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New DOL Rule Allows Employers To Offer Perks Without Affecting Regular Pay Rate

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Mark Wallin
Partner

The U.S. Department of Labor (DOL) issued its [final regular rate](#) rule on December 16, 2019. The rule is designed to clarify what forms of payments made by employers must be included in an employee's "regular rate of pay," and what payments may be properly excluded from the time-and-a-half overtime calculation required by the Fair Labor Standards Act (FLSA) for non-exempt employees.

The regular rate of pay is the rate which employers must multiply by 1.5 to calculate the appropriate rate of pay for overtime. Thus, determining an employee's regular rate is critical to properly calculating their overtime rate. While the regular rate may simply be the employee's hourly rate of pay, that is not always the case. In certain circumstances, non-discretionary bonuses and other perks or benefits may need to be included in the regular rate calculation. For example, if the employee receives an attendance bonus each pay period, that bonus must be accounted for in the employee's regular rate of pay calculation.

The new DOL rule provides welcome clarity in this area. In particular, the final rule states that the following benefits may be offered without requiring an adjustment to the employee's regular rate:

- Certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts

on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student loan program), and adoption assistance

- Payments for unused paid leave, including paid sick leave or paid time off
- Payments of certain penalties required under state and local scheduling laws
- Reimbursed expenses including cell phone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit. The rule clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”
- Certain sign-on bonuses and certain longevity bonuses
- Office coffee and snacks provided to employees as gifts
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense

The final rule also reaffirms that discretionary bonuses need not be included, clarifies that the label assigned to a bonus does not determine whether it is discretionary, and provides illustrative examples.

Among several other changes, the final rule amends existing regulations relating to “call-back” pay. The rule eliminates the requirement that such pay may only be excluded from the regular rate where call-backs are “infrequent and sporadic,” while preserving the restriction that a call-back must not be pre-arranged if it is to be excluded from the regular rate calculation.

The DOL’s new regular rate rule is effective January 15, 2020, and will affect employers in numerous industries, especially those with substantial numbers of non-exempt workers. The DOL’s rule seeks to remove some of the pitfalls employers encounter as they try to navigate the often complex wage and hour requirements of FLSA regulations. The good news is that under this rule, employers can provide employees with additional perks and benefits without fear that these benefits may result in litigation over needed, but unknown, additions to overtime rates.