

Regular Rate - DOL Issues Opinion Letters

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Right now, it feels like all COVID-19 all the time and employers are focused on serious issues - what a layoff might look like, what unemployment compensation is available to employees, and how to keep the business afloat.

The Department Of Labor (DOL) definitions and issues relating to the calculation of regular rate remain important as we think about moving forward to determine overtime and other issues, but also when considering the new emergency sick leave and Emergency FMLA provisions in the recently passed FFCRA.

The DOL, in addition to dealing with COVID response matters, continues its regular work and issued three new opinion letters regarding the calculation of regular rate.

Benefits

FLSA 2020-5 issued March 26, 2020 answers questions about whether benefits provided to an employee, such as health insurance, are to be included in the calculation of the regular rate. The DOL notes, “the regular rate includes ‘remuneration from employment paid to, on behalf of, the employee,’ subject to eight statutory exclusions.” The DOL continues, “there is no presumption that income taxable under the IRC must be included in the regular rate,” specifically that an employer’s contributions to things such as life insurance policies or health insurance are not typically included in regular rate calculations for calculating overtime pay under Section 7 of the FLSA. Benefits are not included as part of the regular rate.

Discretionary Bonus

FLSA 2020-3 issued March 26, 2020 addresses whether an Alabama city’s Christmas bonus is to be considered as part of the employees’ regular rate of pay. Using the same reasoning and statutory language as the prior letter FLSA 2020-5, the DOL finds that the bonuses are in fact part of a regular rate calculation because they are not discretionary in any form.

The city passed a 1981 resolution which stated, “all eligible employees of the city ...**shall** be entitled to receive an incentive award in the form of a longevity award.” If the city had made these bonuses discretionary and given itself wiggle room simply by stating that all eligible Alabama city employees “be entitled” the bonus would not be included within a regular rate calculation. In use of “**shall**,” there exists an enforceable contractual right on the part of the employee to the bonus.

The moral of this story, particularly in relationship to the calculation of regular rate, is to make sure that you leave wiggle room in any bonus that you intend to be discretionary, such as stating that bonuses **may** be provided or that bonuses are provided at the sole discretion of the board of directors or other governing entity.

Referral Bonus Program

FLSA 2020-4 also looks at a question of longevity bonuses as the employer inquired whether a referral bonus program where an employee received a payment for referring a new employee and then another payment if both employees remained there for 12 months constitutes a longevity bonus or contractual obligation.

If the referral bonus is a contractual obligation it would be considered as part of regular rate. Of particular note in this opinion is that employees for whom recruitment was an actual job component, such as human resources or an actual recruiter, would not qualify for referral bonuses.

The DOL indicated that initial payment for bringing in a new employee through social networking and contacts would not be considered part of the regular rate as it was not dependent upon production, hours worked, or longevity.

It was the second installment, after both employees remained for 12 months, that created the issue. The DOL decided, “if payment of the second installment is not contractually enforceable then it may be excluded from the regular rate ...” But, “if payment of the second installment is contractually enforceable then it must be included in the regular rate.” Any ability on the part of the employee to contractually enforce a future payment defeats the idea that this is a discretionary payment or gift.

It is difficult to create a program where longevity is important which would not create a potential contractual right. The takeaway may be to limit payments to the initial recruitment bonus rather than a secondary payment. Alternatively, an employer could base the secondary payment on multiple factors, rather than simply longevity of service, making it clear that the second payment was actually discretionary.

The Big Picture

Regular Rate Calculations are used frequently in employment law, whether to compute the rate for overtime or in our current situation, how much unemployment compensation an employee will receive. Close attention to wording as you structure your policies goes a long way toward ensuring that the calculated rate of pay is what you intend it to be.

Please contact an attorney if you have questions about how to word policies or want a review of your policies in their current form.

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