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Department of Labor Proposes Update to FLSA Regulations Governing the Regular Rate of Pay

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Department of Labor Proposes Update to FLSA Regulations Governing the Regular Rate of Pay

On March 29, 2019, the Department of Labor ("DOL") issued a proposal to modernize the Fair Labor Standards Act ("FLSA") regulations governing the calculation of the regular rate of pay for overtime compensation. The Proposed Rule will amount to the largest update the DOL has made to the FLSA's regular rate of pay regulations in over 50 years.

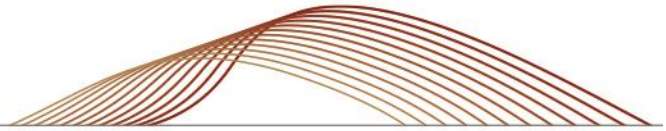
Under the FLSA, employers must pay non-exempt employees overtime pay at one-and-one-half times their "regular rate of pay" for all hours worked over 40 in a workweek. Importantly, the regular rate includes "all remuneration for employment" unless specifically excluded by the Act or the regulations.

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 Proposed 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.

A Promise of Clarity for the Modern Workplace

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

- the cost of providing wellness programs, onsite specialist treatment, gym access, and fitness classes;
- employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred "solely" for the employer's benefit;



- pay for bona fide off-duty meal periods "unless agreement or actual course of conduct establish that the parties have treated the time as hours worked";
- contributions to benefit plans that provide accident, unemployment, and legal services benefits; and
- tuition programs, such as reimbursement programs or repayment of educational debt.

The Proposed Rule also provides clarification about other forms of compensation, including premiums for holiday and weekend work, discretionary bonuses, reporting time pay, and "call back" pay.

For example, the Proposed Rule provides that employers do not need a prior formal contract or agreement with an employee to exclude certain overtime premiums paid for working more than eight hours in a day, holidays, and weekends.

Additionally, the Proposed Rule clarifies 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 Proposed Rule provides examples of payments that may meet those requirements, including "employee of the month bonuses, bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, [and] bonuses for overcoming stressful or difficult challenges . . . ."

With respect to reporting time and "call back" pay, the Proposed Rule eliminates the current restriction that such payments must be made for "infrequent and sporadic" occasions to qualify as excludable. However, the DOL explains that if the payments are so regular that they essentially are prearranged in the employee's schedule, they will not qualify for exclusion.

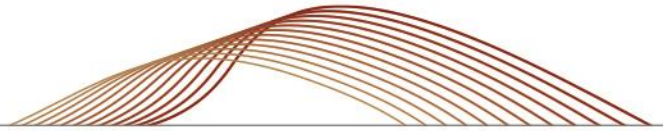
Last, the Proposed Rule clarifies when monetary penalties imposed on employers for violating state and local "predicative scheduling laws" may qualify for exclusion.

Takeaway for Employers

In the DOL's own words, by issuing the Proposed Rule, 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.

The DOL's final regulations will issue after a 60-day notice and comment period. In the meantime, we recommend employers:

- 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 Proposed Rule;



- Monitor this area closely and develop a plan to take action once final regulations go into effect. Because the Proposed Rule impacts federal law, employers should also consider how the Rule will interact with state and local wage and hour laws; and
- Interested parties may submit comments on the Proposed Rule by May 28, 2019, which is just a few weeks after comments on the DOL's Proposed Overtime Rule are due. Employers may consider aligning with chambers of commerce, organizational associations and trade groups, and legal counsel to submit any comments to the DOL during the 60-day public comment period.

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