

DOL CLARIFIES RULES REGARDING CALCULATING OVERTIME PAY RATES

The U.S. Department of Labor (DOL) has taken two recent steps to help employers comply with the Fair Labor Standards Act's (FLSA) complex "regular rate" rules for purposes of calculating an employee's overtime pay. The FLSA requires payment of at least 1.5 times a nonexempt employee's regular rate for hours worked over 40 in a workweek. With limited exclusions, the "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee," including nondiscretionary bonuses and nondiscretionary incentive payments. In contrast, employers may exclude discretionary bonus payments from a nonexempt employee's regular rate.

On Dec. 12, 2019, the DOL published a Final Rule, which took effect Jan. 15, 2020, clarifying the types of employee benefits that may be excluded from a nonexempt employee's "regular rate." Under the Final Rule, the following items may be *excluded* from "regular rate" calculations:

- pay for unused paid leave;
- sign-on and longevity bonuses, gifts and discretionary bonuses;
- compensation for bona fide meal periods;
- reimbursement for cellphone plans and travel (even if not solely used for the employer's benefit);
- certain overtime premiums;
- payment of state and local penalties;
- contributions to benefit plans, including accident, unemployment and legal services; and
- other benefits such as parking, wellness programs, on-site specialist treatment, gym and fitness memberships, employee discounts on retail goods and services, and tuition.

In addition, the DOL also released an opinion letter on Jan. 7, 2020, clarifying how employers should incorporate nondiscretionary incentive payments that cover more than one workweek into a nonexempt employee's "regular rate". Specifically, the DOL confirmed that—absent a basis for tying bonus earnings to particular workweeks in a bonus period—"the appropriate method" for computing bonuses into overtime pay is to allocate bonuses equally to each week of the bonus period. Notably, however, the DOL's opinion letter

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illustrates that the workweeks to be included in that calculation are limited to those during which the bonus was actually *earned*. The DOL examined the following example:

- Employees earned an incentive payment of \$3,000 for completing a 10-week training and *agreeing* to work for eight more weeks after the training.
- When calculating overtime pay, the \$3,000 training should be allocated equally (i.e., \$300 per week) across the 10 weeks in which the training was actually completed.
- Thus, for any workweek in that 10-week period when a non-exempt employee worked more than 40 hours, \$300 would be added to the employee's regular rate in order to calculate the employee's overtime pay earned.
- Although the employees in the example also agreed to work eight weeks after the training, none of the bonus would be allocated to the post-training period because the bonus was already earned upon completing the training.

Armed with this new clarity from the DOL and an organized plan, employers can take steps to mitigate risks emanating from their incentive and non-monetary benefit practices. For example, privileged audits, with the assistance of counsel, can serve as a confidential means of identifying and correcting risky incentive-pay practices. Likewise, employers may consider reorganizing their incentive-pay strategies to allocate more incentive funds into categories the DOL's Final Rule now allows employers to exclude from the "regular rate."

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