

FACT SHEET

Overtime Pay under the FLSA

CALCULATING THE REGULAR RATE OF PAY

Brought to you by **Cowden Associates, Inc.**

The FLSA requires that most employees in the United States be paid at least the federal [minimum wage](#) for all hours worked and [overtime pay](#) at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. [Fact Sheet #22](#) provides general information about determining hours worked.

The amount of overtime pay due to an employee is based on the employee's regular rate of pay and the number of hours worked in a workweek. Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment (except for the statutory exclusions) in any workweek by the total number of hours actually worked to determine the regular rate. [Fact Sheet #23](#) provides additional information regarding overtime pay.

The regular rate of pay is based upon actual facts and cannot be circumvented by an agreement. The regular rate may not be lower than the FLSA minimum wage or, where applicable, a higher state or local minimum wage. If the regular rate is higher than the federal FLSA minimum wage, overtime compensation must be calculated using that higher regular rate. [Fact Sheet #23](#) provides additional information regarding the calculation of overtime pay.

The formula to compute the regular rate is:

$$\text{Regular Rate for the workweek} = \frac{(\text{Total Compensation in the Workweek} - \text{Statutory Exclusions})}{\text{Total hours worked in the workweek}}$$

EXCLUSIONS FROM THE REGULAR RATE

Under the FLSA, the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee." The FLSA (29 USC § 207(e)) provides an exhaustive list of types of payments that can be

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excluded from the regular rate of pay when calculating overtime compensation. Unless specifically noted, payments that are excludable from the regular rate may not be credited towards overtime compensation due under the FLSA. Additional information regarding exclusions from the regular rate may be found in the regulations, [29 C.F.R. § 778.200-.225](#). The following types of payments are excludable from the regular rate:

GIFTS AND PAYMENTS IN THE NATURE OF GIFTS ON SPECIAL OCCASIONS

Sums paid as gifts, including payments in the nature of gifts made on holidays or on other special occasions, or as a reward for service may be excluded from the regular rate, provided the amounts of the gifts (or payments) are not measured by or dependent on hours worked, production, or efficiency. Examples include, but are not limited to, coffee, snacks, coffee cups, t-shirts, raffle prizes, certain sign-on bonuses, and certain longevity bonuses.

PAYMENTS FOR OCCASIONAL PERIODS WHEN NO WORK IS PERFORMED DUE TO VACATION, HOLIDAYS, OR ILLNESS; REIMBURSABLE BUSINESS EXPENSES; AND OTHER SIMILAR PAYMENTS

Payments for Leave:

Employers may exclude from the regular rate certain payments made for occasional periods when no work is performed. This includes paid vacation, holiday, sick leave, and other paid time off. It also includes payments for occasional periods when the employer fails to provide sufficient work, such as when machinery breaks down, expected supplies do not arrive, or there is inclement weather.

Similarly, payments for unused paid leave (also known as paid leave buy-backs) or payments when the employee works instead of taking leave or a paid holiday, are not required to be included in the regular rate. In the case where an employee reports to work on the holiday and is paid for hours worked plus the holiday payment, the holiday payment is excludable from the regular rate, because it is not considered a payment for hours worked. Pay for unused leave is similarly excludable. The pay must be approximately equivalent to the employee's normal earnings for the period of time that is being "bought back." Such payment may be made during the same period when the employee forgoes leave or during a subsequent pay period as a lump sum.

Some employers provide paid meal breaks when employees are relieved from their work duties. Bona fide meal breaks are not hours worked and these payments do not automatically convert the time to hours worked. The pay for these meal breaks may be excluded from the regular rate, unless an agreement or established practice indicates the parties have treated the time as hours worked, in which case the payments must be included in the regular rate.

Reimbursement for business expenses

Reimbursement of the actual or reasonably approximate amount of expenses that an employee incurs while furthering the employer's interests may be excluded from the regular rate. Examples include, but are not limited to:

- Business supplies, materials, or tools
- Cell phone plans
- Membership dues in a professional organization
- Credentialing exam fees
- Travel expenses

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Other similar payments that are not compensation for employment

“Show-up” or “reporting” pay compensates an employee for when the employee reports to work as scheduled but is sent home early because there is insufficient work or the employee is not needed to complete the shift. Such payments may be excluded from the regular rate provided they are made on an infrequent and sporadic basis.

“Call-back” pay is extra compensation paid to an employee for responding to a call from the employer to perform extra work that was unanticipated by the employer. Such pay is in addition to the compensation for the time actually worked. Call-back pay may be excluded from the regular rate provided the call-back was not prearranged. Payments may be considered prearranged if the scheduling issue that necessitated the payment was anticipated and could have been reasonably scheduled in advance. The specific facts of the situation determine whether the employer anticipated the work and could have scheduled the work.

Some penalties imposed under state and local scheduling laws are similar to “show up” pay or “call-back” pay, and therefore may be excludable from the regular rate. See [Fact Sheet #56B](#) for additional information regarding state and local scheduling law penalties.

Additionally, a payment or the cost of a convenience provided to employees is excludable as an “other similar payment” only if there is no connection to hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of the employee’s work. These conveniences, often referred to as “perks,” include, but are not limited to:

- On-the-job medical care and on-site treatment from specialists such as chiropractors, massage therapists, personal trainers, physical therapists, counselors, or Employment Assistance Programs
- Recreational facilities, such as gym access, gym memberships, and fitness classes
- Wellness programs, such as health risk assessments, vaccination clinics, nutrition and weight loss programs, smoking cessation, and financial counseling, and mental health wellness programs
- Employee discounts on retail goods or services
- Parking benefits and spaces
- Tuition payments, which includes payments for an employee’s or an employee’s family member’s tuition, regardless of whether the payments are made to the employee, an education provider, or a student-loan repayment program
- Adoption assistance

DISCRETIONARY BONUSES

Such bonuses may be excluded from the regular rate only if:

- Both the fact that the bonus payment is to be made and the amount of the bonus payment are at the sole discretion of the employer at or near the end of the period; and
- The bonus payment is not made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly.

The label assigned to the bonus and the reason for the bonus do not conclusively determine whether the bonus is discretionary. More information regarding discretionary bonuses is available in [Fact Sheet #56C](#).

PROFIT-SHARING PLANS

Payments made pursuant to a bona fide profit-sharing plan or trust or a bona fide thrift saving plan may be excluded from the regular rate.

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EMPLOYER CONTRIBUTIONS TO BENEFIT PLANS

Employers may exclude from the regular rate contributions irrevocably made by an employer to a trustee or third person as part of a bona fide plan for death, disability, advanced age, retirement, illness, medical expenses, hospitalization, accident, unemployment, legal services, or other events that could cause significant future financial hardship or expense.

PREMIUM PAYMENTS FOR NON-FLSA OVERTIME

Extra compensation paid at a “premium rate” for certain hours worked by the employee because such hours are hours worked in excess of eight in a day, in excess of 40 hours in the workweek, or in excess of the employee’s normal working hours or regular working hours, as the case may be, may be excluded from the regular rate of pay. Such payments may be credited towards overtime compensation due under the FLSA.

Extra compensation paid at a “premium rate” for work on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek may be excluded if the premium rate is at least equal to one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days. Such compensation may be creditable toward overtime pay due under the FLSA.

Extra compensation provided by a “premium rate” under an applicable employment contract or collective bargaining agreement for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding 40 hours) if the premium rate is at least equal to one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek. Such extra compensation may be creditable toward overtime pay due under the FLSA.

STOCK OPTIONS

Any value or income derived from employer-provided grants or rights provided through a stock option, stock appreciation right, or bona fide employee stock purchase program meeting certain criteria may be excluded from the regular rate. See [Fact Sheet #56](#) for more information.

GENERAL PRINCIPLES:

- All compensation for hours worked, services rendered, or performance must be included in the regular rate.
- When a payment is a wage supplement, even if not directly related to employee performance or hours worked, it is still compensation for “hours of employment” and must be included in the regular rate.
- The determination of whether a particular payment, perk, or benefit may be excluded from the regular rate is made on a case-by-case basis applying the requirements set out in the statute to the specific circumstances.

WHERE TO OBTAIN ADDITIONAL INFORMATION

For additional information, visit our Wage and Hour Division

Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866- 4USWAGE (1-866-487-9243).

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When state law differs from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at <https://www.dol.gov/agencies/whd/state/contacts>.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Source: [U.S. Department of Labor, Fact Sheet #56A](#)