

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **DOL updates regular rate of pay regulations**

The Fair Labor Standards Act 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." On December 16, 2019, the DOL's Wage and Hour Division issued a final rule to clarify and update the rules for determining the regular rate, effective January 15, 2020.

#### **Background**

The federal Fair Labor Standards Act (FLSA) requires that 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. However, not all forms of compensation must be included in an employee's regular rate.

FLSA Section 7(e) identifies the following eight categories of exclusions: (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,

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stock appreciation right, or employee stock purchase plan, provided certain restrictions are satisfied. Except for extra pay provided by a premium rate, sums excluded from the regular rate cannot be credited toward minimum wages or overtime compensation.

On March 29, 2019, the DOL's Wage and Hour Division proposed changes to clarify and update the FLSA's regular rate regulations that have been substantially unchanged for over 50 years. (See our [April 11, 2019 FYI](#).)

## Final rule

On December 16, 2019, the DOL issued a final rule updating the regulations governing the FLSA's regular rate requirements. The final rule clarifies which perks and benefits that are common in today's workplace must be included in the regular rate of pay and which an employer may provide without increasing the overtime rate. The final rule is effective January 15, 2020.

The final rule makes clear that the following can be excluded from an employee's regular rate of pay when calculating overtime, even though not specified in the statutory exclusions:

- Cost of providing certain parking benefits, wellness programs (such as health risk assessments, biometric screenings, smoking cessation programs, and exercise programs), mental health wellness programs, financial wellness programs or financial counseling, onsite specialist treatment (such as chiropractors, massage therapists, personal trainers and EAP visits), gym access and fitness classes, employee discounts on retail goods and services, tuition reimbursement (whether paid to an employee, education provider or student loan program), and adoption assistance
- Payments for unused paid leave, including paid sick leave and paid time off
- Certain payments or penalties required under state and local scheduling laws (such as call-back, reporting, predictability, and "clopening" pay, or schedule change premiums)
- Reimbursed expenses such as cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred solely for the employer's benefit
- Certain sign-on and longevity bonuses
- Complimentary office coffee and snacks
- Discretionary bonuses
- Certain overtime, holiday or Sunday premium payments without the need for a prior formal contract or agreement
- Contributions to benefit plans for accident, unemployment, legal services or other events that could cause future financial hardship or expense

### Meal periods and “call-back” pay

The final rule provides additional clarification on payment for meal periods and “call-back” pay. It makes clear that paid meal break periods do not count as “hours worked” unless the parties agree otherwise or there is a past practice of doing so.

The final rule also eliminates 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. However, the payments cannot occur so regularly that they essentially are prearranged in the employee’s schedule.

### Discretionary bonuses

The final rule reiterates that merely labelling a bonus as “discretionary” will not make it so. However, it does offer additional examples of bonuses that may be excluded from the regular rate, such as severance, referral, and employee-of-the-month bonuses.

### Cafeteria plans

Additionally, the DOL addresses several cafeteria plan issues. First, it confirms that cash payments in lieu of plan participation or health benefits generally must be included in the regular rate of pay. Second, it clarifies that employer contributions for premiums and other benefits under a cafeteria plan are excludable from the regular rate, provided cash payments to employees in lieu of benefits are “incidental” to the plan’s benefits. In comments, the DOL limits such payments to no more than 20% of the employer’s contribution.

### Alternative “basic rate”

Employers may calculate overtime compensation using a “basic rate” rather than the regular rate under certain circumstances. Under current regulations, employers that use the basic rate method 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 final rule increases the \$0.50 threshold to 40% of the higher of the applicable local, state or federal minimum wage a week on average for the overtime weeks in which the employer makes the payment. At today’s federal minimum, that would be \$2.90.

### In closing

Employers should evaluate their current pay practices to determine whether adjustments are needed in light of the final rule that will take effect on January 15, 2020.

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