

Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Governing the Regular Rate under the FLSA

The U.S. Department of Labor (Department) is proposing to clarify and update 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 a 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 rulemaking, the Department proposes updates to a number of regulations, both to provide clarity and better reflect the 21st-century workplace. In doing so, these proposed changes would 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. The Department expects that the proposed rule will encourage some employers to start providing certain benefits that they may presently refrain from providing due to apprehension about potential overtime consequences, which in turn might have a positive impact on workplace morale, employee compensation, and employee retention. The Department was unable to quantify such potential benefits and invites comment from the public regarding the possible effects of the proposed rule.

*** Key Provisions of the Proposed Rule ***

The NPRM focuses primarily on clarifying whether certain kinds of perks, benefits or other miscellaneous payments must be included in the “regular rate” used to determine an employee’s overtime pay. In relevant part, the Department proposes clarifications to the current regulations to confirm the following:

- that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee’s regular rate of pay;
- that payments for unused paid leave, including paid sick leave, may be excluded from an employee’s regular rate of pay;
- that reimbursed expenses need not be incurred “solely” for the employer’s benefit for the reimbursements to be excludable from an employee’s regular rate;

- that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and meets other regulatory requirements may be excluded from an employee’s regular rate of pay;
- that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and
- that pay for time that would not otherwise qualify as “hours worked,” including bona fide meal periods, may be excluded from an employee’s regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

The Department also proposes to provide examples of discretionary bonuses that may be excluded from an employee’s regular rate of pay under section 7(e)(3) of the FLSA and to clarify that the label given a bonus does not determine whether it is discretionary. The Department also proposes to provide additional examples of benefit plans, including accident, unemployment, and legal services, that may be excluded from an employee’s regular rate of pay under section 7(e)(4) of the FLSA.

Additionally, the Department proposes to clarify that tuition programs, such as reimbursement programs or repayment of educational debt, could be excluded under several different provisions of section 7(e), and welcomes comments about how employers currently administer such programs.

Finally, the Department proposes two substantive changes to the existing regulations. First, the Department proposes to eliminate 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 proposes an update to its “basic rate” regulations. 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’s proposal would update this regulation to change the \$0.50 limit to 40 percent of the federal minimum wage—currently \$2.90.. The Department welcomes comments on whether 40 percent is an appropriate threshold.

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