Department of Labor Proposes Amended Regulations Concerning FLSA's 'Regular Rate'

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The Department of Labor (DOL) has issued a Notice of Proposed Rulemaking (NPRM) to revise the regulations governing the calculation of the regular rate under the Fair Labor Standards Act (FLSA).

The FLSA generally requires employers to pay non-exempt employees overtime pay at one-and-one-half times their "regular rate" for all hours worked over 40 in a given workweek. The regular rate is defined, with a few exceptions, as all "remuneration for employment paid to, or on behalf of, the employee," divided by the total number of hours worked during that week. Employers sometimes struggle, however, with properly determining the regular rate when providing various benefits and other forms of compensation to their employees in the modern workplace.

The proposed regulations, released on March 28, 2019, are lengthy and detailed, and public comments must be submitted by May 28, 2019. We review some highlights of the proposal below.

Vacation, Sick Time, Paid Time Off

The proposed amendments address the employer trend of consolidating vacation, sick, and personal time into one category, referred to as "paid time off" (PTO). DOL clarifies that payment for PTO (when not worked), as well as payouts for unused PTO, need not be included in the regular rate, as this is pay for non-working time.

"Bona Fide" Meal Periods

A proposed amendment addresses the apparent contradiction that has arisen between 29 C.F.R. § 778.218(b) and 29 C.F.R. § 778.320 surrounding whether pay for "bona fide meal periods" is excludable from the regular rate.

Section 778.218 concerns payments made for occasional periods when no work is performed. It provides that when payments for such time "are in amounts approximately equivalent to the employee's normal earnings," they are not compensation for hours of employment and may be excluded from the regular rate. Section 778.218(b) further provides that this clause "deals with the type of absences which are infrequent or sporadic or unpredictable," not with lunch periods or days of rest that are regularly scheduled.

Section 778.320 addresses "hours that would not be hours worked if not paid for," such as "time spent in eating meals between working hours." Section 778.320(b) states that even when such time is compensated, the parties may agree the time will not be counted as hours worked.

In light of both the courts' and the DOL's own recognition that Sections 778.218(b) and 778.320(b) "may not be compatible," the DOL proposes to amend the regulations to remove the reference to "lunch periods" in Section 778.218(b) to "eliminate any uncertainty about its relation to [Section] 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate."

Reimbursement for Reasonable Expenses

Under existing regulations, employer reimbursement of expenses incurred by an employee for his or her *own* benefit, such as commuting expenses, meals, rent, and so on, must be included in the regular rate. However, under Section 778.217 of the current regulations, reimbursable expenses are excludable if they are incurred "solely" in the interest of the employer. The FLSA itself does not include this limitation. Instead, the Act excludes all expenses incurred "in the furtherance of [the] employer's interests." Because neither the courts nor the DOL have abided by the "solely" language, the proposed amendments would remove that word from Section 778.217.

Along these same lines, the proposed amendments provide guidance on what constitutes a "reasonable" expense within the meaning of 29 C.F.R. 778.217(b) and excludable from the regular rate. For example, if an employer pays the employee double for any expenses the employee incurs, the overage may be considered wages. The DOL states that it will consider an expense to be *per se* reasonable if it is "at or

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beneath the maximum amounts reimbursable or allowed for the same type of expenses under the Federal Travel Regulation ...." While reimbursements exceeding these amounts will not necessarily be deemed "unreasonable," they will not be considered *per se* reasonable and must be evaluated on a case-by-case basis.

"Other Similar Payments"

Section 7(e)(2) of the FLSA identifies three categories of remuneration that are excluded from the regular rate: (1) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; (2) reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his or her employer's interests and properly reimbursable by the employer; and (3) other similar payments to an employee which are not made as compensation for his or her hours of employment. 29 U.S.C. § 207(e)(2). While the first two categories are fairly straightforward, the third is frustratingly vague.

Courts generally have held that the "similar payments" exclusion applies to any compensation paid based on an individual's general status of being an employee and not on the quality or quantity of his or her work. The proposed amendments would add a number of additional examples to the non-exhaustive list of excludable benefits currently found in the regulations to include "conveniences furnished to the employee," such as:

- "Treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs";
- "Gym access, gym memberships, fitness classes, and recreational facilities";
- Modern "wellness programs" such as health screenings, vaccinations, smoking cessation support, and nutrition classes;
- Discounts on employer-provided retail goods and services; and
- "[T]uition benefits."

These benefits cannot be tied to the "employee's hours worked, services rendered, or other conditions related to the quality or quantity of work" (except that an employer may require an initial waiting period for benefit eligibility or require repayment if the benefit is misused).

Among the categories newly described, the carve-out for tuition assistance benefits likely will be the most interesting to employers. It poses a number of questions, however. For instance, many employer tuition assistance programs are open only to employees who have attained a certain number of years of service. The proposed regulations do not clarify whether the allowance of an "initial waiting period" would include a policy that requires two or three years of service before tuition reimbursement becomes available. The DOL is seeking additional information and comments about the nature of employers' tuition assistance plans and employers' concerns in offering such plans.

Show-Up Pay

Existing DOL regulations provide that payments given by employers to employees for "show-up" pay is excluded from the regular rate of pay under Section 7(e)(2) of the FLSA. Show-up pay describes a minimum payment given to employees who report to work and are sent home because of lack of work. For example, if an employee reports to work, works one hour, and is sent home, some employers voluntary provide show-up pay for a minimum number *(e.g.,* four hours) of work. Under some state laws, such minimum pay is required.

The proposed amendments clarify that recent state and local laws, requiring "reporting pay" for employees who are unable to work their scheduled hours because the employer subtracted hours from a regular shift before or after the employee reports to duty, will be treated as "show-up" pay under existing regulations. The DOL refers to proposed laws in Arizona, Connecticut, Illinois, Massachusetts, Maryland, New York, and Chicago.

Call-Back Pay

Under Section 778.221 of the current regulations, if an employee is called back to work after his normal shift ends, pay for the number of additional hours the employee actually works, of course, is included in his or her total hours of work and in calculation of the regular rate. However, any additional pay the employee receives simply for being recalled to work may be properly excluded from the regular rate. For example, if an employee returns to work for an emergency and works one hour, but is paid a minimum of four hours, the three additional hours may be excluded from the regular rate.

The proposed amendments revise Section 778.221 to eliminate the requirement that call-back payments be received only on an "infrequent" or "sporadic" basis for the exclusion to apply (thus, arguably broadening the exclusion). The revision also notes the payments cannot be "so regular that they are essentially prearranged."

To illustrate the point, the proposal provides an example of an employee who is called in to help clean up a store after a roof leak and is called in three weeks later to cover for a coworker who left for a family emergency. If the employee is given minimum call-back pay, the pay in excess of hours actually worked may be excluded, as these incidents were not prearranged. However, if the employee is called in for "emergency help" during a busy period for six out of eight weeks, the proposed regulations provide that

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the call-back pay would be "so regular" that it is, in effect, "prearranged" and cannot be excluded. In contrast, payment for periods when an employee is "on-call" must be included in the regular rate, according to DOL regulations.

Predictability Pay or Schedule Change Premiums

Several local jurisdictions, including New York City and Seattle, have enacted laws requiring employers to pay employees a schedule change premium or penalty when an employer fails to provide employees with sufficient notice *(e.g.,* less than 14 days) prior to the beginning of their shift or cancels a shift without sufficient notice to an employee. As with call-back pay, the proposed regulations provide that these extra payments may be excluded from the regular rate of pay under Section 207(e)(2) of the FLSA, so long as they are not "so regular" that they are "essentially prearranged."

"Clopening" Pay

Similar to predictability pay, the proposed regulations provide that extra payments given by employers to employees solely because the employees are called back to work before the expiration of a specified number of hours between shifts need not be included in the regular rate of pay. This form of compensation is sometimes referred to as "rest period" pay or "clopening" pay, because an employee is required to work both a closing shift and the following opening shift without sufficient rest time between the shifts. Again, to be excludable, such payments cannot be so common as to be prearranged.

Discretionary Bonuses

An employer providing a bonus to non-exempt employees must determine whether the bonus should be included or excluded from the regular rate of pay. The general rule is that non-discretionary bonuses must be included, while discretionary bonuses may be excluded. (Discretionary bonuses are those where the fact and the amount of the bonus are determined at the sole discretion of the employer at or near the end of the period to which the bonus corresponds.)

The proposed amendments seek to "elaborate" on the types of bonuses that are, and are not, discretionary, purportedly to add "clarity" for employers and employees.

The proposed regulations reiterate that a bonus's label is not determinative. A new section (29 C.F.R. § 778.211(d)) expressly provides that "the label assigned to a bonus does not conclusively determine whether a bonus is discretionary under section 7(e)(3) of the Act." Proposed Section 778.211(d) also lists additional examples of bonuses that may be non-discretionary: (1) bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria (citing a case where employees were given "spot bonuses" for extraordinary contributions); (2) severance bonuses; (3) bonuses for overcoming challenging or stressful situations (citing a 2008 DOL opinion letter addressing a bonus given to 911 operators); (4) employee-of-the-month bonuses; and (5) "other similar compensation."

Contributions Pursuant to Bona Fide Benefit Plan

Section 7(e)(4) of the FLSA excludes from the regular rate "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." The existing DOL regulations *(i.e.,* 29 C.F.R. § 778.215(a)(2)) further explain that, to be excludable, "[t]he primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like."

The DOL's proposed amendments attempt to update this regulation by adding more examples of the types of modern benefit plans that may be excludable from the regular rate of pay. The Department proposes adding "accident, unemployment, and legal services" as additional examples of contributions that are excludable from the regular rate. The proposed amendments make clear that these examples, like the examples already provided in the regulation, would have to satisfy the other requirements outlined in Section 778.215. The DOL is inviting comments on whether there are other similar benefit plans that likewise should be included as examples.

Voluntary Premium Payments

Section 207(e) of the FLSA permits employers to exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods. In particular, premiums may be excluded:

- For "hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee [under Section 7(a)] or in excess of the employee's normal working hours or regular working hours, as the case may be," Section 207(e)(5);
- "[F]or work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days," Section 207(e)(6); or
- "[I]n pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection [7(a)], where such premium rate is not less than one

and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek." Section 207(e)(7).

Additionally, Section 207(h)(2) provides that extra compensation of the types described in Sections 7(e)(5), (6), and (7) is creditable toward overtime compensation owed under Section 7(a). These are the only types of compensation excludable from the regular rate that also are creditable toward overtime compensation.

Existing DOL regulations *(i.e.,* 29 CFR §§ 778.202, 778.203, 778.205, and 778.207) explain the requirements for excluding from the regular rate the overtime premiums described in Sections 207(e)(5) and (6). The DOL's proposed amendments suggest removing from the existing regulations any references to "employment agreements" or "contracts," so as to eliminate any confusion that the overtime premiums described in Sections 207(e)(5) and (6) may be excluded only under written contracts or agreements. The DOL explained that this clarification is consistent with the fact that neither Section 207(e)(5) nor Section 207(e)(6) requires that the overtime premiums be paid pursuant to a *formal* employment contract or collective bargaining agreement (as opposed to Section 207(e)(7), which *expressly requires* such a contract or bargaining agreement). The DOL notes that this interpretation, which focuses more on the employer's practice than on any formal agreement or contract, is consistent with both its own practice and with how most courts have interpreted the FLSA and existing regulations. However, because some courts have expressed confusion, the DOL is seeking to clarify its position in the regulations.

The Regulations are Not Exhaustive

Because compensation practices may vary significantly and will continue to evolve, the DOL notes, as long as the minimum wage and overtime requirements are satisfied, the FLSA does not restrict the forms of "remuneration" that an employer may pay. The DOL further explains that, while the eight *categories* of excludable payments enumerated in the current regulations are exhaustive, unless otherwise indicated, those regulations do *not* contain an exhaustive list of permissible or impermissible compensation *practices.* Rather, the regulations merely provide examples of regular rate and overtime calculations that, by their terms, may or may not comply with the FLSA under Section 207(e).

Accordingly, the proposed amendments intend to specify that the examples of excludable payment types set forth in the regulations are not exhaustive and other payment types may exist that nonetheless qualify as excludable from the regular rate.

What Happens Next

The 60-day period for the public to comment on the proposed amendments is underway and closes on May 28, 2019. Following the comment period, the DOL likely will issue a Final Rule, although no date has been announced for doing so.

The DOL's proposed amendments to the regulations, while unlikely to eliminate all problems stemming from the oft-confounding regular rate determination, nevertheless should provide some much-needed and updated guidance to employers in their efforts to comply with the FLSA.

If you have any questions about the proposed amended regular rate regulations, want assistance with submitting comments, or have questions about any other wage and hour issues, please consult with the Jackson Lewis attorney(s) with whom you regularly work.

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