

DOL Issues New Opinion Letters Revolving Around the FLSA’s “Regular Rate”

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Continuing the practice it reinstituted about two years ago, on March 26, 2020 the U.S. Department of Labor’s Wage Hour Division (WHD) issued three new opinion letters, each revolving around the “regular rate” that is used when calculating any overtime pay due to non-exempt employees for work performed in excess of 40 hours in a workweek. A brief summary of those Opinion Letters is as follows:

Opinion Letter FLSA2020-3: Should an Alabama City’s End-of-Year Bonus Be Included in the Regular Rate Calculation?

In Opinion Letter FLSA2020-3, the DOL addressed whether an Alabama city’s longevity bonus, paid to city employees as mandated by the city’s board of commissioners, must be included in the regular rate calculation. The city had been paying the bonus to qualifying employees every two weeks, but was contemplating compiling the bonus to pay out in a single lump sum each year around Christmas time, and was seeking advice on whether such a payment would need to be included in the regular rate calculation.

Concluding that the bonus was to be included in the regular rate calculation, the DOL noted that the pertinent resolution of the board of commissioners directed that the bonus “shall” be paid. This mandatory language rendered the payment non-discretionary and therefore, as the FLSA regulations clearly set forth, required that it be included in the regular rate calculation. Although the city had discretion as to the form and the timing of the bonus, it did not have the authority to forego the bonus altogether. However, the DOL noted that such bonuses would be subject to exclusion from the regular rate, for “bonuses paid at Christmas or on other special occasions,” *if* the board of commissioners’ resolution stated that city officials “may” pay such a bonus, thereby rendering the bonus discretionary.

A copy of the FLSA2020-3 may be found here: [Opinion Letter FLSA2020-3](#)

Opinion Letter FLSA2020-4: Was the Employer’s New Hire Referral Bonus Excludable from the Regular Rate Calculation?

In Opinion Letter FLSA2020-4, the DOL examined a company’s new hire referral bonus program.

Eligible employees (*i.e.* those whose regular job duties did not involve the recruitment and hiring of new employees) would receive a referral bonus in two installments, the first upon hire of the recommended candidate and the second if both the new hire *and* the referring employee were still employed a year later. Typically, under the regulations a referral bonus will not be included in the regular rate calculation if (1) participation in the referral process is voluntary; (2) the employee's efforts in recruiting do not involve a significant amount of time; and (3) recruitment activities are limited to solicitation among friends, relatives, etc. during the employee's off hours as part of his or her social affairs.

In the instant case, the first installment of the employer's referral bonus payment at issue met these requirements and therefore was excludable from the regular rate. The second installment, however, prompted more scrutiny. Given that a condition of the second half of the bonus payment was that the referring employee still be employed a year later, the DOL concluded that this portion of the bonus was more akin to a longevity bonus. Longevity bonuses may still be excludable from the regular rate calculation, as long as they are not dependent upon an employee's "hours worked, production or efficiency" or do not create a contractual right to enforcement by the employee. Here, there was no indication that the first set of circumstances existed, but it was unclear whether or not the second half of the bonus payment was contractually enforceable. Thus, the DOL could not provide a definitive answer as to whether the second installment of the bonus payment was excludable from the regular rate calculation. The Agency did note, however, that if the second installment of the bonus was paid regardless of whether the referring employee remained employed, or if it was paid shortly after the first installment, it would no longer be characterized as a longevity bonus and therefore would be excludable from the regular rate calculation as well.

A copy of FLSA2020-4 may be found here: [Opinion Letter FLSA2020-4](#)

Opinion Letter FLSA2020-5: Is "Imputed Income" From an Employer's Insurance Benefit Included in the Regular Rate Calculation?

Opinion Letter FLSA2020-5 concerned an employer's contributions to group term life insurance premiums. Because the IRS requires payments for employer premiums of an employee's life insurance coverage exceeding \$50,000 to be included in the employee's taxable gross income, the employer questioned whether this also required the amount of those premiums to be included in the regular rate calculation. They do not, responded the DOL, as they are excludable under Section 207(e)(4) of the FLSA regulations as "contributions irrevocably made by an employer pursuant to a bona fide benefit plan." IRS regulations are not co-extensive with FLSA regulations, noted the DOL, and payments that are taxable as income are not necessarily payments that should be included as part of the regular rate calculation.

A copy of FLSA2020-5 may be found here: [Opinion Letter FLSA2020-5](#)

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