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Opinions Do Count

Especially when they are issued by the Department of Labor

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Statutes and regulations cannot possibly provide guidance for every situation. As a result, any agency charged with enforcing a particular statute, such as the New Jersey Department of Labor and Workforce Development, must also interpret the law. Agency interpretations range from the informal, where an investigator will give his or her "opinion" (verbally) on whether a certain course of conduct is legal, to the formal, where the agency issues an Opinion Letter discussing how the law applies to the facts set forth by the party requesting the letter.

These letters are often given deference by state and federal courts and allow an employer the benefit of a safe harbor. Even if a court determines that the agency "interpretation" is incorrect or, indeed, illegal, the employer will escape liability for all preceding conduct as long as the employer acted consistently within the parameters of the letter. Moreover, statutes themselves often contain "safe harbor" provisions, which give immunity to an otherwise offending employer who relies upon an interpretation or enforcement position of a given agency. Both the Fair Labor Standards Act and New Jersey Wage Hour Law contain such provisions (*See* 29 C.F.R. §790.13; N.J. Stat. § 34:11-56a25.2).

However, there is one caveat: Agency interpretations are only relevant or persuasive when the statute or regulation is vague or unclear. There, the agency performs the role of a gap filler by interpreting the statute, publishing that interpretation and clarifying rights and obligations. If the regulation is clear, however, no interpretation is warranted. For example, the New Jersey Wage and Hour Law (NJWHL) sets the state minimum wage at $7.25 per hour. Courts would not defer to an agency interpretation placing the minimum wage at less than $7.25 per hour. The vagueness of a statutory provision allows a court to adopt the interpretation of the agency charged with enforcing and interpreting the statute at issue.

This runs counter to the basic principle that cases and statutes define the law. When agency Opinion Letters are either uncovered or requested, these documents, often only one or two pages, can be just as persuasive to a court that is ruling on a specific controversy.

Two decisions highlight this point. In November 2011, the Appellate Division, in *Anderson v. Phoenix Health Care* (Docket No. A-2607-10T2 Nov. 16, 2011), affirmed summary judgment in a case where the regulation might have been considered "clear," but had been interpreted by the Department of Labor (DOL) for 40 years in a different manner. *Anderson* aptly illustrates that DOL Opinion Letters can be a powerful, and ultimately decisive, tool for defending wage and hour lawsuits.

In *Anderson*, registered nurses who were paid on an hourly basis brought a class action lawsuit alleging that they were denied overtime in violation of the NJWHL. The plaintiffs conceded that they performed the professional work required to be exempt from overtime, but claimed that their hourly payment removed them from the exemption. The regulations provided an exemption for "professionals," such as registered nurses, who were paid on a "salary or fee basis." However, the regulations were otherwise silent as to whether "professionals" fell within the exemption if they were paid hourly. Similarly, the New Jersey courts never addressed this issue. Despite this dearth of case law and statutory authority, the Superior Court determined based on two DOL Opinion Letters that registered nurses were exempt from overtime as a matter of law regardless of whether they are paid by the hour or on a salary. The Appellate Division affirmed this decision, in which the damages exceeded $400,000.

The Appellate Division based its decision on the same two Opinion Letters. The first, issued in 1975, stated "the fact that the employee is paid on an hourly basis would not cancel this exemption if the

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employee is receiving at least the minimum weekly amount provided in our regulations for the week." The second Opinion Letter, *issued 33 years later*, affirmed the earlier pronouncement and stated that "bonafide professionals, including registered nurses, who meet all other criteria contained in this regulation and whose weekly gross compensation does not fall below $400.00 per week (regardless of salary/fee/hourly rate) may qualify for this exemption." The second Opinion Letter explicitly recognized that "this enforcement policy has been consistently administered by the New Jersey Division of Wage and Hour Compliance for the past forty years."

The Appellate Division found that "this well-established interpretation" was entitled to deference, and held that registered nurses would not lose the overtime exemption because they were paid hourly, rather than by a salary. This holding is notable since it is contrary to the established interpretation of the Fair Labor Standards Act, whose exemption regulations New Jersey adopted in September 2011. Moreover, a strong argument could be made that the New Jersey legislature did not intend the NJWHL's "professional" exemption to apply to hourly employees as evidenced by the language of the regulation. In particular, the NJWHL seemingly limits the exemption to an individual "[w]ho is compensated…on a salary or fee basis…" N.J.A.C. 12:56-7.3. In the end, however, the Appellate Division noted that "if there is to be any change [in the interpretation of the professional exemption], it must come either through an amendment of the applicable regulation or the legislative process."

The Appellate Division's decision in *Anderson* was consistent with the manner in which New Jersey courts have considered Opinion Letters, or interpretative guidance, from state agencies. Specifically, our courts have made clear that, "[w]hen interpreting a statute or regulation that an agency is charged with enforcing, we give substantial deference to the agency's interpretation which 'will prevail provided it is not plainly unreasonable.'" *In re Raymour and Flanigan Furniture*, 405 N.J. Super. 367, 376 (App. Div. 2009). *See also Lourdes Medical Center v. Board of Review*, 197 N.J. 339, 361 (2009) (stating that substantial deference is given to an agency interpretation of the statute it is charged with enforcing, especially when the agency construes the "express and implied powers of a statute for the purpose of carrying out legislative intent").

Federal courts apply the same doctrine. In this regard, the District of New Jersey has given deference to Opinion Letters authored by the United States Department of Labor (USDOL). In *United Transportation Union Local 759 v. Orange Newark Elizabeth Bus*, 111 F.Supp.2d 514 (2000), the District of New Jersey dismissed a collective action brought on behalf of bus drivers who claimed failure to pay overtime in violation of the Fair Labor Standards Act (FLSA). The company maintained that the drivers were exempt from overtime under the motor carrier exemption of the FLSA, 29 U.S.C. §213(b)(1). To qualify for the motor carrier exemption, employees must perform safety-related functions, must work in interstate commerce and must be employed by a "motor carrier."

In *Local 759*, the plaintiff drivers conceded that they performed safety functions and there was no dispute that Orange Newark Elizabeth Bus Company was a "motor carrier." The issue hinged on whether the drivers were employed in interstate commerce. The undisputed facts showed that the drivers never left New Jersey. But a passenger could use the same ticket for an intrastate trip (e.g., East Orange to Newark Penn Station) and then an interstate trip (Newark to New York City). In a case where the agreed-upon damages exceeded $750,000, the company moved for summary judgment, relying solely upon a 1999 USDOL Opinion Letter holding that through-ticketing arrangements placed the drivers in interstate commerce. The court stated that the interpretation of the FLSA by the DOL was "entitled to great deference," and dismissed the lawsuit.

Where case law and statutory precedent does not exist, or is not specifically applicable, counsel should first find relevant Opinion Letters and, if necessary, secure an Opinion Letter from a state department of labor. Although the USDOL has now stopped issuing Opinion Letters, state departments of labor continue to do so. Counsel should prepare a short statement of facts, followed by a request that the agency interpret a particular statute or regulation's applicability to those facts. Counsel is also free to suggest an "appropriate" interpretation, but should not do so in a heavy-handed manner. This practice would not only provide a potential defense to a wage and hour lawsuit, but would enable employers to properly analyze whether they are in compliance with a particular statute/regulation.

State departments of labor provide employers with an invaluable benefit by issuing informal advice and letter interpretations. Indeed, these informal advice and letter interpretations can guide employers on how to comply with a particular law, which is preferable to waiting for a lawsuit to test whether an "educated guess" as to the propriety of an employer's conduct was correct. ■