

# Regular rate calculation gets a makeover

Nonexempt employees who work longer than 40 hours in a week must be paid overtime at 1.5 times their regular rates of pay. Final regulations, which will become effective Jan. 15, 2020, allow you to offer more perks to nonexempt employees without having to include those perks in their regular rate calculation when you're figuring their overtime rate.

These regs are the first time in over 50 years that the Department of Labor has addressed the regular rate calculation.

Caution: Stricter state laws governing the payments that are included and excluded from the regular rate calculation continue to apply.

What to do now: Employers should take steps now to adjust their regular rate calculations to the new criteria laid out in these regs.

## New excludable payments

Although the regs primarily restate current law on the items that can be excluded from nonexempts' regular rates, the DOL has also updated and modernized some of these items. The following items can be excluded from nonexempts' regular rate calculations:

- The cost of wellness programs, onsite specialist treatment, gym access, and fitness classes
- Cash payments for unused paid leave, including paid sick leave
- Reimbursements for expenses that aren't incurred solely for the employer's benefit
- Reimbursements for employees' cell phone expenses, membership dues or credentialing exam fees
- Reimbursements for travel expenses, up to the federal per diem rates
- Reimbursements for employees' educational expenses
- Employee discounts on retail goods and services
- The cost of parking benefits
- Adoption assistance
- Cash payments for time that doesn't otherwise qualify as working time (e.g., bona fide meal periods).

A word of warning: Some of these payments will be considered taxable fringe benefits to employees, so you should get the whole picture from your Payroll department.

## Discretionary bonuses

The regs retain the definition of a discretionary bonus—a bonus over which management retains control until quite close to the payout date—and reiterate that the label assigned to a bonus doesn't determine whether it's discretionary. New examples of discretionary bonuses include:

- Bonuses to reward employees for coping with challenging or stressful situations (e.g., spot bonuses)
- Bonuses for employee-of-the-month
- Referral bonuses for employees not primarily engaged in recruiting activities.

## **Payments for time not worked**

Payments employees receive for not working, specifically reporting pay and show-up pay, are excluded from the regular rate calculation, regardless of whether those payments are infrequent or sporadic because they're payments for an employer's failure to provide employees with expected work.

Call-back pay falls into this category, as well, unless the payments are so regular they are essentially prearranged. If that's the case, call-back pay is included in the regular rate calculation.

The regs also clarify that payments for all forms of unused leave (e.g., PTO leave), not just holiday and vacation time, are treated the same for purposes of determining whether they may be excluded from the regular rate.

## **State and local scheduling laws**

Under the regs, the same principle that applies to on-call pay—exclusion from the regular rate, unless the payments are so regular they are essentially prearranged—apply to the following payments:

- “Clopening” or “right to rest” pay laws for employees who work the end of one day's shift and the start of the next day's shift with fewer than 10 or 11 hours between shifts or who work during a rest period
- “Predictability pay” for employees who don't receive the requisite notice of a schedule change
- On-call pay for employees with scheduled on-call shifts but who aren't called into work.