CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

GLENN SPENCER
SENIOR VICE PRESIDENT
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

MARC D. FREEDMAN
VICE PRESIDENT
WORKPLACE POLICY

June 12, 2019

The Honorable R. Alexander Acosta
Secretary of Labor
c/o The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

VIA ELECTRONIC FILING: www.regulations.gov

Re: RIN 1235–AA24, Notice of Proposed Rulemaking, 29 C.F.R. Part 548; 29 C.F.R. 778, *Regular Rate Under the Fair Labor Standards Act,* 84 FR 11888 (March 29, 2019)

Dear Secretary Acosta:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the proposal of the U.S. Department of Labor (the "Department"), as published in the Federal Register on March 29, 2019,[1] to revise the regulations at 29 C.F.R. part 548 and part 778, regarding the regular rate under the Fair Labor Standards Act ("FLSA" or the "Act") the "Proposed Rule").

The FLSA requires employers to pay employees overtime for all hours worked over 40 in a workweek at 1.5 times their "regular rate of pay." The term "regular rate" is defined at 29 U.S.C. § 207(e) as including "all remuneration for employment," with eight enumerated exclusions. The Department's official interpretations of this definition and the exclusions at 29 C.F.R. part 778, most of which have not been updated in over 60 years, are a relic of the past addressing types of compensation and pay plans no longer in common use and providing no

[1] Regular Rate Under the Fair Labor Standards Act, 84 Fed. Reg. 11888 (March 29, 2019) [hereinafter "2019 Proposed Rule"].

guidance to today's compensation and benefits. It is past time for clarification of how section 7(e) applies to twenty-first century compensation practices.

Thus, the Chamber is very supportive of the Department's proposed changes to the part 778 and part 548 regulations. The Proposed Rule, as the Department intends, will provide much-needed updated guidance on the regular rate calculation and thereby promote compliance with the FLSA. Most importantly, updating the regulations to clarify the types of employee benefits and perks that need not be included in the regular rate will encourage employers to provide such benefits to non-exempt employees. The fear of regular-rate errors leading to significant, unexpected overtime liability has kept many employers from providing non-exempt employees with tuition reimbursement, student loan repayment benefits, public transportation subsidies, child care subsidies or services, adoption assistance, certain types of bonuses, discounts, and similar benefits that are highly valued by employees. Such benefits are not provided based on hours of work, production, or efficiency. They are not provided to avoid paying more in overtime. They are provided as perks to attract and retain employees, and thus are especially important today in this era of record low unemployment. The Department's proposed changes are a win-win for employers and employees.

In these comments, however, we present some additional thoughts and suggestions for further changes to the part 778 regulations, including other types of benefits and perks provided by employers which the Department should also recognize as excludable from the regular rate.

I. "REMUNERATION FOR EMPLOYMENT"

The FLSA defines the regular rate as including "all remuneration for employment paid to, or on behalf of, the employee."[2] This phrase begins the analysis of whether a type of compensation must be included in the regular rate—if a payment or perk provided by an employer to an employee is not "remuneration for employment," the analysis ends. The perk is not included in the regular rate, and there is no need to go further to determine if the payment fits within one of the eight enumerated exclusions. Despite its importance, the meaning of the phrase "all remuneration for employment" is not obvious or self-evident, but neither the FLSA nor the Department's regulations define it.

[2] 29 U.S.C. § 207(e).

Thus, as an initial matter, we request that the Department add a definition of the ambiguous statutory language in the part 778 regulations, probably under section 778.108, which restates the statutory definition of regular rate as including "all remuneration for employment."[3]

What is the meaning of this phrase? "Remuneration" generally means a payment or remittance. However, that definition certainly cannot mean that every transfer of a thing of value from an employer to an employee must be included in the regular rate. Such an interpretation would render meaningless the words "for employment."

A careful reading of the enumerated statutory exclusions reveals a general theme that provides some guidance: the payment must be related to hours worked, production, or efficiency. Section 7(e)(1) excludes "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, *the amounts of which are not measured by or dependent on hours worked, production, or efficiency*."[4] Section 7(e)(2) excludes "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."[5] Section 7(e)(3) excludes payments made under profit-sharing plans if "the amounts paid to the employee are *determined without regard to hours of work, production, or efficiency*."[6]

When the amount of the payment does not differ based on hours worked, production or efficiency such payments are not "remuneration for employment" in the first instance because they are not paid for the quantity or quality of work performed. Perks provided by an employer to all of its employees regardless of work hours or performance are excludable from the regular rate whether or not the payment fits squarely within an enumerated exclusion in section 7(e) of the FLSA. This is true even if the perk is provided only to all employees based on their work location, years of service or other criteria unrelated to hours worked, production, or efficiency. Perks that employers provide to all employees regardless of hours worked or performance, and for which the perk or payment amount does not change based on hours worked or performance include, for example, worksite parking, public-transit subsidies, child-care services or subsidies,

---

[3] 29 C.F.R. § 778.108 also needs to be updated to reflect that section 7(e) now includes eight statutory exclusions, rather than "seven types of payments" that are excluded from the regular rate.

[4] 29 U.S.C. § 207(e)(1) (emphasis added).

[5] 29 U.S.C. § 207(e)(2) (emphasis added).

[6] 29 U.S.C. § 207(e)(3)(b) (emphasis added). Additionally, the exclusions for employee benefits, section 7(e)(4), and stock options, section 7(e)(8), are not dependent on hours of work, production, or efficiency as such benefits are provided to all employees qualified under plan documents (e.g., all regular full-time employees after completing a year of service). Sections 7(e)(5), (6), and (7) are exclusions for hours already paid at a premium rate thus establishing that employers are not required to pay overtime on overtime. Thus, every statutory exclusion from the regular rate is consistent with the theme that payments not dependent on hours worked, production, or efficiency are *not* "remuneration for employment" which must be included in the regular rate.

adoption assistance, wellness benefits, and repayment of student loans. The Department should recognize that these and similar perks need not be included in the regular rate.

II. PAYMENTS THAT MAY BE EXCLUDED FROM THE REGULAR RATE

If the payment or perk provided to an employee is to be considered "remuneration for employment," the next step in the analysis is to determine if any of the eight enumerated exclusions from the regular rate applies. When revising its part 778 interpretations of the statutory exclusions, the Supreme Court's recent decision in *Encino Motorcars, LLC v. Navarro,*[7] requires the Department to give the exclusions "a fair (rather than a narrow) interpretation." Every interpretation in part 778 was adopted decades before the *Encino* decision, which fundamentally changed how we must interpret the FLSA. In *Encino,* citing Justice Scalia's final book, *Reading Law*, the Court stated:

> Because the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair (rather than a narrow) interpretation. The narrow construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs. [8]

In *Encino,* the Court was interpreting an exemption from the FLSA overtime requirements. But, the "fair interpretation" principle is equally applicable to exclusions from the regular rate.[9] Like the FLSA overtime exemptions, there is no "textual indication" that the exclusions from the regular rate should be given anything other than a fair reading.[10] We request that the Department revise section 778.1 to so state, citing *Encino*.

A. Excludable Compensation Under Section 7(e)(1)

Section 7(e)(1) of the FLSA excludes from the regular rate "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or

---

[7] 138 S. Ct. 1134 (2018).

[8] 138 S. Ct. 1134, 1142 (2018) (citing ANTONIN SCALIA & BRYAN GARNER, READING LAW 363 (2012)) (citations and quotations omitted).

[9] *See, e.g., McKinnon v. City of Merced*, 2018 WL 6601900 at *3 (E.D. Cal. Dec. 17, 2018) (applying *Encino* to interpret an exclusion from the regular rate, but also discussing ambiguities in section 7(e)(2) and 29 C.F.R. § 778.219 regarding holiday pay exclusion from the regular rate in denying employer's motion to dismiss).

[10] *Id.*

efficiency." The Department's guidance on this exclusion appears at section 778.212 and was last updated in 1968. After quoting the statutory language, that section provides:

> To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.
>
> . . . .
>
> If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category. [11]

The Department has not proposed any changes to section 778.212, although it was last revised in 1968. The Chamber suggests that the Department include in 778.212 its discussion of section 7(e)(1) as including two separate exclusions—for sums paid as "gifts" and "payments in the nature of gifts"—with the limitation of being paid at Christmas time or special occasions, or as a reward for service applicable only to the latter.[12] We also suggest that, as with other 1968 language, the Department's goals of promoting compliance, providing updated guidance and encouraging employers to provide additional and innovated benefits would be furthered by adding examples of excludable "gifts" to this section. For example, despite the clear statutory language that "rewards for service" are gifts, employers often question whether non-monetary awards based on years of service (such as a crystal vase after 20 years of service) must be

[11] 29 C.F.R. § 778.212(b), (c).

[12] 2019 Proposed Rule, *supra* note 1, at 11897.

included in the regular rate. Other examples which the Department should add to this section are discounts provided by the employer or a third-party and gifts provided to an employee on his or her annual work anniversary.

B. Excludable Compensation Under Section 7(e)(2)

Section 7(e)(2) of the FLSA includes three separate and distinct exclusions from the regular rate:

1) *Pay for time not worked*: "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;"

2) *Reimbursement of business expenses*: "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; and"

3) *Other similar payments*: "other similar payments to an employee which are not made as compensation for his hours of employment."

The Chamber generally supports the Department's proposed changes to its interpretations of these three exclusions which are found in sections 778.216 through 778.224 of part 778, but also suggests additional changes below.

1. Reimbursement for expenses—section 778.217

The FLSA excludes from the regular rate "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."[13] The Department's interpretation of this exclusion is at section 778.217, which states as a general rule that payments for expenses are excludable from the regular rate if an employee "is required to expend sums *solely* by reason of action taken for the convenience of his employer."[14] The Department proposes to remove the word "solely" from the regulation, correctly reasoning that the section 7(e)(2) language does not restrict excludable expenses to those "solely" benefitting the employer.[15] It explains that that this removal is

[13] 29 U.S.C. 207(e)(2).

[14] 29 C.F.R. § 778.217(a) (emphasis added).

[15] 2019 Proposed Rule, *supra* note 1, at 11893.

consistent with the Section 778.217's remaining text, the Department's opinion letters, the Wage and Hour Division's Field Operations Handbook, and relevant court rulings.[16]

We agree with the Department's proposal to remove the word "solely." The "solely" requirements goes well beyond the statutory text, which requires only that the expenses be incurred "in the furtherance of his employer's interests." Section 7(e)(2) does restrict the exclusion for business-expense reimbursements to those incurred "solely" for the benefit of the employer, and the Department did not have authority to impose such a limitation. Removal of the "solely" limitation in section 778.217(a) is consistent with section 778.217(d), which provides only that expense reimbursements are excludable from the regular rate if "incurred by the employee on the employer's behalf or for his benefit or convenience." Further, as recognized by the Department, neither its opinion letters[17] nor its Field Operations Handbook (FOH)[18] have applied the "solely" standard. Finally, courts have not analyzed whether the expenses were incurred "solely" for the employer's benefit.[19]

But removing "solely" from Section 778.217(a) may not fully solve the problem. We also suggest that the Department add to this section language similar to that in 778.217(b): reimbursements for "the expenses incurred by the employee on the employer's behalf or for his benefit or convenience" are excludable from the regular rate. In addition, the Department should add a new sentence to affirmatively state that the business expenses need not be solely or primarily incurred for the employer's benefit. Thus, we request that section 778.217(a) be revised to read as follows:

> (a) *General rule*. Where an employee incurs expenses on the employer's behalf, or for the employer's benefit or convenience, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the

---

[16] *Id.*

[17] *See, e.g.*, Opinion Letter FLSA2004-3, 2004 WL 2146923 (May 13, 2004) (reimbursement for cost of meals while on business travel were for the employer's benefit and excludable); Opinion Letter FLSA-1234 (July 12, 1985) (reimbursement must be for "expenses incurred by the employee on the employer's behalf or convenience"); Opinion Letter FLSA-940 (Mar. 9, 1977) ("reimbursement for expenses where an employee incurs out of pocket expenses on the employer's behalf" are excludable from the regular rate); Opinion Letter FLSA-940 (Mar. 9, 1977) ("reimbursement for expenses where an employee incurs out of pocket expenses on the employer's behalf" are excludable); Opinion Letter FLSA-828 (July 19, 1976) (reimbursement for expenses "incurred on behalf of an employer" excludable).

[18] FOH 32d05a(a) (reimbursement of expenses "incurred by an employee in furtherance of his employer's interests" are excludable).

[19] 2019 Proposed Rule, *supra* note 1, at 11893 (citing *Berry* v. *Excel Grp., Inc.*, 288 F.3d 252, 253–54 (5th Cir. 2002), *Brennan* v. *Padre Drilling Co., Inc.*, 359 F. Supp. 462, 465 (S.D. Tex. 1973), and *Sharp* v. *CGG Land, Inc.*, 840 F.3d 1211, 1215 (10th Cir. 2016)).

> reimbursement reasonably approximates the expenses incurred), even if not solely or primarily incurred for the employer's benefit. Such payments are not compensation for services rendered by the employees during any hours worked in the workweek.

Section 7(e)(2) limits excludable reimbursements to "reasonable payments" for expenses, which the Department interprets in section 778.217(c) as "the actual or reasonably approximate amount to of the expenses." Employers who provide per diems in lieu of reimbursing actual expenses, without collecting receipts, have struggled to determine when the per diem reasonably approximates the actual expenses. The FOH provides that per diem payments are excludable from the regular rate "to the extent that they do not exceed a reasonable approximation of actual additional expenses"[20] but provides no guidance regarding how to reasonably approximate the expenses. Thus, the Department proposal to revise section 778.217(c) to state that reimbursement at the federal per diem rate is per se reasonable[21] is most welcome. We caution, however, that the proposed new subsection (c)(2) should not be adopted without the proposed new subsection (c)(3) providing that the new language "creates no inference" that reimbursements "exceeding" the federal per diem rate is "unreasonable." Without the new subsection (c)(3), some courts may interpret the reference to the federal per diem rate as requiring reimbursement only at that rate, with payments above that rate being includable in the regular rate—as courts have interpreted the reference to the IRS mileage rate in FOH § 30c15 as requiring reimbursement at that rate.[22] We also suggest the following changes to the new section (c)(3) to clarify that reimbursement of actual expenses is never "disproportionately large" and employers may use other reasonable methods for approximating expenses:

> (3) Paragraph (c)(2) of this section creates no inference that a reimbursement for an employee traveling on his or her employer's business exceeding the amount permitted under the Federal Travel Regulation System is unreasonable or excessive. If an employer reimburses employees for actual expenses or reasonably approximates expenses under any reasonable method, such payments are excludable from the regular rate.

2. Compensation for idle hours, including meal periods—section 778.218

The first independent clause in FLSA section 7(2)(e) excludes payments made when no work is performed: "payments made for occasional periods when no work is performed due to

[20] FOH § 23d05a(b).

[21] 2019 Proposed Rule, *supra* note 1, at 11893.

[22] *See e.g., Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712, 716-17 (E.D. Pa. 2014) (court held that plaintiffs were "entitled to be reimbursed at the IRS rate" where employer did not keep detailed records of actual expenses).

vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause." The Department's interpretations of this statutory exclusion begins at section 778.218 of the regulations. The Department proposes changes to section 778.218(b) which includes the confusing sentence that the exclusion for pay when no work is performed "has no relation to regular 'absences' such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either 'holidays' or 'vacations,' or days on which the employee is absent because of the failure of the employer to provide sufficient work."

The Chamber supports the Department's proposal to remove "lunch periods" from this provision as inconsistent with 29 C.F.R. § 778.320. Section 778.320 addresses the situation when an employer pays employees for time that is not compensable work under the Department's regulations at 29 C.F.R. part 785—including when paid meal periods are provided. Under 29 C.F.R. § 785.19, bona fide uninterrupted meal periods of thirty or more minutes are not work time. Nonetheless, employers will sometimes pay employees for their meal period—not because they must, but because they want to. Section 778.320 provides that pay for a bona fide meal period may be excluded from the regular rate unless absent an established practice or agreement to treat the meal period as work time. Courts[23] and the Department[24] itself have recognized for many years that the brief mention of "lunch periods" in section 778.218(b) as not qualifying for the section 7(e)(2) statutory exclusion is not supportable. We also support the proposal to revise section 778.320 to clarify that the pay for bona fide meal periods alone does not convert such time to hours worked without an agreement or established practice of doing so.

However, we also ask the Department to consider removal of the entirety of section 778.218(b) as confusing, unclear, and beyond its statutory authority. In addition to "lunch periods," the section also seems to state that pay for "regularly scheduled days of rest" and "Sundays" are not excludable under the 7(e)(2) statutory exclusion—apparently because such non-work days happen regularly rather than being "infrequent or sporadic or unpredictable." As the word "solely" in section 778.217(a) which the Department proposes to remove, the words "infrequent," "sporadic," and "unpredictable" are nowhere to be found in section 7(e)(2) and flatly inconsistent with *Encino*. The statute excludes from the regular rate payments for "occasional periods when no work is performed." Paid absences may be "occasional" without being "infrequent," "sporadic," or "unpredictable." Paid vacation, for example, is usually scheduled in advance and thus cannot be characterized as "unpredictable." Under the standard in

[23] *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004) (holding that pay for a bona fide lunch period was "properly excluded from the calculation of the regular rate under 29 U.S.C. 207(e)(2) as interpreted by revised section 778.320").

[24] WHD Opinion Letter, 1996 WL 1031805 (Dec. 3, 1996). *See also* WHD Opinion Letter, 1997 WL 998021 (July 21, 1997) (pay for bona fide meal periods not be included in the regular rate).

section 778.218(b), an employer who provided employees with a week of paid vacation every month would need to include the pay in the regular rate. The same is true for National Guard training, which is pre-scheduled, predictable and regular. Surely the Department does not intend to require employers to pay overtime on paid leave for National Guard training.[25] The Department should provide guidance on the definition of "occasional" absences, but there is no statutory basis for declaring that payments for any regular, predictable, or frequent (what is frequent?) absence cannot be "occasional" and thus must be included in the regular rate. Additionally, why would the Department want to so limit this exclusion and thus create a disincentive for employers to provide employees with paid time off on a more frequent and regular basis?

Finally, the Department should update the examples of "other similar cause" in section 778.218(d) to include other types of paid leave commonly provided by employers today. The example of "reporting to a draft board" is a bit out of date, but the examples excluding paid leave for jury duty and bereavement should be retained. The Department should add paid family medical leave as an example in section 778.218(d), and paid leave for military service; voting; attending child custody or adoption hearings; attending school activities; donating organs, bone marrow, or blood; voluntarily serving as a first responder; and any other paid leave required under state or local laws. All of these examples are pay for time not worked similar to the paid vacation, holiday, and sick leave in the statute, and to the jury duty and bereavement examples currently listed in section 778.218(d).

3. Pay for forgoing holidays and vacations—section 778.219

Section 778.219 provides additional guidance on the statutory exclusion in section 7(e)(2) of the FLSA for "payments made for occasional periods when no work is performed." This section currently addresses pay for forgoing holidays and vacation. Of course, the pay for hours actually worked on a holiday or unused vacation is included in the regular rate. But under section 778.219, payouts of unused paid holidays and vacations are excludable from the regular rate if compensated at the employees "customary rate (or a higher rate)."

The Department proposes to update section 778.219 to include other types of paid leave, including sick pay,[26] and we support this proposal. Paid sick time is a perfect example of a benefit paid as part of today's evolving workplace. Indeed, many local municipalities have passed laws requiring employers to provide paid sick leave as an additional benefit to employees for hours not worked. If employers are legally required to offer paid sick leave, or otherwise

[25] *See* www.nationalguard.com/select-your-state/TX ("Training typically requires one weekend each month, with a two-week training period once each year.") (last visited on June 11, 2019).

[26] *See* 2019 Proposed Rule, *supra* note 1, at 11891–92.

want to offer employees an option to cash-out or be paid unused sick leave, they should be able to treat this payment in the same way as they treat a pay out of unused vacation—as excludable from the regular rate.

The proposal is consistent with the FLSA's text as section 7(e)(2) excludes from the regular rate payments for non-working time "due to vacation, holiday, *illness*, failure of the employer to provide sufficient work, *or other similar cause*."[27] The statute is, therefore, intentionally not exhaustive. It reflects the variety of ways in which employers structure paid-leave benefits. Although not currently included in section 778.219, section 32d03e of the Department's Field Operations Handbook has stated since at least 1971 that that the same rules apply to both vacation and sick leave:

> (a) Where a sum is paid to an employee for foregoing a vacation which is in addition to the employee's normal compensation for working it is not in fact compensation for hours worked, and hence need not be counted in determining the regular rate of pay. This rule is limited to situations where there is a bona fide agreement or understanding that the employee shall receive a vacation with pay, and the sum paid for foregoing the vacation is the approximate equivalent of the employee's normal earnings for a similar period of working time.
>
> (b) This same rule applies to payments for unused sick leave where there is a bona fide agreement that the employees will receive a specific amount of sick leave with pay, and the sum paid for unused sick leave is the approximate equivalent of the employee's normal earnings for a similar period of working time.

For almost 50 years, then, the Department has stated that payouts of unused sick pay need not be included in the regular rate. It is time for the Department to ensure the regulated community is aware of this guidance by including the FOH section in the regulations themselves.

We also agree with the Department that there is no reasonable basis for distinguishing between different types of paid leave. Many employers provide employees with a bank of paid time off which they can use for any reason at all—vacation, illness, to attend a child's soccer game—or no reason at all. This is what employees prefer. A rule that only payouts for holiday and vacation pay may be excluded from the regular rate will discourage employers from providing this benefit.

---

[27] 29 U.S.C. § 207(e)(2) (emphasis added).

However, we suggest that the Department reconsider its interpretation that paid leave and payouts for unused leave are only excludable if paid "in amounts approximately equivalent to the employee's normal earnings for a similar period of time."[28] FLSA section 7(e)(2) contains no such requirement. The statutory text is "payments made for occasional periods when no work is performed." It does not state "payments approximately equivalent to an employee's normal earning made for occasional periods when no work is performed." Contrast this exclusion with the exclusion under section 7(e)(6) for extra compensation for work on Saturdays, Sundays, holidays, regular days of rest, or the sixth or seventh day of the workweek—which is only excludable if paid at a rate "not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days."[29]

4. Reporting pay, call-back pay, and similar payments—sections 778.220, 778.221, and 778.222

Further guidance on the statutory exclusion from the regular rate for "payments made for occasional periods when no work is performed" can be found at 29 C.F.R. §§ 778.220, 778.221, and 778.222, which address situations in which an employer guarantees its employees pay for a minimum number of hours but the employee works fewer hours than the guaranteed minimum. For example, under an employer policy or state law, employees may be guaranteed four hours of pay for each day they are scheduled to work, are not provided sufficient notice that they need to report to work, or are called back into work. These sections establish that, while pay for time actually worked must be included in the regular rate, pay for hours not worked are excludable from the regular rate under section 7(e)(2) of the FLSA. If an employee is guaranteed four hours of pay but performs work for only one hour, that pay for the additional three hours guaranteed is not includable in the regular rate.

All three of these sections limit application of FLSA section 7(e)(2) to "infrequent and sporadic occasions." We support the Department's proposal to remove this language from sections 778.221 (call-back pay) and 778.222 (other payments similar to call-back pay). As the Department states, only reporting pay as described in section 778.220 falls under the first clause of section 7(e)(2) as a payment "made for occasional periods when no work is performed due to . . . failure of the employer to provide sufficient work." Such payments, the Department reasons, "are not made for periods when the employer fails to provide sufficient work but are instead additional payments made to compensate the employee when the employer provides

[28] 29 C.F.R. § 778.218(a); *see also* 29 C.F.R. §778.219(a) (excludable if paid at the employee's "customary rate (or higher)."

[29] 29 U.S.C. § 207(e)(6). *See also* 29 U.S.C. § 207(e)(7) (premium payments for work outside of established hours excludable if the "premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek").

unanticipated work."[30] Thus, such payments are excludable under the third distinct regular-rate exclusion in section 7(e)(2) as "other similar payments to an employee which are not made as compensation for his hours of employment—which does not limit the exclusion to "occasional periods."

However, the Department does not go far enough and then goes too far. It intends to retain the "infrequent and sporadic" language in section 778.220, retain the "without prearrangement" requirement language in section 778.221(a), and *add* new language in section 778.222(b) stating: "Payments that are so regular that they are essentially prearranged, however, may not be excluded from the regular rate."[31] As discussed above, no statutory text in section 7(e)(2) limits the exclusions to occasions that are "infrequent" or "sporadic." The concept that pay for time not worked must be included in the regular rate if such payments "are so regular that they are essentially prearranged" appears to be created by the Department. It has no statutory foundation.

The text of the first exclusion in section 7(e)(2) is "occasional periods"—not "infrequent, sporadic, irregular, and occasional periods." The text of the third exclusion in section 7(e)(2) does not include this or any similar language. Payments for "occasional periods" when work is not performed can and does happen regularly and frequently. That does not change the fact that the employee is being paid but performing no work. Pay for time not worked is a good deed by employers, but cannot be "remuneration for employment" under section 7(e). Retaining and adding these limitations to the statutory exclusions is no longer justified or permissible in light of the Supreme Court's direction in *Encino,* which prohibits the Department and courts from adopting narrow interpretations of the FLSA. The Department should resist adding additional requirements to the statutory text. The Department should consider the impact of these limitations on employees. If the Department does not abandon these limitations, and thus require employers to include payments for non-worked time in the regular rate calculation, many employees will lose this type of compensation.

Finally, we appreciate the Department's recognition of a growing number of state and local laws mandating penalties and pay to employees in a variety of situations: penalties for employees who do not receive advance notice of schedule changes; pay for a minimum number of hours on days they report to work; penalties for missed meal or rest breaks; extra pay when an employee is not provided sufficient time to rest between shifts.[32] In its Proposed Rule, the Department explains how such mandated payments will be analyzed under the existing and

[30] *See* 2019 Proposed Rule, *supra* note 1, at 11897–98.

[31] *See* 2019 Proposed Rule, *supra* note 1, at 11898.

[32] *Id.* at 11897–98 (discussing developments).

revised regulations. The Department intends, for example, to analyze the pay and penalties imposed by the various new "predictive scheduling" laws under section 778.222.

Unfortunately, this approach is not appropriate, even more so as the Department's reasoning would also place analysis of California meal and rest break penalties under 788.222. The Department acknowledges that under 778.222 the state or local government mandated penalties and pay, all for time not worked, would be includable in the regular rate if the employer makes such payments regularly.[33] It is hard to imagine employers with operations in California that do not regularly pay meal or rest break penalties as required by California law. As stated above, the Department has no basis in the statutory text for adding a limitation that the payments for non-work time must be included in the regular rate if paid regularly. Applying that standard here is particularly pernicious, where it is the law, not the employer, that dictates when such payments must be made. In effect, the Department proposes to require employers to increase overtime pay based on state and local mandated penalties. It should not do so. Instead, the Department should adopt a new subsection (c) in 778.220 that states: "All penalties or payments to employees that are mandated by state or local laws but are not payments for hours actually worked by the employees are excludable from the regular rate."

5. Other similar payments—section 778.224

The third distinct exclusion from the regular rate under section 7(e)(2) of the FLSA are "other similar payments to an employee which are not made as compensation for his hours of employment." This is a "catch-all" provision that excludes all types of compensation which, although "*remuneration*," cannot be fairly characterized as pay "*for employment*."[34] Like the other exclusions in section 7(e)(2), payments are excluded as "other similar payments" when the amount of the payment is not dependent on hours worked, production, or efficiency—whether the payment is made and the amount of the payment is unaffected by the quantity or quality of work performed.[35]

---

[33] *See* 2019 Proposed Rule, *supra* note 1, at 11898.

[34] *See Flores v. City of San Gabriel*, 824 F.3d 890, 899 (9th Cir. 2016) ("the `key point' " for exclusion under the third clause "is whether the payment is `compensation for work' " (quoting *Local 246 Utility Workers Union of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 295 (9th Cir. 1996)); *Acton v. City of Columbia, Mo.*, 436 F.3d 969, 976 (8th Cir. 2006) ("Section 207(e)(2), properly understood, operates not as a separate basis for exclusion, but instead clarified the types of payments that do not constitute remuneration for employment for purposes of section 207.").

[35] *Id.* at 11894-95, *citing Reich v. Interstate Brands Corp.*, 57 F.3d 574, 578 (7th Cir. 1995) (The word "similar" in Section 7(e)(2) refers to other payments that do not depend at all on when or how much work is performed"); *Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1462 (3d Cir. 1988) (payments under Section 7(e)(2) all "share the essential characteristic . . . of not being compensation for hours worked or services rendered").

Section 778.224, which includes the Department's interpretation of this exclusion and was last revised in 1950,[36] provides only scant guidance—quoting the statute and providing a few examples. Additional direction is needed. Without more, litigation will continue to be a challenge for employers. The Chamber thus supports the Department's proposal to add additional examples to section 778.224(b).

The Department has not proposed changes to section 778.224(a). We think this is a missed opportunity. We request that the Department revise subpart (a) to add a summary of its discussion in the preamble to the Proposed Rule on the scope of this exclusion.[37] Examples are helpful; we support all of the proposed additional examples and suggest a few more below. But, as recognized in 778.224 itself, it is not feasible to address every possible type of payment that may fall under the "other similar payment" exclusion now and in the future. The regulated community would be greatly aided if the Department would add at least a short statement of its general principles in subsection (a). We suggest adding the following language before the last sentence:

> Payments are "similar" when the amount of the payment is not dependent on hours worked, production, or efficiency and when the amount of the payment is unaffected by the quantity or quality of work performed.

Applying these general principles, we ask the Department to revise section 778.224(b) to list the following additional employee perks, all common and valued benefits in our workplaces today, and none dependent on hours worked, production, or efficiency.

(a) Tuition reimbursement and student loan repayment

The Department is proposing to add an example in section 778.224(b)(5) clarifying that tuition benefits offered by employers are excludable from the regular rate as an "other similar payment" if the benefit is available to employees regardless of their hours worked or services rendered, and depend only on one's being an employee.[38] We support this change. Tuition reimbursements are an increasing area of litigation—in the "no good deeds go unpunished" category. We are not aware of any court that has found reimbursement of tuition payments includable in the regular rate, but the handful of courts to issue decisions on the subject have looked to the 7(e)(2) exclusion for reimbursement of a business expense.[39] But this approach

---

[36] *See* 2019 Proposed Rule, *supra* note 1, at 11895.

[37] *See id.* at 11894-95.

[38] 2019 Proposed Rule, *supra* note 1, at 11896–97.

[39] *See White v. Publix Super Markets, Inc.*, No. 3:14-CV-1189, 2015 WL 4949837, at *7–11 (M.D. Tenn. Aug. 19, 2015) (concluding that tuition reimbursement payments were excludable from the regular rate, under the second clause of Subsection (e)(2), because these payments constituted reimbursements for an expense incurred in

places an additional (and incorrect) burden on the employer to show that the expense—here, the tuition—was incurred in advancing the employer's interests, rather than the employee's.[40] By clarifying that tuition payments should be viewed within the paradigm of the "other similar payments" clause, the Department's added example brings needed clarity and removes that additional burden. Further, in our opinion, this same analysis suggests convincingly that employers should be able to exclude the value of reimbursement for tuition of family members and student loan repayments, pursuant to subsection (e)(2)'s "other similar payments" clause. If family tuition reimbursement or student loan repayment programs are not tied to hours worked or services rendered, there is no meaningful distinction from the Department's proposed example on tuition benefits.

(b) Discounts on Gift Cards and third –party discounts

The Chamber agrees with the Department's decision to clarify that the value of discounts on retail goods and services afforded to employees are excludable from the regular rate, if the discounts are not tied to the employee's hours worked or performance. We note that this position reflects the consensus of reported judicial opinions on the subject.[41] That said, we believe the proposed language for this new example should be revised slightly. The example's proposed

---

furtherance of the employer's interest and were not tied to hours); *Adoma v. Univ. of Phoenix, Inc.*, 779 F. Supp. 2d 1126, 1132-39 (E.D. Cal. 2011) (stating that tuition benefit is only excludable under Subsection (e)(2) if it is not compensation for hours *and* it primarily benefits the employer, rather than the employee). *See also* Opinion Letter, Fair Labor Standards Act (FLSA), 1994 WL 1004844 (June 28, 1994) (opining that amounts paid by school district as tuition reimbursement for employee's outside coursework could be excluded from regular rate, analogizing the payments to reimbursement for training).

[40] *See* 29 U.S.C. § 207(e)(2) (excluding from the regular rate "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" (emphasis added)).

[41] Courts have agreed with this conclusion but, for the most part, have analyzed retail discounts as a kind of gift under the rubric of Subsection 7(e)(1). *See, e.g., Harris v. Best Buy Stores, L.P.*, No. 15-CV-00657-HSG, 2016 WL 4073327, at *5 (N.D. Cal. Aug. 1, 2016), *on reconsideration*, No. 15-CV-00657-HSG, 2016 WL 6248893 (N.D. Cal. Oct. 26, 2016) (finding that value of merchandise discounts under employee discount policy were excludable from regular rate, as analogous to gifts under § 207(e)(1)); *Lemus v. Denny's Inc.*, No. 10CV2061-CAB (WVG), 2015 WL 13740136, at *10–11 (S.D. Cal. July 31, 2015) (rejecting argument that fast-food chain was required to include value of discounted meals into regular rate on the grounds that discounted meals were gifts and not tied to hours worked); *Rau v. Darling's Drug Store, Inc.*, 388 F. Supp. 877, 879 (W.D. Pa. 1975) (indicating that an employee merchandise discount was "in the nature of [a gift] and not based upon the number of hours worked" and, thus, could be excluded from regular rate). *See also Rodriguez v. Taco Bell Corp.*, No. 1:13-CV-01498-SAB, 2013 WL 5877788, at *5 (E.D. Cal. Oct. 30, 2013) (suggesting that discounted meal policy could be excludable from regular rate, as a gift, if not tied to hours worked). Nonetheless, we agree that the Department's application of Subsection (e)(2) is also analytically proper. *See, e.g., Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1462 (3d Cir. 1988) (concluding that the "essential characteristic" of the types of payments described in Subsection (e)(2) is that of "not being compensation for hours worked or services rendered" and, thus, that lump-sum payments incentivizing approval of a new labor contract constituted "other similar payments" that could be excluded from regular rate).

language—"[d]iscounts on *employer-provided retail goods and services*"—could suggest that the exclusion is limited to the value of discounts on an employee's purchase of the employer's own retail goods and services are excludable.[42] In our experience, however, employers commonly provide or facilitate two other types of discounts. *First*, an employer may allow employees to purchase gift cards at a discount, which employees may give to others, not employed by the business, as a gift at Christmas, birthdays and other special occasions. *Second*, an employer may partner with third parties to provide employees with the opportunity to obtain discounts for the third party's goods or services. For example, an employer might contract with a clothing retailer to give employees a discount on that retailer's goods. In analyzing whether the value of an employer-facilitated discount should be excludable from the regular rate, there is no meaningful distinction between a discount that an employee used to purchase employer's goods or services and a discount on gift cards that may be redeemed by non-employees or on discounts of goods or services provided by a third party. Thus, we suggest revising the Department's proposes section 778.224(b)(5) as follows:

> Discounts on goods, services and gift cards provided by employers or third-parties, 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).

(c) Public-transit subsidies

To encourage the use of public transportation, and thus reduce traffic congestion and pollution, many employers in urban areas provide employees with public-transit subsidies. In fact, the Department provides such subsidies to its own employees "to encourage the use of public transportation."[43] The Department should add such subsidies to 778.224(b) as an example of an "other similar payment" excludable from the regular rate.

Since 1950, section 778.224 has included the cost of providing employees with "parking spaces" as an example of excluded "similar" payments. Free parking provided to employees who drive to and from work cannot be distinguished from free public transportation to commute to work. Like parking, public transit subsidies are not dependent on hours worked, production, or efficiency; receipt of this benefit is not affected by the quantity or quality of work performed. Like parking, the only condition for receiving the benefit is being an employee.

---

[42] *See* 2019 Proposed Rule, *supra* note 1, at 11911 (emphasis added).

[43] *See Benefits*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/jobs/benefits (last visited June 12, 2019).

We are not suggesting that the cost of taking public transportation to commute is excludable as a business expense. Section 778.217(d), interpreting the business expense exclusions suggests otherwise:

> If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses."

In addition, we are aware of one state court that applied this provision to hold that transit subsidies must be included in the regular rate. [44]

This language in 778.217(d) applies equally to parking and transit subsidies; nonetheless, section 778.224 has provided that the cost of parking is excludable from the regular rate as an "other similar payment" for 69 years. Also important here is the Department's proposal to eliminate the requirement that business expenses must be "solely" for the benefit of the employer before reimbursements are excludable from the regular rate. Surely, public transit subsidies benefit the employer, as it does both the employee and the public, with reduced traffic congestion and cleaner air.

Furthermore, section 778.217(d) is irrelevant to the issue of whether transit subsidies are excludable as "other similar payments not made as compensation for his hours of employment." There can be no question that these subsidies are not compensation for work hours. Under the Portal-to-Portal Act, 29 U.S.C. § 254(a), walking, riding, or traveling to and from the actual place of performance of the principle activity or activities" which an employee is employed to perform—commuting time—is not work.[45] Since commuting time is not work under the FLSA, a transit subsidy or other method for reimbursing employees for using public transportation for commuting cannot be "remuneration for employment." Rather, like other compensation excluded under section 7(e)(2), transit subsidies are pay for time not worked.

Employers who provide transit subsidy benefits are doing a good turn for their employees, for public transportation systems, and for the environment. If the Department concludes that transit subsidy benefits must be included in the regular rate, many employers are likely to discontinue the benefit.

---

[44] *See Mont. Public Emps.'s Ass'n v. Mont. Dep't of Trans.*, 954 P.2d 21, 26 (Mont. 1998).

[45] *See also* 29 C.F.R. § 785.35 ("Normal travel from home to work is not worktime.")

(d) Onsite childcare, childcare subsidies, and adoption assistance

Since 1950, section 778.224(b) has stated that on-site medical care is excluded from the regular rate as an "other similar payment." The Department now proposes to add examples for similar on-site services which need not be included in the regular rate, including free onsite treatment "from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs." The Department's proposal also recognizes as "other similar payments" the cost of gym memberships, fitness classes, the use of recreational facilities, health risk assessments, biometric screenings, vaccination clinics, nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals.

The Chamber supports these proposed changes. Calculating and including the value of such perks in the regular rate is administratively difficult, if not impossible. How do you track which employees participate in biometric screenings or vaccination clinics? How do you determine the value of the perk to each individual employee? How do you allocate that value over work hours and for what time period (a week, month, year)? As part of excluding wellness benefits, however, the Department should also recognize as excludable from the regular rate any cash payments (e.g., $100 for participating in a biometric screening) and medical insurance premium discounts provided to employees for participating in a wellness program or meeting wellness goals. As with other wellness benefits, these are similar to the "on-the-job medical care" already excluded under section 778.224; are provided to reduce health care costs and improve employee health and morale; and are not tied to hours worked, production, or efficiency.

In addition, the Department has left out of its list three similar but even more important benefits—onsite childcare services, childcare subsidies, and adoption assistance. There is no meaningful difference between these perks and the other benefits on the list. Like onsite medical care, access to onsite childcare, childcare subsidies, and adoption assistance are not dependent on hours worked, production, or efficiency; receipt of these benefits are not affected by the quantity or quality of work performed. The Department itself was the first federal agency to establish an onsite day-care center, available to all employees with children who work at locations with such centers. For other employees, "[i]n keeping with the Department's commitment to foster a quality work place for all its employees, the Department provides a child care subsidy to the Department families to assist them in their efforts to obtain quality, licensed day care for dependent children through the age of 13 and disabled children through the age of 18."[46] As the Department itself has recognized, providing free child care will remove barriers to women in the workforce, increasing employee flexibility to meet varying job schedules and demand. Most mothers would

[46] *See Benefits*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/jobs/benefits (last visited June 12, 2019).

likely pass on fitness classes if necessary to obtain child care assistance. But, despite its own commitment to providing childcare benefits to employees, the Department's proposal prefers and incentivizes employers to provide free massages over free child care, to provide free gym memberships over free adoption assistance. Surely, the Department can accommodate mothers (and fathers) everywhere and add childcare and adoption assistance to section 778.224(b) in the final rule.

(e) The cost of employer-provided meals

Under section 3(m) of the FLSA,[47] the reasonable cost of "board, lodging, or other facilities" may be considered part of wages and thus count towards an employer's minimum wage obligation. "Other facilities" includes "[m]eals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees."[48] Of course, like tips, if an employer counts the cost of meals towards the minimum wage requirement, that cost is included in the regular rate of pay.[49] However, many employers who pay employees above the minimum wage also provide free or discounted meals to employees. Other employers charge less for meals, snacks and drinks in a company cafeteria than charged by local eateries.[50] In this situation, when the employer is not counting the cost of the meal towards minimum wage, the meal is not dependent on hours worked, production, or efficiency. Thus, the Department should further revise section 78.224(b) to include the cost of free or discounted employer-provided meals from the regular rate as an "other similar payment."

C. Excludable Compensation Under Section 7(e)(3)

Section 7(e)(3) of the FLSA excludes discretionary bonuses from the regular rate, that is: "sums paid in recognition of services performed during a given period if . . . both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly." The Department's interpretations of this regular rate exclusion is at 29 C.F.R. § 778.211. After restating the

---

[47] 29 U.S.C. § 293(m).

[48] 29 C.F.R. § 531.32.

[49] FOH § 32b06 ("Where employees are paid goods or facilities which are regarded as part of their wages, the reasonable cost to the employer of the goods or the facilities must be included in the regular rate.")

[50] *See, e.g.*, Katie Canales, *Cayenne Pepper Ginger Shots, Homemade Lemon Tarts, and Michelin-Starred Chefs—Here's What Employees at Silicon Valley's Biggest Tech Companies Are Offered for Free*, BUSINESS INSIDER (July 31, 2018), www.businessinsider.com/free-food-silicon-valley-tech-employees-apple-google-facebook-2018-7 (describing free and discounted meals, snacks and drinks provided by Silicon Valley tech companies).

statutory language, section 778.211(b) provides guidance on the requirements that both the fact of payment and the amount of payment must remain in the sole discretion of the employer:

> In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate under section 7(e)(3)(a). Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, in his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

Section 778.211(c) provides many examples of bonuses that are *not discretionary* and thus *must be included* in the regular rate—bonuses promised to employees upon hiring or which are the result of collective bargaining; bonuses which are announced to employees to induce them to work more steadily, rapidly, or efficiently; bonuses for remaining with the firm; attendance bonuses; individual or group production bonuses; bonuses for quality and accuracy of work; bonuses contingent upon the employee's continuing in employment until the time the payment is to be made.

But there is not a single example in section 778.211 of bonuses which *are discretionary* and thus *may be excluded* from the regular rate. Thus, the Chamber welcomes and supports the Department's proposal to add a new section 778.211(d) with examples of discretionary bonuses: bonuses to employees who made unique or extraordinary efforts which are not awarded

according to pre-established criteria; severance bonuses; bonuses for overcoming challenging or stressful situations; employee-of-the-month bonuses. [51]

The Department has requested comments on "other common types of bonuses that the Department should address."[52] Below, we describe five common bonuses that the Department should add to 778.211(d) as examples of discretionary bonuses excludable from the regular rate.

1. Percentage bonuses—section 778.110

As an initial matter, we ask the Department to clarify the types of compensation that must be included in a percentage bonus under section 778.110. This section recognizes the mathematical fact that a bonus paid at a percentage of both straight-time and overtime earnings provides "simultaneous payment" of both the bonus and any additional overtime due on the bonus. The section states:

> For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required.[53]

The Department has not proposed any changes to section 778.110. However, questions often arise regarding whether specific types of compensation must be included in the percentage calculation. In a January 2018 opinion letter, the Department addressed one such question: Can an employer exclude from the percentage calculation other payments made during the bonus period that are excludable from the regular rate under section 7(e) of the FLSA, such as expense reimbursements and other discretionary bonuses? The Department answered "yes," concluding that "an employer may exclude previous payments properly excluded from the regular rate under section 7(e) when calculating a year-end bonus which is based on a percentage of an employee's total straight-time and overtime earnings"[54] and withdrawing a 1973 opinion letter[55] that had reached the opposite conclusion.

---

[51] 2019 Proposed Rule, *supra* note 1, at 11899.

[52] *Id.*

[53] *See also* 29 C.F.R. § 778.503 ("Such a bonus increases both straight time and overtime wages by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact.").

[54] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2018-9 (January 5, 2018).

[55] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter WH-241 (Nov. 26, 1973).

The Department should take the opportunity of this rulemaking to incorporate Opinion Letter FLSA2018-9 (January 5, 2018) into the text of section 778.210. In addition, the Department should revise section 778.210 to state that the percentage calculation need not include other non-discretionary bonuses for which overtime is separately, or has already been, calculated and paid. Any other conclusion results in improper pyramiding of overtime—paying overtime on overtime. Section 778.503 (pseudo percentage bonuses) already defines "total wages" under section 778.210 as "both straight time and overtime wages." If overtime has already been calculated and paid separately, there is no requirement to pay more overtime still. Thus, by incorporating the Opinion Letter, the Department would not be changing policy—just clarifying that 778.503 means what it says.

2. Discretionary bonuses—section 778.211

(a) "Spot" bonuses

The Chamber asks the Department to consider including language that a "spot bonus" or similar program is discretionary when, although the existence of the program is announced to employees in advance, the announcement does not include any information about when or why the bonus would be awarded or the amount of the bonus—all of these decisions being left to front-line managers. In this type of program, the manager is usually provided a budget for the bonuses, but that budget is not known by employees.

Section 7(e)(3) requires that the employer retain discretion as to "the fact that payment is to be made." In these type of programs, the announcement does not promise that any payments will be not or who will receive them. Section 7(e)(3) also requires that the employer retain discretion as to "the amount of the payment." Here, the announcement does not include any information as to the amount of the payments that a manager could make under the program. These "spot bonus" programs are so vague and non-specific, they cannot create an incentive, and they prevent any expectation for or reliance on the bonus payment. Announcements of a bonus program, even in writing, that are so vague and non-specific that no promises can be found or expectation formed should not prevent a bonus from being discretionary.

(b) Referral bonuses

We also ask that referral bonuses be identified as discretionary by incorporating the standards in the Department's Fact Sheet #54, related to calculating overtime pay in the healthcare industry, into section 778.211. Under Fact Sheet #54, referral bonuses paid for recruitment of new employees are not included in the regular rate of pay if all of the following conditions are met:

i. Participation is strictly voluntary;
ii. Recruitment efforts do not involve significant time; and
iii. The activity is limited to after-hours solicitation done only among friends, relatives, neighbors, and acquaintances as part of the employees' social affairs.

This three-part test is based on a 1969 opinion letter,[56] now difficult for the public to locate. Fact Sheet #54 is the only easily assessable statement of the test, but has caused confusion as it provides guidance on "common FLSA violations found by the Wage and Hour Division during investigations in the health care industry." Of course, regular rate standards do not differ by industry, but the Department should make this clear by incorporating Fact Sheet #54 into sanction 778.211.

(c) Sign-on bonuses

Like the severance bonuses already identified in the Department's proposal, sign-on bonuses are not tied to an employee's "hours of employment or service."[57] In addition, the amount paid to a newly hired employee as a sign-on bonus is in the sole discretion of the employer. Unlike a performance or attendance bonus, an employee's work hours and services provided cannot influence the amount he or she receives as a sign-on bonus, as the employee has not yet performed any work. Moreover, because sign-on bonuses are paid before the employee actually begins working, or shortly thereafter, there is no inducement to remain with the employer and there is no "prior contract, agreement, or promise causing the employee to expect such payments regularly."[58] In fact, sign-on bonuses are explicitly a one-time payment and are, in many cases, intended to provide newly hired employees with sufficient funds during their transition into a new job. These funds are not intended to compensate employees for their time or for their service, they are a gesture of good-will from employer to employee during what may be a stressful or tumultuous time in the new employee's life. Accordingly, we also request that the Department recognize sign-on bonuses as discretionary, absent a requirement that the employee repay the bonus if they terminate employment before a specified time has passed.

(d) Relocation bonuses

Relocation bonuses are also common, although provided more frequently to exempt employees because of the legal uncertainty regarding whether covering relocation costs for non-exempt employees must be included in the regular rate. Like a sign-on bonus, a relocation bonus if not tied to hours worked, productivity, or efficiency. Rather, a relocation bonus is often

[56] *See* U.S. Dep't of Labor, Wage & Hour Div., Op. Letter (Jan. 27, 1969).

[57] *Minizza v. Stone Container Corp. Corrugated Container Div. East Plant*, 842 F.2d 1456, 1462 (3d Cir. 1988).

[58] 29 U.S.C. 207(e)(3).

necessary for an employee to afford the expense of moving for a promotional opportunity or when a job at their current work site is moved or eliminated. Like a referral bonus, the employer may announce the existence of a program and who is eligible for the program (exempt on non-exempt employees, full-time or part-time employees). However, the fact of payment and the amount of payment are discretionary "until at or near the end of the period," depending on the employee's choice to relocate, the employer's decision to allow the relocation, the employer's decision to provide relocation assistance, and/or the cost of that relocation.

(e) Non-cash awards of de minimis value

Lastly, with respect to discretionary bonuses excluded from the regular rate, we ask the Department to provide that non-cash awards of *de minimis* value are excludable from the regular rate. Small acts of recognition to show employee appreciation can improve employee morale and decrease employee turnover: a plaque, a branded coffee cup or umbrella, a soda, or a snack. Even if provided to recognize performance, calculating the value of such items and including them in the regular rate is an administrative nightmare that usually results in only a few cents of additional pay.

The Department has established a *de minimis* rule in 29 C.F.R. Part 548, the basic rate regulations also a subject of this rulemaking. Among other things, part 548 permits employers who meet all other requirements to use a basic rate excluding payments that would not increase the employee's weekly compensation by more than 50 cents. The Department last considered the *de minimis* threshold in 1966, when 50 cents represented 40% of the minimum wage, and now proposes to update that threshold to 40% of the current minimum wage.[59] We suggest that the Department adopt a similar threshold for exclusion from the regular rate of non-cash awards of *de minimis* value.

3. Prizes as bonuses—sections 778.330

The Department has not proposed any changes to the part 778 regulations on prizes, sections 778.330 to 778.333. Section 778.330 provide:

> Prizes are therefore included in the regular rate if they are paid to an employee as remuneration for employment. If therefore it is asserted that a particular prize is not to be included in the regular rate, it must be shown either that the prize was not paid to the employee for employment, or that it is not a thing of value which is part of wages.

[59] *See* 2019 Proposed Rule, *supra* note 1, at 11901−02 (surveying historical developments).

Two common questions arise under this section: Whether, when and how lottery prizes and points awarded to employees that may be redeemed for merchandise are includable in the regular rate. We ask the Department to add a new subsection (b) to 778.331 to clarify that neither type of prize is included in the regular rate.

(a) Prizes awarded under an employer-run lottery or drawing

Section 778.330 provides that prizes must be included in the regular rate unless the prize "was not paid to the employee for employment, or that it is not a thing of value which is part of wages."[60] This provides very little guidance on when a prize won in a lottery or drawing must be included in the regular rate. In 1996, however, the Department issued an opinion letter regarding an employer-sponsored lottery for a car. The employer entered employees' names into the lottery if they had perfect attendance. The employer entered many employees in the lottery, so each employee's chance of winning the car was "very small." Under those circumstances, the Department found that the car's value need not be included in the winning employee's regular rate.[61] As the opinion letter indicates, the mere fact that an employee is eligible to participate in a lottery or drawing does not create a promise or expectation of payment. Instead, participation in an employer organized lottery or drawing merely creates a chance of winning an otherwise unexpected award.

Similarly, in *White v. Publix Super Markets, Inc.*,[62] the employer asked employees to review safety materials and take a quiz. It then randomly distributed to some employees who took the quiz a $5 gift card. The court held that the employer need not include these gift cards in the regular rate.[63] It emphasized that the employees participated in the program only if they wanted to.[64] The court also noted that they spent little time on the quizzes.[65] The gift cards therefore bore little relationship to hours worked or services rendered, and so did not have to be included in the regular rate.[66]

---

[60] 29 C.F.R. § 778.300.

[61] *See* U.S. Dep't of Labor, Wage & Hour Div., FLSA Opinion Letter, 1996 WL 1031796 (Aug. 6, 1996).

[62] No. 3:14-CV-1189, 2015 WL 4949837, at *11–12 (M.D. Tenn. Aug. 19, 2015).

[63] *Id.*

[64] *Id.* at *12.

[65] *Id.*

[66] *See id.* ("[T]he fact that the completion of the quiz merely entitles an employee to be entered into a drawing makes this payment even more attenuated from the effort expended by the employee.").

Under these authorities, the value of randomly awarded prizes bearing little relation to work hours need not be included in the regular rate. The Department should incorporate this principle into section 778.330, prizes or contest awards generally.

(b) Prizes awarded under a point award program

Dozens of employee benefit vendors market and administer incentive programs where employers can award "points" to employees that, if they collect enough points, they can redeem for merchandise. In some programs, employees award each other with points. Although increasingly popular with employers, these programs create legal risk as it is unclear whether the value of the points or the value of the merchandise must be included in the regular rate. Like lottery entries, the value of each point is very small and thus is "not a thing of value." However, like the employer-run lottery, after months or even years of collecting points, an employee may be able to redeem them for merchandise with a higher value.

We suggest that these point award programs are similar to employer-run lotteries. Initially there is a prize awarded of very small value, from which the employee may later receive a larger prize. Here, the chance of being awarded a single point is very small (like a lottery or the "spot bonus" described above), and whether an employee will collect enough points to redeem for a larger prize in some unknown future is random. Being awarded points under such a program merely creates a chance of winning an otherwise unexpected award. Thus, prizes under a point award program should be excluded from the regular rate, just has the Department has excluded prizes under employer-run lotteries for over twenty years.

Any other answer creates its own questions and problems: Must the employer include in the regular rate the value of each point or the value of any merchandise for which the employee redeems the points? When were the points or merchandise earned? How is an employer to calculate and pay overtime due if an employee spends months or years collecting the points used to redeem for merchandise? What if the employee never collects enough points to redeem for merchandise? What if the employee does not redeem the points before employment terminated? If the value of the points are wages and thus includable in the regular rate, is an employer obligated to payout the value of the points upon termination of employment under the FLSA or state wage payment laws?

D. Excludable Compensation Under Section 7(e)(4)

Section 7(e)(4) of the FLSA excludes from the regular rate "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." The

Department's interpretations on the scope and requirements for this exclusion, last revised in 1968, are found primarily at 29 C.F.R. § 778.215.

The Department proposes adding more examples of the types of modern benefit plans that may be excludable from the regular rate of pay. Specifically, the Department proposes to add examples for benefits provided on account of ''accident, unemployment, and legal services'' to section 778.215(a)(2). While we applaud and agree with the Department's efforts in providing additional examples of excludable benefits, we also ask the Department to acknowledge that FLSA section 7(e)(4) also applies to discretionary employer contributions to retirement plans and common types of self-funded health and welfare benefit plans that do not utilize a related irrevocable trust or other funding device (such as an HRA or major medical plan).

Although the Department's interpretive guidance may have reflected typical benefit designs in 1968, the guidance has not been revised to clearly reflect modern-day benefit designs and features such as certain notional, self-funded medical accounts, and commonplace employer discretionary contributions to retirement plans. The Department's interpretative guidance predates the passage of the Employee Retirement Income Security Act of 1974 ("ERISA") by six years. Indeed, the 1968 interpretive guidance was written in the context of the comparatively weak Welfare and Pension Plans Disclosure Act, which ERISA replaced. The benefits-plan provisions of the guidance have never been meaningfully updated to account for ERISA's impact on the employee benefits landscape. Furthermore, the 1968 guidance predates the existence of Internal Revenue Code ("Code") section 401(k)—which was enacted as part of the Revenue Act of 1978 and provides a host of substantive rules (including vesting and funding rules) with respect to employer-sponsored retirement and pension plans.

In recent years, plaintiffs have begun relying on the Department's outdated interpretive guidance to assert that certain long-standing benefit arrangements are in fact subject to the FLSA's overtime rules and must be taken into account by an employer. For example, in *Russell v. Government Employees Insurance Co.*,[67] the plaintiffs argued that discretionary employer contributions to a 401(k) plan should be included in the "regular rate of pay" given that the plan at issue did not meet all of the section 778.215 requirements. The court correctly held that the employer's discretionary contribution to its retirement plan was not "regular rate" compensation that needed to be factored into FLSA-required overtime pay. The court reasoned that the profit-sharing contribution need not meet the requirements under both FLSA section 7(e)(3) and section 7(e)(4), so long as the plan was a "bona fide" benefit plan under section 7(e)(4). This litigation is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit.

[67] Case No.: 17-CV-672-JLS (WVG), 2018 WL 1210763 (S.D. Cal. March 8, 2018).

The court in *Laughlin v. Jim Fischer, Inc.*,[68] ruled similarly. As in *Russell*, the plaintiffs argued that their employer improperly excluded 401(k) contributions from the "regular rate of pay." Relying on *Russell*, the court held the 401(k) contributions could be excluded because the plan included a definite formula "quantif[ying] each variable [and] describ[ing] those variables' relation to each other" despite the lack of a minimum contribution.[69]

We propose that in order to eliminate any confusion regarding the excludability of employer provided retirement plan contributions and to reduce litigation in this area, the Department should revise section 778.215 to reflect modern-day benefit designs and features such as certain notional, self-funded medical plans, and commonplace employer discretionary contributions to retirement plans. In its Final Rule, the Department can and should address these issues by amending the regulations or its existing interpretive guidance as detailed below.

The Department should amend 29 C.F.R. § 778.215(b) to provide an exemption for all ERISA section 3(3) plans (i.e., employee welfare benefit and employee pension benefit plans governed by ERISA). ERISA was specifically enacted to address those concerns and to provide robust protections for employees and beneficiaries—including vesting and funding rules designed to ensure that the promised benefits were realized by employees and their beneficiaries. In the intervening years, statutory enactments such as the Health Insurance Portability and Accountability Act ("HIPAA") and the Patient Protection and Affordable Care Act have only expanded employee and participant protections.

The existing relief in section 778.215(b) is, unfortunately, of limited value because it only applies to Code section 401(a)-governed plans "approved" by the IRS, and the IRS has recently curtailed the process for obtaining qualified plan-determination letters. Further, the guidance in subsection (b) provides relief for only three of the five requirements under section 778.215(a). Thus, the interpretive guidance should be modernized to provide under section 778.215(b) that any employee benefit plan governed by, and in material compliance with, ERISA satisfies all of the requirements of section 778.215(a). This would have the practical effect of excluding all ERISA-governed plans—including health/welfare and pension/retirement plans—from the regular rate of pay.

As an alternative to an ERISA exclusion, the following more targeted guidance could be adopted:

- Update section 778.215(b) to reflect that any Code section 401(a)-governed plan that is in material compliance with the requirements of ERISA and the Code will be deemed to

[68] Case No. 16-C-1342, 2019 WL 1440406 (E.D. Wisc. March 31, 2019).

[69] *Id.*

satisfy all of the requirements of section 778.215(a). Such a change would be in keeping with the existing provisions of section 778.215(b) (i.e., limited to Code section 401(a) retirement plans), but would reflect the expansion and protective reach of the retirement-plan provisions of ERISA and the Code by updating and expanding section 778.215(b).

- Revise section § 778.215(a)(4) (regarding bona fide benefit plans in general) to eliminate the existing requirement that an employer's contributions "must be paid irrevocably to a trustee or third person," so long as the employer is contractually obligated to provide the benefit (including payments from notional accounts such as an HRA, and employer funding of claims-payment accounts established with third-party health-plan administrators).

- Revise section 778.211 to clearly state that discretionary employer contributions to retirement plans may qualify for exclusion from the regular rate as discretionary bonuses, and need not also be analyzed under section 778.215 or other sections of part 778.

- Revise section 778.215(a)(3) to clarify that employers do not need to provide any minimum contribution for bona fide plans to qualify for the exemption. The Department should consider adopting the formulation used in *Russell* and *Laughlin*, and specifically state that employers are only required to adopt a formula that "quantifies each variable … and describes those variables' relation to each other."

- Amend part 778 to add language, most likely at section 778.214 (providing direction as to the tests applicable to different benefit plans) specifying that a bona fide profit-sharing, thrift, or savings plan does not need to qualify under both FLSA section 7(e)(3) and (e)(4) to receive an exemption. Instead, employers may argue that a plan falls under either exclusion or both. This approach comports with the FLSA's legislative history. The conference report to the 1949 amendments provides: "[A] payment excluded under any one subdivision [of the FLSA's exemption provision] would not be deemed part of the 'regular rate' by reason of the fact that such payment may not be excluded by the language of any other subdivision."[70]

Finally, the Department should add two additional examples of payments excluded under section 7(e)(4) as providing "similar benefits" for employees. *First*, contributions by employers into employee Health Savings Accounts (HSAs). Like premiums for health insurance, these contributions are irrevocable and, without payment of taxes and significant penalties, must be used for medical and dental expenses. *Second*, cash back in lieu of benefits under cafeteria and

[70] H.R. Rep. No. 81-1453, at 2258 (1949) (Conf. Rep.).

similar benefit plans. Here, the Department should incorporate Opinion Letter FLSA2003-4 (July 2, 2003) into the regulations. In that Opinion Letter, the Department concluded that cash paid to employees in lieu of benefits was excludable from the regular rate under section 7(e)(4) if "(1) no more than 20% of the employer's contribution is paid out in cash; and (2) the cash is paid under circumstances that are consistent with the plan's overall primary purpose of providing benefits."

E. Excludable Compensation Under Section 7(e)(8)

Section 7(e)(8) of the FLSA excludes from the regular rate income derived from employer-provided stock grants or rights if certain requirements are met. The Department has the opportunity to recognize that certain types of stock grants common in today's workplace, including Restricted Stock Units ("RSUs"), are also excluded from the regular rate.

Congress amended the FLSA in 2000 to exclude certain types of stock and stock options from the regular rate of pay. Congress took this extraordinary step in response to a 1999 opinion letter issued by the Department. The opinion letter involved an employer's stock-option program, which extended stock options to non-exempt employees. The options had a two-year vesting period. The Department concluded that the stock-option program did not meet any of the existing exclusions to the regular rate. In testimony to Congress, the Administrator justified the letter on the basis that the Act does not expressly exclude such stock-option programs from the regular rate. Because section 7(e)'s exclusions to the regular rate did not clearly exempt the profits of stock options or similar equity devices from the regular rate, Congress concluded that the opinion letter was a permissible reading of the statute. Congress was concerned, however, that a practical effect of the interpretation was that businesses would no longer offer stock options to nonexempt employees.[71]

As the opinion letter became known in the business community and on Capitol Hill, it became clear that the letter raised an issue under the FLSA that previously had not been contemplated and that a revision to the FLSA would be needed to change the law. Accordingly, Congress passed the Worker Economic Opportunity Act in 2000, updating the FLSA to "ensure that rank-and-file employees and management can share in their employer's economic well-being in the same manner."[72] The legislation was wholly without controversy, passing unanimously in the both the House and the Senate.[73]

---

[71] *See* 146 Cong. Rec. S2577 (April 12, 2000).

[72] *Id.* at S2576.

[73] The House vote was 421–0 (yeas and nays) and the Senate vote was 95–0 (yeas and nays). See *Final Vote Results for Roll Call 139*, HOUSE.GOV (May 3, 2000), http://clerk.house.gov/evs/2000/roll139.xml; *Roll Call Vote 106th Cong.—2nd Session: Vote Number 81*, SENATE.GOV (April 12, 2000),

In tackling a complex issue, sponsors of the legislation did their best to simplify and explain the scope of the exclusion. They recognized that stock-option plans come in many different forms: "Employer stock options and stock programs come in all different types and formats. The Worker Economic Opportunity Act focuses on the most common types: stock options, stock appreciation rights and employee stock purchase programs."[74] To simplify, they defined "stock options" as providing "the right to purchase the employer's securities for a fixed period of time. Stock option programs vary greatly by employer . . . . Most programs are nonqualified stock option programs, meaning that the structure of the program does not protect the employee from being taxed at the time of the exercise. But the mechanics of stock option programs are very similar regardless of whether they are qualified or non-qualified."[75]

The sponsors of the legislation detailed the main characteristics of stock options as including:

1. Grants. An employer grants to employees a certain number of options to purchase shares of the employer's stock.

2. Vesting. Most stock options have some sort of requirement to wait some period after the grant to benefit from the options.

3. Exercise. An employee can exchange the options, along with sufficient cash to pay the exercise price or the options, for shares of stock.[76]

Congress concluded that the value and income from stock options, stock appreciation rights and employee-stock-purchase programs "should be excluded from the regular rate, because they allow employees to share in the future success of their companies."[77] The sponsors noted that in drafting the Act, they "hoped to create an exemption that would be broad enough to capture the diverse range of broad-based stock ownership programs that are currently offered to non-exempt employees across this nation."[78]

---

https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00081.

[74] 146 Cong. Rec. S2577.

[75] *Id*.

[76] *Id*. at S2576- 7.

[77] *Id*. at S2577.

[78] *Id*. at S2580.

The sponsors of the legislation also noted that many companies were developing plans resembling those discussed in the legislation. They encouraged the Department to treat these plans flexibly and in the spirit of the Act:

> The sponsors believe that it is in the best interests of employees for the Secretary of Labor to review these and other new types of plans carefully in the light of the purposes of the Worker Economic Opportunity Act to encourage employers to provide opportunities for equity participation to employees—and to allow section 7(e) as amended to accommodate a wide variety of programs, where it does not undermine employee's fundamental right to overtime pay. *It is the sponsors' vision that this entire law be flexible and forward-looking and that the Department of Labor apply and interpret it consistently with this vision.*[79]

Today, it is common for employers to offer employees, including non-exempt employees, equity benefits in the company called Restricted Stock Units ("RSUs") that are subject to vesting schedules. While elements of the plans may vary, generally employers grant RSUs on the basis of pre-established criteria. Once RSUs vest under a plan, the number of vested stock units will be transferred to an employee's third party-managed investment account. The employee then has the option to continue holding the stock units, or may sell the units for a cash gain, subject to certain timing restrictions. Typically, the employer will grant RSUs with an exercise price equal to the fair market value of the stock on the grant date.

RSUs are not specifically listed in either the 2000 revision to the FLSA or its legislative history as a form of a stock or stock option that is excludable from the regular rate, probably because RSUs were an evolving form of stock options benefits not commonly in use 20 years ago. However, RSUs are similar to the type of stock option or stock appreciation rights that Congress intended to exclude from the regular rate. Indeed, typical employer RSU programs comply with all the requirements set forth in section 7(e)(8) of the FLSA:

A. There is typically a written plan communicated to employees;

B. The RSUs typically do not begin vesting until a period of at least six months and the employee voluntarily chooses whether to exercise the vested RSU;

C. The exercise price is equal to at least 85% of the fair market value on the grant date; and

[79] *Id.* at S2578 (emphasis added).

D. The amount of the award granted is determined based on previously established criteria.

An RSU plan with these characteristics is similar to stock options, stock appreciation rights, and employee stock-purchase programs, which result in income to employees that is excludable from the regular rate.

We interpret the legislative history as establishing Congressional intent to interpret the exclusion broadly to cover different types of stock rights that might be developed by employers in the future. RSUs fall within the type of stock, stock option, or stock grant that can be "fairly read" as falling within Congressional intent, as it is a benefit which appears to have been developed, or at least not widely adopted, until after the 2000 amendments to the FLSA adding section 7(e)(8). As Congress intended, the Department through its regulations should remove impediments to businesses allowing employees to participate in corporate growth. Employees want RSUs, employers what to provide RSUs, and allowing employees to receive equity in a business is a bipartisan idea. As a fair reading of the section 7(e)(8) exclusion is required under the Supreme Court's decision in *Encino*,[80] the Chamber requests that the Department issue a final rule recognizing that RSUs and similar plans are excludable from the regular rate if they meet the criteria set forth in section 7(e)(8).

III. OVERTIME CALCULATIONS

The FLSA does not restrict how employers may pay their non-exempt employees, although most are paid by the hour. Non-exempt employees also may be paid a salary, on commissions, by piece, shift, day or job, or any other method—as long as the employer pays the employee at least the minimum wage for all hours worked and overtime at one and one-half the employee's regular rate for hours worked over 40 in a week. The part 778 regulations, at sections 778.107 to 778.112, provide examples of how to calculate overtime for non-exempt employees paid under different compensation plans. The Department does not propose any changes to these sections, but does propose to revise section 778.1 to clarify that: "Part 778 does not contain an exhaustive list of permissible or impermissible compensation practices under section 7(e) of the Act, unless otherwise indicated. Rather, it provides examples of regular rate and overtime calculations under the FLSA and the types of compensation that may be excluded from regular rate calculations under section 7(e) of the FLSA."

This language, which the Chamber supports, is critical for the regulated community as it attempts to apply part 778 to real situations in contemporary workplaces. The Department should further confirm in its final rule that the forms of compensation, and the methods of calculating

[80] 138 S. Ct. 1134, 1142 (2018).

overtime, presented in sections 778.107 to 778.122 are non-exclusive *examples*. If an employer's method of compensation does not fall squarely under one of these examples that, by itself, cannot establish an FLSA violation. The test is whether the employer has properly included all "remuneration for employment" in the regular rate calculation and paid employees overtime at one and one-half that rate.

This seems self-evident: The FLSA calculates the regular rate "by dividing [the employee's] total remuneration for employment . . . in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid."[81] It does not, however, list every item included in the employee's "total remuneration for employment." Instead, it takes into account the parties' specific compensation arrangement:

> The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is . . . an actual fact. Once the parties have decided upon the amount of wages . . . the determination of the regular rate becomes a matter of mathematical computation.[82]

The FLSA's statutory text does not expressly require any specific method of calculating overtime for non-exempt employees other than mandating that an employer must pay 1.5 times the regular hourly rate for all hours worked over 40. "It was not the purpose of Congress in enacting the [FLSA] to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement."[83] Rather, an employer may use any number of wage calculation methods so long as those calculations reflect the FLSA's minimum wage and overtime requirements:

> The statute contains no definition of regular rate of pay and no rule for its determination. Contracts for pay take many forms. The rate of pay may be by the hour, by piecework, by the week, month or year, and with or without a guarantee that earnings for a period of time shall be at least a stated sum. The regular rate may vary from

[81] 29 C.F.R. § 778.109.

[82] *Walling v. Youngerman Reynolds Hardwood Co.*, 325 U.S. 419, 424–25 (1945); *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460–61 (1948) (holding that the regular rate is determined by looking to the employment arrangement because "every contract of employment, written or oral, explicitly or implicitly includes a regular rate of pay for the person employed").

[83] *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203–04 (1947).

> week to week. The employee's hours may be regular or irregular. From all such wages the regular hourly rate must be extracted.[84]

These authorities show that so long as an employer meets the FLSA's requirements, it may choose from among many possible compensation practices. Nonetheless, some courts have found FLSA violations where they could not find the employer's compensation arrangements explicitly described in one of the part 778 examples. This is especially true in two areas: calculating overtime for non-exempt employees paid under the section 778.114 fluctuating workweek method, and for employees paid a day or job rate under section 778.112.

We ask the Department to clarify that employees paid under the fluctuating workweek or on a day or job rate may also be paid additional types of compensation as long as the additional compensation is appropriately included in the regular rate.

A. The Fluctuating Workweek Method

The FLSA provides that an employer may compensate an employee under the fluctuating-workweek method when: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary, regardless of the number of hours worked that week; (3) the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum wage; (4) the employee clearly understands that the salary covers straight-time pay whatever hours the job may demand in a particular workweek; and (5) the employee receives a 50% overtime premium in addition to the fixed weekly salary for all hours in excess of 40 worked in a workweek.[85]

One of the main components of a fluctuating-workweek plan is that the employee receive "a fixed salary that does not vary with the number of hours worked during each workweek (excluding overtime premiums)."[86] This requirement has caused some confusion over whether additional compensation based on the particular hours or days worked will invalidate such a pay plan.[87] The Department has previously attempted to alleviate this confusion.

---

[84] *Bay Ridge*, 334 U.S. at 460–61; *see also Walling*, 325 U.S. at 425–25 (recognizing that, so long as employers comply with the overall requirements of the FLSA, they "may agree to pay compensation according to any time or work measurement they desire").

[85] 29 C.F.R. § 778.114.

[86] 29 C.F.R. § 778.114(a).

[87] See *O'Brien v. Town of Agawam*, 350 F.3d 279, 294–99 (1st Cir. 2003) (holding that payment of night shift differential, overtime for hours worked in excess of eight in a day, and premium for being called to work while off duty invalidated fluctuating workweek pay plan); *Ayers v. SGS Control Services, Inc*., 2007 U.S. Dist. LEXIS 19634 (S.D.N.Y. Feb. 26, 2007) (holding that any employee who received a premium for "sea-pay" or "day-off" pay did not have fixed weekly straight time pay in violation of 29 C.F.R. § 778.114(a)); *Dooley v. Liberty Mutual*

In 2008, the Department issued a Notice of Proposed Rulemaking which proposed to resolve any confusion by amending 29 C.F.R. § 778.114 to specifically state that the payment of bona fide bonuses or premium payments does not invalidate the fluctuating workweek method of compensation:

> The payment of additional bonus supplements and premium payments to employees compensated under the fluctuating workweek method has presented challenges to both employers and the courts in applying the current regulations. The proposed regulation provides that bona fide bonus or premium payments do not invalidate the fluctuating workweek method of compensation, but that such payments (as well as ''overtime premiums'') must be included in the calculation of the regular rate unless they are excluded by FLSA sections 7(e)(1)–(8). The proposal also adds an example to § 778.114(b) to illustrate these principles where an employer pays an employee a nightshift differential in addition to a fixed salary. Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees. . . . The Department's proposed clarification would eliminate any disincentive for employers to pay additional bona fide bonus or premium payments.[88]

The Department's proposed regulations were issued by the Bush Administration, and in the final regulations issued by the Obama Administration in April 2011, the Department completely changed its course. The Department withdrew its proposal to add new regulatory language allowing payment of bonuses and premium pay to fluctuating workweek employees, and instead stated its agreement with the case law holding that such payments invalidate the fluctuating workweek method:

> The Department has carefully considered all of the comments submitted on this section. While the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees in many other contexts, we have concluded that unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime under section 778.114. As several

---

Ins. Co., 369 F. Supp. 2d 81 (D. Mass. 2005) (holding that payment of a premium for Saturday work invalidated fluctuating workweek pay plan). In contrast, other district courts have upheld the FWW method where bonuses and even commissions have been paid. *See, e.g. Cash v. Conn Appliances, Inc*., 2 F. Supp. 2d 884 (E.D. Tex. 1997) (applying fluctuating work week despite the fact that the employer paid bonuses); *Black v. Comdial Corp*., No. 92-081-C, 1994 U.S. Dist. LEXIS 2457, 1994 WL 70113, at *5 (W.D. Va. Feb. 15, 1994) ("The provision of bonus pay for hours 45-61 changes neither the salary basis of his pay, nor the applicability of the fluctuating workweek method . . . ."); *Lance v. The Scotts Co*., No. 04-5270, 2005 U.S. Dist. LEXIS 14949, at *26 (E.D. Ill. July 21, 2005) (finding that paying commissions in addition to salary does not invalidate the FWW method.)

[88] 73 FR 43654, 43662 (July 28, 2008).

> commenters noted, the proposed regulation could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees' compensation into bonus and premium payments, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked. It is just this type of wide disparity in weekly pay that the fluctuating workweek method was intended to avoid by requiring the payment of a fixed amount as straight time pay for all hours in the workweek, whether few or many. The basis for allowing the half-time overtime premium computation under the fluctuating workweek method is the mutual understanding between the employer and the employee regarding payment of a fixed amount as straight time pay for whatever hours are worked each workweek, regardless of their number. . . . Moreover, on closer examination, the Department is persuaded that the courts have not been unduly challenged in applying the current regulation to additional bonus and premium payments. See *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003); *Adeva v. Intertek USA*, 2010 WL 97991 (D.N.J. 2010); *Dooley v. Liberty Mutual Ins. Co.*, 369 F. Supp. 2d 81 (D. Mass. 2005); *Ayers v. SGS Control Services, Inc.*, 2007 WL 646326 (S.D.N.Y. 2007). Finally, while the proper use of the fluctuating workweek method of pay results in an employee being paid time and one-half of the employee's regular rate for overtime hours, the Department is cognizant that this method of pay results in a regular rate that diminishes as the workweek increases, which may create an incentive to require employees to work long hours. The Department does not believe that it would be appropriate to expand the use of this method of computing overtime pay beyond the scope of the current regulation.[89]

These comments from the Preamble to the 2011 Final Regulations still leave some questions unanswered. The Preamble does not specifically address commission payments or the distinction between premium pay based on hours worked and performance bonuses based on metrics not tied to hours worked. To add to the confusion, the 2011 Final Rule withdrew the 2008 proposed language, but failed to add language to the regulations specifically stating the types of premium pay and bonuses which would invalidate a fluctuating workweek plan.

At least one court has rejected the Department's reasoning and refused to give deference to the 2011 Preamble. In *Smith v. Frac Tech Services, LLC,* for example, the court found the employer's use of the FWW valid even though it paid the employees a weekly bonus in addition to salary.[90] The court stated that the Preamble was merely an interpretation of the U.S. Supreme Court's decision in *Overnight Motor Transportation Co., Inc. v. Missel*,[91] and that it "owes no

[89] 76 Fed. Reg. 18832, 18850 (April 5, 2011).

[90] No. 4:09CV00679, 2011 U.S. Dist. LEXIS 64079, at *15 (E.D. Ark. 2011).

[91] 316 U.S. 572, 579–80 (1942).

deference to an agency's interpretation of a Supreme Court decision."[92] The court concluded that "there is nothing in the FLSA that prohibits an employer from adding compensation such as bonuses or commissions to the fixed salary each week to determine the regular rate."[93]

Other courts, despite the Department's Preamble, have distinguished between performance-based bonuses and premium pay tied to hours worked. In *Wills v. RadioShack Corp*,[94] for example, the court explained that incentive compensation "based entirely on performance-based metrics" "differs in kind" from "premium pay based on hours."[95] Unlike hours-based premiums, the court stated, "performance-based bonuses . . . do not cause a weekly salary to vary by hours worked."[96] The court concluded that the payment of performance-based incentive compensation that is not "tied to the number of hours worked" does not affect an employee's "fixed weekly salary" and is therefore compatible with § 778.114.[97]

With regard to commissions, the First Circuit has addressed this question in favor of the employer. In *Lalli v. GNC*, Case No. 15-1199 (1st Cir. Feb. 12, 2016), the First Circuit was presented with a FWW compensation plan for a store manager at GNC. The plan provided for a guaranteed weekly salary regardless of hours worked during the week, as well as a non-discretionary sales commission that varied based upon the amount of eligible sales attributed to the manager during that week. Overtime was paid for each hour worked over 40 in a work-week under the FWW method by including both the weekly salary and any weekly earned commissions to calculate the regular rate. The store manager challenged that overtime calculation, and claimed that, since the commissions earned varied each week, he was not paid a "fixed" amount, and therefore the FWW calculation method could not apply. The First Circuit affirmed summary judgment for GNC and held that the payment of a performance-based commission does not foreclose the application of the FWW method. The Court found that, unlike

---

[92] 2011 U.S. Dist. LEXIS 64079 at *7.

[93] *Id.* at *7-9 ("Nothing in *Missel* prohibits the use of the fluctuating work week method for calculating damages whenever an employer gives a bonus to an employee.")

[94] 981 F. Supp. 2d 245, 256 (S.D.N.Y. 2013).

[95] *Id*. at 256.

[96] *Id*. at 261 (emphasis in original).

[97] *Id*. at 256–58. *See also Switzer v. Wachovia Corp*., No. H-11-1604, 2012 WL 3685978, at *3–5 (S.D. Tex. Aug. 24, 2012) (holding that payment of bonuses based on performance metrics such as sales growth, portfolio growth, and customer service were consistent with "fixed salary" contemplated by section 778.114 because compensation did not "vary with the number of hours worked"); *Soderberg v. Naturescape, Inc.*, Civ. No. 10-3429, 2011 WL 11528148, at *4-5 (D. Minn. Nov. 3, 2011) (holding that performance-based bonuses that were "based on criteria untethered to the hours Plaintiffs worked" did not preclude reliance on § 778.114); *Hanson v. Camin Cargo*, No. H–13–0027, 2015 WL 1737394, at *3 (S.D. Tex. April 16, 2015) (holding that an extra $75.00 per day received by employees when working off-shore did not invalidate a FWW arrangement, nor did receiving car and meal allowances that exceeded actual expenses).

in cases where additional compensation had been found to invalidate the application of the FWW method where the amount of the salary paid to the employee varied based upon the number of hours worked by the employee, the additional commission payments at issue in *Lalli* did not impact the amount of the fixed salary that the manager received each week, because they were based upon sales, not hours worked. Rather, GNC's commission plan complied with the Department's requirement that a fixed salary be paid for all hours worked, since the Department did not require a fixed total amount of compensation for the week. The Court also held that the Department's 2011 preamble to its new regulations did not change its analysis, as it found that the Department had only raised concerns based upon cases which dealt with variations in compensation based upon the number and type of hours worked, and did not call into question cases dealing with performance-based commissions.

While the *Lalli* case provides comfort to employers who pay additional commissions, uncertainty remains regarding payment of bonuses to employees paid on a FWW basis. Accordingly, the Chamber asks that the Department clarify in its final rule that employees paid on a fluctuating workweek plan may receive additional income, including bonuses and commissions, without invalidating the plan. The Department should also clarify that this income should be included in the regular rate.

We acknowledge that the Department recently added section 778.114 to its long-term regulatory agenda. But a decade of litigation and uncertainty compels action sooner. Revising section 778.114 is within the scope of this rulemaking,[98] and the revisions have already been drafted in the 2008 proposal.

B. Day or Job Rates

Similarly, the Chamber seeks clarification from the Department on the effect the inclusion of additional compensation has upon day or job-rate pay plans under section 778.112 which provides:

> If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums

[98] Revising section 778.114 is a logical outgrowth of the Department's Proposed Rule, which notified the general public of its intention to clarify and update the part 778 regulations. *See Conn. Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1983) (holding that an agency adopting final rules that differ from its proposed rules is required to re-notice only when the changes are so major that the original notice did not adequately frame the subjects for discussion in order to allow interested parties a fair opportunity to comment upon the final rules in their altered form, but that the agency "need not re-notice changes that follow logically from or that reasonably develop the rules it proposed originally").

> received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.[99]

The phrase "no other form of compensation for services" contained in section 778.112 has created significant confusion over its application, with some arguing that the day-rate or job-pay plans cannot include additional compensation aside from the flat pay rate. This argument ignores, however, that the day-rate provision[100] provides merely one example of how the regular rate may be calculated (i.e., when an employee is paid a day rate and no other form of compensation). It does not foreclose other compensation arrangements, and it does not exclude other compensation arrangements from the standard "wages divided by hours compensated" approach to determining the regular rate.

Accordingly, the Chamber recommends clarifying section 778.112 by adding language that employees paid a day or job rate can also receive additional compensation such as bonuses. It may also be helpful to add an example of the overtime calculation when an employee is paid a day rate and also receive a non-discretionary bonus. The Chamber believes that such clarification in the regulations would alleviate misunderstanding and unnecessary litigation over a myriad of issues, include providing additional compensation to those being paid a day rate.

IV. THE BASIC RATE

Finally, the Chamber supports the Department's proposal to update the basic-rate regulations. The proposed update modernizes certain aspects of the regulations while hewing closely to the Department's historical approach.

Section 7(g) of the FLSA permits employers to calculate overtime compensation using a basic rate instead of the regular rate in some circumstances.[101] In particular, section 7(g)(3) allows them to use a basic rate approved by the Administrator through its regulations.[102] Those regulations appear in part 548.[103] Among other things, part 548 permits employers who meet all

---

[99] 29 C.F.R. § 778.112.

[100] *Id.*

[101] 29 U.S.C. § 207(g).

[102] *Id.* § 7(g)(3).

[103] 29 C.F.R. pt. 548.

other requirements to use a basic rate excluding payments that would not increase the employee's weekly compensation by more than 50 cents.[104]

The Department last considered the 50-cent threshold in 1966, when 50 cents represented 40% of the minimum wage.[105] The Department used the same methodology eleven years earlier, when it set the threshold at 30 cents.[106]

The Department now proposes to use the same methodology to update the threshold.[107] But instead of using a specific dollar amount, the Department proposes to embed its methodology in the regulations: it sets the threshold at 40% of the federal minimum wage.[108]

This proposal makes sense. It stays consistent with the Department's historical approach while ensuring that the threshold continues to reflect the applicable minimum wage. It also helps avoid costly litigation over insignificant amounts. The only parties who benefit from such litigation are trial lawyers, who frequently capitalize on trivialities and recover millions for themselves while making little difference in employees' lives. The Chamber agrees that such litigation should be stamped out and so supports the Department's approach.

The Department also asked for feedback on whether the threshold should reference any applicable state minimum wage.[109] The Chamber supports that proposal as well. The purpose of the threshold is to identify payments that can rightly be excluded from the basic rate as trivial.[110] Whether payments count as trivial will rise with the employee's minimum compensation. So taking into account the applicable minimum wage, whether under state or federal law, best reflects the regulations' purpose.

V. CONCLUSION

The U.S. Chamber of Commerce supports the Proposed Rule. The Department's approach of adding specific examples of employee benefits and perks popular in today's workplace that may be excluded from the regular rate will increase compliance, reduce unexpected liability, and encourage more employers to provide more perks. We believe that

---

[104] *Id.* § 548.305(b)−(c).

[105] *See* 2019 Proposed Rule, *supra* note 1, at 11901−02 (surveying historical developments).

[106] *See id.*

[107] *Id.* at 11902.

[108] *Id.*

[109] *Id.*

[110] *See* 29 C.F.R. § 548.305(b).

adding the additional examples suggested in these comments would make the final rule an even stronger and more effective rule. We also suggest that the Department promptly revise Chapter 32 of the Field Operations Handbook, some sections of which have been unchanged since 1967, to reflect the final rule and provide additional guidance.

Sincerely,

Glenn Spencer
Senior Vice President
Employment Policy Division
U.S. Chamber of Commerce

Marc Freedman
Vice President
Workplace Policy
U.S. Chamber of Commerce

Of Counsel:
Tammy D. McCutchen
Littler Mendelson, P.C.
815 Connecticut Avenue NW, Suite 400
Washington, DC 20006