

DOL proposes new rate of pay rule, issues opinion letters

The U.S. Department of Labor is having a busy spring. In addition to the big overtime pay proposal issued at the beginning of March, the DOL also proposed a new rule for rate of pay. Within that same week, they also issues two new opinion letters on everyone's favorite topic - FMLA Leave - as well as on how to handle after-hours charitable activities. All of this while the White House asked for a 10% budget cut from the Department.

DOL opinions on FMLA leave, volunteerism

The U.S. Department of Labor has issued new opinion letters addressing FMLA leave and compensation for employees who spend time volunteering. According to the letters, published March 14:

- Employers must run FMLA leave concurrently with any paid leave an employee takes for an FMLA-qualifying condition.
- There is no need to pay employees for voluntarily participating in after-hours charitable activities at the employer's suggestion.

Opinion letters indicate how the DOL is likely to interpret a law but do not carry the weight of law.

Run FMLA concurrently

Some employers let employees exhaust paid leave before starting the clock on their 12 weeks of unpaid FMLA leave. The opinion letter says the clock starts ticking right away.

It states that FMLA regulations require employers to designate FMLA leave within five business days of determining that the leave is FMLA-qualifying, regardless of the kind of leave taken. As a result, any leave taken subsequent to the employer's designation of FMLA leave counts against the employee's 12-week FMLA entitlement.

Employers are free to provide additional paid leave, but they may not increase the 12 weeks of protected FMLA leave the law dictates.

Note: The letter conflicts with a 9th Circuit decision. If you have employees in Western states, consult your attorney to determine if your FMLA practices comply.

Unpaid after-hours volunteerism

The second letter responded to an employer that encouraged employees to do volunteer charity work. It paid them for time spent volunteering during normal work hours. It wondered if it was required to pay them for time spent volunteering after hours or on weekends. The employer factored in volunteer hours when calculating a discretionary bonus.

The DOL said the employer did not have to pay for after-hours volunteering as long as it did not direct

employees' work or penalize them for refusing to participate in the program.

Online resource Read the FMLA leave opinion letter at tinyurl.com/concurrentFMLA. Read the volunteerism letter at tinyurl.com/flsavolunteer.

Proposed DOL rule takes on regular rate of pay

A Department of Labor rule proposed March 28 would clarify when bonuses and certain contingent payments have to be counted toward an employee's regular rate of pay for the purpose of determining overtime pay.

Which bonuses count?

Under current rules, a non-discretionary bonus payment must be calculated into the regular rate of pay, which raises overtime pay.

The proposed regulations make it clear that true discretionary bonuses are excluded.

But exactly what is a discretionary and a non-discretionary bonus? The proposed regulations would help employers figure that out.

Non-discretionary bonuses are based on a prior promise, contract or agreement and typically focus on attendance, production, work quality and longevity.

The proposed rule notes that there are times when a bonus that was not promised in advance may otherwise look like a non-discretionary bonus. The rule clarifies how to tell the difference.

What matters is whether the employer retains the right to pay or not pay the bonus up until very close to the time when it is paid, and that the employee doesn't have an expectation that he will receive it.

Examples of discretionary bonuses that don't count toward a regular rate of pay: employee-of-the-month bonuses, severance bonuses, spot bonuses for employees making extraordinary efforts or overcoming difficult challenges.

Show-up and call-back pay

Currently, employees who show up for work but are then sent home because they are not needed are paid for their actual time worked and sometimes receive a payment for showing up. Those payments does not have to be included in the regular rate of pay.

Call-back pay is additional compensation for calling an employee back without advance notice to do extra work after scheduled hours have ended. That pay may also be excluded from the regular rate of pay under the proposed rule.

Current rules also say these occasions must be infrequent and sporadic. The proposed rules remove that restriction.

White House proposes 10% budget cut for DOL

The White House wants to cut the U.S. Department of Labor's budget by 10%. President Trump's budget request, released March 11, seeks \$10.9 billion for DOL activities in fiscal year 2020, about \$1.9 less than FY 2019.

However, a handful of DOL functions would see budget increases. Some of the funding requests:

\$558 million for the Occupational Safety and Health Administration represents a slight increase to help ensure workers are safe on the job, including additional resources for more compliance safety and health officers.

\$233 million for the Wage and Hour Division to enforce minimum standards for wages and working conditions in U.S. workplaces, a \$3.6 million increase over FY 2019, to improve compliance assistance and ensure workers receive fair wages.

\$194 million for the Employee Benefits Security Administration, including an increase of \$10 million to help employers and self-employed workers form associations and obtain health coverage in large group markets with more bargaining power.

The FY 2020 budget request also calls for providing new parents with at least six weeks of paid family leave to support new mothers and fathers, including adoptive parents. However, the budget contained no specific funding requests.

The White House budget request is generally considered a list of wishes that are not expected to come true. Congress will develop its own FY 2020 budget this summer.