

# EMPLOYER ALERT - US Department of Labor Issues Final Rules on Calculating “Regular Rate of Pay”

AUTHOR: TIMM SCHOWALTER

Hopefully, all employers know that FLSA requires employers to pay non-exempt employees overtime pay at one-and-one-half times their “regular rate” for all hours worked over 40 in a given workweek. But, what is included in an employee’s “regular rate” of pay when calculating the overtime hourly rate? While often confusing, the DOL attempts to clarify the calculation by clarifying the following:

*“Bona Fide” Meal Periods:* Payments for such periods need only be included in the regular rate when the parties have paid for a meal period and have treated it as hours worked. The DOL failed to provide any assistance in re-defining a bona fide meal period which is often in disputed in wage and hour litigation.

*Reimbursement for Reasonable Expenses:* The current regulation states that the exclusion applied if the expenses were incurred “solely” in the interest of the employer. So the value of an expense where there was, arguably, a benefit to the employee, such as accommodations, commuting expenses, meals, etc.) were required to be included in the hour rate calculation. The Final Rule removed the term “solely” and replaced

*Vacation, Sick Time, and other Paid Time Off (PTO):* While not surprising to most, it was necessary, for the DOL to definitively set forth that pay that payment for unused vacation, holiday, sick pay, or other forms of paid time off, are excluded from the regular rate.

*Show Up Pay:* clarifies that payments for occasional periods when no work is performed such as show up pay are excluded.

*Voluntary Premium Payments:* The DOL clarified that voluntarily premium payments (e.g., hours in excess of 8 hours, weekends, holidays, etc.) may be excluded pursuant to a “written or unwritten employment contract, agreement, understanding, handbook, policy, or practice.”

*Discretionary Bonuses:* Many employers have been faced with the nightmare of recalculating regular rate of pay for each workweek and grossing up overtime upon the payment of a year-end bonus. Generally, non-discretionary bonuses must be included while discretionary bonuses may be excluded. Discretionary bonuses are those where the amount of the bonus are determined at the sole discretion of the employer at or near the end of the period to which the bonus corresponds. While not providing overall relief from this issue, the DOL did set forth examples of bonuses that may be considered “discretionary”:

- Bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria;
- Severance bonuses;
- Referral bonus;
- Bonuses for overcoming challenging or stressful situations;
- Employee-of-the-month bonuses; and
- Other similar compensation

*Additional benefits:* The DOL provided a non-exhaustive list of excludable benefits:

- Treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs;
- Gym access, gym memberships, fitness classes, and recreational facilities;
- Modern “wellness programs” such as health screenings, vaccinations, smoking cessation support, and nutrition classes;
- Discounts on employer-provided retail goods and services;
- Tuition benefits; and
- parking benefits;
- Contributions Pursuant to a Bona Fide Benefit Plan;

For more information, about compliance with local, state, and federal wage and hour laws, please contact Timm Schowalter at [tschowalter@sandbergphoenix.com](mailto:tschowalter@sandbergphoenix.com), (314) 425-4910 or another member of Sandberg Phoenix & von Gontard, P.C.'s Labor and Employment Law Team.