

Insights, News & Events

USDOL'S PROPOSAL REAFFIRMING THAT THERE IS NOTHING "REGULAR" ABOUT THE REGULAR RATE

Insights
Mar 28, 2019

The USDOL has continued to plow through its regulator agenda. Today it released its proposed guidance 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".

Once published in the Federal Register, the public will have 60 days to submit comments. What do you need to know about this breaking news?

BUT FIRST, THE BASIC PRINCIPLES

Overtime compensation for employees subject to the FLSA's overtime provisions must be based upon the "regular rate" of pay. The regular rate is normally determined by dividing the total wages paid for a workweek by the total hours worked in that workweek for which those wages are paid.

This calculation must include "all remuneration for employment" paid to or on behalf of a non-exempt employee, subject only to limited exceptions. Overtime premium must therefore be computed and paid on most commissions, bonuses, shift-differentials, retroactive pay increases, good-attendance or longevity payments, and many other sorts of compensation far too numerous to list. If the employer does not take all includable compensation into account in figuring overtime pay, then the worker has received less than the FLSA-required wages.

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EXECUTIVE SUMMARY: 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.

- Unused paid leave, in various forms § [778.219](#)
- Pay for non-work periods such as bona-fide meal periods §§ [778.218](#), [778.320](#)
- Reimbursements for expenses, including providing per se reasonable amounts and allowing partial benefit to employee § [778.217](#)
- Scope of “infrequent and sporadic” for call-back and similar payments §§ [778.221](#), [778.222](#)
- Wellness programs and employee discounts § [778.224](#)
- Scope of “similar benefits [plans] for employees” § [778.215](#)
- Exclusion of eligible overtime-type premiums does not have prerequisites § [778.202, et. seq.](#)
- Scope of “discretionary” bonuses by example § [778.211](#)
- Emphasis on non-exhaustive nature of examples § [778.1](#)
- “Basic rate” adjustments (regulatory) § [548.3](#)

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 entirely (currently, and it seems, going forward) of *interpretations*. Still, it is reasonable to expect courts to give some additional weight to codified interpretations that have gone through the process of public

comment and emerged in a final form consistent with the proposed.

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, 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”. This is perhaps a slight overstatement. After all, USDOL has identified the regulatory language regarding the basic rate at Part 548 to be actual changes, as well as the language regarding “infrequent and sporadic”, which it deems a deregulation. But it seems correct that the proposed rule is intended to clarify, not change.

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 through the attorney client privilege. Given the pending NPRM though, it is particularly important that employers seek additional advice regarding any practice changes that relates 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 continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information, and follow our [Wage And Hour Blog](#) to see our latest commentary.

This Legal Alert provides an overview of a specific federal proposed rule. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.