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Insights

DOL Final Rule on Regular Rate of Pay Goes into Effect January 15, 2020

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On December 12, 2019, the Department of Labor (DOL) announced a final rule governing the regular rate of pay requirements under the Fair Labor Standards Act (FLSA). This is the first significant update relating to calculation of an employee's regular rate in over fifty (50) years. The regular rate of pay is used to determine what forms of pay employers are to include and exclude in the FLSA's time and one-half calculation to determine overtime rates. The rule was issued to address the uncertainly about the role benefits and perks play when calculating the regular rate of pay.

The Final Rule confirms that employers may exclude the following benefits from an employee's regular rate of pay:

1. Payments for unused paid leave, including paid sick leave or paid time off;
2. Pay for time that would not otherwise qualify as "hours worked" including bona fide meal periods;
3. The cost of providing certain benefits including parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
4. Payments of penalties required under state and local scheduling laws;
5. Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred solely for the employer's benefit (reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments");
6. Certain sign on bonuses and longevity bonuses;
7. The costs of miscellaneous benefits such as coffee and snacks for employees;
8. Discretionary bonuses; and
9. Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

Further, the DOL also provides guidance and fact-based examples to illustrate the types of bonuses that are discretionary and may be excluded from an employee's regular rate of pay.The DOL also eliminates the restriction that "call back pay" and other similar payments must be "infrequent and sporadic" in order to be excluded from the regular rate of pay, while maintaining that such payments cannot be pre-arranged. Lastly, the final rule updates the requirements for using a "basic rate" as an alternative to the regular rate of pay.

If your entity has employees who are working overtime, it is important to reevaluate whether you are calculating employees' regular rate of pay in accordance with these new changes. The new rule goes into effect on January 15, 2020. If you have any questions about compliance with this new guidance from the DOL or would like assistance ensuring that you are maximizing your entity's dollars when it comes to paying overtime, please contact one of our attorneys for further assistance.