

DOL Issues Second Major Wage Proposal in a Month, This Time Targeting Overtime Calculations

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On Thursday, March 28th, the DOL published another proposed rule change to overtime pay that could affect thousands of workers and employers alike. The proposal would clarify the circumstances under which certain employee benefits, including tuition and travel reimbursements, unused paid leave, and meal breaks, may be excluded from the calculation of an employee's regular rate of pay—the rate used to calculate overtime premiums.

This proposal comes less than three weeks after the Department published its long-awaited proposal updating the salary threshold requirements for [employees exempt from overtime pay](#).

The proposed rule change would allow employers to exclude certain employee benefits from the regular rate of pay calculations, so long as those benefits are not tied to an employee's hours worked or services rendered. The proposal also directly addressed a trend across several states and localities to require additional compensation when employers make last-minute changes to employee schedules. Under the proposed rule, such “predictive scheduling penalties” would also be excluded from the regular rate calculations.

The Fair Labor Standards Act requires employers to pay nonexempt employees an overtime rate of one-and-a-half times their regular rate of pay for all hours worked in excess of 40 hours in a given week. Prior to these proposed updates, the regulations governing this calculation had not been updated in more than 50 years, and required the inclusion of all “remuneration for employment” in the regular rate calculation, except for a list of seven specific items. The proposed revisions would expand upon those seven categories and specifically exclude the following from the regular rate calculations:

- Pay for forgoing holidays or leave;
- Compensation for bona fide meal periods;
- Reimbursed travel and business expenses;
- Reporting pay and “predictability” pay;
- A non-exhaustive list of other benefits (including specialist treatment provided onsite; gym access/membership/classes; wellness programs; employee discounts; tuition reimbursement).

The proposal comes as a welcome move for employers, who want to offer competitive benefits to lure talented employees, yet don't want to be penalized for offering such benefits. Had the proposal

required benefits to be included in overtime calculations, it likely would have created a chilling effect on the types of benefits being offered to employees because of the difficulties in properly calculating overtime. Instead, by excluding many benefits from regular rate calculations, the Department's proposal opens the door for employers to offer more creative employee benefits without fear of a double financial impact.

For more information about this proposed rule update, contact a member of the firm's [Labor & Employment Practice Group](#).

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