

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

AUGUST 6, 2019

The DOL's Back At It with New FLSA Opinion Letters and Regular Rate Guidance, Part 1

BRENNA McLAUGHLIN
BMcLAUGHLIN@BOARDMANCLARK.COM

In 2019, the U.S. Department of Labor (“DOL”) awoke from its regulatory slumber and began issuing a flurry of guidance on our nation’s chief wage and hour law, the Fair Labor Standards Act (“FLSA”). Congress has made few changes to the FLSA since its initial passage in 1938, and the DOL has resumed its attempts to bring legal clarity to several outstanding regulatory gaps under the law. This is the first installment of a two-part update on the recent activity over at the DOL. Part one of this wage and hour update tackles two issues relating to the calculation of the regular rate.

Much-Needed Clarification on What is Excluded from the Regular Rate.

In March 2019, the DOL issued a proposed rule to clarify what types of compensation may be excluded from an employee’s regular rate of pay for overtime purposes. As employers should know, all non-exempt employees must receive 1.5 times their “regular rate” for all hours worked over 40 in a workweek. The regular rate includes not only an employee’s straight hourly pay, but also the monetary value of other forms of compensation such as nondiscretionary bonuses, shift differentials, and commissions.

There has long been confusion, however, over whether the monetary value of certain employee benefits and other office perks must also be included in an employees’ regular rate under the FLSA. Businesses have faced lawsuits from employees claiming they should have paid overtime on the value of employee discounts and other benefits. The DOL’s proposed rule states that “[u]nder current rules, employers are discouraged from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees’ regular rate of pay.”

To remedy this uncertainty, the DOL’s proposed rule clarifies that the value of the following benefits may be excluded from an employee’s regular rate when calculating overtime pay:

- Wellness benefits, including gym memberships, fitness classes, and on-site specialist treatment;
- Employee discounts on retail goods and services;
- Payouts to employees for unused paid vacation and paid sick leave;
- Discretionary bonuses;
- Travel reimbursements that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and satisfy other regulatory requirements;

- Reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- Benefit plans, including accident, unemployment, and legal services benefits; and
- Tuition reimbursement and repayment of student loans.

By clarifying that employers do not need to include these types of compensation when calculating an employee’s regular rate, the DOL hopes employers will not be discouraged from providing such workplace benefits. If the DOL’s proposed rule is finalized and takes effect, employers could provide these popular office perks to employees without worrying that the value of such benefits would be included in an employee’s regular rate for overtime pay. The proposed rule also clarifies that payments for hours not worked, such as bona fide meal periods and certain types of “call-back” pay, are also excludable from the regular rate.

The DOL’s proposed rule is not yet final and may be revised before final publication. The public comment period for the proposed rule ended in June 2019, and publication of the final rule could occur at any time and may include changes from the proposed rule. Employers seeking to revise their payroll practices in light of this development should consult with counsel to keep abreast of any changes to the proposed rule.

Don’t Forget to Include Nondiscretionary Bonuses in Overtime Compensation.

The DOL also recently tackled a technical question regarding how to calculate overtime pay when employees receive periodic, nondiscretionary bonuses. In Opinion Letter FLSA2019-7, the DOL was asked whether employers are required to include nondiscretionary bonuses received over multiple workweeks in the calculation of employees’ regular rate of pay for purposes of calculating earned overtime at the end of each workweek.

In the letter, employees earned quarterly and annual bonuses based on a fixed percentage of their wages during the quarter or year. The employer simultaneously paid overtime compensation due on the quarterly bonus. For the annual bonus, however, the employer calculated the employees’ weekly regular rate of pay without including the annual bonus earnings. Instead, when the employer paid out the annual bonus, the employer retrospectively recalculated the employees’ weekly regular rate of pay during the bonus period to include the annual bonus earnings. The employer evenly distributed the annual bonus amount over every week the employee performed work over the bonus period. The employer then paid the employees any difference owed in overtime compensation. In doing this, the employer averaged the annual bonus earnings across the entire bonus period. The DOL was asked to review this practice and determine if it was acceptable.

The DOL reiterated that nondiscretionary bonuses must be included in the calculation of an employee’s regular rate of pay for overtime purposes. Employers may choose to simultaneously pay out overtime compensation due a fixed percentage bonus. However, the DOL noted it is also permissible for an employer to base bonuses on work performed over multiple workweeks and pay the bonus at the end of a bonus period. In doing this, the employer can “disregard the bonus in computing the regular hourly rate” until the bonuses amount is determined. 28 C.F.R. § 778.209(a). Once the bonus amount is known, the employer must then retroactively recalculate the employee’s regular rate for each workweek in the bonus period and pay any additional overtime compensation due on the bonus.

The DOL found the employer’s practice to be in compliance with the FLSA. The quarterly bonus was based on a fixed percentage of all the employee’s earnings and simultaneously paid overtime compensation due on the bonus. Thus, the quarterly bonus already took into account the employee’s hourly and overtime wages and no recalculation of the regular rate was needed. The annual bonus, by contrast, was not tied to hourly time or overtime hours. At the time of the annual bonus payout, an employer must evenly distribute the bonus amount over each week in the bonus period where the employee performed work, recalculate the regular rate for each workweek, and pay any additional overtime compensation that is due once the annual bonus was included in the employees’ regular rate. But here, the employer was already doing this, so the employer was in compliance with the FLSA.

The takeaway for employers is that nondiscretionary bonuses must be included in an employee's regular rate of pay when calculating overtime compensation. While it can be easy to forget to include annual or quarterly nondiscretionary bonuses when computing the regular rate, the FLSA nevertheless mandates that such bonus amounts be included. Employers can either pay overtime compensation due on the bonus during regular payroll dates if the bonus amount is known, or pay owed overtime at the end of the bonus period. If the employer chooses to pay overtime at the end of the bonus period, once the amount of the bonus is determined, employers may need to make a retroactive overtime analysis and pay out any owed overtime payments if the employees' previous regular rate did not include bonus compensation. Companies seeking guidance on how to best structure periodic bonuses in relationship to overtime compensation should consult with their attorney for continued FLSA and state wage and hour law compliance.