



# DOL Says Emergency Pay Counts Toward OT Calculation: 10 Compliance Steps for Employers

Insights

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Do your employees receive emergency pay? Are you including it in overtime pay calculations? The Department of Labor (DOL) just issued an opinion finding that extra “emergency pay” firefighters received during declared emergencies must be counted in their overtime calculations under the Fair Labor Standards Act (FLSA). Here’s what you need to know about the opinion letter and 10 steps you can take to ensure your pay practices are compliant.

## The Question

A firefighter sought guidance from the DOL on whether pay provided during declared emergencies could be excluded from the regular rate of pay when calculating overtime under the FLSA.

The city that employed him had a written policy in place outlining both the amount of emergency pay (an extra 50% of the base hourly rate for each hour worked during emergency periods) and the specific circumstances under which it would be issued.

The firefighter believed that the emergency pay should have been included when calculating overtime premiums.

## The Verdict

Emergency pay for firefighters (and other non-exempt employees covered by the city’s policy) should be included in the regular rate of pay used to calculate overtime compensation, according to [the DOL’s September 30 opinion letter](#). These letters serve as formal, written guidance from DOL officials explaining to the public how the agency would apply the law to a specific set of facts.

In this scenario, the DOL concluded that emergency pay did not qualify as a discretionary bonus since both the entitlement and amount were predetermined by city policy rather than left to the city’s discretion at the end of the work period. Therefore, the emergency pay should be included in [the regular rate of pay under the FLSA](#) when calculating overtime premiums.

The Department also found that the pay was not an excludable overtime premium under the FLSA, as it was not related to extra hours, weekends or holidays, or work performed outside the normal schedule.

While DOL opinion letters are not binding on courts, they do serve as a powerful compliance tool and can be used as persuasive authority in defending against a legal claim.

## 10 Best Practices for Employers

The DOL's opinion puts a spotlight on the type of compensation that should be included in the regular rate for purposes of calculating overtime. Do your pay practices align? Here are 10 key steps you should consider taking to ensure compliance:

- 1. Review pay policies:** Determine whether any premium pay (like emergency pay, hazard pay, or shift differentials) must be included in the regular rate.
- 2. Avoid mislabeling premiums:** Do not assume a payment can be excluded as a “discretionary bonus” or “overtime premium” if it is guaranteed or tied to specific conditions (like emergencies).
- 3. Document pay calculations:** Maintain clear, written procedures showing how the regular rate is calculated, especially when additional premiums apply.
- 4. Train payroll and HR staff:** Make sure those calculating pay understand that supplemental pay (emergency, hazard, night shift, etc.) should be included in the regular rate.
- 5. Audit payroll regularly:** Periodically review overtime calculations to confirm all applicable earnings are included.
- 6. Be cautious with policy language:** Written pay policies that promise extra pay in defined circumstances may not be considered “discretionary” and, therefore, would need to be included in the regular rate.
- 7. Apply consistently to all non-exempt employees:** Confirm that emergency pay is treated the same for all covered employees (not just firefighters) to avoid selective compliance issues.
- 8. Consult legal guidance before implementing new premiums:** If new forms of supplemental pay are created (like disaster pay or COVID pay), check whether they should be included in the regular rate.
- 9. Communicate with employees:** Clearly explain how emergency pay affects overtime so employees understand their compensation.
- 10. Plan for budget impact:** Recognize that including emergency pay in the regular rate increases overtime costs and account for this in staffing and financial planning.

## Conclusion

If you would like assistance with reviewing wage and hour compliance measures, reach out to your Fisher Phillips attorney or any member of our [Wage and Hour Practice Group](#). We will continue to monitor developments related to all aspects of workplace law. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox.

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