

Insights, News & Events

# LABOR DEPARTMENT OFFERS EMPLOYERS SOME FLSA CLARITY THROUGH NEW “REGULAR RATE” INTERPRETATION

Insights  
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For the first time in over 60 years, the U.S. Department of Labor today issued a final rule updating its interpretative guidance with respect to permissible exclusions from the “regular rate.” According to the USDOL, the proposed rule is intended to better reflect the modern workplace and provide clarity to employers on what types of compensation, benefits, or perks may be excluded from the regular rate. While the majority of the changes in the final rule are “interpretative” – meaning they do not have the force of full-fledged regulations – they provide needed clarity to employers and should help reduce litigation over what is and what is not included in the “regular rate.” The Final Rule will be published on December 16, 2019, with an effective date of January 15, 2020.

## BACKGROUND

Under the Fair Labor Standards Act (FLSA), non-exempt employees must be paid “at a rate of not less than one and one-half times the regular rate of which he is employed” for any hours the employee works in excess of 40 hours in a workweek. The “regular rate” in turn, is defined as “all remuneration for employment paid to, or on behalf of, the employee,” subject to eight categories of exclusions.

It is these eight categories of exclusions that have provided ample ground for extensive and costly litigation, as the decision to exclude a certain sum may have considerable impact on an employee’s “regular rate.”

## Related People



**Joshua D. Nadreau**

Regional Managing Partner  
and Vice Chair, Labor  
Relations Group

617.722.0044

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## MODERN GUIDANCE

There is no dispute that the modes and methods of employee compensation have shifted significantly in the more than 60-year period since the USDOL last issued interpretative guidance on allowable exclusions. The changes discussed below are meant to harmonize the agency's interpretations with the modern workforce.

- **Pay for Foregoing Holidays or Leave:** All forms of unused leave will now be treated the same for determining whether the sums paid are excluded from the regular rate. The prior regulation referenced only holiday and vacation time. The final rule acknowledges that most employers lump time off into "paid time off" and clarifies that the Department will treat all such time consistently with respect to whether it should be included in the regular rate.
- **Meal Breaks:** The final rule clarifies that pay received for a bona fide meal break period does not convert such time to hours worked, unless there is an agreement or past practice of doing so. It also removes reference to "lunch breaks" that had caused confusion.
- **Reimbursable Expenses:** The Department has removed the word "solely" from the following regulation: "where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer." The word "solely" is not in the FLSA, and court decisions have emphasized that the expenses need only benefit the employer (but not solely benefit the employer). The final rule also announces that reimbursement expenses are *per se* reasonable so long as they reflect actual expenses or are at or below the amounts listed in the Federal Travel Regulation (a regulation used to determine reimbursements for federal employees).
- **Excludable Benefit and Perk Payments:** The "modernization" trend continues with an update to the list of "other similar payments" that are excludable, which are largely employer-sponsored, non-wage benefits. The USDOL's list of permissible exclusions now includes onsite "specialist treatments" (think chiropractors, massage therapists, personal trainers, and EAP visits); gym access/memberships; employee wellness programs;

employee discounts on retail goods; and tuition reimbursement.

- **Show-Up Pay:** Under certain state and local laws, employers are required to provide a minimum payment if an employee reports to work and is subsequently sent home due to a lack of work. These payments are excluded from the regular rate. The final rule clarifies that new state and local laws that require “reporting pay” (i.e., pay for employees whose employer subtracted hours from a regular shift before or after the employee reports to duty) will be treated as “show-up” pay under existing regulations.
- **Call-Back Pay:** Call-back pay refers to a scenario in which the employee completes their regular shift but is subsequently called back to work. In some jurisdictions, the employee is entitled to additional compensation simply for being called back in, such as a requirement to pay a minimum of four hours, regardless of how long the employee works. Under prior regulations, the “call-back” payment (not payments for hours worked) is excluded only if “infrequent” or “sporadic.” The final rule broadens the exclusion, so long as the “call-back” payments are not “so regular that they are essentially prearranged.”
- **Predictability Pay or Schedule Change Premiums:** Many cities, including New York City and Seattle, have enacted laws requiring payment when an employer changes an employee’s schedule without appropriate notice. As with “call-back” pay, the final rule states that these payments are excludable as long as they are not “essentially prearranged.”
- **“Clopening” Pay:** Clopening pay (referring to pay for workers required to work until closing on a late shift and then work an opening shift early the next morning) is required in some jurisdictions when there is not a minimum number of hours between the end of one shift and the start of another. Like predictability pay, the final rule permits exclusion of these payments as long as they are not so frequent to be considered “prearranged.”

## ADDITIONAL INTERPRETATIVE GUIDANCE

The final rule also addresses a variety of other miscellaneous issues. For example, it reiterates that bonuses

that merely label the payment as “discretionary” are not sufficient to guarantee that the pay is truly optional in nature. It also provides additional examples of excludable discretionary bonuses: employee-of-the-month bonuses; bonuses to employees who made unique or extraordinary efforts; severance bonuses; and bonuses for overcoming challenging or stressful contributions.

These changes may lead to employers issuing more discretionary bonuses without fear that they may need to be included in a regular rate calculation. The rule likewise clarifies that it is the USDOL’s position that contributions by an employer for “accident, unemployment, and legal services” are excludable under Section 7(e)(4)’s bona fide benefit plan contribution exception.

The final rule also eliminates reference to “employment agreements” and “contracts” with respect to voluntary premium payments for hours of work in excess of a daily work period, holidays, or Sundays. This change reflects the USDOL’s opinion that such a formal agreement is not necessary. According to the agency, this revision is consistent with its enforcement practices and court decisions.

## **WHAT TO DO NEXT?**

Unlike the upcoming changes to the FLSA white-collar regulations, which will have the force of law, this final rule is predominately interpretative in nature. Nevertheless, you should review these changes carefully to determine whether any of the clarifications are applicable to your workforce.

If you have not recently audited your pay practices, both this final rule and the impending white-collar regulations provide a great opportunity to evaluate how you pay your workforce. You should approach your review with caution, however, as it also crucial to ensure you are complying with relevant state wage and hour law as well. While many states follow the FLSA and its interpretations, there are others who have their own interpretations which may be contrary to the USDOL’s.

We will continue to monitor the legal and practical impact related to this new rule, so make sure you are subscribed to [our alert system](#) to gather the most up-to-date information. For help with compliance steps or to answer

questions, please contact your Fisher Phillips attorney or any attorney in our [Wage and Hour Practice Group](#).

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