

## LAW &amp; POLICY GROUP

**GRIST****DOL PROPOSES UPDATES TO FLSA RULE ON OVERTIME CALCULATIONS**

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Employers would get clarity on the perquisites and benefits that can be excluded from overtime-eligible employees' regular rates of pay when calculating overtime pay, under a [proposed rule](#) from the Department of Labor (DOL). The proposal, which would update regulations that have been in place more than 50 years, aims to "provide clarity and better reflect the 21st century workplace," the agency says. Comments can be submitted until 28 May 2019. The DOL has also proposed a rule to increase the salary threshold for white-collar employees counted as exempt from overtime — comments on that rule can be submitted until 21 May 2019.

**BACKGROUND**

The Fair Labor Standards Act (FLSA) generally requires nonexempt employees — those who are eligible for overtime pay — to be paid at least 1.5 times the regular rate of pay for any hours worked over 40 in a week. White-collar (executive, administrative, professional, outside sales and computer) employees are exempt from overtime pay if they are paid on a salary basis at or above a specified minimum weekly level and meet certain requirements related to their primary duties.

Under current FLSA overtime rules, a nonexempt employee's regular rate of pay must include "all remuneration for employment" except eight types of payments, including employer contributions to "a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." But compensation packages and benefit practices have evolved in the decades since the rules were adopted, DOL notes, and "employers are discouraged from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees' regular rate of pay."

**PROPOSED EXCLUSIONS**

The proposed rule would let employers exclude the following from an employee's regular rate of pay:

- The cost of providing wellness programs (e.g. biometric screenings, health risk assessments, vaccination clinics, smoking cessation programs and nutrition classes), onsite specialist treatment

(e.g., chiropractors, massage therapists, employment assistance programs and physical therapists), gym access and fitness classes, and employee discounts on retail goods and services

- Payments for unused paid time off, including unused accrued paid sick leave
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit
- Reimbursed travel expenses that don't exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements
- Discretionary bonuses (examples are provided, and DOL clarifies that the label given a bonus doesn't determine whether it is discretionary)
- Benefit plans, including accident, unemployment and legal services
- Certain tuition programs, such as reimbursement programs or repayment of educational debt
- Pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, unless an agreement or established practice is in place to include the time
- Certain types of call-back payments paid to employees required to return to work due to an emergency or other unforeseen circumstances

## RELATED RESOURCES

### Non-Mercer Resources

- [Proposed Rule \(Federal Register, 29 Mar 2019\)](#)
- [Notice of Proposed Rulemaking \(DOL, 28 Mar 2019\)](#)
- [Press Release \(DOL, 28 Mar 2019\)](#)
- [Fact Sheet \(DOL, March 2019\)](#)

### Mercer Law & Policy Resources

Links to resources in the Mercer Select archive are accessible to Mercer consultants. Clients may contact their consultants for free copies:

- [US: More Employees Would Be Eligible for Overtime Pay under Proposed Rule](#) (18 Mar 2019)

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