

Resources

DOL Proposes Another Major FLSA Rule Change: This Time on Calculating the “Regular Rate of Pay” for Overtime

March 29, 2019

Earlier this month, the DOL published a Notice of Proposed Rulemaking (“NPRM”) to increase the minimum salary level most exempt employees must be paid in order for them to be deemed exempt from the FLSA’s overtime pay requirements. For a summary of that proposal, [click here](#). The comment period for the proposed changes will close in late May, and it is anticipated that the salary level rules will be finalized and implemented in early 2020. This NPRM was “big news,” particularly in light of the 2016 national injunction barring the implementation of the Obama Administration’s attempted changes to the regulations.

The NPRM Addressing the "Regular Rate of Pay"

The DOL has just announced a development that may be even bigger news, or at least more significant for employers. On March 28th, it announced that it’s publishing another NPRM, but on an entirely different issue; it seeks to clarify what types of payments to non-exempt employees must be included in the employees’ regular rates of pay for the purpose of calculating their overtime rates of pay. Under the current rules, one’s regular rate of pay is not limited to the employee’s base rate of pay; it also includes certain additional amounts such as non-discretionary production bonuses, longevity bonuses, commissions, lead premiums, and shift premiums.

The regulations requiring these amounts to be rolled-into a non-exempt employee’s pay have been in place and unchanged for more than 50 years. Compensation systems, though, have evolved since then, and as they have evolved, the DOL, courts and employers have struggled with the issue of whether these new types of payments must also be rolled-into employees’ regular rates. Specifically, the confusion regarding what amounts should be included in the calculation of the regular rate of pay has generated a great deal of litigation and often conflicting judicial decisions. Through this NPRM, the DOL is endeavoring to draw a clearer and brighter line as to what types of payments must be rolled-into regular rates of pay, and what types do not require such a recalculation. By doing so, the DOL hopes to lessen the volume and cost of litigation over regular rate of pay issues.

Highlight of the "Regular Rate of Pay" Rule Changes

As explained by the DOL, the proposed regulations, if adopted, will establish that the following payments and costs may be excluded from an employee’s regular rate of pay for overtime calculation purposes:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods;
- Cash-outs of unused PTO and sick leave;
- Reimbursed expenses that are not incurred “solely” for the employer’s benefit; and
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System and meet other regulatory requirements.

The new rules would also:

- Clarify the fact that employers do not need a prior formal contract or agreement with employees to exclude certain overtime premiums provided for working more than eight hours in a day, holidays, weekends and the like, per Sections 7(e)(5) and (6) of the FLSA, 29 USC § 207(e)(5) and (6);

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- Clarify that time paid that would otherwise not be regarded as “hours worked” (such as bona fide meal periods) also 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; and
- Provide additional examples of benefit plans—including accident, unemployment, and legal services—that may be excluded from an employee’s regular rate of pay.

Another major issue the Department is hoping to clarify through the new rule regards what constitutes a “discretionary bonus,” i.e., a bonus which does not need to be rolled into the regular rate of pay for overtime calculation period. Stressing that labeling a bonus as “discretionary” is not enough to trigger the exclusion, the proposed rule provides:

[R]egardless of the label or name assigned to bonuses, bonuses are discretionary and excludable if both the fact that the bonuses are to be paid and the amounts are determined at the sole discretion of the employer at or near the end of the periods to which the bonuses correspond and they are not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. Examples of bonuses that may be discretionary include bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming challenging or stressful situations, employee-of-the-month bonuses, and other similar compensation. Such bonuses are usually not promised in advance and the fact and amount of payment is in the sole discretion of the employer until at or near the end of the period to which the bonus corresponds.

In addition to clarifying the current rules, the new rules will eliminate the current restriction excluding “call-back” pay and other payments similar to call-back pay from the regular rate of pay only to instances that are “infrequent and sporadic,” but still stating if such payments are so regular that they are essentially prearranged they are to be included in the regular rate of pay.

Impact of the New Rule, if Adopted and Next Steps

If the regular rates of pay rule changes are implemented, they will narrow the gray area of uncertainty significantly. Employers will have 60 days to submit comments on these proposed rules once officially published in the Federal Register, and therefore comments will be due in late May. The NPRM also seeks input from stakeholders on the issue of when payments made pursuant to various types of tuition programs should or should not be excluded from employees’ regular rates of pay. Given the significance and scope of the rules, it is anticipated that there will be a large volume of comments. Consequently, it is doubtful that the regulations will be finalized until sometime in 2020, but likely months before the election.

Another item on this issue that should be on most employers’ radars is state law rules regarding calculating the regular rate of pay for overtime. Many states adopt the federal standards, but some may not. If these new rules are promulgated, employers should still determine if they satisfy state rules.

For more information on this NPRM, or to discuss submitting comments on the proposal, contact Robert Boonin (313-568-6707), any of the attorneys in Dykema’s Labor and Employment Law Practice Group, or your Dykema relationship attorney.

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