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Regulatory Spring

Rulemaking by the Wage & Hour Division

TRANSCRIPT OF AUDIO BLOG; AUDIO AVAILABLE [HERE](#)

May 2, 2019

Welcome to our latest installment of Regulatory Spring, Seyfarth Shaw's weekly blog series covering the U.S. Department of Labor's three-headed effort to revise and modernize various core components of the Fair Labor Standards Act. My name is Kevin Young, I'm a partner in Seyfarth's Atlanta office. This week we'll be covering—for the first time in audio format—the DOL's notice of proposed rulemaking, or "NPRM," regarding the rate of pay that employers must use to determine an employee's overtime compensation—more formally known as the "regular rate."

Comments are due to the DOL on the regular rate proposal in three and a half weeks, on May 28. Seyfarth plans to submit comments on the proposed rule. In this week's installment, we'll provide an overview of the proposed regular rate rule. Then, in our following two installments, we'll ask for your feedback on specific regulatory proposals. You don't need to wait, though...you should always feel free to email us feedback at regulatoryspring@seyfarth.com.

So...what does the proposed rule set out to do? Well, according to WHD, the rule "would provide clarity for employers to allow them to add more benefits to their employees without unknown overtime consequences or litigation." That clarity is much needed—the FLSA is more than 80 years old, and the regular rate regulations basically haven't been touched in 50 years. The existing rules fail to clearly address many types of compensation that have become far more common in recent years. But there is uncertainty surrounding the question of whether these newer types of compensation need to be included in the regular rate.

The regular rate NPRM focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous payments must be included in the regular rate. Specifically, the DOL proposes clarifications to the current regulations on six key points:

- First, the cost of providing wellness programs, onsite specialist treatment, gym access, and employee discounts may be excluded from an employee's regular rate of pay. This hits on a growing trend to provide employees with wellness benefits intended to promote health. The NPRM also notes that the cost of certain other conveniences provided to the employee—such as parking spaces and lockers—may be excluded.
- Second, payments for unused paid leave, including paid sick leave, may be excluded from the regular rate. As most employers know, both law and practice concerning sick leave and similar benefits have evolved quickly and substantially. Not only do many employers now combine various types of leave into a single PTO plan, but a number of state and local governments have passed laws requiring employers to provide paid sick leave.
- Third, reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate. The proposal also creates a threshold under which those payments are inherently excludable as reimbursements.

- Fourth, the NPRM clarifies that employers do not need a prior contract or agreement with an employee to exclude overtime premiums paid for working more than 8 hours in a day, for working on a weekend or a holiday, or for working a 6th or 7th day in a workweek. This essentially harmonizes the regulatory language with the Department's longstanding position and applicable case law.
- Fifth, pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from the regular rate, unless an agreement or established practice indicates that the parties have treated the time as hours worked. Other examples of payment for hours not worked that may be excluded include statutorily mandated payments at a time and a half rate for things like being called back to work after retiring for the day, showing up to work only to be sent home due to a lack of work, and last minute changes in the schedule.

Finally, the NPRM addresses discretionary bonuses. This has been a thorny issue for so many employers. As most employers know, non-discretionary bonuses must be included in the regular rate, even if they're paid for a period encompassing multiple workweeks, while discretionary bonuses may be excluded. Where the rubber meets the road, of course, is determining whether a given bonus is discretionary or not. The DOL's proposed rule clarifies that labels are not determinative of a bonus's character—instead, the focus remains on whether the bonus is paid pursuant to any sort of prior contract, agreement, or promise. The proposed rule notes that severance bonuses, employee-of-the-month bonuses, and bonuses for overcoming challenging situations are discretionary, as they are usually not promised in advance and the fact and amount of payment is in the employer's sole discretion until at or near the end of the period to which the bonus corresponds.

So there's our run-down on the regular rate of pay NPRM. We realize this is a lot to take in. If you want to read more about the rule, you can check out the DOL's website dedicated to the rule, which is www.dol.gov/whd/overtime/regularrate2019.htm. You can also feel free to reach out to us with questions, comments, or other feedback; again, our email address is regulatoryspring@seyfarth.com.

Thanks so much, and we look forward to seeing you again next week, when we'll provide a first round of questions for your feedback on the regular rate rule

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