



FLSA2020-5

March 26, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether certain benefits that are imputed to an employee as income for tax purposes must be included in the employee's regular rate when calculating overtime pay under the Fair Labor Standards Act (FLSA). Specifically, you request an opinion addressing whether the regular rate for a non-exempt employee under the FLSA must include amounts that the Internal Revenue Code (IRC) requires be included in the employee's taxable gross income when the employer contributes to group-term life insurance coverage of over \$50,000 for the employee. 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

You explain in your letter that section 79 of the IRC requires employers to report as part of an employee's taxable gross income on the employee's wage statement the cost of providing the employee with group-term life insurance beyond \$50,000 worth of coverage, reduced by any amounts paid by the employee toward the purchase of such insurance. *See* 26 U.S.C. § 79; *see also* Internal Revenue Service (IRS), Publication 15-B, "Employer's Tax Guide to Fringe Benefits," 13 (2019). You refer to this taxable gross income that arises from such contributions as "imputed income." You represent that your law office has "been presented, on numerous occasions, with the issue of whether imputed income . . . reported on an otherwise [FLSA] non-exempt employee's wage statement in accordance with [IRC] § 79, should be included in any such employee's 'regular rate.'"

GENERAL LEGAL PRINCIPLES

The FLSA requires payment "at a rate not less than one and one-half times the regular rate at which [an employee] is employed" to all non-exempt workers 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. *Id.* at § 207(e). In interpreting these exclusions, the Department is mindful of the Supreme Court's guidance that to determine the scope of an exemption under the FLSA, the statutory text must be given a "fair (rather than a narrow) interpretation" because the FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). "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." *Sec'y U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019).

“[C]ontributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide [benefit] plan,” such as a life insurance plan, may be excluded from the regular rate. 29 U.S.C. § 207(e)(4).¹ With respect to the bona fide plans described in Section 7(e)(4), it is the employer’s *contributions* to such plans that are included in or excluded from the regular rate according to whether the requirements of that section, as explained in the Department’s regulations, are met. *See* 29 C.F.R. § 778.214(c); *see also* 29 C.F.R. § 778.215.

The regular rate “must reflect all payments which the parties have agreed shall be received regularly during the workweek” and “is not an arbitrary label chosen by the parties; it is an actual fact.” *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945); *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948) (“As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract.”); 29 C.F.R. § 778.108 (citing *Bay Ridge* and *Youngerman-Reynolds* in explaining that the regular rate is based on “what happens under the employment contract” and is the rate “actually paid the employee”).

OPINION

There is no presumption that income taxable under the IRC must be included in the regular rate. *Cf. Baouch v. Werner Enters., Inc.*, 908 F.3d 1107, 1113 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 122 (2019) (“The IRS regulations governing accountable plans are not identical to the [Department of Labor] regulations governing the calculation of employees’ regular rates for minimum wage purposes. There are legal differences and, in the case of a regular rate calculation, many additional factors at play. The two findings are not coextensive and thus a finding in one does not negate or direct a finding in the other.”); *Clarke v. AMN Servs., LLC*, No. 16-4132, 2017 WL 6942755, at *2 (C.D. Cal. Oct. 12, 2017) (“[C]ourts have recognized the tests for whether per diems should be included in an employee’s regular rate under FLSA and whether per diems should be taxable are not coextensive.”) (collecting cases); 29 C.F.R. § 778.215(b) (explaining that when certain benefit plans are approved by the IRS as meeting specific IRC requirements or are reasonably believed by the plan sponsor or government employer to meet specific IRC requirements, an employer’s contributions to the plan will be considered to meet some, but not all, of the requirements for exclusion from the regular rate under Section 7(e)(4)). Taxable income is included in the regular rate if it represents “remuneration for employment paid to, or on behalf of, the employee” and does not fall within one of the statutory exclusions. 29 U.S.C. § 207(e).

Regardless of its treatment for income tax purposes, an employer’s contributions to a group-term life insurance policy need not be included in an employee’s regular rate when calculating overtime pay under Section 7 of the FLSA provided that the criteria in Section 7(e)(4) are met. The relevant evaluation to determine whether such contributions are excludable from an employee’s “regular rate” under the FLSA is whether the employer’s contributions on the employee’s behalf to the employer-provided life insurance policy meet the statutory and

¹ This exclusion may apply when the costs for excess group-term life insurance coverage represent genuine employer contributions. It does not apply when an employee elects to have the employer purchase excess coverage on the employee’s behalf using a deduction from wages as permitted under 29 C.F.R. § 531.40(c).

regulatory requirements. *See* 29 U.S.C. § 207(e)(4); 29 C.F.R. §§ 778.214 and 778.215. “It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits.” 29 C.F.R. § 778.214(b). While the insurance policy “benefits must be specified or definitely determinable on an actuarial basis” or there must be “a definite formula” for determining both the employer’s contributions and the benefits to employees for the contributions to be excludable, 29 C.F.R. § 778.215(a)(3), nothing in these statutory or regulatory provisions limits the contributions to a particular dollar amount.² *Cf.* WHD Opinion Letter FLSA-794 (Aug. 11, 1981) (“Whether employer contributions to a retirement plan qualify for exclusion from the computation of the regular rate depends on the purpose of the plan and not on the amount of contributions an employer may make on an employee’s behalf.”).

Therefore, it is not necessary to separately evaluate income imputed to an employee for an employer’s cost of providing group-term life insurance coverage in excess of \$50,000. *See* 29 C.F.R. § 778.214(c). The Department’s regulations make clear it is whether an employer’s contributions to a benefit plan satisfy these statutory or regulatory requirements that matters in determining whether the contributions are included in or excludable from an employee’s regular rate. *See id.* The IRC’s designation of such amounts as taxable income has no impact on the exclusion of these amounts from an employee’s regular rate under the FLSA.

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 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)(7).**

² We provide no opinion here as to whether the group-term life insurance policies that your clients utilize satisfy the actuarial basis or formula requirements explained in 29 C.F.R. § 778.215(a)(3).