

DOL FINAL RULE PROVIDES MUCH-AWAITED CLARIFICATION ON REGULAR RATE CALCULATION

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The Wage and Hour Division of the Department of Labor (“DOL”) administers and enforces the Fair Labor Standards Act (“FLSA”), which, in part, requires payment of one and one-half times the regular rates of pay for those hours worked in excess of 40 hours by non-exempt employees in a single workweek.

The regular rate of pay, though, is not simply the employee’s hourly wage; the regular rate of pay includes “all remuneration for employment paid to, or on behalf of the employee,” taking into consideration additional forms of compensation (e.g., non-discretionary bonuses). The FLSA identifies specific exclusions to the regular rate (e.g., “sums paid as gifts . . . not measured by or dependent on hours worked, production, or efficiency,” discretionary bonuses, contributions to a “bona fide” health plan); however, employers have long wondered whether certain perks provided to employees should be included in the regular rate calculation or statutorily excluded.

The DOL recently published a “Final Rule,” clarifying the types of payments that are excluded from the regular rate of pay calculation, finding, in particular, exclusions for the following benefits:

- Payments for unused paid leave and/or paid sick leave;
- Payment for time that cannot constitute “hours worked” (e.g., “bona fide meal periods”);
 - “Call-back” pay that is more regular than “infrequent and sporadic” but is not “prearranged”;

- “[S]ome” longevity and sign-on bonuses that meet “certain requirements”;
- Discretionary bonuses (this does not include bonuses that are announced in advance to encourage employees to work more steadily, rapidly, or efficiently or to remain employed);
- Benefit plan contributions for “accident, unemployment, legal services, or other events that could cause significant future financial hardship or expense”;
- Office snacks, coffee, meals, and pantry services;
- Parking benefits;
- “[T]he cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, and payments for tuition programs”; and
- Reimbursement for the “actual amount expended by an employee in purchasing supplies, tools, materials, cell phone plans, or equipment on behalf of his employer or in paying organization membership dues or credentialing exam fees where relevant to the employer’s business.”

Contact a Workplace Law attorney to assist in the review of all remuneration awarded to covered, non-exempt employees and to ensure that overtime compensation is calculated and paid in compliance with the FLSA and the DOL’s Final Rule.



ABOUT THE AUTHOR

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Rebecca C. Seguin-Skrabucha concentrates her practice in advising employers on compliance with state and federal employment and labor laws.

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