U.S. DOL PROPOSES CHANGES TO RULES THAT DEFINE THE "REGULAR RATE" FOR PURPOSES OF OVERTIME

Hodgson Russ Home Care Alert
March 29, 2019

Today, the U.S. Department of Labor ("DOL") released a proposal to amend the regulations that define the regular rate requirements. If adopted, the new regulations could reduce challenges often faced by employers in determining the correct overtime rate for non-exempt employees.

The Basic Principles regarding Regular Rate

Overtime compensation for non-exempt employees is computed at one and one-half the "regular rate" of pay. The regular rate, however, is not necessarily the employee's usual rate of pay. Rather, the regular rate is calculated by dividing the total wages paid to the employee in a workweek by the total number of hours worked. The "total wages" considered in this calculation must include all "remuneration" paid to the employee, subject to only limited exceptions. Regulations promulgated under the Fair Labor Standards Act specify what types of payments (e.g., certain bonuses, commissions) are included for purposes of this calculation, and what compensation paid to employees may be excluded. To ensure that employees receive the correct overtime pay rate, it is critical that the "regular rate" is calculated correctly. The federal regulations defining the regular rate have not been modified in 50 years and have, historically, caused a slew of class action claims against employers in which employees allege that the regular rate, and hence the overtime rate, were improperly calculated and paid to employees.

The DOL's Proposed Regulations

On March 29, 2019, the DOL published a Notice of Proposed Rulemaking ("NPRM") and request for comments, outlining its proposed changes to "clarify and update" the Fair Labor Standards Act requirements regarding the "regular rate." According to the DOL's announcement of the NPRM, the proposed regulations will:

1. Clarify whether certain kinds of "employee perks," benefits or other miscellaneous payments must be included in the regular rate;
2. Confirm that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee's regular rate of pay;

Attorneys

Jane Bello Burke
Reetuparna Dutta
Rob Fluskey
Peter Godfrey
John Godwin
Michelle Merola
Kinsey O'Brien
Matthew Parker
David Stark
Amy Walters
Sujata Yalamanchili

Practices & Industries

Home Care

3. Confirm that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;
4. Confirm that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;
5. Confirm that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and meets other regulatory requirements may be excluded from an employee's regular rate of pay;
6. Confirm that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums; and
7. Confirm that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

Also according to the DOL, the proposed regulations will also: (1) provide examples of discretionary bonuses that may be excluded from an employee's regular rate of pay; (2) clarify that the label given a bonus does not determine whether it is discretionary; and (3) provide additional examples of benefit plans, including accident, unemployment, and legal services, that may be excluded from an employee's regular rate of pay; and (4) clarify that tuition programs, such as reimbursement programs or repayment of educational debt, could be excluded in determining the regular rate of pay for overtime purposes.

NYC's New Requirements for Employers with Lactating Employees

Employers in New York City with four (4) or more employees are now required to: (1) provide adequate time for employees to express breast milk during the workday; (2) provide a lactation room; and (3) have a written policy on lactation accommodations. Employers must keep in mind that the new requirements are in addition to those requirements already established under federal and New York State Labor Law regarding lactation breaks.

Under the new laws, which amend the New York City Human Rights Law, covered employers are required to provide employees who need to express breast milk with access to a lactation room, as well as to a refrigerator suitable for breast milk storage, in "reasonable proximity" to the employee's work space. The law defines a lactation room as "a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at a minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water."

While employers are not required to create a dedicated lactation room, if the room is also used for other purposes, it must be used solely as a lactation room during times when an employee is using the room to express milk and the employer must provide notice to other employees that the room is given preference for use as a lactation room.

If providing a lactation room creates an undue hardship on the employer, the employer must engage in a cooperative dialogue with the employee to determine what, if any, alternate accommodation may be available. The employer also must provide the employee with a written final determination at the conclusion of the cooperative dialogue process that identifies what accommodation was granted and/or denied.

Covered employers also are required to develop and implement a written policy regarding the provision of a lactation room. This policy must be distributed to all new employees upon hire. The policy must include a statement that employees have a right to request a lactation room and identify the process through which employees can request a lactation room. The policy must:

1. state how an employee can submit a request for a lactation room;
2. require the employer to respond to requests within a reasonable amount of time, but no later than within five (5) business days;
3. provide a procedure for what to do when two or more employees need to use the lactation room at the same time;
4. state that the employer will provide reasonable break time for an employee to express breast milk; and
5. explain that if providing all aspects of the lactation room normally required by law would create an undue hardship for the employer, the employer will have a cooperative dialogue with the employee to figure out an appropriate accommodation to enable the employee to express breast milk at work.

In order to assist employers with the implementation of these new laws, the New York City Commission on Human Rights ("NYCCHR") has launched a new website on Lactation Accommodations. The website contains three model policies: one for workplaces that have a dedicated lactation room, another for workplaces that have a multi-purpose space, and one for workplaces that have no available space for a lactation room. Employers are not required to adopt these model policies so long as the employer's policy meets the above stated requirements. Employers should be aware that the model policies go beyond what is required by the new laws. The website also contains a model lactation accommodation request form, information for employers, and responses to frequently asked questions.

Generally, employers should provide employees with information about their right to lactation accommodations and information about the employer's policy on lactation accommodations before the employee starts parental leave. An employee may request a lactation accommodation at any time, orally or in writing.

Because these new requirements only apply to employers with four (4) or more employees, employers who employ domestic workers, such as nannies, home health aides, and cleaners, might be excluded from the obligations under this law.