Employer’s Cheat Sheet: DOL’s Proposed Changes to the Regular Rate Definition

Thursday, April 4, 2019

On March 28, 2019, the Department of Labor (DOL) announced a proposal that would change the federal wage and hour regulations to clarify which perks, benefits and other forms of payments to employees must be factored into their overtime compensation.

Is this a big deal? YES.

The proposed changes would allow employers to exclude many payments made to or on behalf of employees when calculating an employee's regular rate of pay, which may lower the amount of overtime due to employees. If approved, the changes will give employers certainty that excluding the payments listed in the revised rules will not result in liability and overtime claims.

Isn’t overtime just calculated based on the employee’s hourly rate of pay? NO.

Here is a quick refresher:

- **Minimum.** Employees who are not exempt from the Fair Labor Standards Act (FLSA) must be paid at least the minimum wage ($7.25 an hour) for every hour worked and 1.5 times their regular rate of pay for all hours worked over 40 in a workweek.*
• Regular Rate. Though the FLSA does not define *regular rate*, the DOL regulations and case law have provided guidance on how to determine the regular rate. Under traditional interpretations and DOL guidance, the regular rate includes an employee’s hourly rate *plus* other types of compensation, including certain bonuses and shift differentials. The DOL regulations also expressly exclude some types of compensation, but the exclusions are interpreted narrowly. This means that, generally, an employer must (1) add up an employee’s regular hourly wages to other covered compensation and (2) divide the dollar amount by the total number of hours worked for that workweek to determine the employee’s regular rate. The employer must then use that regular rate to calculate the value of each overtime hour (*i.e.*, regular rate x 1.5) worked during that week.

If you have questions about calculating non-exempt employees’ overtime compensation, contact your legal counsel to ensure you are getting it right.

**What’s new? Many benefits, perks and payments could be excluded.**

If approved, the changes will provide more clarification and examples regarding the types of compensation that must be included in the regular rate calculation. The proposed changes also exclude the following forms of compensation from the regular rate calculation:

• Certain wellness program payments and benefits, such as onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;

• Payments made for *unused* paid sick leave;

• Reimbursements for expenses, including expenses not incurred solely for the employer;

• Reimbursements for travel expenses that do not exceed certain requirements under federal laws and regulations; and

• Pay for time that would not qualify as “hours worked” (like bonafide meal plans) unless an agreement or established practice indicates the parties have treated the time as hours worked.

**Why the change? To get with the times.**

Businesses have continued to change the way they compensate employees for their work. Employers are increasingly offering more benefits and perks, including wellness benefits like reimbursements and payments for fitness memberships and clubs, free vaccinations, etc. In some states and municipalities, employers are required to provide paid sick leave. According to the DOL, the current regulations fail to properly guide employers in determining which compensation must be factored into the regular rate.

The DOL also stated that it expects the changes “will encourage some 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.”

We will post updates on the proposed changes as the proposed changes make it through the rulemaking process.

*Keep in mind that state and local laws may require employers to pay a higher minimum wage and/or to calculate overtime compensation in a different manner. For example, on March 28, 2019, Maryland passed legislation to raise the minimum wage for most employees in that state to $15 an hour by 2025. Employers must comply with applicable federal, state and local laws when compensating employees.

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