

Employment Alert: DOL Issues Proposed Rules to Update Regulations Issued under the Fair Labor Standards Act

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On July 28, 2008, the U.S. Department of Labor's Wage and Hour Division published a proposed rule that will update regulatory provisions under the Fair Labor Standards Act of 1938 ("FLSA") and Portal-to-Portal Act of 1947 ("Portal Act"). The proposed revisions incorporate certain court decisions as well as FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007 and Portal Act amendments passed in 1996. These amendments largely clarify, refine, or add to the current exemptions to the minimum wage and overtime pay requirements of the FLSA. The Department of Labor ("DOL") is seeking public comment on the proposed changes.

Proposed Changes of Significance to Employers

Stock Options. The proposed rule incorporates an FLSA amendment, enacted in 2000, which allows for stock options meeting certain criteria to be excluded from the computation of the regular rate.

Individual Volunteers at Food Banks. The proposed rule incorporates a 1998 amendment to the FLSA that provides that the term "employee" excludes individuals that volunteer solely for humanitarian purposes at private nonprofit food banks and who receive groceries from those food banks.

Employee Commuting. As part of the Small Business Job Protection Act of 1996 ("SBJPA"), Congress amended the Portal Act to define circumstances under which pay is not required for employees who use their employer's vehicle for home-to-work commuting. Such use is incidental and, therefore, not compensable if: (a) the use of the vehicle is pursuant to an agreement between the employer or employee and (b) the work sites are within the normal commuting area of the employer's establishment. The proposed rule provides that activities incidental to the use of an employer-provided vehicle for commuting are not principal activities and are not compensable if they meet the statutory conditions.

Youth Opportunity Wage. The proposed rule incorporates an SBJPA amendment to the FLSA whereby an employer may pay an employee under the age of 20 an hourly wage not less than \$4.25 during the first 90 consecutive calendar days of employment.

Tipped Employees. The SBJPA amended the maximum allowable tip credit an employer may claim. The proposed rule also incorporates a 1977 amendment to the definition of "tipped employee" which provides that a tipped employee is any employee engaged in an occupation in which he or she receives more than \$30 a month in tips.

Meal Credit. The proposed rule incorporates court decisions holding that an employer may take a meal credit even if an employee chooses not to accept the meal.

Compensatory Time Off. The proposed rule incorporates case law holding that a public agency is required to permit the use of compensatory leave in lieu of overtime pay within a reasonable period after an employee request is made, unless the use would unduly disrupt the agency's operations. Neither existing law nor the proposed rule allow for compensatory time off in lieu of overtime payments for employees of private companies.

Fluctuating Work Weeks. The proposed rule clarifies the fluctuating workweek method of computing overtime compensation. In particular, the proposed rule provides that bona fide bonus or premium payments do not invalidate the fluctuating workweek method of compensation; however, such payments and overtime premiums must be included in the calculation of the regular rate unless otherwise excluded under the FLSA.

Action Items for Employers

The proposed changes will not take effect until after the public comment period concludes on September 11, 2008. Employers who wish to prepare and submit comments must do so before September 11. The DOL will issue its final rule after the close of the public comment period. In the interim, employers are well advised to revisit their FLSA and Portal Act policies and practices and consider how they may need to be updated if these proposed regulations are finalized.

This alert provides a brief overview of the proposed changes to the FLSA and Portal Act regulations. All employers should familiarize themselves with these potential changes on a more comprehensive level and seek guidance on how the changes could impact their particular organizations.

View the full text of DOL's proposed rule.

For additional information, or for help preparing and submitting comments on the proposed rule, please contact the Mintz Levin lawyer with whom you usually work or one of the employment attorneys listed below.

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