinion letters often provide courts with a legal roadmap for deciding cases.[267]

One notable example is DOL's April 2019 "gig economy" opinion letter, which examined whether service providers for a virtual marketplace company were employees or independent contractors.[268] The opinion letter examined the FLSA classification of service providers who used a virtual marketplace company to be referred to end-market consumers to whom the services were actually provided.[269] WHD concluded, based

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[264] *Special Message to the Congress Upon Signing the Portal-to-Portal Act*, *supra* note 54.

[265] *See, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 381 (2d Cir. 2015), *superseded by* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016) ("The FLSA unhelpfully defines 'employee' . . . ."); Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1326 (10th Cir. 1981) (describing FLSA's definitions of "employee" and "employ" as "circular and all inclusive") (quoting Marshall v. Regis Educ. Corp., 1980 WL 2201, at *2 (D. Colo. May 29, 1980)); Solis v. Laurelbrook Sanitarium and Sch., Inc., 642 F.3d 518, 522 (6th Cir. 2011) (describing the FLSA's definitions of "employee," "employer," and "employ" as "exceedingly broad and generally unhelpful").

[266] *See, e.g.*, McPhee v. Lowe's Home Centers, LLC, 860 F. App'x 267, 271 (4th Cir. 2021) (citing two WHD opinion letters in support of conclusion that company bonuses and paid leave provided to employees for time spent on voluntary charitable activities were properly excluded from the regular rate used to calculate overtime compensation under the FLSA); Adams v. City of Kansas City, No. 19-CV-00093-W-WBG, 2021 WL 4484551, at *5 (W.D. Mo. Sept. 29, 2021) (citing two WHD opinion letters in deciding regular rate case).

[267] *See, e.g.*, Dougherty v. Cable News Network, 396 F. Supp. 3d 84, 110 (D.D.C. 2019).

[268] U.S. Dep't Labor, Wage & Hour Div., Opinion Letter FLSA2019-6, at 1 (Apr. 29, 2019), *available at* https://www.insidernj.com/wp-content/uploads/2019/05/2019_04_29_06_FLSA.pdf [https://perma.cc/JHQ8-HGBY].

[269] *Id.*

upon decades of case law, that the service providers appeared to be independent contractors and not employees of the virtual marketplace company.[270]

The gig economy opinion letter received a great deal of attention from practitioners, scholars, and the media.[271] In fact, the gig economy opinion letter was even featured above the fold on the front page of the *New York Times*.[272] The analytical roadmap laid out in that opinion letter has been utilized by several federal courts.[273] Most significantly, in *Franze v. Bimbo Foods Bakeries Distribution, LLC*, the U.S. District Court for the Southern District of New York granted the defendant's motion for summary judgment after determining that plaintiffs, former delivery drivers for the defendant, were properly classified as independent contractors and not employees under the FLSA and New York labor law.[274] In its analysis of whether plaintiffs were properly characterized as "employees" or "independent contractors" under the FLSA, the court's opinion primarily relied on the gig economy opinion letter and the case law contained therein.[275] The court also relied on a WHD opinion letter issued by the Clinton Administration's DOL in 2000 addressing whether pickup and delivery drivers working for a company engaged in a nationwide system of pickup and delivery of small packages are

[270] *See id*. WHD found that it was "inherently difficult to conceptualize the service providers' 'working relationship' with [the virtual marketplace company], because as a matter of economic reality, they are working for the consumer, not [the company]." *Id.* at 7. Because "[t]he facts . . . demonstrate economic independence, rather than economic dependence, in the working relationship between [the virtual marketplace company] and its service providers," WHD opined that they were not employees of the company under the FLSA but rather were independent contractors. *Id*. at 10.

[271] *See, e.g., Gig Companies' Lawyers 'Welcome' New US Labor Opinion Letter*, YAHOO! FINANCE (Apr. 29, 2019), https://finance.yahoo.com/news/gig-companies-lawyers-welcome-us-064803398.html [https://perma.cc/S7ZE-ZLLD]; *see also* Richard R. Meneghello, *Department Of Labor Says Certain Gig Workers Are Contractors*, FISHER PHILLIPS (Apr. 29, 2019), https://www.fisherphillips.com/news-insights/department-of-labor-says-certain-gig-workers-are-contractors-1.html [https://perma.cc/R99Z-SDYX] (noting "[w]e can also hope that a court will look to this letter and adopt these same principles in an active piece of misclassification litigation.").

[272] Scheiber, *supra* note 34.

[273] *See, e.g.*, Franze v. Bimbo Foods Bakeries Distribution, LLC, No. 17-CV-3556(NSR), 2019 WL 2866168, at *6 (S.D.N.Y. July 2, 2019), *aff'd sub nom.* Franze v. Bimbo Bakeries USA, Inc., 826 F. App'x 74 (2d Cir. 2020).

[274] *Id.* at *11.

[275] *See id.* at *6.

independent contractors or are employees covered under the FLSA.[276] The court found in the defendants' favor with respect to each of the factors.[277] Likewise, holding that the relevant factors are similar to the factors under the FLSA, the court premised its finding under New York labor law on the same authorities.[278]

Opinion letters have also given federal agencies an opportunity to inform courts when the agencies disagree with a line of cases – and more importantly – to explain why.[279] For instance, in *Dougherty v. Cable News Network*,[280] the District Court for the District of Columbia noted that some courts had found that employees are allowed to explicitly refuse to take leave they would otherwise be entitled to under the FMLA.[281] The *Dougherty* court, however, cited a recent WHD opinion letter disagreeing with that line of cases and instead expressing the agency's view that the FMLA requires employees to take FMLA-qualifying leave, with no option to "use non-FMLA leave for an FMLA-qualifying reason."[282] WHD noted in the opinion letter that its position is in disagreement with the Ninth Circuit's decision in *Escriba v. Foster Poultry Farms, Inc.*, in which the court held an employee may decline to use FMLA leave for an FMLA-qualifying reason in order to preserve FMLA leave for future use.[283]

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[276] *Id.* at *8 (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Dec. 7, 2000), 2000 WL 34444342, at *1).

[277] *Id.* at *8–*10.

[278] *Id.* at *11.

[279] *See, e.g.*, Dougherty v. Cable News Network, 396 F. Supp. 3d 84, 110 (D.D.C. 2019) (citing U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-1-A, at 2 n.3 (Mar. 14, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_03_14_02_FLSA.pdf [https://perma.cc/HD8U-DL6V]).

[280] 396 F. Supp. 3d 84, 110 (D.D.C. 2019).

[281] *See, e.g.*, Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1244 (9th Cir. 2014) (noting that "there are circumstances in which an employee might seek time off but not intend to exercise his or her rights under the FMLA"); Gravel v. Costco Wholesale Corp., 230 F. Supp. 3d 430, 437 (E.D. Pa. 2017) (finding no FMLA violation when the plaintiff specifically elected not to take FMLA leave, and thus was not protected under the act while on leave); Skrynnikov v. FNMA, 226 F. Supp. 3d 26, 38 (D.D.C. 2017) (noting that plaintiff had properly indicated to employer that he was not electing to take DC FMLA leave for rib injury and instead would use vacation time).

[282] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2019-1-A, at 2 n.3 (Mar. 14, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_03_14_1A_FMLA.pdf [https://perma.cc/WB2J-QJKQ].

[283] *See* Escriba, 743 F.3d at 1244.

Ultimately, opinion letters serve as a useful vehicle for promoting uniformity in federal wage and hour law in the federal courts and beyond.

D. Opinion Letters Apply Decades-Old Statutory Provisions and Regulations to a Modern Economy and Workforce

Those who have attempted to interpret the FLSA and apply the law and regulations to the modern workplace regularly note that this is a difficult and vexing task.[284] Indeed, the FLSA is "a web of exemptions and broad standards that must be applied to an ever-changing economy."[285] The FLSA was passed in 1938 at a time when modern business models and practices did not exist.[286] Opinion letters provide an invaluable way to account for important changes in the modern economy and workforce such as employee use of mobile technology to work remotely and the rise of the gig economy.[287] In a news release accompanying the gig economy opinion letter, the WHD Acting Administrator explained that the opinion letter "offers further insight into the nexus of current labor law and innovations in the job market."[288]

Other WHD opinion letters have helped clarify the contours of FLSA exemptions.[289] On August 28, 2018, DOL issued an opinion letter concluding that employees of a technology company that sells a credit card platform to businesses qualify for an FLSA exemption.[290] Here the

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[284] L. Diane Tindall, *Six Common (and Costly) FLSA Mistakes*, JD SUPRA (Sep. 29, 2020), https://www.jdsupra.com/legalnews/six-common-and-costly-flsa-mistakes-38801/ [https://perma.cc/5FF5-DF5D]; *see also Complying with U.S. Wage and Hour Laws and Wage Payment Laws*, SHRM (Sep. 24, 2019), https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/complyingwithuswageandhour.aspx [https://perma.cc/788Q-3CX5] (noting that the "the FLSA is a very complex piece of legislation that is complemented by a complex set of federal regulations.").

[285] Eisenberg, *supra* note 96, at 1230.

[286] Anderson & Higdon, *supra* note 2.

[287] *U.S. Department of Labor Issues New Wage and Hour Opinion Letter, Concludes Service Providers for a Virtual Marketplace Company Are Independent Contractors*, U.S. DEP'T LAB., https://www.dol.gov/newsroom/releases/whd/whd20190429 [https://perma.cc/KTQ7-QEUG] (last visited Mar. 26, 2021).

[288] *Id.*

[289] *See, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLASA2018-21 (Aug. 28, 2018), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_08_28_21_FLSA.pdf [https://perma.cc/NW2A-P3YY] (involving FLSA exemption under 29 U.S.C. section 207(i)).

[290] *Id.*

employees were sales representatives who sold a technology platform to merchants that enables online and retail merchants to accept credit card payments from a mobile device, online, or in person.[291] The employer sought guidance on whether its employees were exempt under the retail or service establishment exemption under the FLSA.[292] WHD concluded that the exemption applied.[293] More specifically, WHD concluded that the employer sells its wares to a variety of purchasers, the platform serves everyday needs, the platform is not resold, and the company does not sell large quantities to any single customer.[294] That the employer sells its goods to commercial entities did not alter WHD's conclusion.[295] It cited a long line of cases holding that businesses may qualify as retail or service establishments when their customers and end-users are predominantly commercial entities.[296] Given the specific facts underlying the employer's business, WHD found that the employer was a "retail or service establishment" under the operative regulations.[297]

Two WHD opinion letters issued in June of 2020 provided helpful information to employers with a salesforce working outside of the traditional office.[298] One of the opinion letters examined whether company vehicles driven from site to site could be considered the employer's place of business.[299] The employees at issue drove company trucks to high-population areas where they interacted with customers, demonstrated products by using electronic tablets, and made sales.[300] The trucks were stocked with merchandise, marketing displays and demonstration units.[301] The opinion letter concluded that the outside sales

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[291] *Id.*

[292] *Id.* (citing 29 U.S.C. § 207(i)). The question was whether the employer qualified as a "retail or service establishment." *Id.* To qualify, the company must "engage in the making of sales of goods or services"; "75 percent of its sales of goods or services . . . must be recognized as retail in a particular industry"; and "not over 25 percent of its sales of goods or services . . . may be sales for resale." *Id.* (citing 29 C.F.R. § 779.313).

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] Ted Boehm, *"Outside Salesman": Two Simple Words Make for One Complex Exemption*, FISHER PHILLIPS (June 29, 2020), https://www.fisherphillips.com/Wage-and-Hour-Laws/outside-salesman-two-simple-words-one-complex-exemption [https://perma.cc/3R2R-5UJA].

[299] *Id.*

[300] *Id.*

[301] *Id.*

exemption is not lost for salespeople who use their employer's vehicle as a staging ground for their sales activities.[302] The second opinion letter involved whether salespeople who set up displays and perform demonstrations at various retail locations to sell the employer's products qualify for the outside sales employee exemption.[303] Ultimately, DOL concluded that these salespeople did in fact qualify for the outside sales exemption if their primary duty entailed making sales at those sites, which would normally be the case if more than half of their time is spent on such activities.[304] These opinion letters served to apply historic FLSA principles to the modern era.

WHD also issued an opinion letter concerning an employer's use of payroll software to calculate the wages owed to its employees each pay period.[305] The question addressed by WHD was whether that payroll software, which utilizes a formula for rounding off employee clock-in and clock-out times, properly compensated the employees for all work hours in compliance with the FLSA.[306] WHD concluded that the employer's rounding practice was permissible.[307] As a preliminary matter, WHD noted that the Service Contract Act ("SCA") regulations require contractors to calculate hours worked using FLSA principles.[308] WHD then advised that the FLSA allows rounding if it "will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."[309] WHD affirmed its policy to accept neutral rounding in any one of the following increments: the nearest five minutes, one-tenth of an hour, one-quarter of an hour, or one one-half hour.[310] Given that so many employers are now using payroll software to

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[302] *Id.*

[303] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-8 (June 25, 2020), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_06_25_08_FLSA.pdf [https://perma.cc/R4RP-2JV3].

[304] *Id.*

[305] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-9 (July 1, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_07_01_09_FLSA.pdf [https://perma.cc/3TWZ-TP4P].

[306] *Id.*

[307] *Id.*

[308] *Id.* (citing 41 U.S.C. § 6701) ("The SCA generally requires government contractors to satisfy certain minimum compensation standards for service employees under covered contracts."); *Id.* (citing 29 C.F.R. § 785) ("SCA regulations provide that contractors should calculate hours worked by using FLSA principles set forth in part 785 of the regulations.").

[309] *Id.* (quoting 29 C.F.R. § 785.48(b)).

[310] *Id.*

calculate their employees' wages, the DOL's opinion letter offers timely and instructive guidance.[311]

E. Clarity and Consistency in Application of the Law

Opinion letters also help ensure the consistent application of laws and regulations.[312] For instance, since at least 1954, WHD opinion letters have applied a multifactor analysis when considering whether a worker is an employee under the FLSA or is instead an independent contractor.[313] WHD has maintained and repeated this position in opinion letters time and again in the ensuing seven decades, during Democratic and Republican administrations alike.[314]

1. Accounting for Significant Changes in the Legal Landscape

Opinion letters help ensure the consistent application of laws and regulations by accounting for significant changes in the legal landscape. Historically, Supreme Court precedent dictated that the FLSA be interpreted liberally to effectuate its remedial purpose, and that any exemptions from its requirements be narrowly construed against the employer.[315] The Supreme Court has restated this rule many times in the intervening years, and lower courts have invoked the rule "in virtually every significant case involving exemptions."[316] WHD specifically

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[311] Robert Meyer, *Department of Labor Issues Opinion Letter Regarding Timekeeping Rounding Practices*, JD SUPRA (July 16, 2019), https://www.jdsupra.com/legalnews/department-of-labor-issues-opinion-85074/ [https://perma.cc/YN2D-TLV5].

[312] *See, e.g.*, *U.S. Department of Labor Issues New Wage and Hour Opinion Letters*, U.S. DEP'T LAB. (Apr. 12, 2018), https://www.dol.gov/newsroom/releases/whd/whd20180412-0 [https://perma.cc/Q7VQ-3P5J].

[313] Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (proposed Sept. 25, 2020) (applying six factors very similar to the six economic reality factors currently used by courts of appeal).

[314] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Feb. 8, 1956); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA-795 (Sept. 30, 1964), *available at* https://www.vitallaw.com/caselaw/wages-hours-61-66-cch-wh-30-905-opinion-letter-of-the-wage-hour-administrator-sep-30-1964/202004271404471DOC9305 [https://perma.cc/9TLV-QRN6]; *see also* Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 187 (Sept. 25, 2020) (to be codified at 29 C.F.R. pt. 780, 788, 795).

[315] *See, e.g.*, Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). Eisenberg, *supra* note 96, at 1241.

[316] DeCamp & McGillivary, *supra* note 75, at 58.

trained its investigators to apply this rule in every investigation.[317] However, in 2018, the Supreme Court in *Encino Motorcars v. Navarro* rejected the notion that FLSA exemptions are to be construed narrowly, thereby allowing for a broader application of the exemptions.[318] The Court held that the statutory text was entitled to a "fair (rather than a narrow) interpretation" because the FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]."[319] Shortly afterward, the Third Circuit explained that a "fair reading" is what "should be expected, because employees' rights are not the only ones at issue and, in fact, are not always separate from and at odds with their employers' interests."[320] The dramatic change in the legal landscape as a result of *Encino* was described by many wage and hour practitioners as "a true bombshell with respect to FLSA jurisprudence."[321]

Opinion letters, however, accounted for this significant change in the FLSA legal landscape immediately.[322] In 2019, WHD issued an opinion letter finding that highly compensated paralegals were exempt from the FLSA's overtime requirements in light of *Encino*.[323] Given that the paralegals at issue were highly compensated and did customary non-manual work directly related to the management or general business operation of the company (e.g., assisting with finance, regulatory compliance and legal), WHD concluded that a "fair reading" of the FLSA exemptions would find they are properly classified as exempt.[324]

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[317] *See id.*

[318] Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018).

[319] *Id*.

[320] Sec'y U.S. Dep't of Lab. v. Bristol Excavating, Inc., 935 F.3d 122, 135 (3d Cir. 2019).

[321] Joshua B. Waxman & Cori K. Garland, *Employers, Rev Your Engines: SCOTUS Rejects Narrow Construction of FLSA Exemption in Encino Motorcars, LLC v. Navarro*, LITTLER INSIGHT (Apr. 6, 2018), https://www.littler.com/publication-press/publication/employers-rev-your-engines-scotus-rejects-narrow-construction-flsa [https://perma.cc/U4PL-DSNN].

[322] Amanda Inskeep et al., *Latest Set of DOL Opinion Letters Clarify FLSA Salary Basis and Overtime Calculations, FMLA Eligibility Determinations for Public Agencies*, JD SUPRA, n.8–9 (Jan. 9, 2020), https://www.jdsupra.com/legalnews/latest-set-of-dol-opinion-letters-67307/ [https://perma.cc/ZX7K-L4N5] (noting that one recent opinion letter is also significant in demonstrating the Department's embrace of *Encino*).

[323] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-8 (July 1, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_07_01_08_FLSA.pdf [https://perma.cc/BMG6-FWP9].

[324] *Id.*

Similarly, WHD concluded in a January 2021 opinion letter that a broader swath of journalists and media personnel may qualify as creative professionals exempt from the FLSA's minimum wage and overtime requirements.[325] Before *Encino*, WHD generally found that journalists who report the news – as opposed to those whose work is primarily creative or original, such as those who write columns and opinion pieces – were not exempt from these requirements.[326] Post-*Encino*, WHD concluded that small-town print, broadcast, and digital media industry journalists could also qualify for the creative professional exemption.[327] The broadening of the exemption recognizes that technology has triggered an enormous shift in the nature of the journalism profession, requiring more journalists to emphasize substance rather than restating the facts.[328] Practitioners immediately noted the opinion letter's broad impact on journalism.[329] The comparatively short timeframe needed to publish these opinion letters, even with their denser analyses, means agencies can provide detailed guidance to all concerned in short order.

2. Bridge the Divide Between Policy Positions and the Case Law

Opinion letters have also helped bridge the divide between DOL policy positions and judicial opinions.[330] Notably, there was once a glaring divide between DOL and the federal courts regarding unpaid internships.[331] Many commentators contended that the Obama DOL's policies had the effect of actively discouraging unpaid internships by imposing a rigid six-element test, under which an intern was considered an employee unless all six criterion were met.[332] Courts were highly

[325] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-7 (Jan. 19, 2021), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_19_07_FLSA.pdf [https://perma.cc/538F-4S5X].

[326] Shannon Farmer et al., *DOL Opinion Letter Expands Exemption for Journalists and Media Personnel*, JD SUPRA (Jan. 22, 2021), https://www.jdsupra.com/legalnews/dol-opinion-letter-expands-exemption-5902176/ [https://perma.cc/HR55-8P4X].

[327] *Id.*

[328] *Id.*

[329] *Id.* (explaining that the opinion letter "frees up" news companies to reassess overtime pay compensation, thereby giving media management and employees more flexibility).

[330] *See, e.g.*, Schuman v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015).

[331] *See id.*

[332] Liz Peek, *Obama Criminalized Unpaid Internships and Killed Jobs*, FISCAL TIMES (June 19, 2013),

critical of this draconian test and nearly every court to consider the test rejected it.[333] In 2018, WHD abandoned the prior inflexible test and announced that going forward it would follow the seven-factor "primary beneficiary" test adopted by federal appellate courts to determine whether an intern qualifies as an employee under the FLSA.[334] The primary beneficiary test is a "flexible test" with seven non-exhaustive factors; no single factor is determinative.[335] As DOL explained: "whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case."[336] In 2019, WHD issued an opinion letter that provided an important template for how to create or modify an unpaid internship program that complies with WHD's wage and hour laws.[337] The opinion letter analyzed each of the seven factors in a manner

https://www.thefiscaltimes.com/Columns/2013/06/19/Obama-Criminalized-Unpaid-Internships-and-Killed-Jobs [https://perma.cc/Z562-ALJW].

[333] *See Schumann*, 803 F.3d at 1209 (explaining that "while some circuits have given some deference to the test, no circuit has adopted it wholesale and has deferred to the test's requirement that 'all' factors be met for a trainee not to qualify as an 'employee' under the FLSA.").

[334] *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T LAB. WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships [https://perma.cc/4N8E-CF8Y] (last visited Mar. 26, 2021). Under the primary beneficiary test, WHD examines the "economic reality" of the intern-employer relationship to determine which party is the primary beneficiary. *Id.*

[335] *Id.* These seven factors, derived from judicial opinions, are: (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee and vice versa. (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions. (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit. (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning. (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern. (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship. *Id.*; *see, e.g.*, Vaughn v. Phoenix House N.Y., Inc., 957 F.3d 141, 145–46 (2d Cir. 2020).

[336] *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, *supra* note 334.

[337] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-14 (Nov. 7, 2019), *available at*

more consistent with a court's approach to provide companies and non-profits with a helpful roadmap for creating a compliant internship program.[338]

3. Clarity in Litigation

The EEOC has also used opinion letters to ensure consistency and provide necessary clarification of the law.[339] In 2020, the EEOC issued an opinion letter clarifying its authority to bring pattern and practice lawsuits under section 707(a) of Title VII.[340] In the opinion letter, the EEOC acknowledged that its past positions had not been consistent and used the opinion letter to formalize and explain the better position.[341] The EEOC had previously alleged claims in pattern or practice suits relative to an employer's "resistance" to Title VII rights, claims which were not specifically defined in the statute.[342] However, the new approach outlined in the opinion letter limits the EEOC's claims in pattern or practice suits to only concrete allegations of discrimination.[343] As one practitioner explained: "It represents a significant step back from the EEOC's expansive view of its own authority to challenge employer practices without citing a specific alleged violation of discrimination—and its authority to do so without first attempting to resolve the matter informally."[344] Other practitioners hailed the opinion letter as an important step in bringing "transparency and consistency to the agency's procedures."[345]

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https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_11_07_14_FLSA.pdf [https://perma.cc/LX5K-MJP6].

[338] *Id.*

[339] U.S. Equal Emp. Opportunity Comm'n, Opinion Letter on Section 707 (Sept. 3, 2020), *available at* https://www.eeoc.gov/laws/guidance/commission-opinion-letter-section-707 [https://perma.cc/94E5-3JLU].

[340] *Id.*

[341] *Id.* ("Although, there are reasonable arguments for EEOC's previous interpretation, as more fully explained below, the Commission believes that the better reading of the statutory text is that it does not support such a reading of section 707.").

[342] *Id.*

[343] *Id.*

[344] Stephanie L. Adler-Paindiris et al., *EEOC: A "Pattern and Practice" is Not a Standalone Basis to Sue*, JACKSON LEWIS (Sept. 11, 2020), https://www.employmentclassactionupdate.com/2020/09/eeoc-a-pattern-and-practice-is-not-a-standalone-basis-to-sue/ [https://perma.cc/ZB5H-SPBP].

[345] Gerald L. Maatman, Jr., et al., *EEOC Update: The Commission Issues a Rare Opinion Letter Interpreting Requirements for Pattern or Practice Claims*, SEYFARTH SHAW (Sept. 3, 2020), https://www.workplaceclassaction.com/2020/09/eeoc-update-

Opinion letters have also been used to provide needed clarity regarding hot-button litigation.[346] For example, recent years have seen a significant number of lawsuits challenging the proper method of reimbursing delivery drivers' vehicle expenses.[347] The lawsuits frequently assert that a class, or collective group, of delivery drivers was paid less than the minimum wage because the drivers were not reimbursed at the standard mileage rate set by the U.S. Internal Revenue Service ("IRS").[348] In 2020, WHD issued an opinion letter finding that employers of delivery drivers need not reimburse mileage at the IRS standard reimbursement rate.[349] Rather, WHD concluded, the plain language of the regulations allows an employer to reasonably approximate an employee's actual expenses through other methods.[350] The letter also furnished guidance on the nature of WHD guidance itself.[351] Some courts had interpreted an entry in WHD's Field Operations Handbook ("FOH") as requiring employers to reimburse either the actual amount of expenses or the IRS rate, and the requestor described that entry as "the only additional federal guidance" on the topic beyond the regulations.[352] However, WHD, citing the FOH itself, stressed that the FOH is intended as a reference material for wage and hour investigators, it "does not establish a binding legal standard on the public[,] and 'is not a device for establishing interpretive

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the-commission-issues-a-rare-opinion-letter-interpreting-requirements-for-pattern-or-practice-claims/ [https://perma.cc/UMX8-6VW8].

[346] *See* Kathleen Caminiti, et al., *Delivery Drivers Do Not Need to Be Reimbursed at the IRS Mileage Rate, per DOL Opinion*, FISHER PHILLIPS (Sept. 2, 2020), https://www.fisherphillips.com/resources-alerts-delivery-drivers-do-not-need [https://perma.cc/V9D8-SAZN].

[347] *Id.*

[348] *Id.* Under the FLSA, employers are required to pay non-exempt employees at least the minimum wage for all hours worked and overtime pay for hours worked over 40 in a workweek. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-12 (Aug. 31, 2020), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_12_FLSA.pdf [https://perma.cc/DKF6-L8QE]. The cost an employee incurs for tools, uniforms or equipment required to perform the work cannot bring an employee's wages below the minimum wage. *Id.* Employers, therefore, must reimburse employees for business-related expenses to the extent that such expenses would bring wages below the minimum wage. *Id.*

[349] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-12 (Aug. 31, 2020), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_12_FLSA.pdf [https://perma.cc/DKF6-L8QE].

[350] *Id.*

[351] *Id.*

[352] *Id.*

policy.'"[353] The letter further clarified that the FOH stated two permissible methods, not the only two permissible methods, for calculating reimbursements.[354]

Ultimately, the IRS reimbursement opinion letter answered one pivotal question facing many employees and employers and clarified for courts and the public alike the nature of WHD guidance itself. Some wage and hour practitioners explained that the opinion letter's implications "extend far beyond litigation and will shape the reimbursement practices of employers, both of traditional delivery drivers and in other emerging delivery services."[355] This was especially so given that the opinion letter was issued in the midst of the COVID-19 pandemic, when deliveries of goods and services were on the rise as a result of quarantining and social distancing.[356]

F. Opinion Letters Help Ensure that Certain Programs are in Compliance with the Relevant Laws

Opinion letters have also enabled DOL to opine on whether certain programs comply with wage and hour laws.[357] There are a few specific programs and opinion letters that illuminate this particular benefit.

1. The SkillBridge Program Opinion Letters

In November of 2019, WHD and OFCCP both issued separate opinion letters on the U.S. Department of Defense's ("DOD") SkillBridge program.[358] SkillBridge is a DOD job training program that permits

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[353] *Field Operations Handbook*, U.S. DEP'T LAB. WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/field-operations-handbook [https://perma.cc/6H5U-EES9] (last accessed Mar. 17, 2021); *see also* Probert v. Family Centered Servs. of Alaska, Inc., 651 F.3d 1007, 1012 (9th Cir. 2011).

[354] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2020-12 (Aug. 31, 2020), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_12_FLSA.pdf [https://perma.cc/DKF6-L8QE].

[355] Caminiti, *supra* note 346.

[356] *Id.*

[357] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-14 (Nov. 7, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_11_07_14_FLSA.pdf [https://perma.cc/LX5K-MJP6].

[358] *Id.*; *see also* U.S. Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Opinion Letter on DoD Skillbridge Program (Nov. 8, 2019), *available at* https://www.dol.gov/agencies/ofccp/opinion-letters/dod-skillbridge [https://perma.cc/P5FT-MRKM].

service members of any rank to use their last 180 days of service to work and learn with a participating employer that best matches that applicant's job training and work experience.[359] The WHD opinion letter addressed the applicability of the FLSA, the Davis-Bacon Act ("DBA"), the SCA, and the Contract Work Hours and Safety Standards Act ("CWHSSA") to the program.[360] The opinion letter request was from a small business contractor specializing in general construction and construction management working on many federal construction projects, including at a major military installation.[361] The requestor sought clarity regarding whether active duty servicemembers who participate in job training with the business through the DOD's SkillBridge program would be subject to the FLSA, DBA, SCA, and CWHSSA.[362] After examining judicial opinions, the text and purpose of the statutes, the relevant regulations and WHD's FOH, and the possible consequences of applying the laws to the SkillBridge program (i.e., denying these servicemembers the opportunity to receive on-the-job training to prepare them for a career after they leave the military), WHD concluded that active duty servicemembers who participate in the SkillBridge program would not be subject to the relevant wage and hour laws.[363] In a news release, the WHD Administrator explained the opinion letter "[would] provide necessary clarity to businesses interested in participating in the SkillBridge program and ultimately benefit future transitioning service members and their families."[364] The opinion letter also set forth an important template for creating or modifying an unpaid internship program that complies with WHD's wage and hour laws.[365]

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[359] U.S. Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Opinion Letter on DoD Skillbridge Program (Nov. 8, 2019), *available at* https://www.dol.gov/agencies/ofccp/opinion-letters/dod-skillbridge [https://perma.cc/P5FT-MRKM].

[360] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-14 (Nov. 7, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_11_07_14_FLSA.pdf [https://perma.cc/LX5K-MJP6].

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *US Department of Labor Issues Opinion Letters to Enhance Military Service Members' Ability to Succeed in Civilian Workforce*, U.S. DEP'T LAB., https://www.dol.gov/newsroom/releases/whd/whd20191108 [https://perma.cc/HJ7A-M8CQ] (last visited Mar. 26, 2021).

[365] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-14 (Nov. 7, 2019), *available at*

The second SkillBridge opinion letter was issued by OFCCP and concluded that employer participation in the SkillBridge program is not by itself sufficient to render an employer as a contractor subject to OFCCP's jurisdiction.[366] The Director of the OFCCP explained that the opinion letter "[was] another step toward ensuring transparency and certainty to stakeholders and contractors about OFCCP's jurisdiction."[367]

In a press release after the SkillBridge opinion letters were issued, Congresswoman Elise Stefanik stated, "I am grateful to the Department of Labor for taking action on this important issue for servicemembers at Fort Drum who are in the process of transitioning to civilian life."[368] Representative Stefanik further noted that "North Country employers have told me they are eager to provide soldiers with on-the-job training and experience, but have remained on the sidelines due to legal uncertainty."[369] U.S. Senator Martha McSally issued a similar press release after the SkillBridge opinion letters were published and remarked, "[c]ompanies across the country now have the clarity they need to participate in the SkillBridge program that provides critical hands-on job training.[370] It's great to see DOL help solve the issue so that more companies can hire more veterans."[371]

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https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_11_07_14_FLSA.pdf [https://perma.cc/LX5K-MJP6].

[366] U.S. Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Opinion Letter on DoD Skillbridge Program (Nov. 8, 2019), *available at* https://www.dol.gov/agencies/ofccp/opinion-letters/dod-skillbridge [https://perma.cc/P5FT-MRKM].

[367] *US Department of Labor Issues Opinion Letters to Enhance Military Service Members' Ability to Succeed in Civilian Workforce*, U.S. DEP'T LAB., https://www.dol.gov/newsroom/releases/whd/whd20191108 [https://perma.cc/C4AL-R42S] (last visited Mar. 26, 2021).

[368] *Stefanik Delivers Much Needed Clarity to Job Training Program for Departing Service Members*, CONGRESSWOMAN ELISE STEFANIK (NOV. 12, 2019), https://stefanik.house.gov/media-center/press-releases/stefanik-delivers-much-needed-clarity-job-training-program-departing [https://perma.cc/GGZ3-LXES].

[369] *Id.*

[370] *McSally Helps Connect Servicemembers with Real World Jobs*, LEGISTORM (Nov. 9, 2019), https://www.legistorm.com/stormfeed/view_rss/1377679/member/3091.html [https://perma.cc/G7PZ-QSTY].

[371] *Id.*

2. Volunteer Programs

WHD opinion letters have also clarified when volunteer programs comply with wage and hour laws. One notable example is a WHD opinion letter issued in August of 2019 regarding the employment status of volunteer reserve deputies who perform paid extra duty work for third parties.[372] The requestor explained that the particular sheriff's office ran a volunteer program pursuant to state law whereby civic-minded individuals might volunteer to receive training as reserve deputies and serve, without compensation, as state-certified reserve officers.[373] The requestor further explained that a significant increase in demand for extra duty work from third parties in recent years had led the sheriff's association to offer extra duty work to volunteer reserve deputies at the same hourly rate offered to full-time deputies.[374] Importantly, the volunteer reserve deputies program had allowed the growing public safety demands of the community to be met.[375]

WHD concluded that volunteer reserve deputies who perform extra duty paid work for third parties did not lose their volunteer status.[376] Specifically, WHD concluded that reserve deputies who volunteered for the sheriff's office were not employees of either party for any of the activities.[377] WHD concluded, in the alternative, that even if a volunteer's opportunity were to be construed as compensation, such opportunity would be a "reasonable benefit" for volunteering and would not alter his or her volunteer status.[378] This opinion letter both increased the public's access to trained peace officers to help maintain order at large gatherings and preserved the ability of local law enforcement offices to maintain a reserve corps of peace officers without undue stress on their budgets.[379] The benefit of this clarity was made evident a few months later when a gunman who opened fire on a congregation in a Texas church was fatally shot by a volunteer security team member who was a former reserve

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[372] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2019-12 (Aug. 8, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_08_08_12_FLSA.pdf [https://perma.cc/E959-VAJB].

[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *See generally id.*

deputy sheriff.[380] The Attorney General of Texas observed at the time that the volunteer "was a reserve deputy [who] had significant training" because of that service and that the volunteer was "not just responsible for his actions, which ultimately saved the lives of maybe hundreds of people, but [he was] also responsible for training hundreds in that church."[381]

Another WHD opinion letter confirms that an employer may compensate an employee for participating in an optional community service program, which may consist of activities that either the employer or the employee selects.[382] That letter involved an employer that awarded a bonus to the employee group with the most community impact and gave the winning group's supervisor discretion to determine what amount of bonus, if any, to award to individual employees in the group.[383] WHD noted that the employer did not guarantee participating employees a bonus for their volunteer work and that the employees did not suffer adverse consequences in working conditions or employment if they did not participate in the program.[384] This opinion letter benefits many non-profit groups involved with charitable efforts by clarifying that employers may support their employees through philanthropic activities.[385]

3. Wellness and Health Programs

Opinion letters have also clarified the scope of employer wellness programs.[386] For instance, WHD opined that an employer was not required to compensate employees who voluntarily participated in biometric screenings, wellness activities, and benefits fairs.[387] The screenings and

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[380] *See* Amir Vera et al., *Texas Church Security Member Who Shot Gunman Was Trained Reserve Deputy*, CNN (Dec. 30, 2019), https://www.kten.com/story/41505242/official-texas-church-security-member-who-shot-gunman-was-trained-reserve-deputy [https://perma.cc/BX5H-FMKR].

[381] *Id.*

[382] *See Final Rulings and Opinion Letters*, *supra* note 6.

[383] *Id.*

[384] *Id.*

[385] Suzanne Newcomb, *Do I Have to Pay Employees to Attend Company-Sponsored Volunteer Events?*, SMITH AMUNDSEN LAB. & EMP. LAW UPDATE (Apr. 30, 2019), https://laborandemploymentlawupdate.com/2019/04/30/do-i-have-to-pay-employees-to-attend-company-sponsored-volunteer-events/ [https://perma.cc/NQF6-S6CE].

[386] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-20 (Aug. 28, 2018), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_08_28_20_FLSA.pdf [https://perma.cc/2UU4-5PV9].

[387] *Id.*

activities were voluntary and unrelated to the employees' jobs.[388] The screenings tested an employee's cholesterol levels, blood pressure, and nicotine uses; participating in them could decrease an employee's health-insurance deductibles.[389] The employer also offered wellness activities such as health classes, Weight Watchers programs, and use of an employer-provided gym.[390] As with the screenings, participating in these activities could decrease the employee's health insurance premiums.[391] WHD concluded that participating in these voluntary activities predominantly benefited the employee and thus did not constitute compensable worktime under the FLSA.[392] Moreover, WHD concluded that the activities were noncompensable "off duty time" under the applicable regulations because the employer relieved employees of all job duties when it allowed them to participate.[393]

4. Work Opportunity Tax Credit Program

Other federal agencies have issued opinion letters addressing whether certain programs comply with the law.[394] Significantly, the EEOC issued an opinion letter clarifying that employers can use the Work Opportunity Tax Credit ("WOTC") for hiring individuals with disabilities, veterans, and other underrepresented workers without violating federal anti-discrimination laws.[395] The WOTC program is administered by the IRS and its purpose is to encourage employers to hire and train people who are experiencing significant challenges that are often linked to unemployment by offering employers a tax credit.[396] There are nineteen targeted groups under the WOTC program, including veterans who have a service-connected disability, individuals who have been convicted of a felony, and individuals whose families receive benefits from the Temporary

[388] *Id.*

[389] *Id.*

[390] *Id.*

[391] *Id.*

[392] *Id.*

[393] *Id.* (citing 29 C.F.R. § 785.16).

[394] *Formal Opinion Letters*, *supra* note 5.

[395] U.S. Equal Emp. Opportunity Comm'n, Opinion Letter on Federal Work Opportunity Tax Credit Form 8850 (Apr. 9, 2020), *available at* https://www.eeoc.gov/laws/guidance/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850 [https://perma.cc/UHN7-R24J].

[396] *Id.*

Assistance for Needy Families or Supplemental Nutrition Assistance Program programs.[397]

In the opinion letter, the EEOC explained that an employer's proper use of IRS Form 8850 to apply for WOTC did not violate the laws enforced by the EEOC.[398] This tax credit is underutilized because many employers do not understand how it works.[399] To qualify for the WOTC tax credit, the law requires employers to obtain official confirmation of job applicants' WOTC status before the employer extends conditional job offer of employment.[400] This seems counter-intuitive to HR professionals who have been told by the EEOC, for example, not to inquire about an applicant's medical status until after extending a conditional job offer.[401] Because of this tension, employers shied away from these tax credits.[402] The EEOC's opinion letter provides clarity about the requirements of the WOTC, and the consistency of those requirements with federal anti-discrimination laws.[403] As such, the opinion letter was hailed as "a victory for employers who previously shied away from taking advantage of the WOTC process due to fears of discrimination claims."[404]

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[397] *Id.*; LaKisha Kinsey-Sallis, *EEOC Supports Employers' Use of the Work Opportunity Tax Credit*, FISHER PHILLIPS (Apr. 30, 2020), https://www.fisherphillips.com/resources-alerts-eeoc-supports-employers-use-of-the-work [https://perma.cc/LM7B-NKVM].

[398] U.S. Equal Emp. Opportunity Comm'n, Opinion Letter on Federal Work Opportunity Tax Credit Form 8850 (Apr. 9, 2020), *available at* https://www.eeoc.gov/laws/guidance/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850 [https://perma.cc/UHN7-R24J].

[399] *Meeting of April 29, 2020* (U.S. Equal Emp. Opportunity Comm'n) (transcript available at https://www.eeoc.gov/meetings/meeting-april-29-2020/transcript [https://perma.cc/Y4SR-QD99]) (statement of Janet Dhillon, Commission Chair).

[400] U.S. Equal Emp. Opportunity Comm'n, Opinion Letter on Federal Work Opportunity Tax Credit Form 8850 (Apr. 9, 2020), *available at* https://www.eeoc.gov/laws/guidance/commission-opinion-letter-federal-work-opportunity-tax-credit-form-8850 [https://perma.cc/UHN7-R24J].

[401] *Meeting of April 29, 2020*, *supra* note 399.

[402] Kinsey-Sallis, *supra* note 397.

[403] *Id.*

[404] *Id.*

G. Opinion Letters Have Helped Clarify the Scope and Breadth of Religious Liberty

A number of opinion letters issued by both WHD and OFCCP have helped examine and clarify religious exemptions in recent years.[405] A December 2018 WHD opinion letter concluded that members of a religious community who provided services that benefited the community were not employees subject to the FLSA's minimum wage and overtime requirements.[406] Specifically, the opinion letter concluded that the members were not subject to the FLSA based on the ministerial exception and because the members did not expect compensation for the work performed.[407] The opinion letter responded to a request from a religious organization that required members to give up all material possessions and to live in a communal setting.[408] Members worked on behalf of the community and, in some cases, with nonprofit ventures that generated income for the organization.[409] Members were not paid for their services but did receive food, shelter, medical care, and funds for personal subsistence.[410] WHD concluded that the work described by the organization was not compensable work under the FLSA.[411] Because members of the community did not expect to receive compensation for their services, they were volunteers rather than employees for purposes of

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[405] *See, e.g.*, U.S. Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Opinion Letter on Legal Protections for Religious Liberty in the Workplace (Jan. 8, 2021), *available at* https://www.dol.gov/agencies/ofccp/opinion-letters/ReligiousLiberty [https://perma.cc/BMX7-F6PR]; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-2 (Jan. 8, 2021), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_02_FLSA.pdf [https://perma.cc/G2SE-2VW7]; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-29 (Dec. 21, 2018), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_12_21_29_FLSA.pdf [https://perma.cc/LH6Q-QHQZ].

[406] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-29 (Dec. 21, 2018), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_12_21_29_FLSA.pdf [https://perma.cc/LH6Q-QHQZ] (citing Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590 (1944)).

[407] *Id.*

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] *Id.* (citing *Tenn. Coal, Iron & R.R. Co.*, 321 U.S. 590).

the FLSA.[412] WHD noted that there was no evidence of coercion, and support provided by the community to members was based on need, not relative contributions.[413] Moreover, WHD compared the organization to a monastic community, therefore making it difficult to distinguish its members from monks and nuns, who would clearly qualify as church ministers for purposes of the ministerial exception implicit in the First Amendment's Free Exercise and Establishment Clauses.[414] WHD further concluded that the ministerial exception even extended to work performed at the organization's income-producing non-profit ventures.[415]

In a subsequent religion-based opinion letter issued on January 8, 2021, WHD reinforced that the ministerial exception applies to the FLSA's wage and hour requirements.[416] Issued shortly after the Supreme Court had issued another landmark opinion involving the ministerial exception,[417] the opinion letter addressed a request from a church-controlled daycare and preschool.[418] The school asked whether its teachers were exempt from the FLSA's wage and hour requirements and asked WHD to assume the teachers were ministers within the scope of the exception.[419] After conducting a thorough review of the judicial opinions, WHD concluded that the FLSA was not outside the reach of the ministerial exception and that teachers who came within the exception could be paid "on a salary basis that would not otherwise comport with the FLSA."[420] WHD emphasized that whether the teachers were ministers depended on their specific duties, not the employer's designation.[421] WHD also reiterated the Supreme Court's holding that an employee need not be ordained or have a particular title to qualify because "there is no checklist" for determining whether an employee qualifies as a "minister" for

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[412] *Id.*

[413] *Id.* (citing Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290 (1985)).

[414] *Id.* (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012)).

[415] *Id.* (citing Schleicher v. Salvation Army, 518 F.3d 472 (7th Cir. 2010)).

[416] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-2 (Jan. 8, 2021), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_02_FLSA.pdf [https://perma.cc/G2SE-2VW7].

[417] *Id.* (citing Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020)).

[418] *Id.*

[419] *Id.*

[420] *Id.*

[421] *Id.*

purposes of the exception.[422] As had the Supreme Court, WHD explained that what matters most is "the employee's role in carrying out the employer's mission and conveying the employer's message."[423]

These WHD opinion letters performed several important functions for religious entities, their volunteers, and their employees. First, they clarified when work performed for those entities constitutes volunteer time or compensable working hours.[424] Second, they confirmed that the FLSA, like other statutes, is subject to the ministerial exception.[425] Third, they affirmed that a government may not, and that WHD will not, force a religious community or employer to "vitiat[e] its central religious tenets" as a condition of participating in the marketplace.[426]

Other federal agencies have issued opinion letters to provide clarity regarding religious protections, notably OFCCP. In 2021, OFCCP issued an opinion letter entitled "Legal Protections for Religious Liberty in the Workplace" which addressed six possible religious discrimination scenarios.[427] According to the opinion letter, the organization requesting was concerned about its Jewish employees and sought guidance from OFCCP regarding the six scenarios due to its concern "that employees in the technology, education, public, and other sectors may face discrimination at work based on faith-related activities and beliefs."[428]

H. Opinion Letters Benefit Both Employers and Employees

Critics often argue that opinion letters only benefit employers.[429] However, this criticism is inaccurate. As a general matter, the entire

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[422] *Id.* (quoting *Morrissey-Berru*, 140 S. Ct. at 2060).

[423] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-2 (Jan. 8, 2021), *available at* https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2021_01_08_02_FLSA.pdf [https://perma.cc/G2SE-2VW7].

[424] *Id.*

[425] *See id.*

[426] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-29 (Dec. 21, 2018), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_12_21_29_FLSA.pdf [https://perma.cc/LH6Q-QHQZ].

[427] U.S. Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Opinion Letter on Legal Protections for Religious Liberty in the Workplace (Jan. 8, 2021), *available at* https://www.dol.gov/agencies/ofccp/opinion-letters/ReligiousLiberty [https://perma.cc/BMX7-F6PR].

[428] *Id.*

[429] *See* Tornone, *supra* note 170 (noting that DOL officials from the Obama Administration and employee groups have alleged that the opinion letter process favored employers).

regulated community benefits from opinion letters. Opinion letters may be sought by anyone interested, and for decades they have benefitted employees, employers, unions, businesses, trade groups, advocacy groups, and many others.[430] In 2017, the then-Labor Secretary stated that opinion letters "benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes."[431] Federal agencies regularly receive and respond to opinion letter requests from employees.[432] In many cases, employees will submit an opinion letter request which is actually a complaint which will then be referred to the appropriate local office for investigation and resolution.[433]

A substantial number of opinion letters reach employee-friendly conclusions thereby providing employees with a sword with which to challenge employer policies and practices.[434] For instance, one WHD opinion letter responded to the spouse of an employee who had a child with special needs; WHD advised the requestor that the time an employee spent attending a Committee on Special Education meeting to discuss the child's individualized education program would qualify for FMLA protection.[435] In another opinion letter favorable towards employees, WHD found that a dental plan that met DOL's definition of a "group health plan" had to be continued during FMLA leave.[436] In this case, the employer paid one-hundred percent of the insurance premiums and employed a plan administrator to assist employees in handling disputed claims.[437] The employer could grant exceptions for claims denied by the plan administrator.[438] WHD determined that the dental plan met the

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[430] John E. Thompson, *Opinion Letters Are Good for Everybody*, *supra* note 251.

[431] *US Department of Labor Reinstates Wage and Hour Opinion Letters*, *supra* note 98.

[432] *See id.*

[433] *See Request an Opinion Letter*, *supra* note 9.

[434] *See* John E. Thompson, *Opinion Letters Are Good for Everybody*, *supra* note 251.

[435] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2019-2-A (Aug. 8, 2019), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_08_08_2A_FMLA.pdf [https://perma.cc/CBG8-EH99].

[436] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2006-6-A (Oct. 5, 2006), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2006_10_05_6A_FMLA.pdf [https://perma.cc/E9EK-VWPZ].

[437] *Id.*

[438] *Id.*

definition of group health plan and did not fall within the regulatory framework excluding some health programs from the definition of group health plan.[439] As such, WHD concluded that that the employer was required to continue its dental coverage during FMLA-covered leave periods.[440]

In another employee-friendly opinion letter, WHD addressed whether an employee who donated an organ could qualify for FMLA leave, even when the donor was in good health before the donation and chose to donate the organ solely to improve someone else's health.[441] WHD concluded that organ donation surgery was a "serious health condition" under the FMLA so long as the individual required overnight hospitalization or post-surgery recovery.[442] One management-side employment article highlighted how employee-favorable this conclusion was by explaining an important employer takeaway: "beyond obtaining the appropriate documentation confirming that an employee is indeed undergoing surgery so that s/he can donate an organ, don't think too long or hard about whether to approve your employee's request for leave. Just do it."[443]

The American Association of Kidney Patients lauded the opinion letter as "a massive victory for kidney patients due to a lack of certainty that has surrounded the applicability of FMLA protections to living organ donation."[444] The organization's president explained that

> [T]his FMLA clarification will be immensely helpful to the kidney stakeholder community and our united effort to encourage more living organ donations for the tens of thousands of Americans who await a life-saving transplant and the opportunity to once again renew the

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[439] *Id.*

[440] *Id.*

[441] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2018-2-A (Aug. 28, 2018), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2018_08_28_2A_FMLA.pdf [https://perma.cc/8GA5-7F4B].

[442] *Id.*

[443] Aaron R. Gelb, *US DOL Issues FMLA Opinion Letters Clarifying No Fault Attendance Policy Rules and…Organ Donation*, EMP. DEF. REP. (Sept. 7, 2018), https://employerdefensereport.com/2018/09/07/us-dol-issues-fmla-opinion-letters-clarifying-no-fault-attendance-policy-rules-andorgan-donation/ [https://perma.cc/R564-Y3ZH].

[444] *Labor Secretary Acosta Earns Patient Praise for Organ Donor Job Protections*, AM. ASS'N KIDNEY PATIENTS (Aug. 3, 2018), https://aakp.org/labor-secretary-acosta-earns-patient-praise-for-organ-donor-job-protections/ [https://perma.cc/TL3B-WAU8].

> pursuit of their aspirations, including careers marked by full-time work.[445]

The American Kidney Fund also praised the opinion letter and described it as "a game-changer for many Americans who may have considered donating a kidney, but who could not take the time off for fear of losing their jobs."[446] WHD has also found in favor of employees regarding FLSA exemptions.[447] In doing so, opinion letters provide employees with a sword against their employers.

V. THE CONTINUED VALUE OF WITHDRAWN OPINION LETTERS

The value of opinion letters is not limited to those that state an agency's current view. Opponents of opinion letters suggest that withdrawn opinion letters are of no value, especially the more controversial opinion letters such as the gig economy and sleeper berth opinion letters that were withdrawn in the early days of the Biden Administration.[448] However, even withdrawn opinion letters are highly valuable. As an initial matter, withdrawn opinion letters provide a liability defense until the date they are withdrawn.[449] Although withdrawn letters may not be cited as an official statement of current WHD policy entitled to heightened deference, they remain available as a reasoned analysis that at least at one time had persuaded the officers charged with enforcing the law that it was correct.[450] Further, the reasoned analyses set forth in opinion letters are at least on par with a law review article or an

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[445] *Id.*

[446] *Great News for Living Organ Donors: U.S. Department of Labor Says Organ Donors are Protected Under FMLA*, AM. KIDNEY FUND, (Aug. 29, 2018) https://www.kidneyfund.org/news/news-releases/us-department-of-labor-says-organ-donors-are-protected-under-fmla.html [https://perma.cc/W7HY-H7DY].

[447] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2006-42 (Oct. 26, 2006), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2006_10_26_42_FLSA.pdf [https://perma.cc/JC6F-MQLF] (concluding that IT helpdesk employees do not qualify for the FLSA's computer or professional exemption).

[448] *See, e.g.*, Rebecca Smith, *USDOL Opinion Letter on Gig Work: A Narrow, Faulty Ruling with No Precedential Effect*, NAT'L EMP. L. PROJECT (May 15, 2019), https://www.nelp.org/publication/usdol-opinion-letter-gig-work-narrow-faulty-ruling-no-precedential-effect/ [https://perma.cc/YT2F-AUDH].

[449] Anderson & Higdon, *supra* note 2; *see also* Steingart, *supra* note 122.

[450] Jordan Call et al., *Department of Labor Withdraws Gig Economy Opinion Letter that Supported Independent Contractor Classification*, JD SUPRA, (Feb. 23, 2021), https://www.jdsupra.com/legalnews/department-of-labor-withdraws-gig-2161674/ [https://perma.cc/YUF7-AW6H]; *see also* Steingart, *supra* note 122.

unpublished judicial decision.[451] Perhaps, in many ways, a withdrawn opinion letter becomes the equivalent of a dissenting opinion in a judicial decision by laying out the counterarguments to assist the court or practitioner of the alternative path.[452] Those revisiting the question in the future can assess whether the initial interpretation was correct and/or whether changed circumstances warranted changing that interpretation.

An opinion letter that has been withdrawn without being superseded creates a vacuum and – in order to fill this void – the withdrawn opinion letter provides meaningful analysis supported by relevant citations.[453] Practitioners, the public, and the courts must determine how the law is applied whether an agency has articulated a position on a question or not, and a withdrawn opinion letter provides meaningful analysis supported by relevant citations. Likewise, a withdrawn opinion letter places the burden on the repealing party (i.e., the specific Administration that rescinds any opinion letter) to show why their position is correct and an improvement of the prior opinion previously relied on by others.[454] Equally important, a withdrawn opinion letter places the onus on the repealing party to justify why the withdrawn position is wrong.[455]

Furthermore, the impact of an opinion letter may be felt long after it is withdrawn if the letter formed the basis of a judicial opinion.[456] For example, the independent contractor roadmap outlined in *Franze v. Bimbo Foods Bakeries Distribution, LLC* heavily relied on the now-withdrawn gig-economy opinion letter for its analysis of whether the workers at issue were employees or independent contractors.[457] Because it did so, that analysis is now a precedent of the Second Circuit with which other parties and other courts can look to for a meaningful analytical framework.[458]

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[451] DeCamp, *supra* note 71.

[452] *Id.*

[453] *Id.*

[454] *Id.*

[455] *Id.*

[456] *Id.*

[457] Franze v. Bimbo Foods Bakeries Distrib., LLC, No. 17-CV-3556(NSR), 2019 WL 2866168, at *6 (S.D.N.Y. July 2, 2019), *aff'd sub nom.* Franze v. Bimbo Bakeries USA, Inc., 826 F. App'x 74 (2d Cir. 2020).

[458] *See, e.g.*, Stack v. Karr-Barth Assocs., Inc., No. 18-CV-10371 (VEC), 2021 WL 1063389, at *9 n.15 (S.D.N.Y. Mar. 18, 2021) (citing *Franze* in support of court's conclusion that plaintiff was an independent contractor and thus not entitled to protection under a number of laws, including the ADA and FMLA).

VI. STRENGTHENING OPINION LETTERS: SOME SUGGESTIONS

There are several ways to improve opinion letters. This Part also discusses why state labor and employment agencies should utilize opinion letters moving forward. This Part offers some useful suggestions on how to improve opinion letters and the process for issuing them in the future.

A. Model Based on Past Successful Opinion Letter Programs

Opinion letters should be modeled after federal court decisions by laying out the factual background, applicable law, and analysis. Agencies issuing opinion letters should focus on ensuring that the opinion letters are as convincing as possible, both to strengthen their ability to persuade the public and to ensure that they receive the highest degree of deference from courts if the issue is litigated.[459] Opinion letters from WHD during the Trump Administration tended to do this more than had those issued by earlier administrations, which often included only sketches of underlying facts and the reasoning WHD had used to reach its conclusion.[460] Persuasive opinion letters also give stakeholders the confidence that the opinion letters will not likely be summarily withdrawn at a later date because, as noted, it places the onus on the "withdrawer" to justify why it is being withdrawn.[461]

Agencies should also follow WHD's policy of requiring opinion letter requestors to represent that the opinion letter is not being sought by any party that the agency is currently investigating or for use in any ongoing litigation. This measure will help ensure that agency resources are being properly utilized. Agencies should not create incentives for parties to seek agency endorsements of their litigation or investigation position from an agency.

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[459] *See* Parker v. NutriSystem, Inc., 620 F.3d 274, 282 (3d Cir. 2010) (declining to afford deference to opinion letter where its analysis of statutory provision was "insufficiently 'thorough' to persuade [the court]").

[460] Justin R. Barnes & Jeffrey W. Brecher, *Trump DOL Rides Out on Wave of Nine Opinion Letters*, NAT'L LAW REV. (Jan. 22, 2021), https://www.natlawreview.com/article/trump-dol-rides-out-wave-nine-opinion-letters [https://perma.cc/X3EU-9VPZ].

[461] Mark Tabakman, *Biden DOL Withdrawal of Trump DOL Opinion Letters Signals Major Pendulum Swing Towards Employees*, JD SUPRA, (Mar. 4, 2021), https://www.jdsupra.com/legalnews/biden-dol-withdrawal-of-trump-dol-4660175/ [https://perma.cc/53HM-DLU3].

B. Opinion Letters Should be Used to Preview Rules

WHD has used opinion letters in recent years to preview proposed rules, most notably the opinion letters related to tipped occupations and independent contractor status. In the independent contractor notice of proposed rulemaking, the Trump DOL discussed the 2019 gig economy opinion letter and stated that it had helped the Department conclude "that stakeholders would benefit from clarification" for determining whether a worker is an employee or independent contractor under the FLSA.[462] In the "Need for Rulemaking" section, DOL explained that the independent contractor opinion letters dating back to 1954 directly led the Department to conclude that a generally applicable regulation addressing the question of who is an independent contractor versus an employee under the FLSA is necessary.[463]

By issuing an opinion letter before proposing a rule, stakeholders are given a meaningful opportunity to weigh the pros and cons of the specific position taken in a given opinion letter. Likewise, the agency is able to see the advantages and disadvantages before going through the time-intensive and expensive rulemaking process. In many cases, armed with the benefits of previewing the rule, the agency may conclude that rulemaking is not even necessary.

C. State Labor and Employment Agencies Should Issue Opinion Letters

These benefits also accrue to opinion letters issued by state agencies. This is particularly true where state laws or judicial interpretations vary from their federal counterparts. Interestingly, the seemingly partisan divide regarding opinion letters at the federal level does not extend to the state level.[464] In fact, a number of so-called "blue states" use opinion letters.[465] California's Division of Labor Standards Enforcement has issued opinion letters since at least 1983.[466] In recent decades, California has been unwaveringly Democratic: Democrats have had a veto-proof

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[462] Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600-01 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pt. 780; 29 C.F.R. pt. 788; 29 C.F.R. pt. 795).

[463] *Id.*

[464] *See supra* Part III.C (discussing state agency opinion letters).

[465] *Id.*

[466] *Opinion Letters: By Date*, CAL. DEP'T OF INDUS. RELS., https://www.dir.ca.gov/dlse/OpinionLetters-byDate.htm [https://perma.cc/4KAK-ECZ7] (last visited Sept. 3, 2021).

supermajority in both chambers of the state legislature since 2018 and Democrats control every statewide office.[467] The chief of California's Division of Labor Standards Enforcement division – like the director of the Department of Industrial Relations to which the chief reports – is appointed by the governor.[468] The Supreme Court of California has recognized that the California Division of Labor Standards Enforcement's opinion letters, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[469] And, indeed, the entitlement of employers, employees, the public at large, and the courts to the benefits of opinion letters is independent of which party controls a state's levels of power.

Some state courts have openly encouraged state agencies to use opinion letters in order to help the regulated community.[470] Most notably, in 2021, the New Jersey Supreme Court issued a decision in which it suggested that the Department of Labor and Workforce Development "would further the Legislature's intent . . . if it instituted a procedure by which an employer in defendant's position could obtain an opinion letter or other ruling clarifying its obligations under the [state's wage and hour] overtime provisions."[471]

State agencies should look to federal opinion letters regardless of whether the particular state agency has its own an opinion letter program. This is especially important since many states have long looked to and relied on federal opinion letters and leverage the federal authorities to the extent state law incorporates or generally follows federal law.[472] A recent example illustrating the benefits of state agencies using federal opinion letters for guidance was when the Virginia Department of Veteran Services looked to DOL's SkillBridge opinion letters for guidance

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[467] Morgan Gstalter, *Dems Gain Veto-Proof Supermajority in California Legislature*, THE HILL (Nov. 12, 2018), https://thehill.com/homenews/state-watch/416351-dems-gain-veto-proof-supermajority-in-california-state-senate-after [https://perma.cc/XX6T-X2W5].

[468] CAL LAB. CODE §§ 51, 79 (West).

[469] Brinker Rest. Corp. v. Super. Ct., 273 P.3d 513, 529 n.11 (Cal. 2012).

[470] *See, e.g.*, Branch v. Cream-O-Land Dairy, 243 A.3d 633, 636–37 (N.J. 2021).

[471] *Id.*

[472] *See, e.g.*, Robert R. Roginson, Letter from California's Chief Counsel, Division of Labor Standards Enforcement (Aug. 19, 2009), https://www.stoelrivesworldofemployment.com/wp-content/uploads/sites/425/2009/08/2009-08-191.pdf [https://perma.cc/245T-X6GK] (relying on federal DOL opinion letters dating back to the 1970s to support conclusion regarding the salary basis test under the FLSA).

regarding the state's SkillBridge program for transitioning servicemembers who are separating or retiring from the military.[473] More specifically, employers interested in participating in the program are required to state that the internship adheres to DOL's SkillBridge opinion letters and a link to one of the SkillBridge opinion letters is provided on the website.[474]

VII. CONCLUSION

Employment and labor laws are nuanced, technical, and complex. These laws and related regulations will surely continue to be challenging for employers and workers alike for the foreseeable future. As such, the growing demand for meaningful guidance is not likely to abate. Current and future presidential administrations, agencies, and state and local governments should welcome any practice that is designed to provide clarity on complicated laws like the FLSA and foster broad compliance therewith; opinion letters have always been highly regarded in fostering clarity and compliance. The unfortunate alternative is continued uncertainty, ambiguity, vagueness, disputes, and needless investigations and litigation.

This Article has argued that opinion letters have provided an invaluable resource since their inception decades ago. This Article has contended that the many benefits of opinion letters easily outweigh any burden on agency resources or any other the other criticisms of opinion letters. Because of these benefits, federal and state agencies should strive to maintain or implement a robust opinion letter program.

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[473] *Hire Vets Now Fellowship Employer Application*, VA. DEP'T VETERANS SERVS., https://www.dvs.virginia.gov/education-employment/virginia-transition-assistance-program-vtap/e-app [https://perma.cc/Q8ZS-CCL8] (last visited Sept. 3, 2021); U.S. Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Opinion Letter on DoD Skillbridge Program (Nov. 8, 2019), *available at* https://www.dol.gov/agencies/ofccp/opinion-letters/dod-skillbridge [https://perma.cc/P5FT-MRKM].

[474] *Hire Vets Now Fellowship Employer Application*, *supra* note 473.