



June 12, 2019

Submitted via regulations.gov

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

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

Dear Ms. Stanton:

The Society for Human Resource Management’s (SHRM) mission is to create better workplaces where employers and employees thrive together. As the voice of all things work, workers and the workplace, SHRM is the foremost expert, convener and thought leader on issues impacting today’s evolving workplaces. As such, we appreciate the opportunity to provide the Department of Labor (“DOL” or “the Department”) with comments on its proposal to update the regular rate regulations under the Fair Labor Standards Act (FLSA). SHRM’s. With 300,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. Changes to the regular rate regulations affect the workplaces of nearly every SHRM member and the employees they serve.

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) 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. For example, employers 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.

In general, SHRM believes the following:

- employees **and** employers 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
- eliminating regulatory burdens associated with providing otherwise very straightforward benefits is entirely appropriate
- modernizing the regular rate regulations will provide much-needed clarity to the regulated community

Comments on 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, taken for whatever reason, is included in a single bucket of paid time off (PTO). SHRM 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.

SHRM supports the Department's proposal to clarify its treatment of payments for otherwise non-compensable 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 worked. 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 increase the ability of employers to provide this valuable benefit.

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. SHRM supports this proposed change, which, as the Department notes, is consistent with court decisions and the Department’s guidance.

SHRM also supports the Department’s decision to use the Federal Travel Regulation (FTR) as a standard of *per se* reasonableness, **provided that the Department also retains the proposed language that reimbursement amounts in excess of the FTR may nevertheless qualify as reasonable.** Many private sector employers, however, are unfamiliar with the FTR, and human resources professionals would benefit from additional guidance on the use of the FTR, including references to user guides and/or web addresses.

IV. “Other Similar Payments.”

SHRM 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 continue 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).

SHRM fully supports the Department's efforts to ensure that wellness benefits are not adversely impacted by the possibility that they might need to be included in the regular rate of pay. SHRM members work diligently to design and implement benefit plans, including health and wellness initiatives that meet the needs of the workforce while ensuring organizational success. Wellness programs are a critical component of employers' overall benefit offerings and health care strategy to promote healthy lifestyles for employees and reduce health care costs.

Indeed, in recent years, a growing number of employers have incorporated wellness programs into their organizations' health and wellness offerings. A recent SHRM survey found that 58% of HR professionals indicated their organization offered some type of wellness program, resource, or service to employees. Research also shows that health and wellness benefits rank highly for employees when determining job satisfaction. According to SHRM's Employees' Job Satisfaction and Engagement research report, 70% of respondents specifically referenced wellness programs as a contributor to job satisfaction. In addition, 77% of respondents from organizations that offered wellness initiatives indicated that these programs were effective in reducing the cost of health care and improving employees' health.

SHRM is confident that employer-sponsored wellness initiatives will continue to be an integral part of the benefits package employers offer to recruit and retain employees, especially in a competitive labor market. SHRM encourages the Department to continue to exclude such benefits from the calculation of employees' regular rate of pay. In addition to the wellness benefits, SHRM member companies provide a wide variety of benefits that should qualify as "other similar payments," such as:

- Sign-on bonuses;
- Discounts for vendor or other third-party services;
- Discounts on the purchase of gift cards;
- Adoption/surrogacy assistance;
- Financial aid 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;
- Public transportation subsidies;
- Childcare services/subsidies;
- Programs pursuant to which employees are awarded “points” which may later be redeemed for merchandise from a third-party vendor; and
- Small, non-cash awards such as coffee cups, t-shirts, etc.

SHRM also requests that the Department clarify that the receipt of such benefits can require 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) or other, similar requirements.

With respect to tuition assistance and similar programs, SHRM supports the Department’s proposal to provide a provision expressly excluding tuition programs from the regular rate of pay. Although these programs are usually excludable in the manner described by the Department, without an express provision affirmatively stating that they can be excluded, employers may be reluctant to provide them. According to SHRM’s 2019 Employee Benefits Survey, 56% of respondents said they are offering tuition assistance as a benefit. In addition, 8% of respondents said that they are offering employer-provided student loan repayment as a benefit (this is an increase from 4% in 2018).

Tuition assistance benefits including employer-provided student loan repayment is expected to increase, especially as individuals entering the workforce are graduating with a significant amount of student debt. In fact, new research shows that health insurance, paid time off and student loan repayment aid—in that order—are the top three benefits identified by recent college graduates and those approaching graduation when asked what benefits they most value from an employer. In today’s competitive workforce, a comprehensive employer-sponsored benefits package including tuition assistance is an important tool for furthering higher education, allowing employers to attract the best employees and building an educated, diverse workforce to continue to position the U.S. to compete globally.

These programs benefit employers and employees alike. The Department should ensure that they are not limited in their use due to confusion or misunderstanding about

whether the cost of such benefits need to be included in the regular rate of pay -- and, if so, the time period to be used for making the determination.

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

SHRM supports 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.

HR professionals would benefit from additional guidance on determining "essentially prearranged": in the Department's 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), the call-in pay would be included in the regular rate. The example, however, provides no guidance whether being called in for five weeks out of eight would mean the call-in pay does not get included. Similarly, the guidance thus far provides no specifics on the relevant time frame to be included in a review. 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, SHRM 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.

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

Many employers unfortunately have made 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.

The Department's proposal would 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.

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."

SHRM 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." SHRM 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, SHRM 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).

SHRM 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. SHRM 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, 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.

SHRM supports the Department’s proposal, which will benefit employers and employees alike. SHRM also 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.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Emily M. Dickens". The signature is written in black ink and is positioned above the typed name.

Emily M. Dickens, J.D.
Chief of Staff
Society for Human Resource Management