
Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S–3502
200 Constitution Avenue NW.
Washington, DC 20210


Dear Ms. Smith:

The HR Policy Association (“the Association”) welcomes the opportunity to provide comments to the U.S. Department of Labor (DOL or “the Department”) regarding the Wage and Hour Division’s proposed rule on the Regular Rate Under the Fair Labor Standards Act as published in the Federal Register on March 29, 2019.1

The HR Policy Association represents the most senior human resource executives in more than 390 of the largest companies in the United States. Collectively, these companies employ more than 12 million employees in the United States, nearly ten percent of the private sector workforce, and over 20 million employees worldwide. Reform of the 1938 Fair Labor Standards Act (FLSA) to reflect the 21st century workplace is a long-standing goal of the Association, and all of the HR Policy Association member companies will be directly impacted by the proposed rule.

The proposed regulations provide much-needed clarity and guidance regarding which types of payments and benefits should be, and should not be, included within a regular rate computation. Improperly calculated regular rates and associated overtime present significant legal and financial risks for employers. As a result, any uncertainty clouding the payments employers must include in the regular rate discourages innovation in how employers reward, recruit, and retain employees. The proposed changes dispel such uncertainty, helping ensure compliance with the Fair Labor Standards Act and allowing employers to provide additional and innovative benefits to employees without fear of costly litigation.

The Association believes the Department’s inclusion of specific examples in the proposed regulations provides greater clarity to employers. The Association has identified additional areas for further guidance, which employers would welcome so that they could offer these benefits without concern.

1 84 Fed. Reg. 11888.
Our comments below focus on two issues:

- Discretionary Bonuses, and
- Examples of Other Excludable Payments.

In addition, the Association fully supports the comments submitted by the Partnership to Protect Workplace Opportunity of which the Association is a member.

**Discretionary Bonuses Under Section 7(e)(3).**

The proposed regulations better-instruct employers on when to include a bonus in an employee’s regular rate calculations. Under the FLSA, an employee’s regular rate of pay does not include discretionary bonuses. The Act delineates a bonus as discretionary if “both the fact that [the] payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.”

For many years, employers have struggled in determining whether particular bonuses meet this statutory definition.

The proposed regulations help reduce this uncertainty by identifying four specific types of bonuses that may be discretionary. They are: (1) bonuses to employees who made unique or extraordinary efforts and which employers do not award according to pre-established criteria; (2) severance bonuses; (3) bonuses for overcoming challenging or stressful situations; and (4) employee-of-the-month bonuses. With these types of bonuses, “the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period,” and the payments generally do not result from a “contract, agreement, or promise”; thus, employers do not have to include them in the regular rate. Adding these examples to the regulation provides some clarity to employers regarding the types of incentives excludable from the regular rate, and encourages employers to offer these incentives to their workforce.

Equally helpful, the proposed regulations make clear that neither the label assigned to a bonus nor the reason it was paid conclusively determine whether it is discretionary. In doing so, the proposed regulations modify the current regulations to clarify that attendance, production, work quality, and longevity bonuses may qualify as discretionary bonuses if they meet the statutory criteria of discretionary payments under the Act. The Association agrees with the Department that the proper analysis is on the statutory test—not the label applied to a bonus.

The Association also believes three additional examples of common, discretionary bonuses would provide further clarity to employers and recommends the final rule include the following:

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• Year-end bonuses based on company performance where the company retains discretion on whether to pay the bonus until at or near the end of the performance period. Both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer, at or near the end of the period, and not pursuant to any agreement make these types of bonuses excludable.

• Referral bonuses for employees not primarily engaged in recruiting activities. These payments are “not compensation for [] hours of employment,” and thus exclusion is appropriate.

• Payments to induce ratification of a collective bargaining agreement. Such payments are neither pursuant to an agreement, nor are “compensation” for hours worked, and are not “so regular” that the employee would count on it.

These examples meet the statutory criteria for discretionary bonuses under the Act, and warrant inclusion in the final rule. As such, the Association respectfully suggests the following italicized revision to proposed 29 C.F.R. Part 778.211(d):

Examples of bonuses that may be discretionary include bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming challenging or stressful situations, employee-of-the-month bonuses, year-end bonuses based on company performance where the company retains discretion on whether to pay the bonus until at or near the end of the performance period, referral bonuses for employees not primarily engaged in recruiting activities, bonuses to induce ratification of union agreements, and other similar compensation.

Examples of Other Excludable Payments.

The Association understands it is infeasible to include a comprehensive list of all “other similar payments” excludable from an employee’s regular rate calculation under the FLSA and appreciates the Department’s additional examples in the proposed rule. The proposed revisions now include several fringe benefits that are an increasingly common part of any competitive compensation package; e.g., gym memberships, health and wellness plans, and tuition benefits. Employees benefit from these programs as educational assistance provides new skills and opens opportunities for advancement; wellness programs lead to healthier workers; and numerous studies have confirmed that, the more benefits a worker receives, the happier and better they are on the job. With the adoption of the proposed regulations, employers will be able to confidently offer these perks to recruit and retain employees without fear of costly litigation.

In an effort to update the regulations and further clarify the rules regarding “other similar payments,” the Association urges the Department add the following examples to proposed 29 C.F.R. § 778.224(b) in the final rule:

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• Child care services;
• Meals and snacks provided by the employer;
• Transportation benefits; and
• Financial wellness and coaching programs.

These benefits are not “compensation for hours of work,” are not based on quality, quantity or efficiency of work, and are not contingent on the employee’s status other than the requirement they be a current employee. Moreover, the benefits assist the employee in managing work-life balance, account for work-related or “work-adjacent” costs, and are to the mutual benefit of both the employer and the employee. As a result, they are analogous to the types of benefits added in the proposed rule and appropriately excluded from the regular rate of pay.

It would also be helpful for the Department to explicitly provide additional examples of the types of tuition/education benefits that can be excluded from the regular rate of pay to provide further clarity for employers. Employers are expanding the types of “education” benefits they are offering and they operate in a wide variety of ways. Some are direct payments to colleges, universities and other education providers. Some are reimbursement programs. Some involve student loan repayment aid. Other educational programs are handled through bona fide third-party service providers. In all of these cases, the payments are properly excludable and the Department should expressly state as much to ensure the continued use and expansion of these highly popular benefit programs.

The Association also suggests the Department clarify that employers may limit fringe benefits to “active” employees (i.e., not on extended leave or on long-term disability) without requiring they include such benefits in the regular rate. Employers are already permitted to set eligibility conditions for benefits such as an initial waiting period; allowing employers require employees be “active” is equivalent to requiring current employment.7

As such, the Association respectfully suggests the following italicized revision to proposed 29 C.F.R. Part 778.224:

(b) Examples of other excludable payments. A few examples may serve to illustrate some of the types of payments intended to be excluded as “other similar payments.”

(1) Sums paid to an employee for the rental of his truck or car.
(2) Loans or advances made by the employer to the employee.
(3) The cost to the employer of conveniences furnished to the employee such as

7 The Department as already approved of such a condition. See 84 Fed. Reg. 11888, 11911 (regulatory revision approving of condition precedent to benefit “such as an initial waiting period for eligibility or a repayment requirement for employee misconduct”); Minizza, 842 F.2d at 1460 (Discretionary where “the eligibility terms reflect[] a requirement only that a payee achieve the status of an active employee for a specified period of time prior to receipt.”)
(i) Parking spaces;
(ii) Restrooms and lockers;
(iii) On-the-job medical care;
(iv) Treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs;
(v) Gym access, gym memberships, fitness classes, and recreational facilities;
(vi) child care services;
(vii) meals and snacks available on the job; and
(viii) transportation benefits;

(4) The cost to the employer of providing wellness programs, such as health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, coaching to help employees meet health goals, and financial wellness programs or financial counseling; and

(5) Discounts on employer-provided retail goods and services, and tuition, education, and student loan benefits, provided such discounts and benefits are not tied to an employee’s hours worked, services rendered, or other conditions related to the quality or quantity of work performed (except for fundamental conditions such as an initial waiting period for eligibility or a repayment requirement for employee misconduct).

(c) In offering the benefits in Part 778.224(b) above, employers may take into consideration whether an employee is currently “active”—that is, the employee is not on extended leave or on long-term disability—at the time the payment is offered. Employers may deny such benefits to “inactive” employees without being required to include those benefits in the regular rate of pay for “active” employees.

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HR Policy appreciates the opportunity to comment on the Wage and Hour Division’s proposed rule on Regular Rate Under the Fair Labor Standards Act, and we look forward to working with you in the future. If the Association can be of further assistance, please contact me at 202-315-5575 or mwilson@hrpolicy.org.

Sincerely,

D. Mark Wilson
Vice President, Health & Employment Policy