

LEGAL UPDATE

DOL Issues Opinion Letter on Per-Project Pay and Salary Basis Test

On Jan. 7, 2020, the U.S. Department of Labor (DOL) issued [FLSA 2020-2](#), an opinion letter that answers whether per-project payments satisfy the salary basis test for an exemption under the Fair Labor Standards Act (FLSA).

The Salary or Fee Basis Test and Per-Project Pay

Employees must be paid on a salary or fee basis to qualify for an administrative or professional minimum wage and overtime exemption under the FLSA. To satisfy the salary basis test, an employee must be paid a predetermined and fixed salary that is not subject to reduction due to the quality or quantity of the employee's work. To satisfy the fee basis test, an employee must receive "an agreed sum for a single job regardless of the time required for its completion."

In its letter, the DOL asserts that per-project payments can satisfy the fee basis test if the payments do not vary from pay period to pay period, based on the number of hours worked or the quality of the work performed.

Changes in Project Payment Agreements

The DOL letter also explains that occasionally, employers may increase or reduce an exempt employee's project compensation if the changes in pay are tied to changes in the scope of the project (as long as the changes preserve the requirement for fixed and predetermined payments).

However, the DOL also warns that an employee's exempt status may be undermined if contract or project revisions are so frequent that:

- ☒ "The employee's biweekly compensation for a certain project is rarely the same from pay period to pay period;" and
- ☒ "The circumstances suggest the amount of the payment is, in fact, actually based on the quantity or quality of work performed."

Provided to you by [Cowden Associates, Inc.](#)

Next Steps for Employers

Opinion letters provide the DOL's official opinion on how labor and employment laws apply in specific situations.

Employers that rely on opinion letters may be able to establish a "good faith defense" under the law. As a result, employers that compensate exempt employees on a per-project structure should:

- Become familiar with this DOL guidance; and
- Review their payment structures to ensure compliance with the FLSA's salary basis requirements.

"Employers may increase or reduce an exempt employee's project compensation if the changes are tied to changes in the scope of the project."