



## Bonus! DOL Opinion Letters Clarify Regular Rate Calculation For Workplace Perks

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U.S. Department of Labor (DOL) Wage and Hour Division administrator recently issued three opinion letters, each concerning whether certain employee payments should be included in the calculation of the regular rate of pay. The regular rate of pay is a frequent source of confusion for employers, something the current administration has [sought to clarify](#).

The “regular rate of pay” is the pay rate which must be multiplied by 1.5 in order to arrive at the appropriate overtime rate of pay. Thus, determining a non-exempt employee’s regular rate is critical to properly calculating the employee’s appropriate overtime. While the regular rate may simply be the employee’s hourly rate of pay, that is not always the case. In addition to non-discretionary bonuses, certain other perks or benefits may be required to be included in the regular rate calculation. Each of three opinion letters dealt with a different type of payment to non-exempt employees, and whether such payment is properly excluded from the regular rate of pay.

**Group Term Life Insurance:** The [first opinion letter](#) dealt with whether employer-provided group term life insurance must be included in the regular rate of pay. The Wage and Hour administrator explained that it may be excluded, even though such benefit is taxable if it exceeds \$50,000 in coverage. According to the administrator, whether the benefit is taxable is not dispositive of whether a payment or benefit must be included in the regular rate. Rather, such benefit may be excluded if the contributions satisfy the

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dictates of the Fair Labor Standards Act (FLSA) and its related regulations.

**Multi-Installment Referral Bonus:** The [second opinion](#)

[letter](#) concerned a multi-installment employee referral bonus. In this letter, administrator answered an inquiry where the employer contemplated provided non-recruiting employees with two referral bonuses for successful candidates. The administrator opined that only a portion of the multi-installment referral bonus could be excluded from the regular rate of pay. The first bonus installment, paid upon the hiring of the referred candidate, could be excluded. However, the second bonus installment, paid on the referred candidate's one-year employment anniversary, must be included in the regular rate. Relying on the Wage and Hour Division's recent Final Regular Rate Rule, the administrator explained that a recruitment bonus (i.e., the first installment) is not "remuneration for employment;" whereas, the second installment is essentially a longevity bonus, and thus must be included in the regular rate. The administrator went on to note, however, that the second installment could be excluded from the regular rate if the referring employee received the bonus regardless of whether the referred candidate was still employed at the one-year mark, or if the second installment was paid at a shorter interval, such as after one pay period.

**Municipal Employee Annual Bonus:** The [third and final opinion](#)

[letter](#) dealt with an end of year bonus offered by a city in Alabama, by way of municipal resolution. The administrator concluded that the bonus is not properly excluded from the regular rate. The bonus was calculated using a formula based upon the employee's length of tenure, and was essentially a "longevity award." The administrator determined that the bonus is not properly considered a "gift," which would be excludable from the regular rate, but rather a non-discretionary bonus. The operative resolution stated that the bonus "shall" be paid, not that it "may" be paid. This textual difference was sufficient to remove the payment from an excludable gift to a non-discretionary bonus that must be included in the regular rate of pay.

Like all Wage and Hour Division Opinion Letters, these latest opinion letters are a useful reference for employers. Although they do not have the same binding effect as DOL Rules, the opinion letters provide employers with useful guidance to ensure proper calculation of non-exempt employees' regular rate of pay and overtime. As with most wage and hour issues, employers would be wise to pay heed to this guidance from the DOL, and to remain abreast of the DOL Rules concerning the calculation of the regular rate and other wage and hour issues. Failure to do so may expose employers to litigation, including workplace class and collective actions.