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DOL's Wage and Hour Division Proposes Clarifications to FLSA "Regular Rate of Pay" Exclusions with Potential Implications for Employee Benefits

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On March 29, 2019, the Department of Labor ("DOL" or "Department") Wage and Hour Division ("WHD") submitted a notice of proposed rulemaking ("NPRM" or "proposed rule") and request for comments to the Federal Register regarding exclusions from the "regular rate of pay" (including, notably, where such exclusions impact calculation of overtime) under the Fair Labor Standards Act ("FLSA"). The DOL will be accepting comments until May 28, 2019.

The DOL promulgated the current regulations governing "regular rate of pay" calculations and exclusions in 1968, and, although the DOL has made periodic updates since then, the regulations remain substantively unchanged. In its NPRM, the DOL states that it is seeking to provide "clarity" and regulations that "better reflect the 21st-century workplace." Key portions of the NPRM focus on various employee benefits and whether (or how) those benefits will impact "regular rate" determinations and overtime calculations.

This benefits brief outlines the portions of the NPRM proposals that may be particularly relevant to employee benefits.

Key takeaways for employers are:

- The recently issued proposed rules fail to clearly exempt certain common employer-sponsored benefit arrangements from having to be taken into account for purposes of the FLSA's overtime rules, including, most notably (1) self-funded health and welfare plans that do not utilize a qualifying trust (such as self-funded plans that utilize a "claims account" with their claims administrator, as well as most Health Reimbursement Arrangements or "HRAs"), (2) discretionary profit sharing contributions to qualified retirement plans where the contribution amount is at the election of the plan sponsor, (3) phantom stock arrangements, and (4) student loan/debt assistance programs.

- There is increasing litigation activity with respect to the FLSA's overtime requirements and many employers had been hopeful that the current rulemaking project would be an opportunity for the DOL to clearly state that the overtime rules do not apply to the above arrangements (as well as all ERISA plans more generally). As

discussed below, DOL unfortunately did not take the opportunity to provide such clarifying guidance.

- Employers with the above arrangements should review their arrangements in light of the recent litigation and proposed rulemaking.
- For employers and other stakeholders interested in submitting written comments on the proposed rule, comments are due by May 28, 2019.

Background

Section 7(a)(1) of the FLSA mandates that employers pay non-exempt employees one and one-half times their "regular rate" of pay for time worked in excess of 40 hours a week. Section 7(e) defines "regular rate" to include "all remuneration for employment paid to, or on behalf of, the employee[.]" The provision excludes, however, eight specified categories of payment:

1. Gifts and payments on special occasions;
2. Payments made for occasional periods when no work is performed such as vacation or sick pay, reimbursements for work-related expenses, and other similar payments that are not compensation for hours of employment;
3. Discretionary bonuses, payments to profit-sharing, thrift, or savings plans that meet certain requirements, and certain talent fees;
4. Contributions to a bona fide plan for retirement, or life, accident, or health insurance, or similar;
5. Extra compensation provided by a premium rate for certain hours worked in excess of eight in a day, 40 hours in a workweek, or the employee's normal working hours;
6. Extra compensation provided by a premium rate for work on Saturdays, Sundays, regular days of rest, or the sixth or seventh days of the workweek;
7. Extra compensation provided by a premium rate pursuant to an employment contract or collective bargaining agreement for work outside of the hours established therein as the normal workday (not exceeding eight hours) or workweek (not exceeding 40 hours); and
8. Income derived from a stock option, stock appreciation right, or employee stock purchase plan.

The Department first issued regulatory guidance interpreting the FLSA in 1948, and the regulations are found at 29 C.F.R. Parts 548 and 778.[2] The Department has updated these regulations repeatedly to account for changes in the law, but the pace of updates fell off dramatically after 1967, the last year the DOL updated *any* of the regulations at Part 548. While Part 778 has been updated more often – most recently in 2011 – the last comprehensive revision occurred in 1968. The current regulations therefore use antiquated language and examples, and often do not reflect current employment trends. Moreover, the interpretative guidance predates major changes in the laws governing employee benefits, including the Employee Retirement Income Security Act of 1974 ("ERISA"), enacted in 1974, and Internal Revenue Code section 401(k), enacted in 1978.

Key Employee Benefits-Related Proposals

- **Exclusion of Payments for unused leave:** The FLSA excludes "payments made for occasional periods where no work is performed" from the regular rate. The proposed rule would clarify that, for payments made to an employee for *foregoing* leave *(e.g.*, cash-out of unused annual leave), payment may be excluded from the regular rate regardless of the *type* of leave at issue.
- **Clarification that wellness programs, tuition benefits and similar benefits offerings may be excluded:** Currently, the FLSA regulation providing a list of examples of "other similar payments that are not compensation for hours of employment" dates from 1950. The DOL proposes adding a more modern list of examples, including wellness programs and tuition benefits.
- **For bona fide plans, clarification of the types of benefits that may be excludable:** The DOL proposes adding new examples to the existing list of "bona fide plan" examples. Currently, the list of examples includes only benefits generally related to health and retirement: additional examples would relate to unemployment, accidents, and legal services.
- **Clarification regarding discretionary bonuses:** The NPRM would clarify that a bonus' label is not determinative: instead, whether a bonus is discretionary depends on the specific facts surrounding the bonus.

- **Examples are not exclusive:** The NPRM would add a new introductory statement to 29 C.F.R. section 778, providing that, while the *categories* of payment in FLSA section (7)(e) are exhaustive, the *types* of payment listed in the rules are not: employers are free to be creative within the categories listed in the statute.[1]