

Expense Reimbursement + Regular Rate: What a Recent DOL Opinion Letter Means for Construction Employers

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Takeaways

- A Nov. 2024 DOL Opinion Letter reminds employers when expense reimbursements must be factored into the regular rate of pay for purposes of calculating overtime under the FLSA.
- An employer cannot provide a reimbursement that is disproportionately large to the actual expense.
- Employers should review their reimbursement practices to ensure they reflect actual expenses incurred and the payments are documented.

For employers in the construction industry, a dynamic workforce and unforeseen circumstances often result in employers paying overtime and reimbursing employee costs. While each business's needs vary, employees often incur expenses on the employer's behalf such as for the use of personal tools and equipment. The Department of Labor recently addressed whether per diem expense payments for tools and equipment may be excluded from the hourly rate when calculating overtime pay under the Fair Labor Standards Act (FLSA). Although not breaking new ground, this is an important reminder for employers about when such reimbursements must be factored into the regular rate.

When determining the rate that an employee in the construction industry should be paid for overtime, the employer needs to make sure to correctly calculate the employee's regular rate of pay. The FLSA requires employers to pay non-exempt workers at a rate not less than one-and-a-half times the employee's regular rate of pay for all hours worked after 40 hours in a workweek. The FLSA requires "all remuneration" to be included in the regular rate when computing overtime pay. There are exceptions to this requirement. In most cases, payment for the purpose of reimbursing workers for expenses incurred on the employer's behalf can be excluded from the employee's regular rate of pay.

The Department of Labor Wage and Hour Division's recently released WHD Opinion Letter FLSA2024-01 (Nov. 8, 2024) reminds employers what can and cannot be excluded from the regular rate.

Section 7(e)(2) of the FLSA allows an employer to exclude from their employee's regular rate of pay "reasonable payments for traveling expenses, or other expenses, incurred by the employee in furtherance of [their] employer's interests and properly reimbursable by the employer" and "similar payments to an employee which are not made as compensation for [their] hours of employment."

In the situation that led to the Opinion Letter, the employer asked about paying its employees \$150 to \$200 per day for tool and equipment expenses and exclude that amount from the regular rate. It currently pays workers \$25 per day for those expenses. The FLSA requires that expense payments reflect actual expenses incurred. An employer cannot provide a reimbursement that is disproportionately large to the actual expense. In cases where that happens, the regular rate will only be calculated excluding the reasonable value of the expenses incurred and the excess will be attributed to the regular rate.

If you calculate the overtime rate based on an artificially low regular rate because you overestimated expense payment, you may find yourself in violation of the FLSA for the artificially low overtime rate.

Employers should review their reimbursement practices to ensure they reflect actual expenses incurred and the payments are documented. FLSA recordkeeping provisions require that employers document “the amount and nature of each payment” to be excluded from the regular rate calculation.

Employers who have questions about these and other issues should contact the Jackson Lewis attorney with whom they regularly work.

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