

## CLIENT ALERT

### DOL Proposes Rules to Clarify FLSA 'Regular Rate'

April 4, 2019

On March 28, 2019, the Department of Labor (DOL) offered hope to many in the employer community seeking clarity regarding compliance with the Fair Labor Standards Act's overtime calculation rules, by issuing a notice of a final rule to update the principles applicable for calculating the "regular rate." It has been more than 50 years since the DOL last updated its regulations on this issue. While compensation practices have evolved, employers have been discouraged from offering certain benefits and perks to employees in the absence of clarity as to whether they should be included in the "regular rate" calculation. The DOL's new rule promises to resolve some of this uncertainty.

The proposed rule would exclude from the regular rate:

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

DOL's proposed rule also clarifies what does and does not constitute a discretionary bonus, which is traditionally excluded from the regular rate calculation. The proposed rule clarifies that simply calling a bonus "discretionary" does not make it so for purposes of overtime calculation. Bonuses the proposed rule excludes from the regular rate include spot bonuses and employee-of-the-month awards. Included in the regular rate are bonuses paid according to an agreement (*e.g.* promised to an employee when she is hired) and those announced to employees to encourage them to remain with the organization or work more efficiently.

The proposed rule has been published for public comment pursuant to the Administrative Procedure Act. Comments are due on or before May 28, 2019. The final rule will likely be promulgated a few months after the close of the comment period.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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