U.S. Department of Labor Wage and Hour Division
Washington, D.C. 20210

FLSA2026-2

January 5, 2026

Dear **Name***:

This letter responds to your request for an opinion concerning whether section 7(e) of the Fair Labor Standards Act (FLSA or Act) permits your employer to exclude certain bonus payments from the "regular rate of pay" and, if not, how it must include these payments in the calculation of employee overtime premiums.

It is our opinion that, under the facts and circumstances set forth in your request, your employer must include the bonus payments you describe in each employee's regular rate of pay for every workweek said bonuses are earned. These payments do not qualify as discretionary bonuses excluded by the Act from the regular rate, or fall within any other statutory exclusion. Accordingly, your employer must include these incentive bonus payments, in addition to each employee's base hourly wage, in the regular rate used to calculate overtime, as described below.

BACKGROUND

You represent that your employer operates in the waste management industry and pays its employee drivers a rate of $12.00 per hour. Based on the practices described, we presume that your employer classifies its drivers as non-exempt and subject to the requirements of sections 6 and 7 of the Act, and, as a result, pays them at least the minimum wage for all hours worked and overtime premiums for all hours worked over 40 in a workweek.[1] In addition to this base hourly wage and overtime premium, drivers can earn additional compensation pursuant to a "Safety, Job Duties, and Performance" bonus plan. Under this plan, an employee can earn supplemental performance-based bonuses each pay period that, if earned, apply to all hours worked in that pay period.

Your employer's bonus plan uses detailed criteria and one or more formulas both to determine whether a bonus is earned and to calculate the hourly bonus amount each employee earns. The plan rewards an employee's punctuality, attendance, consistency in completing daily safety tasks,

[1] You did not request—and so this letter does not provide—an opinion on whether these drivers qualify for the overtime exemption in 29 U.S.C. § 213(b)(1) (exempting employees from overtime pay requirements based on certain motor carrier activities conducted in interstate commerce).

driving safety, compliance with traffic laws, proper attire, and performance efficiency.[2] The maximum bonus amount is $9.50 per hour. We assume the employees receive the bonus plan information before performing the work.

Upon applying the bonus plan's criteria, your employer pays the bonus described above, along with the base hourly wages for each pay period. Your employer does not, however, include the bonus payments in each employee's regular rate for purposes of calculating overtime premiums. Instead, your employer calculates all overtime premiums owed using only each employee's $12.00 base hourly rate.

GENERAL LEGAL PRINCIPLES

The FLSA requires that employers pay at least the federal minimum wage for all hours worked and overtime pay "at a rate not less than one and one-half times the regular rate at which [the employee] is employed" to all non-exempt employees for all hours worked over 40 hours in a workweek. 29 U.S.C. §§ 206, 207(a)(1). The "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee," with limited exceptions. *See id.* § 207(e).

"[T]he rule for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any workweek[.]" *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 459–60 (1948); *see also* 29 C.F.R. § 778.109. First, the employer must total the employee's "straight-time" earnings *actually paid* for that workweek, all remuneration less any amounts excluded under section 7(e). Then, the employer must total all the hours *actually worked* in that same workweek. Once the straight-time earnings and hours worked are ascertainable, "the determination of the regular rate becomes a matter of mathematical computation[.]" Bay *Ridge*, 334 U.S. at 461 (citations and quotes omitted).

To calculate the regular rate, the employer must divide the total straight-time earnings by the total hours worked in that same workweek. Then, the employee's overtime premium is calculated by dividing the regular rate in half (yielding the "half-time" rate) and multiplying that amount by the FLSA overtime hours worked to obtain the FLSA overtime premium pay due for the workweek. *See* 29 C.F.R. § 778.110. Of relevance to your request, section 7(e)(3) of the Act permits an employer to exclude from the regular rate "[s]ums paid in recognition of services performed during a given period" if "both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments

[2] The bonus plan criteria also provides for adjustments for the "[a]ctual cost of repair or replacement" if there is "[v]ehicle or property damage" when determining whether or to what extent a bonus might be earned. There is no indication in the materials submitted that any bonus plan criteria ever reduces a driver's base hourly rate. Business costs, however, cannot be passed along to an employee to the extent that doing so (whether through payroll deduction or otherwise) results in an underpayment of the minimum wage or an employee's overtime premium pay. *See Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1369–70 (5th Cir. 1973) (citing 29 C.F.R. § 531.35 and holding that the FLSA prohibits deductions from employees' pay to cover damages to a company vehicle to the extent such deductions reduce employee's pay below the minimum wage).

regularly[.]" 29 U.S.C. § 207(e)(3). Such a payment is often termed a "discretionary" bonus. *See* 29 C.F.R. § 778.211.

OPINION

Based on the specific facts described in your letter, the employer must include the bonus payments in the regular rate of pay in any workweek for which they are earned, because such payments are incentives and do not qualify as a discretionary bonus or meet any other section 7(e) exclusion. Accordingly, the employer has failed to pay in full the overtime premium—i.e., the "half-time" premium—to employees who received the safety, job duties, and performance bonus.

A. Additional incentive bonus payments must be included in the regular rate.

Section 7(e)(3) of the FLSA requires that three conditions be satisfied for a payment to qualify as an excludable discretionary bonus: (1) the fact and amount of the payment must be "determined at the sole discretion of the employer"; (2) the employer's determination must occur "at or near the end of the period" when the employee's work was performed; and (3) the payment must not be made "pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly[.]" 29 U.S.C. § 207(e)(3). Here, the bonus payments are not discretionary because, although the decision to offer the bonuses and on what terms was initially at the employer's discretion, the fact and amount of such payments are not made at the "sole discretion of the employer at or near the end of the period" in which the work is performed. *Id.*; 29 C.F.R. § 778.211(a). Rather, the amount of the bonus is calculated using a predetermined plan to incentivize certain work performance. Thus, regardless of whether the plan used by the employer to calculate any bonus payments constitutes a prior contract, agreement, or promise, the first two statutory requirements of an excludable discretionary bonus are not satisfied.

The employer's plan sets forth criteria such that, once met, the corresponding amount of the bonus is quantifiable under the plan and earned by the eligible employee. Thus, because the policy automatically triggers the bonus upon meeting the criteria, the employer has effectively "abandoned" its discretion with respect to the fact and amount of the payment. *See* 29 C.F.R. § 778.211(b) ("If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it."). Moreover, although opinions may differ when deciding whether a particular criterion is satisfied (*e.g.*, whether a vehicle was returned in "clean" condition), such differences do not change the non-discretionary nature of the payment because it is not subject to the *sole* discretion of the employer—as eligibility for, and the amount of, the bonus are based on terms predetermined before performance. *See* 29 U.S.C. § 207(e)(3); 29 C.F.R. § 778.211(b) (stating that abandonment of discretion as to "the amount of the bonus though not with regard to the fact of payment," results in a non-discretionary bonus); *see also* WHD Opinion Letter FLSA2004-11 at 3 (Sept. 21, 2004) (explaining that where bonus "criteria [are] tied to productivity in any way and [are] not at the sole discretion of the employer," the resulting bonus is non-discretionary and must be included in the regular rate). Accordingly, the incentive bonus payments, as described, do not meet the criteria of a discretionary bonus under section 7(e)(3), nor any other statutory exclusion from the regular rate. As such, the payments must be included in the employees' regular rate used to calculate overtime premiums. *See* 29 C.F.R. § 778.211(c); *see also id.* § 778.208.

Moreover, because the bonus plan you describe is meant to induce employees to meet certain performance metrics, and foreknowledge is a critical component of incentivizing employees to perform, we assume that your employer communicates the requirements of this bonus to the employees before any work is performed. This foreknowledge further supports the bonus being understood as a non-discretionary bonus that must be included in the regular rate of pay. *See* 29 C.F.R. § 778.211(c) ("Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently . . . are regarded as part of the regular rate of pay.").

B. Overtime premium pay should be calculated using one half of an employee's regular rate of pay for the relevant workweek.

Having established that the employer must include the bonus in the regular rate of pay, we turn to how to calculate overtime premiums properly for the employees described in your request. Here, the employer calculates the hourly bonus such that, even though the amount is not ascertainable until the completion of the pay period, the employer can allocate the bonus based on the hours worked in each of the relevant workweeks and calculate any overtime premium pay due for each separate workweek.

Your letter describes an employee who works 50 hours in a workweek, is paid a base hourly wage of $12.00, and also receives $9.50 per hour in bonuses ($1.50 for efficiency and $8.00 for safety/performance) for all hours worked. This results in a regular rate of $21.50 per hour. You correctly concluded that the employee was due $21.50 for all hours worked up to 40 and $32.25 (1.5 × $21.50) for each overtime hour.

You state: "By excluding these bonuses, the company pays overtime at $18.00 ($12.00 × 1.5), resulting in a shortfall of $14.25 per overtime hour ($32.25 - $18.00)[.]" However, this calculation overlooks that, in your hypothetical, the employee received the $9.50 bonus for all 50 hours worked, including each of the 10 overtime hours, in addition to the $12.00 wage. The employer actually paid $27.50 for each overtime hour: $21.50 in straight-time earnings plus a $6.00 premium. Thus, the correct overtime shortfall is $4.75 per hour, not $14.25.

By way of another example:

James earns a base hourly rate of $12.00 per hour and works a total of 50 hours in a workweek in which, based on the predetermined incentive terms, the employer pays an additional $5.60 per hour for all hours worked as a non-discretionary bonus. His total straight-time earnings are $880.00 ((50 hours × $12.00) + (50 hours × $5.60)).[3] *His regular rate for the workweek is therefore $17.60 ($880.00 ÷ 50 hours) and the half-time rate is $8.80 ($17.60 × 0.5). Thus, he is entitled to an additional $8.80 per hour for each overtime hour worked for a total overtime premium of $88.00 ($8.80 × 10 overtime hours), increasing his total wages to $968.00 ($880.00 (straight-time earnings for all hours worked) + $88.00 (half-time due for all hours worked over 40 per workweek)).*

Notably, employers may structure bonuses to require employees to meet certain conditions, including adherence to safety protocols, codes of conduct, or performance targets, consistent with

[3] Alternatively, an employer would reach the same result if it structured this equation for hourly-based pay components using the distributive property: 50 hours × ($12.00 + $5.60) = $880.00.

the requirements of the FLSA. Such bonus plans may rely on a variety of factors or criteria such that the amount of an employee's bonus ultimately earned may vary from workweek to workweek. But if a bonus plan neither satisfies the requirements of 29 U.S.C. § 207(e)(3), nor fits within another statutory exclusion, any bonus payment made must be included in the employee's regular rate for overtime purposes. Employers must heed to these core principles, imbued throughout the Act, when structuring pay components to achieve business objectives in a legally compliant manner.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the Wage and Hour Division of the United States Department of Labor for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,

Andrew B. Rogers
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).** You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for any litigation that commenced prior to your request. This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.