

What's in the Regular Rate? December 2019 DOL Rules and March 26, 2020 Opinion Letters Provide Clarification for the COVID-19 Era

Article

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Many employers are bedeviled by the question of what payments need to be included under the Fair Labor Standards Act (FLSA) in an hourly employee's hourly rate for the purpose of determining what their pay rate should be for overtime (hours worked over 40 in a workweek). This is often referred to as the employee's "regular rate."

It's important to have an accurate regular rate because that can make a big difference in an employee's overtime pay. For example, if an employee's regular rate is \$20 per hour, the overtime rate is \$30 (\$20 x 1.5). But if the employer has to add additional payments to the regular rate, that rate and thus the overtime rate both go up.

On December 12, 2019, the U.S. Department of Labor (DOL) issued a final rule that clarifies what perks and benefits may be included in and excluded from an employee's regular rate. See <https://www.dol.gov/agencies/whd/overtime/2019-regular-rate> for the entire rule and additional interpretive information. This new rule, as well as some recent DOL Opinion Letters, bear taking a look at now, especially in light of the creative steps some employers are taking with respect to employee pay during the COVID-19 pandemic. While DOL Opinion Letters are not laws or regulations, they are very helpful in obtaining guidance as to the DOL's position on a number of Wage and Hour Topics. Here is the link to the Opinion Letters access portal: <https://www.dol.gov/agencies/whd/opinion-letters/search>

Both the Rule itself, and the DOL's explanations, focus on exclusions from the regular rate, so let's start our review there.

Under the basic rule, exclusions from the regular rate are:

- Gifts and payments in the nature of gifts on special occasions;
- Payments for occasional periods when no work is performed due to vacation, holiday or illness;

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- Reimbursable business expenses; and
- Other similar payments such as reporting pay, call-back pay, and miscellaneous “perks”.

The December 2019 clarifications as to what may be excluded from the regular rate are:

- various “perks” such as the cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- payments for unused paid leave, including paid sick leave or paid time off (commonly known as paid leave buy-backs);
- payments of certain penalties required under state and local scheduling laws;
- reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”;
- certain sign-on bonuses and certain longevity bonuses;
- the cost of office coffee and snacks to employees as gifts;
- discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples and;
- contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The exclusions that appear to give employers the most grief in determining whether they should be included in the regular rate are longevity and discretionary bonuses. Let’s take a look at two recent DOL opinion letters that touch on these issues.

Is a Longevity Bonus Included in the Regular Rate? We SHALL See

FLSA Opinion Letter 2020-3 (March 26, 2020) offers some guidance as to when a longevity bonus must be included in the regular rate when calculating overtime. The facts are simple: an Alabama city passed a resolution providing that “All eligible employees of the City..... shall be entitled to receive an incentive award in the form of longevity award” This award amounted to \$2 per month for each year of the employee’s tenure, so that an employee with 20 years of service would receive an award of \$40 per month, or \$480 per year.

What’s in
the Regular
Rate?
December
2019 DOL
Rules and
March 26,
2020
Opinion
Letters
Provide
Clarification
for the
COVID-19
Era

In the DOL's opinion, this pay had to be included in the regular rate because the word "shall" in the resolution made the payment mandatory, or required. If the resolution had said "may", and left it up to the City to determine the actual amount of the longevity pay, the payments could probably be excluded as a discretionary bonus or gift.

On the other hand, if you have a base hourly rate that is added to after completion of a certain number of years of employment, that additional amount is clearly not discretionary and needs to be included in computing the employee's regular rate.

Referral Bonuses – Keep it Simple

Many employers have a referral bonus program where employees receive a cash bonus if they refer someone to the company who then becomes an employee. These programs usually call for the referred employee to stay in the company's employer for a period of time, usually a year.

In **FLSA Opinion Letter 2020-4 (March 26, 2020)** the employer asked whether payment made under its two step referral bonus program had to be included in the regular rate. The first payment would be paid to the referring employee when the referred employee was hired, with the second payment being made a year later if both the referred and referring employees were still in the company's employ.

In the DOL's opinion, the first installment was discretionary because participation in the program was completely voluntary, and the company was not employing participants in the program as recruiters (HR employees were specifically excluded from participation.)

However, because the referring employee had to be in the company's employ a year later to receive the second payment, that might be considered a contractually enforceable longevity bonus which would have to be included in the regular rate. DOL suggested that the company go back to the drawing board to clarify and probably simplify its program in order to ensure that the second payment would also be properly excluded from the regular rate.

Pay Considerations for the COVID-19 Virus Era

Many employers in essential industries have implemented or are considering a variety of innovative compensation strategies for their hourly employees during this difficult time. Some form of a premium pay or "bonus" plan is a popular option among those being considered. This may involve offering employees additional pay in the form of either a higher hourly rate or a lump sum (monthly, for example) in order to incentivize the employees to come to work. In either case, because the additional pay is totally dependent upon the employee coming to work, the additional pay must be added to the regular rate. In the case of a lump sum, the payment has to be spread over the time period it was intended to

What's in
the Regular
Rate?
December
2019 DOL
Rules and
March 26,
2020
Opinion
Letters
Provide
Clarification
for the
COVID-19
Era

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Simply calling such a plan a “bonus” or even including some discretionary language does not, as the new Rule makes clear, mean that DOL will consider it to be a discretionary payment and thus excludable from the regular rate. If, for example, the employee has to come to work or work a specified number of hours to earn the payment, it will be considered non-discretionary and must be included in the regular rate no matter what the employer calls it.

On the other hand, a previously unannounced cash “gift” to employees who came to work or provided exemplary service to the employer, perhaps including “spot” bonuses paid immediately for individual acts of great service to the employer or its customers, may be excludable from the regular rate if the program or policy is properly drafted.

It is strongly suggested that employers consult with their legal advisors before adopting a pay plan that may result in unintended and perhaps expensive consequences to them.

What's in
the Regular
Rate?
December
2019 DOL
Rules and
March 26,
2020
Opinion
Letters
Provide
Clarification
for the
COVID-19
Era