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DEPARTMENT OF LABOR PROPOSES NEW RULE ON CALCULATING REGULAR RATE OF PAY

For the first time in 50 years on March 25, 2019, the Department of Labor ("DOL") proposed changing the definition of "regular rate" of pay. The proposed change will impact the calculation of employee overtime. The DOL's proposal defines and updates what forms of payment and benefits employers include and exclude when they calculate employee overtime pay.

As a reminder, an employee's "regular rate" of pay is not just 1 ½ of their hourly rate. It should also include most bonuses, shift differentials, on-call pay and commissions. The proposed DOL rule excludes the following perks and benefits from an employee's "regular rate" of pay:

- The cost of providing a wellness program, gym access and fitness classes and employee discounts on retail goods and services;
- Payments for unused unpaid leave, including sick leave;
- All reimbursed expenses;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement under federal regulations;
- Discretionary bonuses; and
- Tuition programs or repayment of educational debt.

The DOL reminds employers that simply referring to a bonus as "discretionary" does not mean it is excluded from the regular rate of pay. Additionally, any bonus paid according to an agreement or contract would not be excluded from the overtime pay calculation.

The proposed rule also provides that bonuses designed to have employees work more quickly or efficiently, to remain with the employers as well as attendance bonuses must be included in the regular pay rate under this rule.

This proposed rule has not yet been finalized and the deadline for public comment is May 28, 2019. However, employers are cautioned to keep a close eye on this proposed DOL rule and to start evaluating its current compensation and benefit offerings.