

## **Fact Sheet: Final Rule to Update the Regulations Governing the Regular Rate under the FLSA**

The U.S. Department of Labor (Department) is clarifying and updating the regulations governing the regular rate requirements under the Fair Labor Standards Act (FLSA). The FLSA generally requires overtime pay of at least one and one-half times the regular rate for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the “time and one-half” calculation when determining workers’ overtime rates.

Part 778 constitutes the Department’s official interpretation with respect to the meaning and application of the regular rate for purposes of calculating overtime compensation due under section 7 of the FLSA, 29 U.S.C. 207, including calculation of the regular rate. Part 548 of Title 29 implements section 7(g)(3) of the FLSA, which permits employers, under specific circumstances, to use an authorized basic rate to compute overtime compensation rather than a regular rate. Parts 778 and 548 have not been significantly revised in over 50 years.

In this Final Rule, the Department updates a number of regulations to provide clarity that will allow employers to provide more benefits to their employees without unknown overtime consequences or litigation and will better reflect the 21st-century workplace. In doing so, the Department expects that these changes will promote compliance with the FLSA, provide appropriate and updated guidance in an area of evolving law and practice, and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation, all resulting in a positive impact on workplace morale, employee compensation, and employee retention.

### **\* Key Provisions of the Final Rule \***

The Final Rule clarifies whether certain kinds of benefits or “perks” and other miscellaneous payments must be included in the regular rate used to determine an employee’s overtime pay. The Department clarifies the current regulations to confirm that employers may exclude the following from an employee’s regular rate of pay:

- the cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- payments for unused paid leave, including paid sick leave or paid time off;
- payments of certain penalties required under state and local scheduling laws;
- reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”;
- certain sign-on bonuses and certain longevity bonuses;
- the cost of office coffee and snacks to employees as gifts;

- discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples and;
- contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The Department also provides guidance and fact-based examples to illustrate the types of bonuses that are discretionary and may be excluded from an employee’s regular rate of pay under section 7(e)(3) of the FLSA, and includes clarification that the label given a bonus does not determine whether it is discretionary. Finally, the Department makes two substantive changes to the existing regulations. First, the Department eliminates the restriction in §§ 778.221 and 778.222 that “call-back” pay and other payments similar to call-back pay must be “infrequent and sporadic” to be excludable from an employee’s regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged. Second, the Department updates its regulations on “basic rate”, which is authorized under section 7(g)(3) of the FLSA as an alternative to the regular rate under specific circumstances. Under the current regulations, employers using an authorized basic rate may exclude from the overtime computation any additional payment that would not increase total overtime compensation by more than \$0.50 a week on average for overtime workweeks in the period for which the employer makes the payment. The Department updates this regulation to change the \$0.50 limit to 40 percent of the higher of the applicable local, state, or federal minimum wage.

**For additional information, visit our Wage and Hour Division Website: [www.wagehour.dol.gov](http://www.wagehour.dol.gov) and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).**

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