



What's "Regular" About My Rate of Pay? — U.S. Department of Labor Clarifies Overtime Regulations

January 7, 2020

All employers know (or should know) that Federal law (the Fair Labor Standards Act, or "FLSA") requires that employees receive overtime pay of at least one and one-half times their "regular rate of pay" (i.e. "time and a half") for all hours worked beyond 40 in a workweek. (Certain employees are exempt from the FLSA, as discussed here: <https://www.cullenllp.com/blog/important-overtime-developments-and-why-new-york-state-employers-may-not-care/>).

It sounds simple, and in many cases, it is. If a nonexempt employee is regularly paid \$20 an hour, and works 45 hours in a workweek, those 5 hours beyond 40 are paid at \$30 an hour (1 ½ times \$20). However, what if the employee receives other forms of compensation, such as a productivity bonus, or a "buyout" of unused sick or vacation time, or expense reimbursement? Do these payments have to be factored in?

The answer is "sometimes". When they do, it creates headaches for employers. For example, suppose the employee above received a \$100 bonus for meeting certain productivity goals, or for having "perfect attendance"? This would affect the "regular rate of pay" for that week and change the overtime calculation. It works like this: 45 hours of work at \$20 per hour equals \$900. Add the \$100 bonus and the result is \$1,000. Divide by 45 hours worked, and the new "regular rate" becomes \$22.22. Therefore, the overtime rate becomes \$33.33. This calculation must be made every single week, and if the employee works 42 hours or 46 hours or 50 hours (but still receives the bonus), the "regular rate" will change each time.

But which additional payments count for this purpose, and which don't? The U.S. Department of Labor is attempting to clarify that question with respect to certain types of compensation, many of which were unheard of when the FLSA was adopted during the Great Depression, by adopting a new rule (effective January 15, 2020). You can read the full text of the (very lengthy) rule here:

<https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act>. The key takeaways are that the following types of payment are not included in the regular rate calculation:

- Loans or advances made by the employer
- The cost of providing:

- parking benefits
 - gym access, memberships, fitness classes or recreational facilities
 - wellness programs
- Discounts on employer-provided retail goods and services
 - Tuition benefits and adoption assistance
 - Payments for unused paid leave
 - Payments for certain call-back pay penalties
 - Reimbursed expenses incurred on the employer's behalf – including for cell phone plans, organization membership dues, credentialing exam fees, supplies, tools, materials, equipment or travel – where the amount of the reimbursement reasonably approximates the actual expense incurred
 - Gifts and special payments, such as:
 - Certain sign-on and longevity bonuses
 - Office coffee and snacks
 - Benefit plan contributions for death, disability, accident, retirement, unemployment, legal services, or other events that could create significant future financial hardship or expense

Also important to note is that “nondiscretionary” bonuses (those based on the quality or quantity of work, or required under a collective bargaining agreement or individual contract of employment, for example) are included in the regular rate, while “discretionary” bonuses (where employees have no right of expectation) are not included in the regular rate. While this has always been true, the new rule clarifies that simply labeling a bonus “discretionary” doesn’t necessarily make it so. Each bonus must be reviewed on its facts. Some types of bonuses considered “discretionary” under the new rule include “bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, referral bonuses for employees not primarily engaged in recruiting activities, bonuses for overcoming challenging or stressful situations, employee-of-the-month bonuses, and other similar compensation.”

All employers should review their pay practices to make sure they are following the law and should review their pay practices to be sure they are in compliance with the new rules.

If you have questions regarding any aspect of employment law, feel free to contact Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com, James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, or Gary Fishberg at (516) 357-3703 or gfishberg@cullenllp.com.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Practices

- Labor and Employment

Attorneys

- Gerard Fishberg