Employment Law Daily Wrap Up, TOP STORY—DOL proposal would update, clarify 'regular rate' in a move that's 'good for everyone', (Mar. 28, 2019)

Employment Law Daily Wrap Up

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The proposed rule would bring into the 21st century regulations pertaining to the "regular rate" used to calculate overtime for nonexempt employees, bringing "much needed clarity" to the impact of modern benefit programs on that rate.

The Department of Labor has released a proposed rule that would clarify and update the "regular rate" requirements in regulations that have not been updated in more than 50 years. The regular rate has been a headache for many employers, because while it is the rate that must be used when calculating overtime pay, that rate is not always easy to determine.

A notice of proposed rulemaking scheduled for publication in the *Federal Register* on March 29, 2019, endeavors to bring the regulations into the 21st century and take away some of the mystery for employers.

According to experts that *Employment Law Daily* contacted, the proposed changes would make updates to the treatment of some of the more current employee benefit offerings, such as gym memberships, massage therapists, and wellness programs (e.g., stress reduction programs), in calculating an employee's regular rate—a move that one of them characterized as good for both employers and employees alike, so that these innovative programs can move forward without fear of violating the FLSA.

OT is based on the regular rate. The FLSA generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per workweek. The regular rate includes all remuneration for employment, subject to certain exclusions that are outlined in Section 7(e) of the FLSA.

The DOL's official interpretation of Section 7's overtime compensation requirements, including requirements for calculating the regular rate, is contained in Part 778 of Title 29, Code of Federal Regulations. Part 548 of Title 29 implements section 7(g)(3) of the FLSA, which permits employers under specific circumstances to use a basic rate to compute overtime compensation rather than a regular rate.

It's about time. The DOL stressed that it has not updated many of these regulations in more than half a century, despite the fact that compensation practices have evolved significantly. The notice of proposed rulemaking updates multiple regulations both to provide clarity and better reflect the 21st century workplace, it says. The proposed changes, according to the DOL, would promote FLSA compliance; provide appropriate and updated guidance in an area of evolving law and practice; and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation.

The sticky question of perks. Under current rules, employers are discouraged from offering more perks to their employees because it may be unclear as to whether those perks must be included in the calculation of an employees' regular rate of pay, the DOL observed in a release. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. Because these regulations have not been updated in decades, the proposal would better define the regular rate for today's workplace practices.

Excludable from regular rate. Under the proposed rule, employers may exclude the following from an employee's regular rate of pay:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- Payments for unused paid leave, including paid sick leave;
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements;
- Discretionary bonuses, by providing additional examples and clarifying that the label given a bonus does not determine whether it is discretionary;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational debt.

Meal periods and "call back pay." Among other things, the proposed rule would also clarify (in Parts 778.218(b) and 778.320) that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate *unless* an agreement or established practice indicates that the parties have treated the time as hours worked.

The rulemaking would also eliminate the restriction (in Parts 778.221 and 778.222) that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged.

Basic rate computations. Notably, the proposed rule would increase, from $0.50 to a weekly amount equivalent to 40 percent of the hourly federal minimum wage (currently $2.90, or 40 percent of $7.25), the amount by which total compensation would not be affected by the exclusion of certain additional payments when using the "basic rate" to compute overtime provided by § 548.3(e).

Much needed clarity provided. Ogletree Deakins Sharehold Liz Washko said the primary effect of the proposed changes would be "to provide clarity to employers and employees regarding certain aspects of compensation and benefits that would be excluded from the regular rate of pay for purposes of calculating overtime."

She explained that "many of the compensation elements and benefits listed in the proposed rule are of the type that would be excludible from the regular rate under existing law and regulations, as they have been traditionally interpreted."

But there has been some recent litigation activity in which employee-side attorneys have filed complaints alleging that employers have violated the FLSA by failing to include certain benefits in the regular rate, Washko noted. "These proposed rules will provide clarity that will preclude these kinds of claims seeking to expand the definition of what compensation must be included in the regular rate," she said.

Impact on the workplace. Jackson Lewis Principal Jeffrey Brecher said that the proposed rule "should be welcomed by both employers and employees." He pointed out that many of the changes that would be made under the proposal "merely reflect longstanding DOL guidance and would codify that guidance in regulations."

"Employers, above all, want clarity," Brecher observed. "In my experience, employers want a clear answer to a question—do we have to include X in determining the employee's rate of pay or not? They don't want to hear, 'maybe' or 'its grey.'" The proposed rule seeks to eliminate "maybes" and provide employers with "yes" or "no" answers, "which is good for employers and employees," Brecher explained.

Updated to reflect changes in perks. Some of the changes proposed reflect changes in perks that employers provide to employees, the Jackson Lewis attorney continued. "The regulations were written over 50 years ago and have not been updated to reflect these changes," he said. "For example, employers may wish to provide perks such as gym memberships, massage therapists, wellness programs (e.g., stress reduction programs) but have been hesitant to do so because of uncertainty whether the value of those perks must be included in determining a non-exempt employee's rate of pay for overtime purposes."

These proposed rule "clears the air and may encourage employers to move forward with these and other innovative benefits without fear they are violating federal law," according to Brecher. "Employees will certainly like that," he suggested.

Premium payments under predictive scheduling laws. The proposal also addresses how to handle premium payments due to employees under various new predictive scheduling laws passed by a handful of states and localities, Brecher noted. "For example, if an employee is due a premium payment because he or she was not given his schedule with 14 days advance notice, does that payment have to be included in the regular rate? Most of those state or municipal laws say ‘no,’ but there was no federal guidance," according to Brecher.

The proposed rule clears that up, too, and explains that the answer generally would be "no," Brecher continued. "This revision is necessary because of the emergence of this type of compensation at the state and local level," he said.

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