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## *Department of Labor Issues Major Update to FLSA Regulations Governing the Regular Rate of Pay*

By [Zach P. Hutton](#)

On December 12, 2019, the U.S. Department of Labor (“DOL”) issued a Final Rule, adopting a proposal announced earlier this year to modernize the Fair Labor Standards Act (“FLSA”) regulations governing the calculation of the regular rate of pay for overtime compensation. The Final Rule amounts to the largest update the DOL has made to the FLSA’s regular rate of pay regulations in over 50 years.

Under the FLSA, employers must pay non-exempt employees overtime pay at one-and-one-half times their “regular rate of pay” for all hours worked over 40 in a workweek. Importantly, the regular rate includes “all remuneration for employment” unless specifically excluded by the Act or the regulations.

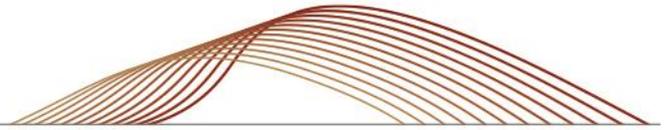
Although the regular rate of pay regulations have gone largely unchanged for 50 years, pay practices and employer perks have seen significant changes. Employers increasingly offer novel employee benefits such as wellness programs, gym benefits, and student loan repayment assistance programs. In recent years, confusion about whether to include the value of such perks in the regular rate has led to increased litigation. The Final Rule (which the DOL issued not as a change to the law, but “to provide clarity and better reflect the 21st-century workplace”) offers relief to employers by clarifying that these and other perks may be excluded from overtime calculations.

Because the regulations update federal law, employers also should consider how the regulations will interact with regular rate of pay exemptions under state and local wage and hour laws.

### **I. A Promise of Clarity for the Modern Workplace**

Recognizing the need to update its rules “in light of modern compensation and benefits practices,” the regulations make clear that employers may exclude the following benefits from the regular rate of pay:

- the cost of providing certain parking benefits, wellness programs, onsite specialist treatment, 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, including paid sick leave or paid time off;



- payments of certain penalties required under state and local predictive scheduling laws;
- reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit;
- certain sign-on bonuses and longevity bonuses;
- the cost of office coffee and snacks provided to employees as gifts; and
- contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

Additionally, the regulations clarify the definition of a “discretionary bonus,” emphasizing that merely labeling a bonus as “discretionary” is not enough to make it excludable from the regular rate. Instead, the DOL emphasized, “bonuses are discretionary and excludable if both the fact that the bonuses are to be paid and the amounts are determined at the sole discretion of the employer at or near the end of the periods to which the bonuses correspond and they are not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.” The new regulations provide examples of payments that may meet those requirements, including severance bonuses, referral bonuses for employees not primarily engaged in recruiting activities (if certain requirements are met), bonuses for overcoming challenging or stressful situations, and employee-of-the-month bonuses.

## II. Takeaway for Employers

In the DOL’s own words, by updating the regulations, it seeks to encourage employers “to start providing certain benefits that they may presently refrain from providing due to apprehension about potential overtime consequences, which in turn might have a positive impact on workplace morale, employee compensation, and employee retention,” while also providing clarity to those employers who already provide such benefits.

Employers may wish to take the following steps, in light of the updated regulations:

- Identify the benefits provided to non-exempt employees in your workforce and determine whether current practices of calculating overtime pay comply with the FLSA’s regular rate of pay requirements.
- Determine whether any adjustments need to be made in light of the updated regulations.
- Before implementing changes based on the DOL’s update to its regulations, employers should carefully review their incentive programs to make sure they qualify for exclusion, and confirm that the regulations do not conflict with the regular rate of pay laws of the states and localities in which they operate.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*



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