



PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

June 12, 2019

The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Submitted via regulations.gov

Re: Regular Rate Under the Fair Labor Standards Act; Proposed Rule (RIN 1235-AA24) (84 Fed. Reg. 11888, March 29, 2019)

Dear Ms. Stanton:

These comments on the proposal to update the regular rate regulations under the Fair Labor Standards Act (FLSA) are submitted on behalf of the Partnership to Protect Workplace Opportunity (PPWO). The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of employees across the country in almost every industry who will be impacted by the proposed changes.

The PPWO applauds the Department's efforts to address the regular rate regulations (Part 778) to provide clarity and better reflect the 21st-century workplace. The PPWO's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee pay and benefits and clarity for employers when preparing total compensation packages. We also appreciate the Department's efforts to review these issues as deregulatory actions under President Trump's Executive Order 13771. Eliminating the regulatory burdens associated with providing otherwise very straightforward benefits is entirely appropriate and consistent with the President's directive.

With the last substantive revision to Part 778 coming over 50 years ago, the regulatory language has failed to keep up with the wide variety of creative methods of

compensation considered by employers. Benefits and compensation come together as “total rewards,” which is the lens through which employers typically view the amounts provided to employees for their service. Unfortunately, as the Department has not previously weighed in on a wide variety of issues, and as individual courts around the country have interpreted arcane (and, frankly, limited) statutory and regulatory language, there has been increased uncertainty of employers regarding certain items of total rewards and their treatment for regular rate purposes. Some of this uncertainty is created by one-off court decisions finding certain benefits to be included in the regular rate, while some of the uncertainty is due to cautious employers concerned that the economic analysis underpinning their decision to provide a benefit can be dramatically altered by a creative plaintiffs’ lawyer.

As a result of this uncertainty, many employers have made difficult decisions to eliminate certain benefits and/or choose not to provide them in the first place. Detailed data is unavailable, but, anecdotally, employers who belong to PPWO member groups have made decisions not to offer benefits such as:

- Anniversary bonuses;
- Public transportation subsidies;
- Discounts on gift cards;
- Discounts with vendor partners;
- Adoption assistance;
- Tuition reimbursement;
- Employer-provided or discounted meals;
- Non-cash awards (such as coffee cups, t-shirts);
- Participation in raffles; and
- Restricted stock units.

In addition, uncertainty with respect to the inclusion of bonuses in the regular rate of pay has resulted in the elimination of a wide variety of bonus programs.

The PPWO thus supports the Department's efforts to modernize the regular rate regulations, providing much-needed clarity to the regulated community. We now address the Department's specific proposals.

I. Pay for Forgoing Holidays or Leave.

Section 7(e)(2) of the FLSA permits an employer to exclude "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause" from the regular rate. The regulations treat such payments as excludable from the regular rate because they are not compensation for hours of employment. *See* 29 CFR 778.218. Similarly, extra payments made for working on a holiday or vacation (i.e., forgoing holidays or vacation) are excluded from the regular rate. *See* 29 CFR 778.219. No similar regulatory provision exists with respect to sick leave.

As the Department rightly recognizes, many employers have eliminated separate "buckets" of leave for sick and vacation and personal. For these employers all leave is included in a single bucket of paid time off (PTO). The PPWO supports the Department's proposal to harmonize the concepts in the existing 778.218-.219 -- that pay for not working is not pay for working -- with the realities of the modern workplace and treating all forms of leave -- sick, vacation, and holiday -- in the same manner for regular rate purposes.

II. Compensation for Bona Fide Meal Periods.

The PPWO supports the Department's proposal to clarify its treatment of payments for otherwise noncompensable bona fide meal periods. In particular, eliminating any presumption (intended or otherwise) that the payment of a bona fide meal period makes the meal period hours to be "hours worked" is a welcome clarification. Many employers pay for bona fide meal period without express agreements to exclude those payments from hours worked and/or regular rate. Ensuring that such payments will be excluded from the regular rate "[u]nless it appears from all pertinent facts that the parties have treated such activities as hours worked," will allow employers to provide this valuable benefit without worrying whether they someday will be required to disprove the intent of such payments.

III. Reimbursable Expenses.

The Department proposes to reconcile the statutory language of FLSA section 7(e)(2) (“reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer”) with the regulatory language in 29 CFR § 778.217 (“[w]here an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses.”) by eliminating the word “solely” from the regulatory language. The PPWO supports this proposed change, which, as the Department notes, is consistent with court decisions and the Department’s guidance.

The PPWO likewise supports the Department’s decision to use the Federal Travel Regulation as a standard of *per se* reasonableness, provided that the Department also retains the proposed language that reimbursement amounts in excess of the Federal Travel Regulation may nevertheless qualify as reasonable. Similarly, many employers use the Internal Revenue Service’s (IRS) guidelines for reimbursement of employee travel expense. The Department should clarify that reimbursement payment following the IRS’s guidelines is *per se* reasonable. The PPWO requests, however, that at such time as this proposed regulation becomes final, the Department provide additional guidance on the use of the Federal Travel Regulation, including references to specific sections and web addresses that employers may use to identify the applicable rates.

IV. “Other Similar Payments.”

The PPWO supports the Department’s proposal to exclude a wide variety of benefits-type payments from the regular rate calculation. As the Department recognizes, these benefits do not vary based on hours of work -- a gym membership, for example, costs a specific amount of money; nothing about the effective cost of that membership should change based on an employee working overtime hours. The Department’s clarification that the regular rate should exclude payments not tied to an employee's hours worked, services rendered, job performance, credentials, or other criteria linked to the quality or quantity of the employee's work will give employers

additional certainty that will permit them to provide these benefits to employees with increased frequency.

The Department proposes specific references to:

treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs; gym access, gym memberships, fitness classes, and recreational facilities; the cost to the employer of providing wellness programs, such as health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals; and discounts on employer-provided retail goods and services, and tuition benefits, provided such discounts and benefits are not tied to an employee's hours worked, services rendered, or other conditions related to the quality or quantity of work performed (except for fundamental conditions such as an initial waiting period for eligibility or a repayment requirement for employee misconduct).

The PPWO agrees with the Department's list, but, recognizing that the Department cannot prepare an all-inclusive, comprehensive, exhaustive list of the types of payments that may be excluded from the regular rate, nevertheless believes that including additional examples would be beneficial. Employers who are members of PPWO organizations have suggested that the Department should clarify that the following types of payments should be excluded from the regular rate as "other similar payments":

- Sign-on bonuses;
- Discounts for vendor or other third-party services;
- Discounts on the purchase of gift cards;
- Adoption/surrogacy assistance;
- Financial assistance provided to assist with repayment of educational debt (i.e., student loan repayment);
- Cash (or other prizes) provided in connection with raffles, contests, or other rewards, even where eligibility for the raffle may be based on certain performance;
- Relocation stipends;
- Public transportation subsidies;

- Childcare services/subsidies;
- Programs pursuant to which employees are awarded “points” which may later be redeemed for merchandise (including programs involving a third-party vendor); and
- Small, non-cash awards worth less than \$20, such as coffee cups, t-shirts, etc.

In addition, the PPWO requests that the Department clarify that “[b]asic commonsense conditions” for the receipt of such benefits can include -- in addition to the proposed “reasonable waiting period for eligibility” or repayment of “benefits as a remedy for employee misconduct” -- a threshold number of hours worked (e.g., to limit provision of a particular benefit to employees who work on something more than a casual basis), a repayment requirement for failure to remain employed for a particular amount of time after the benefit is provided (e.g., repayment of a sign-on bonus if the employee leaves before the expiration of a year of service), or other, similar requirements.

In response to the Department’s request for additional information regarding tuition and similar programs, the PPWO notes that it would be helpful for the Department to provide a provision expressly excluding tuition programs from the regular rate of pay. Although these programs are generally excludable in the manner described by the Department, without an express provision stating as such, employers may have questions regarding their excludability, which stands as a disincentive to providing them. The benefits of tuition programs inure to employees and employers alike, as both are served by the increased education--employees of themselves and employers of their workforces. These programs should be lauded and incentivized, not left to die on the vine due to regulatory uncertainty about whether an employer must pay overtime on tuition.

These programs may also benefit employees’ family members. Some programs allow qualified family members to access tuition or other educational benefits, such as online courses (including GED programs). These benefits are properly excludable as well. They are not provided as compensation for an employee’s service; indeed, in some cases, a family member may be able to continue participation in the program after the employee ceases work for the employer.

Tuition plans operate in a wide variety of ways. Some are direct payments to colleges and universities. Some are reimbursement programs. Other educational programs are handled through bona fide third-party service providers. In all cases, payments are properly excludable and the Department should expressly state as much to ensure the continued use of these programs by employees and family members who seek to improve themselves through education.

The PPWO also requests that the Department clarify that restricted stock units (RSUs) are properly excludable from the regular rate. RSUs are shares of stock awarded to an employee that vest at some point in the future, after some specified events take place (e.g., the passage of time, the meeting of certain corporate or individual goals). They share similar qualities to stock options and stock appreciation rights, but are not specifically identified in the law or regulations as excludable (as are stock options and stock appreciation rights). Notwithstanding the absence of this language, the similarities between the various types of equity programs supports a conclusion that RSUs should likewise be excluded from the regular rate calculation.

Finally, the PPWO again requests (as it did in its comments with respect to the Part 541 salary threshold rulemaking) that the Department harmonize its regulations on the issue of board, lodging, and other facilities. If an employer must include a non-hourly payment in the regular rate, that payment should likewise count towards the salary threshold. If the employer can exclude the payment, it should not count towards the salary threshold. If the employer must determine the value -- and the Department must determine the value -- in the context of a regular rate calculation, there is no reason why the determination of the value is “administratively unwieldy” in the context of salary. Non-hourly payments that count towards regular rate should count towards both the standard salary threshold and the HCE threshold.

V. Show-Up Pay, Call-Back Pay, and Payments Similar to Call-Back Pay.

The PPWO agrees with the Department’s proposal to align the language in 29 CFR 778.221 and -.222 with the statutory language pursuant to which those provisions were promulgated by eliminating the extra-statutory requirement that call-back pay and similar payments be made on an “infrequent or sporadic” basis. The Department’s proposed substitute requirement that such payments be made “without

prearrangement,” which in turn states that the regularity of such payments can make them “essentially prearranged,” however, is likely to cause confusion.

While the Department’s examples are helpful, they do not provide sufficient information for employers to make meaningful distinctions. For example, the Department provides an example in which a restaurant employee is called in for the busiest part of Saturday evening for six weeks out of eight or nine (i.e., two months), and, thus, the call-in pay would be included in the regular rate. The example, however, sheds no light on whether five weeks would demand a different conclusion, or what the result would be if the employee did not get called in for the four weeks following the period described (or one time in the following eight weeks). What is the relevant time frame for review? Is the determination of inclusion in the regular rate only made retroactively? More concrete guidance from the Department on what will be considered in the determination of “prearrangement” would be helpful to ensuring that this revision has its desired effect.

Finally, the PPWO agrees with the Department’s proposed treatment of state and local requirements related to “reporting pay,” “right to rest pay,” “predictability pay,” “on-call pay scheduling penalties,” and similar penalty payments. Specifically, the PPWO agrees that reporting pay be treated as show-up pay under 29 CFR 778.220 (payment for employer’s failure to provide work); right to rest pay and predictability pay (and associated penalties) be analyzed under 29 CFR 778.222 (payment not for hours worked and excludable if not regular); and “on-call pay scheduling penalties” be analyzed under 29 CFR 778.223 (pay for non-productive hours).

VI. Discretionary Bonuses Under Section 7(e)(3).

Employers who are members of PPWO organizations regularly make decisions to eliminate or forego bonus payments based on regular rate issues. Including bonus payments in the regular rate often is a time-consuming and administratively taxing process. And, in many cases, it is questionable whether payments must be included in the regular rate. Employers often choose to avoid the risk and/or the administrative issues by not making such payments. As a result, providing clarification on the types of bonus payments that can be included as discretionary is likely to result in an increase in these types of payments, and the PPWO welcomes the Department’s proposal to do so.

The Department's proposal would - consistent with the Department's positions in a variety of contexts -- make clear that labels are not dispositive. Instead, the Department's proposal would make clear that, if both the fact that the bonus is to be paid and the amount are determined at the sole discretion of the employer at or near the end of the period to which the bonus corresponds and the bonus is not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly, the bonus is discretionary and excludable.

Although somewhat inconsistent with the concept of labels not being dispositive, the Department also proposes to include additional examples of bonuses that may be discretionary: employee-of-the-month bonuses, bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming stressful or difficult challenges, and other similar bonuses for which the fact and amount of payment is in the sole discretion of the employer until at or near the end of the periods to which the bonuses correspond and that are not paid "pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly."

The PPWO appreciates the Department's efforts to clarify these provisions, but requests that it go still further in clarifying discretionary bonus payments. For example, a short waiting period following the announcement of a bonus (e.g., the 2018 annual bonus will be paid at the end of the first quarter of 2019) should not "convert" an otherwise discretionary bonus to a non-discretionary bonus. Similarly, sign-on bonuses (as referenced above) may also be discretionary. Including a recovery provision that requires an employee to remain employed for a specified period of time or repay the sign-on bonus should not alter the analysis.

VII. Excludable Benefits Under Section 7(e)(4).

The Department proposes to include additional examples of benefits plans that can be excluded from the regular rate, specifically plans for "accident, unemployment, and legal services." The PPWO supports the Department's proposal.

In addition to the types of plans identified by the Department, there are a number of benefits-related issues that should be clarified by the Department. First is the treatment of domestic partner benefits outside of traditional benefits plans. These

payments are made for the same reasons as otherwise excludable payments made within traditional benefits plans -- to provide benefits coverage for an employee's family member. As is the case with traditional benefits, these payments are not intended to be "wages," and should not be treated as such. Accordingly, the PPWO requests that the Department specifically clarify that payments made for domestic partner benefits are excludable from the regular rate.

Similarly, the Department should take this opportunity to harmonize its position on the provision of cash in-lieu of benefits for employees subject to the Service Contract Act or Davis-Bacon Act with the provision of cash in-lieu of benefits for employees not subject to those laws. As the Department is aware, pursuant to 29 CFR 778.214(d) and (e), payments made to satisfy the fringe benefits requirements of the SCA or DBA are excluded from the regular rate even when those payments are made in cash directly to the employee. The Department should treat non-SCA and non-DBA covered employees similarly, and, where an employer has a bona fide benefits plan, and an employee voluntarily opts out of that plan and is provided a cash payment instead, those cash payments should be excluded from the regular rate, provided that such payments are separately identified in the employer's records.

VIII. Overtime Premiums Under Sections 7(e)(5)-(7).

The PPWO supports the Department's proposal to amend §§ 778.202 and 778.205 to remove references to employment agreements and contracts in those sections to eliminate any confusion. The PPWO agrees that the overtime premiums described in sections 7(e)(5) and (6) may be excluded from the regular rate absent written contracts or agreements.

IX. Clarification That Examples in Part 778 Are Not Exclusive.

The Department's proposal to clarify that Part 778 is in many ways illustrative and not proscriptive is a welcome development but does not go far enough. Language such as "if he receives no other form of compensation for services" throughout Part 778 has been used to argue that the examples provided are proscriptive and failure to pay precisely in accordance with the regulatory example means that the employer has somehow "lost" the ability to use the "normal" regular rate calculation. The Department

should make clear not only that there may be new and evolving pay practices, but that employers may pay via any method or combination of methods and the regular rate calculation is precisely the same: total includable remuneration divided by hours worked. Specifically identifying alternatives to the examples provided in the regulations -- for example, that day rates and hourly rates may be paid in the same workweek without somehow changing the method of calculating regular rate or that piece rates and bonuses may similarly be paid in the same workweek without changing the calculation -- will help address some of the confusion in the regulated community regarding exactly how the regular rate principles operate.

X. Basic Rate Calculations Under Section 7(g)(3).

Under section 7(g) of the FLSA, an employer may calculate overtime compensation using a basic rate (i.e., a rate that does not necessarily reflect all of the compensation typically included in the regular rate) rather than the regular rate. The Department proposes to change one of the requirements for one of the circumstances in which the basic rate is permitted. That requirement allows use of a basic rate of pay when the rate is “authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time[.]” In other words, the basic rate and regular rate must be very close; the Department has established via regulation a tolerance level for how close they must be.

The current tolerance level for the use of basic rates under section 7(g)(3) of the FLSA is \$0.50 per week (i.e., the overtime pay with basic rates must be within \$0.50 per week of what the calculation would have been using regular rate). As a practical matter, this is too low for most employers to make meaningful use of the provisions. The Department’s proposal to increase that tolerance level to 40% of the applicable minimum wage (currently resulting in \$2.90 per week) may increase the likelihood that employers will be able to take advantage of the basic rate under section 7(g)(3). Given the fact that the employer is likely to have to compute the applicable rates of pay in any event, however, it is not clear that even the \$2.90 per week is high enough. For many payments, it is the administrative burden associated with determining the increase to the regular rate that is the real issue, not the amounts of the increase itself. A tolerance

level of \$10 or more per week is likely to provide far more use of the basic rate calculation (and, thus, increased use of extra payments to employees), as the amounts saved at that threshold would justify the additional administrative expense.

XI. Conclusion.

The PPWO supports the Department's proposal, which will benefit employers and employees alike. The PPWO suggests some additions and modifications to increase the clarity of when and which benefits should be excluded from calculations of regular rate. We thank the Department for the opportunity to comment.

Of Counsel

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National Organizations

American Bankers Association
American Bus Association
American Hotel & Lodging Association
American Rental Association
Asian American Hotel Owners Association
Associated Builders and Contractors
Associated General Contractors
Auto Care Association
Building Service Contractors Association International
College and University Professional Association for Human Resources
HR Policy Association
Independent Electrical Contractors
International Association of Amusement Parks and Attractions
International Festivals & Events Association
International Franchise Association
International Public Management Association for Human Resources
Job Creators Network
National Association of Home Builders
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Council of Chain Restaurants
National Lumber and Building Material Dealers Association
National Parking Association
National Ready Mixed Concrete Association

National Retail Federation
National RV Dealers Association
Retail Industry Leaders Association
Small Business & Entrepreneurship Council
Society for Human Resource Management
U.S. Chamber of Commerce

Regional, State and Local Organizations

CAWA - Representing the Automotive Parts Industry
Kentucky-Indiana Automotive Wholesalers
Ohio Equipment Distributors Association
Ohio Society of CPAs
Pennsylvania Food Merchants Association
United Equipment Dealers Association