

## FLSA Clarifies What Counts as the “Regular Rate” of Pay for Overtime Calculations

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Last week, the United States Department of Labor (“DOL”) announced a rule clarifying the types of compensation that should be included when determining an employee’s “regular rate” of pay for the purpose of calculating overtime pay under the federal Fair Labor Standards Act (“FLSA”). The new rule permits employers to exclude certain fringe benefits provided to employees when calculating the employee’s regular rate of pay. The rule is the first update to the relevant regulations in half a century, and will take effect on January 15, 2020.

The FLSA provides that employers must calculate a non-exempt employee’s overtime pay at one-and-a-half times the employee’s “regular rate” of pay. The FLSA further defines the “regular rate” as including “all remuneration for employment paid to, or on behalf of, the employee,” with the exception of certain specific exclusions, such as gifts, certain reimbursements, health insurance or pension contributions, daily overtime, holiday pay, and stock options. However, whether employers needed to include certain other perks and benefits in the regular rate calculation remained an open question.

The DOL’s new rule adds a list of specific types of benefits that are excluded from the regular rate computation. These include:

- Certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts, certain tuition benefits, adoption assistance;
- Payments for unused paid leave;
- Certain reimbursed expenses beyond expenses incurred “solely” for the employer’s benefit;
- Certain sign-on and longevity bonuses;
- Office coffee and snacks provided to employees;
- Discretionary bonuses; and
- Certain contributions to benefit plans.

In light of the new rule, employers can choose what perks and benefits make business sense to include as part of their employment package and have confidence as to whether those perks and benefits increase the overtime pay rate for non-exempt employees. However, employers should remember that state laws regarding overtime pay may impose stricter requirements than federal law, and should base pay calculation decisions on a careful analysis of all applicable laws.

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