U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-4

March 26, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether referral bonuses that your client is considering paying its employees must be included in the employees' regular rate when calculating overtime pay under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

Your client is an employer that is considering implementation of a program that would offer certain employees a referral bonus payable in two equal installments. You state that only employees who do "not work in the Human Resources area" and do not have "any responsibilities associated with employee recruitment, hiring, selection, or the final decision on whether the referred job applicant is actually hired" would be eligible for this bonus. You indicate that participation in the referral program would be strictly voluntary, does not require significant time beyond submitting the name of a potential recruit, and is limited to after-hours conversations as part of the referring employees' social affairs.

You describe the amount of the referral bonus being contemplated as "significant." You explain that the first installment of the referral bonus would be paid to the referring employee when your client hires the referred employee. The second installment would be paid to the referring employee on the one-year employment anniversary of the referred employee, provided that the referring employee is still actively employed. In other words, both the referred employee and the referring employee must still be working for your client one year after the referred employee was hired for the referring employee to receive the second installment.

GENERAL LEGAL PRINCIPLES

The FLSA requires payment "at a rate not less than one and one-half times the regular rate at which [the employee] is employed" to all non-exempt employees for all hours worked in excess of forty hours in a workweek. 29 U.S.C. § 207(a)(1). The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," subject to eight statutory exclusions. 29 U.S.C. § 207(e). In interpreting "remuneration for employment" and the statutory exclusions, the Department of Labor (Department) is mindful that a "'fair reading' of the FLSA, neither narrow nor broad, is what is called for." *Sec'y U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) (quoting *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018)). "And that is as should be expected, because employees' rights

are not the only ones at issue and, in fact, are not always separate from and at odds with their employers' interests." *Id.*

The preamble to the Department's 2019 Final Rule revising the regular rate regulations (Regular Rate Under the Fair Labor Standards Act) reaffirmed the Department's longstanding position that sums paid to an employee for recruiting another to join his or her employer's workforce are not part of the recruiting employee's remuneration for employment that must be included in the regular rate, if the following conditions are met: (1) participation in recruitment activities is strictly voluntary, (2) the employee's efforts in connection with recruitment activities do not involve significant amounts of time, and (3) recruitment activities are limited to after-hours solicitation among friends, relatives, neighbors, and acquaintances as part of the employee's social affairs.[1] *See* 84 FR 68755-56 (citing WHD Opinion Letter FLSA (Jan. 27, 1969)); *see also* 29 C.F.R. § 778.211(d) (including "referral bonuses for employees not primarily engaged in recruiting activities" as a type of bonus that may be excludable from the regular rate as discretionary under § 207(e)(3) so long as the statutory conditions are met); WHD Fact Sheet #54, "The Health Care Industry and Calculating Overtime Pay," at 2; *Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, No. LA CV13-02171-JAK (PLAx), 2016 WL 6571270, at *25 (C.D. Cal. Mar. 21, 2016). As explained in the preamble to the revised regulations, satisfaction of these conditions demonstrates that the employee receiving a recruitment bonus is not employed to recruit others, and therefore, the bonus is not "remuneration for employment" that must be included in the employee's regular rate. *See* 84 FR 68756.

A referral bonus outside of these circumstances generally constitutes remuneration for employment and must be included in the regular rate unless another statutory exclusion applies. Relevant here, one of these exclusions covers "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." 29 U.S.C. § 207(e)(1). The Department's regulation further explains that, if the bonus "is so substantial that it can be assumed that employees consider it a part of the wages for which they work" or "is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it)," it is not "in the nature of a gift." 29 C.F.R. § 778.212(b). But a bonus may be excludable as a gift under § 207(e)(1) even if "the employees are led to expect it" because "it is paid with regularity," and even if the amounts paid vary according to the employees' "length of service . . . so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency." *Id.* § 778.212(c); *see also Shiferaw*, 2016 WL 6571270, at *26–27 (excluding long-term service awards from the regular rate as gifts even though employer "promulgated a . . . scale for employees to know the timing and amount of [the awards]").[2]

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[1] Occasional solicitation by the recruiting employee during working hours, such as during a break, will not prevent this third condition from being satisfied.

[2] WHD notes that one district court has held that bonuses "based on [a] scale promulgated by the City" were not excludable as "payments in the nature of gifts" under § 207(e)(1). *Local 359 Gary Firefighters, AFL-CIO-CLC v. City of Gary*, No. 2:87 CV 20, 1995 WL 934175, at *6–7 (N.D. Ind. Aug. 17, 1995). But the court's reasoning rested on the Department's regulation (29 C.F.R. § 778.211) regarding the excludability of certain discretionary bonuses under § 207(e)(3), *see* 1995 WL 934175, at *6–7, instead of

OPINION

The first installment of the referral bonus that your client is considering need not be included in the employee's regular rate. Your letter states that an employee is eligible for the referral bonus only if he or she does not work in Human Resources and has no work responsibility for recruitment, hiring, or selection of new employees. Furthermore, you state that participation in the referral program is strictly voluntary, does not take significant time, and is limited to conversations as part of the employees' social affairs outside of work hours. Thus, your client does not employ the employees participating in the referral program to recruit new workers, and consistent with the Department's revised regulations and WHD's prior guidance, the first installment is not remuneration for employment that must be included in the employees' regular rate. *See* 29 C.F.R. § 778.211(d); 84 FR 68755–56; WHD Fact Sheet #54; WHD Opinion Letter FLSA (Jan. 27, 1969); *see also Shiferaw*, 2016 WL 6571270, at *25.

On the other hand, because payment of the second installment is contingent on the referring employee remaining employed with your client for one year after the referred employee is hired (in addition to the referred employee being employed for one year after being hired), the second installment would essentially be a longevity bonus that rewards the referring employee for an additional year of service. We note, however, that if the referring employee were eligible to receive the second installment regardless of whether he or she is employed after one year, then the second installment would be a referral bonus like the first installment and would not be remuneration for employment that must be included in the employee's regular rate. Likewise, if the second installment required a shorter amount of time of continued employment before payment, such as a single pay period, the second installment would not be like a longevity bonus, but instead would be similar to the first installment and would not be remuneration for employment that must be included in the employee's regular rate. But given the requirement that the referring employee remain employed for one year, it is properly analyzed as a longevity bonus. A longevity bonus constitutes remuneration for employment and must be included in the regular rate, unless it is subject to a statutory exclusion. *See Featsent v. City of Youngstown*, 70 F.3d 900, 905 (6th Cir. 1995) (concluding that a longevity bonus must be included in the regular rate).

As a longevity bonus, the second installment could be excludable from the regular rate as a "payment[] in the nature of gifts … as a reward for service" under § 207(e)(1). To qualify for this exclusion, the bonus, among other conditions, must not be: (1) "measured by hours worked, production or efficiency," or (2) "paid pursuant to [a] contract (so that the employee has a legal

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the applicable regulation (29 C.F.R. § 778.212) regarding the excludability of "payments in the nature of gifts" under § 207(e)(1). Notably, § 207(e)(3) and 29 C.F.R. § 778.211(a) provide that a bonus is excludable as a discretionary bonus if it was paid without "any prior contract, agreement, or promise causing the employee to expect such payments regularly" (emphasis added). In contrast, 29 C.F.R. § 778.212(b) explains that a bonus is excludable as a gift under § 207(e)(1) if, among other conditions, it was not "pursuant to [a] contract" that enables the employee to "bring suit to enforce it." A promise that falls short of a legally enforceable contract—e.g., unilaterally announcing an intent to pay a bonus at Christmas time or other special occasions as a reward for service—would disqualify the bonus from being excludable from the regular rate as a discretionary bonus under § 207(e)(3). But the same promise would not prevent the bonus from being excludable as a gift under § 207(e)(1).

right to the payment and could bring suit to enforce it)." 29 C.F.R. § 778.212(b); *see also Moreau v. Klevenhagen*, 956 F.2d 516, 520–21 (5th Cir. 1992) (excluding longevity pay under § 207(e)(1)).

Regarding the first condition, based on the information you provided, neither the requirement for the referring employee to remain employed with your client for one year nor the amount of the bonus is dependent on that employee's "hours worked, production or efficiency." Your letter further states that the referring employee has no Human Resources work responsibilities, such as worker retention. As such, the retention of the referred employee for one year is not dependent on the referring employee's "hours worked, production or efficiency." Thus, the first condition for exclusion as a gift appears to have been met.

Regarding the second condition, based on your letter, it is unclear whether your client's referral program creates a contractual right to the second installment that is enforceable by the referring employee, or if it merely preannounces the timing and amount of the payment. Mere preannouncement of the timing and amount of a longevity bonus does not prevent that bonus from being excludable as a gift under § 207(e)(1). *See Shiferaw*, 2016 WL 6571270, at *26 (excluding longevity pay even though employer "promulgated a [] scale for employees to know the timing and amount" of the pay); *see also* 29 C.F.R. § 778.212(c) (explaining that a bonus may be excluded "even though it is paid with regularity so that the employees are led to expect it"). But if the referral program creates "a legal right to the payment and [the referring employee] could bring suit to enforce it," the second installment is not a gift, and therefore, would not be excludable under § 207(e)(1). 29 C.F.R. § 778.212(b); *see also O'Brien v. Town of Agawam*, 350 F.3d 279, 295-96 (1st Cir. 2003) (concluding that "contractually guaranteed longevity pay" was not excludable from the regular rate).

In summation, the first installment of the referral bonus is not remuneration for employment that must be included in the regular rate. But whether your client must include the second installment of the referral bonus in the regular rate depends on a fact that your letter left unclear:

- If payment of the second installment is not contractually enforceable, then it may be excluded from the regular rate under § 207(e)(1).[3]

- If payment of the second installment is contractually enforceable, then it must be included in the regular rate.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the

[3] As noted above, to be excludable as a gift, a bonus must also not be "so substantial that it can be assumed that employees consider it a part of the wages for which they work." 29 C.F.R. § 778.212(b). Based on the facts that you provided, we have insufficient information to conclude whether the second installment is so substantial or not.

interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).**