

Fact Sheet #56B: State and Local Scheduling Law Penalties and the Regular Rate under the Fair Labor Standards Act (FLSA)

This fact sheet provides information about whether penalties paid to employees pursuant to state or local scheduling laws must be included in the regular rate under the FLSA or whether they can be excluded from the regular rate. These laws often apply to retail, hospitality, and/or food services establishments, although the coverage and requirements of each law varies.

Overtime and the regular rate

The FLSA requires that most employees in the United States be paid at least the Federal [minimum wage](#) for [all hours worked](#) and [overtime pay](#) at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. The amount of overtime pay due to an employee is based on the employee's regular rate of pay and the number of hours worked in a workweek. [Fact Sheet #56A](#) provides general information about how to calculate the regular rate.

Under the FLSA, the regular rate generally includes “all remuneration for employment paid to, or on behalf of, the employee.” However, the FLSA also provides a list of payments that can be excluded from the regular rate of pay when calculating overtime compensation (29 USC § 207(e)). Among these excludable payments are “payments made for occasional periods when no work is performed due to failure of the employer to provide sufficient work” and “other similar payments to an employee which are not made as compensation for his hours of employment.”

Scheduling law penalty payments

States and cities have enacted one or more different types of scheduling laws. The various types of local or state scheduling penalty payments do not need to be included in the calculation of the regular rate under the FLSA, if certain conditions are met. For more information on scheduling law penalty payments that may be excluded from the regular rate, *see* the WHD regulations at 29 CFR §§ 778.220-.223. Note that any scheduling law penalty payment that is excludable from the regular rate cannot be credited toward statutory overtime compensation due to the employee.

Reporting pay

Some state and local scheduling laws require employers to pay a penalty to an employee for cancelling a scheduled shift or reducing scheduled work hours, before or after the employee reports for duty. These payments are often referred to as “reporting” pay, and are similar to “show-up” or “reporting” pay for the hours that an employee did not work because of the employer's failure to provide the expected work. These payments can be excluded from the FLSA regular rate calculation as long as they are provided on an infrequent and sporadic basis. Note, however, that compensation for any hours actually worked must be included in the regular rate.

Predictive scheduling pay

Some state and local scheduling laws require employers to pay a predictive scheduling penalty when the employer changes an employee's schedule without a loss in hours but without the amount of advance notice required by the state or local scheduling law. These types of payments are made above and beyond the employee's straight time or overtime earnings for the hours actually worked. Such payments can be excluded from the FLSA regular rate calculation as long as the payments were not prearranged. Payments may be considered prearranged if the scheduling issue that necessitated the payment was anticipated and could have been reasonably scheduled in advance.

"Right to rest" or "clopening" pay

Many state and local scheduling laws require penalty payments to employees who are scheduled to work back-to-back shifts without enough off-duty hours in between the shifts (sometimes referred to as "right to rest" or "clopening" provisions). Like predictive scheduling pay, "right to rest" payments over and above the employee's straight time or overtime earnings for the hours actually worked do not need to be included in the FLSA regular rate calculation if such payments were not prearranged (i.e., the payments were unanticipated and could not reasonably have been scheduled in advance).

On-call pay

Some state and local scheduling laws require employers to provide extra pay to an employee who is scheduled for an on-call shift but who is not called in to work. These payments are typically payments made "for performing a duty involved in the employee's job" and therefore must be included in the regular rate of pay.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website:

<http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available at 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When state law differs from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at <https://www.dol.gov/agencies/whd/state/contacts>.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

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