



Proposed USDOL Interpretations: The Regular Rate Is Anything But "Regular"

Insights

3.28.19

The USDOL has proposed to update its guidance (for the most part, currently not regulations) regarding the "regular rate" for purposes of calculating FLSA overtime pay. The NPRM is intended to update and clarify the FLSA's requirements regarding the "regular rate" and the (rarely used) alternative "basic rate," as briefly summarized below.

Proposed Rule In A Nutshell

In many cases, USDOL intends to better define the scope of certain terms within the statutory exclusions by addressing the items identified below. While we await the official publication of the NPRM, links to the provisions currently in effect are provided for context (check here for a refresher on "regular rate").

- Unused paid leave, in various forms § 219
- Pay for non-work periods such as bona-fide meal periods §§ 218, 778.320
- Reimbursements for expenses, including providing per se reasonable amounts and allowing partial benefit to employee § 217
- Scope of "infrequent and sporadic" for call-back and similar payments §§ 221, 778.222
- Wellness programs and employee discounts § 224
- Scope of "similar benefits [plans] for employees" § 215
- Exclusion of eligible overtime-type premiums does not have prerequisites § 202, et. seq.
- Scope of "discretionary" bonuses by example § 211
- Emphasis on non-exhaustive nature of examples § 1
- "Basic rate" adjustments (regulatory) § 3

What Happens Now? - Not Quite The Same As The Overtime Rule

You've learned a thing or two from the white-collar exemption drama, but there are some notable differences this time.

"Rule": Don't be led astray. Even the USDOL's language might lead some to think it is proposing new "regulations," but that is simply not the case for most of the NPRM. Part 548 regarding "Basic Rate" contains some regulations, but it is rarely used (and that will likely still be the case). Part 778

regarding how the regular rate and most overtime pay is calculated consists currently (and, it seems, going forward) entirely of interpretations. Still, it is reasonable to expect some additional weight to be given to codified interpretations that have gone through the process for public comment regardless of how they are labeled.

Authority: Regulations or not, USDOL does not have the same kind of authority as it does with respect to the white-collar exemptions, and indeed, is controlled by fairly-detailed statutory language regarding what can be "excluded" from the regular rate. Accordingly, the agency's focus is on clarifying the application of these exclusions.

Clarifications Versus Changes: While further analysis is necessary, at least the agency's stated goal is that "[t]his proposed rule would not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance." That said, it has identified the regulatory language regarding the basic rate at Part 548 to be actual changes to regulations, as well as the language regarding "infrequent and sporadic," which it deems a deregulation.

What You Should Do: Do not run out and make changes tomorrow based on a *proposal*. That said, the release of the NPRM language alone will bring more attention to the calculation of the regular rate and overtime pay regarding *current* practices. Accordingly, if you have not conducted a self-audit as of late, now is the time to do so. It is typically best to have legal counsel oversee such internal reviews both for expert guidance and to protect the analysis, findings, etc. from disclosure in most circumstances. Given the pending NPRM, it is particularly important that employers seek additional advice regarding any practice changes that relate to the proposed language.

Don't Forget State Law

When conducting any FLSA analysis, state law should not be far from any employers mind. When it comes to the regular rate exclusions and principles, most states with applicable overtime provisions either: (1) fail to address these in any detail, (2) incorporate the FLSA, or (3) restate the FLSA almost verbatim. There are a handful with their own variations, however, so be certain not to make a change based on a new or more informed reading of the FLSA without considering state law implications.

The Bottom Line

While the proposal is meant to consist of clarifications, employers or industries with unique or elaborate compensation structures for overtime-eligible employees might contemplate submitting thoughtful, substantive comments in coordination with legal counsel.

We will be assessing the proposal and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#), and continue to follow our [Wage And Hour Blog](#) to see our latest commentary.

Service Focus

