

U.S. Department of Labor Issues Proposed New Rule on Regular Rate of Pay for Overtime

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Less than a month after proposing an increase to the salary threshold for certain overtime exemptions (see our previous client alert), the U.S. Department of Labor (“DOL”) has announced another possible rule change impacting the way employers pay employees overtime. This new proposed rule would update, for the first time in more than 50 years, rules regarding the types of employee compensation that must be included when calculating an employee’s “regular rate” under the Fair Labor Standards Act (“FLSA”). The new rule would benefit employers, as it would exclude certain employee benefits paid by employers from the regular rate calculation.

To calculate a non-exempt employee’s overtime rate, which the employee generally must be paid for all hours worked in excess of 40 hours in a work week, employers must first determine the employee’s regular rate of pay. In addition to employee wages, all “remuneration” for employment, such as non-discretionary bonuses and commissions, should be included in the regular rate unless specifically excluded. There has been some question, however, as to which employee benefits are excluded from the regular rate. Faced with increasing litigation over claims involving the calculation of employees’ regular rates, employers have pushed the DOL for clarity on the issue, and the issue has been one of the regulatory priorities in the Trump DOL.

In turn, the DOL has proposed a new rule under which certain categories of employee compensation would be excluded from the “regular rate.” Such categories include:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements;
- discretionary bonuses, by providing additional examples and clarifying that the label given a bonus does not determine whether it is discretionary;
- benefit plans, including accident, unemployment, and legal services; and
- tuition programs, such as reimbursement programs or repayment of educational debt.

The proposed rule will now be subject to a notice-and-comment period, and comments from stakeholders such as employer and employee groups will be considered in developing the final rule. As with the DOL’s recent proposed rule to the overtime salary threshold, Foley Hoag will continue to monitor development and provide updates.

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