



DOL Issues Final Rule on “Regular Rate”

Under the Fair Labor Standards Act (FLSA), non-exempt employees must be paid at a rate not less than one-and-one-half times the “regular rate” at which they are employed for any hours the employee works in excess of 40 hours in a work week. The “regular rate” is defined as “all remuneration for employment paid to, or on behalf of, the employee,” subject to several categories of exclusion. Therefore, while many forms of remuneration (e.g., hourly wage, shift differentials, nondiscretionary bonuses, etc.) must be included in the “regular rate,” other categories of remuneration are excluded from the “regular rate.”

There has been much uncertainty over the years as to what perks and benefits are properly excluded from the “regular rate” when computing overtime. That uncertainty has led to quite a bit of litigation. On December 16, 2019, the Department of Labor (DOL) published a final rule that revised regulations related to the regular rate of pay, which will take effect January 15, 2020. The new rule provides further clarification on which perks and benefits must be included in the regular rate of pay, and which perks and benefits may be provided by an employer without including them in the regular rate of pay.

The final rule should help reduce litigation and wage claims. The DOL hopes the new rules better reflect the modern workplace, as the rules have not been updated in approximately 60 years. It should be noted that the new “regular rate” rule has not generated much public comment. The “Regular Rate” rule only generated 80 public comments prior to becoming final, while by comparison, the proposed Overtime Rule (which takes effect January 1, 2020) generated over 300,000 comments.

The final rule did not make many changes to existing exclusions from the regular rate, such as exclusions for gifts and payments for special occasions. Instead, the final rule clarifies that employers may offer the following perks and benefits to employees without these being included in the regular rate:

- Cost of providing certain parking benefits, wellness programs, onsite specialist treatment (like chiropractors, massage therapists, etc.), gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave (while the prior regulation only referenced holiday and vacation time, the revised rule makes it clear all unused paid time off including paid sick leave or paid time off (PTO) will be treated the same and can be excluded);
- Payments of certain penalties required under state and local scheduling laws (e.g., in some jurisdictions, an employer is required to pay a minimum of a certain number of hours for employees who are called back to work regardless of how long the employee actually works);

- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit (also, the new rule clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”);
- Certain sign-on bonuses and certain longevity bonuses;
- Cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses (the new rule clarifies that the label given a bonus does not determine whether it is discretionary and provides additional examples);
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense; and
- Meal breaks (even if an employer pays an employee for a meal break it does not convert such time to “hours worked” unless there is a past practice or an agreement to do so).

HOW DOES THIS IMPACT EMPLOYERS?

Much of the final rule simply provides clarification or explanation as to how the rules should be interpreted. There are several small changes to “call back” pay (eliminating the requirement that it be infrequent and sporadic to be excludable) and the definition of “basic rate” (which is an alternative to the “regular rate” and beyond the scope of this article). The remaining clarifications do not change the previous general understandings about proper exclusions, so many employers who have been calculating the regular rate may have to make no changes whatsoever. However, employers who are uncertain as to whether they are paying overtime correctly based on the regular rate or have other questions, may find this is a good time to review the items that must be included in the regular rate calculation and make adjustments as necessary. If you have questions as you undertake that process, you may wish to consult with legal counsel.

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