

Proposed Ruling Clarifies Overtime Rate of Pay

The Department of Labor (DOL) will publish a proposed rule that amends the Fair Labor Standards Act (FLSA) regulations regarding the regular rate of pay (ROP). This rule is not a significant change from the current law but clarifies that employers may exclude certain perks from employees' ROP.

Generally, the FLSA requires employers to pay non-exempt employees overtime pay of at least one and one-half times the ROP for hours worked in excess of 40 hours per workweek. Often, this is automatically assumed to be the employee's base hourly rate. However, an employer must determine the ROP by taking into account the employee's total compensation for the workweek and dividing the total by the number of hours worked. Any amounts that an employer pays its employee in addition to base wages, including for example, bonuses, shift differentials, and incentive payments, will increase the ROP and by extension increase the amount of overtime pay.

There is some uncertainty of how the current rules should be interpreted. Consequently, some employers are not using certain alternate pay or perks for fear that these must be included in the calculation of ROP. The DOL's proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the ROP. The proposed rule confirms that employers may exclude the following from the ROP:

- The cost of providing wellness programs, onsite specialist treatments, gym access, fitness classes, and employee discounts on retail goods and services
- Payments for unused paid leave, including paid sick leave
- Reimbursed expenses, even if not incurred for the employer's benefit
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations
- Discretionary bonuses
- Benefit plans, including accident, unemployment, and legal services
- Tuition programs, such as reimbursement programs or repayment of educational debt

The proposed ruling provides additional clarity for these items that may have been already excluded from the ROP as well as clarifications about certain other compensation items, such as payment for meal periods, call-in or call-back pay.

This updated guidance, if approved, will be a good checkpoint of how ROP for overtime is being calculated to avoid any potential underpayment or overpayment of overtime pay. The comment period for these proposed rules ends May 28, 2019.

[Please share your thoughts!](#)

Elliot N. Dinkin

President/CEO

412.394.9997

elliotd@cowdenassociates.com

What's Dinkin Thinkin' covers a variety of topics including:
Compensation, benefits, retirement, management, sales, and marketing.

Follow this [blog](#) or on Twitter [@ElliotDofCowden](#).

COWDEN