



FLSA2024-01

November 8, 2024

Dear **Name***:

This letter responds to your request for an opinion concerning whether daily expense payments for tools and equipment may be excluded from an employees' regular rate when calculating overtime pay under the Fair Labor Standards Act (FLSA or Act). 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 a services company in the oil and gas industry with employees who perform inspection and related services on new or existing pipeline assets. You represent that inspectors in the oil and gas industry commonly receive various expense payments in addition to their wages. You state that because inspectors often work in remote areas which are located far from their homes, employers commonly provide mileage reimbursement at the Internal Revenue Service rate for business-related mileage, as well as a per diem for living and meal expenses. Additionally, you assert that inspectors often receive payments to reimburse them for the use of their personal cell phone, camera, computer, vehicle, safety equipment and gear, and other tools and equipment that they use in the field to perform work.

On recent projects, your client has paid inspectors tool and equipment payments totaling \$25 per day for their use of the tools and equipment described above. However, your client wishes to know whether, and under what circumstances, the FLSA would permit it to make significantly higher tool and equipment payments—as high as \$150 to \$200 per day—and then exclude those payments from each inspector's regular rate of pay.

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 after 40 hours in a workweek. 29 U.S.C. § 207(a)(1). The regular rate must include “all remuneration for employment paid to, or on behalf of, the employee,” subject to eight statutory exclusions. *Id.* at § 207(e). In relevant part, the exclusion in section 7(e)(2) of the Act permits an employer to exclude from an employee's regular rate of pay “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of [their] employer's interests and properly reimbursable by the employer,” as well as “other similar payments to an employee which are not made as compensation for [their] hours of employment.” *Id.* at § 207(e)(2).

Determining what is the regular rate of pay “cannot be stipulated by the parties; instead, the rate must be discerned from what actually happens under the governing employment contract.”

Clarke v. AMN Services, LLC, 987 F.3d 848, 853 (9th Cir. 2021) (citations omitted); *see also Newman v. Advanced Tech. Innovation Corp.*, 749 F.3d 33, 39 (1st Cir. 2014) (“The goal is to pierce the labels that parties affix to the payments and instead look to the realities of the method of payment.”). With respect to per diem and expense reimbursement payments, the operative question is whether such payments function as legitimate reimbursements or as compensation for work. *Clarke*, 987 F.3d at 853–54. “The animating concern . . . is to examine the substance of a purported [expense] payment and to ensure that it is actually used to offset expenses[.]” *Newman*, 749 F.3d at 39. Employers bear the burden of establishing that expense payments are eligible to be excluded from an employee’s regular rate of pay. *See Clarke*, 987 F.3d at 853; *Newman*, 749 F.3d at 36; *see also Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 187 (3d Cir. 2000) (“[T]here is a statutory presumption . . . that remuneration in any form is included in the regular rate calculation.”).

In order for a payment to be excludable from an employee’s regular rate of pay as a reimbursement, an employee must “incur[] expenses on [their] employer’s behalf” or be “required to expend sums by reason of action taken for the convenience of [their] employer.” *See* 29 C.F.R. § 778.217(a); *see also* WHD Field Operations Handbook (FOH) 32d05a(b) (“[W]here an employee receives [expense] payments but actually incurs no such additional expenses, the entire amount of the payments shall be included in determining the regular rate.”). If an expense payment “is based upon and thus varies with the number of hours worked per day or week, such payments are a part of the regular rate in their entirety.” *Id.* at 32d05a(c). Finally, “only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as ‘reimbursement’ is disproportionately large, the excess amount will be included in the regular rate.” 29 C.F.R. § 778.217(c)(1).

FLSA recordkeeping regulations specify that employers must document “the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the ‘regular rate,’” noting that “[such] records may be in the form of vouchers or other payment data.” 29 C.F.R. § 516.2(b)(6)(iii).

OPINION

Your letter requests guidance related to whether payments of \$150 to \$200 per day could be excluded from the regular rate of pay of your client’s employees as a reasonable approximation of expenses incurred by those employees related to the use of their “personal mobile phone, camera, computer, and ancillaries” for work. Relatedly, you ask how your client should determine whether a reimbursement payment is a reasonable approximation of such expenses, and whether they may exclude a portion of a tool and equipment payment from an employee’s regular rate of pay if the overall reimbursement payment does not reasonably approximate the expenses incurred by the employee.

As noted above, the FLSA only permits the exclusion of “reasonable payments for . . . expenses . . . incurred by an employee in the furtherance of the employer’s interests[.]” 29 U.S.C. § 207(e)(2); *see* 29 C.F.R. § 778.217(d). Thus, for reimbursement payments to be excludable from the regular rate, employees must actually incur expenses. *See* FOH 32d05a(b); *see also, e.g., Clarke*, 987 F.3d at 854 (identifying “whether the payments are made regardless of whether any costs are actually incurred, and whether the employer requires any attestation that costs were

incurred by the employee” as relevant considerations when assessing the excludability of reimbursement payments). If your client’s employees do not actually incur ongoing tool and equipment expenses, reimbursement payments provided for purported expenses are not excludable from an employee’s regular rate of pay.

Where employees do incur tool and equipment expenses on behalf of an employer and the employer provides reimbursement for those expenses, “only the actual or reasonably approximate amount of the expense is excludable from the regular rate.” 29 C.F.R. § 778.217(c)(1). If the reimbursement payment is not reasonably approximate to the expenses the employee actually incurred, then the excess reimbursement payment must be included in the regular rate. Employers that provide such excessive expense payments, however, may still exclude the actual or reasonably approximate amount of an employee’s incurred expenses from the employee’s regular rate of pay while including the remaining amount in the regular rate. *See* 29 C.F.R. § 778.217(c)(1) (“If the amount paid as ‘reimbursement’ is disproportionately large, the *excess amount* will be included in the regular rate.”) (emphasis added).

WHD does not require or endorse a specific method to approximate employees’ expenses for reimbursement. The FLSA’s implementing regulations are flexible on this issue, requiring only that a method reasonably approximate employees’ actual expenses. *See* 29 C.F.R. § 778.217. Whether a particular method approximates actual expenses will depend on the circumstances in each case. *See WHD Opinion Letter FLSA2020-12 (Aug. 31, 2020)*. If a method reasonably approximates actual business expenses incurred by employees on behalf of their employer, it will comply with the FLSA. If a method fails to reasonably approximate such expenses, it will not.

Based on the facts provided in your letter, it does not appear that \$150 to \$200 per day tool and equipment payments could be excluded from employees’ regular rates. These payments would be six to eight times greater than the \$25 per day that your client currently provides for tool and equipment expenses, and your letter gives no indication that your client’s inspectors actually incur such significant ongoing expenses when using their “personal mobile phone, camera, computer, and ancillaries” for work. If your client implements the tool and equipment payments described in your letter, only that portion of the payment which reasonably approximates expenses that are incurred by inspectors on behalf of your client would be excluded from an inspector’s regular rate of pay.

Please note that tool and expense reimbursement payments cannot be used to artificially reduce employees’ regular rates of pay, in an attempt to reduce the amount an employer must pay its employees for overtime work. The FLSA does not permit schemes of this kind. *See* 29 C.F.R. § 778.500(a) (“[T]he overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means.”).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Jessica Looman".

Jessica Looman
Administrator

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