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## DEPARTMENT OF LABOR PROPOSES RULE CHANGE TO FLSA'S "REGULAR RATE"

by Fred Gaona and Jake Lewis

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On March 28, 2019, the Department of Labor (DOL) announced a proposed rule change to amend regulations that define an employee's "regular rate" under the Fair Labor Standards Act (FLSA). Generally, the FLSA requires overtime pay of at least one and one-half times the "regular rate" of pay for hours worked in excess of 40 hours per workweek. The FLSA regulations define what forms of payment should be included and excluded from an employee's regular rate, which, in turn, has a significant effect on an employee's overtime rate.

The DOL's proposed rule change focuses on clarifying whether certain perks, benefits and other items should be included in the calculation of an employee's regular rate. The current rules have often had the effect of discouraging employers from offering employees certain perks or benefits because it is unclear whether such perks and benefits would be included in employees' regular rates, thus raising employees' overtime rates.

The proposed rule confirms that employers may exclude the following from an employee's regular rate of pay:

- Discretionary bonuses;
- Payments for unused paid leave, including paid sick leave;
- Benefit plans, including accident, unemployment and legal services;
- Tuition programs, such as reimbursement programs or repayment of educational debt;
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements; and
- Costs associated with providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services.

Additionally, the proposed rule change also includes clarification about certain other forms of compensation, including that payment for bona fide meal periods and "call back" pay are excludable from an employee's regular rate.

Employers should be mindful that these rule changes are simply proposals at this time and that the DOL has extended the comment period for these rule changes until May 28, 2019. Employers should continue to follow existing law and DOL regulations when determining an employee's regular rate of pay. The DOL's proposed rule changes aim both to provide clarity for employers and better reflect the 21st-century workplace.

### ABOUT THE AUTHORS



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Employers across the country rely on Fred to resolve all types of labor and employment disputes, including claims under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act and numerous state statutes. He has successfully defended employers against a variety of high-stakes claims through dispositive motions, skillful negotiation and aggressive litigation when necessary. Fred's clients span several industries, including transportation, energy, retail and construction.



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Jake focuses his practice on resolving a broad range of employment litigation matters, including defense of employers under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Family Medical Leave Act and state anti-discrimination laws. He has significant experience handling Department of Labor audits and related litigation involving misclassification of employees and payment of overtime and minimum wage. Jake also prosecutes and defends unfair competition disputes from preliminary injunctive relief through trial, typically involving non-compete agreements, non-disclosure agreements and misappropriation of trade secrets.