ABA Staff Analysis©: Department of Labor's Proposed Rule to Clarify Determination of "Regular Rate" of Pay Under Fair Labor Standards Act
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On March 28, 2019, the U.S. Department of Labor (DOL) released a proposed rule that would clarify which types of compensation must be included in determining an employee's "regular rate" of pay under the Fair Labor Standards Act (FLSA).

ABA has a working group of bankers with which the association is consulting to obtain feedback on specific aspects of the proposal. **If you would like to join ABA's working group or have any questions, please contact ABA's Jonathan Thessin**.

Background

The calculation of an employee's regular rate of pay is important because, under the FLSA, banks and other employers must pay an employee 1.5 times the employee's regular rate of pay for any hours in excess of 40 hours that the employee works in a workweek, unless that employee is exempt from overtime requirements. An employee's regular rate of pay may differ from the employee's hourly rate of pay because the regular rate includes certain "perks" provided to the employee and other forms of compensation.

The FLSA provides that an employee's regular rate includes all "remuneration" paid to the employee, unless the remuneration falls into one of the FLSA's eight exceptions.[1] DOL's proposal seeks to clarify which compensation falls into those statutory exceptions.

Summary of Proposed Rule

One FLSA exception is for payments made if the "fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly . . . ."[2] DOL proposes minor clarifications and provides examples of payments that may be included under this exception:

- DOL's proposal clarifies that the "label assigned to a bonus does not conclusively determine whether a bonus is discretionary." In the supplemental information to the proposal, DOL explains that attendance, production, work quality, and longevity bonuses are usually paid pursuant to a prior contract, agreement, or promise—and thus included in the regular rate. However, "there may be instances when a bonus that is labelled as one of these types of bonuses is not in fact promised in advance and instead the

[1] This staff analysis concerns only the FLSA exceptions for which DOL's proposal would make substantive changes to the implementing regulations. A full list of the FLSA's exceptions is available at 29 U.S.C. § 207(e).
[2] 29 U.S.C. § 207(e)(3).

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employer retains discretion as to the fact and amount of the bonus . . . .” In these instances, the bonus is excluded from the regular rate.
- DOL’s proposal lists examples of bonuses that “may be discretionary” and thus excluded from the regular rate: “bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming challenging or stressful situations, employee-of-the-month bonuses, and other similar compensation.”
- The existing regulation states that attendance bonuses are included in the calculation of an employee’s regular rate of pay (because these bonuses are generally announced to employees to induce them to work productively). DOL’s proposal clarifies that “[m]ost” attendance bonuses are included in the regular rate of pay, in recognition of instances where the employer retained discretion in paying the bonus.

The FLSA also exempts from an employee’s regular rate of pay “other similar payments to an employee which are not made as compensation for his hours of employment . . . .”[3] Among other purposes, DOL’s proposal would clarify which forms of remuneration fall into this “other similar payments” clause. By proposing to make these clarifications, DOL intends to encourage employers to provide more of these types of benefits to their employers, without fear that the provision of these benefits would impact the employee’s regular rate.

The Department has proposed to clarify that the following forms of remuneration are excluded from calculation of an employee’s regular rate of pay:[4]

- Payments for unused “sick” leave (note that payment for unusused holiday or vacation leave is already excluded from calculation of an employee’s regular rate of pay).
- Contributions by the employer to a plan that provides benefits on account of accident or unemployment, or that provides legal services benefits. (Note that the existing regulation already excludes from the regular rate calculation payment of benefits to employees on account of death, disability, advanced age, retirement illness, medical expenses, and hospitalization.)
- Cost to employers to provide onsite treatment from specialists, such as chiropractors, massage therapists, personal trainers, counselors, Employment Assistance Programs, or physical therapists.
- Cost to employers to provide employees with gym access, gym memberships, and fitness classes, whether onsite or offsite.
- Cost to employers to provide wellness programs (i.e., health promotion and disease prevention activities).
- Discounts on retail goods and services, as long as the discount is not tied to an employee’s hours worked or services rendered.

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[3] *Id.* § 207(e)(2).
[4] This list is not exhaustive of the clarifications and other modifications that the proposed rule would make to the existing regulation, but is intended to highlight those changes of potential relevance to banks.

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- Tuition programs that are available to employees regardless of their hours worked or services rendered.

The proposal also would clarify that reimbursable expenses incurred by the employee would be excluded from the regular rate calculation. The proposal removes the requirement that such expenses must have been incurred by the employee “solely” in the interest of the employer to be excluded.

In addition, the proposal would clarify that travel expenses are “reasonable” and “not disproportionately large”—and thus excluded from the regular rate calculation when reimbursed to the employee—if the travel expense is within the limits set by the Federal Travel Regulation System for reimburseable travel by federal employees. The proposal notes that exceeding the Federal Travel Regulation limits is not necessarily unreasonable.

Questions? Contact ABA’s Jonathan Thessin for more information.

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