

FYI[®]
For Your Information[®]

Celebrating
40
years of FYI[®]

DOL Proposes Changes to Regular Rate Regulations

On March 29, the DOL's Wage and Hour Division proposed clarifications and updates to the rules for determining the regular rate of pay under the Fair Labor Standards Act. The law generally requires that nonexempt employees receive overtime pay for all hours worked over 40 in a workweek, calculated at one and one-half times the employee's regular rate of pay. The DOL will accept written comments until May 28.

Volume 42

Issue 34

April 11, 2019

Authors

Nancy Vary, JD

Abe Dubin, JD

Background

The federal Fair Labor Standards Act (FLSA) requires that covered, nonexempt employees receive overtime pay for all hours worked in excess of 40 in a workweek. With certain limited exceptions, the FLSA requires an overtime pay rate of at least one and one-half times the employee's "regular rate of pay."

The regular rate of pay — unlike the employee's base hourly rate — typically includes "all remuneration for employment paid to, or on behalf of, the employee" divided by the total number of hours worked in that workweek. Thus, shift differentials, non-discretionary bonuses, incentive payments, commissions, and other amounts that an employer pays in addition to base wage will increase both the regular and overtime pay rates. However, not all forms of compensation must be included in the regular rate.

FLSA Section 7(e) identifies eight categories of compensation that an employer can exclude when calculating an employee's regular rate. Excludable amounts include: (1) gifts and payments on special occasions; (2) payments made for occasional periods when no work is being performed, such as vacation or sick pay, reimbursements for work-related expenses, and other similar payments that are not compensation for hours of employment; (3) discretionary bonuses, payments to profit-sharing or thrift or savings plans that satisfy certain requirements, and certain talent fees; (4) contributions to a bona fide retirement, life, accident or health insurance plan; (5) extra pay provided by a premium rate for certain hours worked in excess of eight in a day, 40 in a workweek, or the employee's normal schedule; (6) extra pay provided by a premium rate for certain hours worked on Saturdays, Sundays,

holidays, regular days of rest, or on the sixth or seventh day of the workweek; (7) extra pay provided by a premium rate under an employment contract or collective bargaining agreement for hours worked outside the employee's regular workday or workweek; and (8) income from a stock option, stock appreciation right, or employee stock purchase plan, provided certain restrictions are satisfied. With the exception of extra pay provided by a premium rate, sums excluded from the regular rate cannot be credited toward minimum wages or overtime compensation.

Proposed rule

On March 29, the DOL's Wage and Hour Division issued proposed changes to the regulations governing the FLSA's regular rate requirements. While the proposal does not materially differ from the current rule, it does provide clarifications and updates to regulations that have been substantially unchanged for over 50 years.

Comment: The DOL released its proposed changes to the regular rate regulations on the heels of its proposed overtime rule. For more information on that rule, please see our [March 12, 2019 FYI Alert](#).

The DOL's proposal focused on whether "certain kinds of perks, benefits, or other miscellaneous items" that are common in today's workplace must be included in the regular rate. Specifically, the proposed rule would make clear that employers may exclude the following from an employee's regular rate of pay when calculating overtime:

- the cost of providing wellness programs, on-site specialist treatments, gym access and fitness classes, and employee discounts on retail goods and services
- cashouts of unused paid leave, including paid sick leave
- reimbursements for expenses not incurred solely for the employer's benefit
- reimbursements for travel expenses that do not exceed the federal Travel Guidelines and meet other regulatory requirements
- certain overtime premiums without the need for a prior formal contract or agreement
- pay for bona fide meal periods unless the parties treat such time as "hours worked"
- discretionary bonuses
- benefit plans (including accident, unemployment, and legal services)
- tuition programs (such as reimbursement programs or debt repayment)

Along with clarifying current rules, the proposal would also eliminate the restriction that call-back pay and other similar payments must be "infrequent and sporadic" to properly be excluded from an employee's regular rate — but they cannot occur so regularly that they essentially are prearranged in the employee's schedule.

Although the proposal did not alter the definition of a discretionary bonus, the DOL did offer a few new examples of discretionary bonuses that an employer may exclude from the regular rate, including severance and employee-of-the-month bonuses.

Alternative “basic rate”

As an alternative to the regular rate, employers may use a “basic rate” under certain circumstances. Under current regulations, employers that use the basic rate method in calculating overtime pay may exclude “any additional payment that would not increase total overtime compensation by more than \$0.50 on average for overtime workweeks in the period for which the employer makes the payment.”

The proposal would update the basic rate regulations to increase the \$0.50 limit to 40% of the federal minimum wage. At today’s federal minimum, the limit would be \$2.90.

In closing

Employers should consider evaluating their current pay practices to determine whether adjustments would be needed should the proposed rule be adopted. Employers may submit written comments until May 28.

Produced by the Knowledge Resource Center

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI* publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.