

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF LABOR

### Wage and Hour Division

#### 29 CFR Parts 548 and 778

RIN 1235-AA24

#### Regular Rate Under the Fair Labor Standards Act

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The Fair Labor Standards Act (FLSA or Act) generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per workweek. The regular rate includes all remuneration for employment, subject to the exclusions outlined in section 7(e) of the FLSA. Part 778 of Title 29, Code of Federal Regulations (CFR), contains the Department of Labor's (Department) official interpretation of the overtime compensation requirements in section 7 of the FLSA, including requirements for calculating the regular rate. Part 548 of Title 29 implements section 7(g)(3) of the FLSA, which permits employers, under specific circumstances, to use a basic rate to compute overtime compensation rather than a regular rate. The Department has not updated many of these regulations, however, in more than half a century—even though compensation practices have evolved significantly. In this Notice of Proposed Rulemaking (NPRM), the Department proposes updates to a number of regulations both to provide clarity and better reflect the 21st-century workplace. These proposed changes would promote compliance with the FLSA; provide appropriate and updated guidance in an area of evolving law and practice; and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation.

**DATES:** Submit written comments on or before May 28, 2019.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA24, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this NPRM may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats. Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243)

between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at <http://www.dol.gov/whd/america2.htm>.

*Electronic Access and Filing Comments:* This proposed rule and supporting documents are available through the **Federal Register** and the <http://www.regulations.gov> website. You may also access this document via WHD's website at <http://www.dol.gov/whd/>. To comment electronically on Federal rulemakings, go to the Federal eRulemaking Portal at <http://www.regulations.gov>, which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. You must identify all comments submitted by including "RIN 1235-AA24" in your submission. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period (11:59 p.m. on the date identified above in the **DATES** section); comments received after the comment period closes will not be considered. Submit only one copy of your comments by only one method. Please be advised that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

#### SUPPLEMENTARY INFORMATION:

##### I. Executive Summary

The FLSA generally requires covered employers to pay nonexempt employees overtime pay of at least one and one-half times their regular rate for hours worked in excess of 40 per workweek. The FLSA defines the regular rate as "all remuneration for employment paid to, or on behalf of, the employee"—subject to eight exclusions established in section 7(e).<sup>1</sup> Parts 548 and 778 of CFR Title 29 contain the regulations addressing the overtime compensation requirements in section 7 of the FLSA, including requirements for calculating the regular rate of pay.

The Department promulgated the majority of part 778 more than 60 years ago, when typical compensation often consisted predominantly of traditional wages; paid time off for holidays and vacations; and contributions to basic medical, life insurance, and disability

<sup>1</sup> See 29 U.S.C. 207(e).

benefits plans.<sup>2</sup> Since that time, the workplace and the law have changed.

First, employee compensation packages, including employer-provided benefits and “perks,” have evolved significantly. Many employers, for example, now offer various wellness benefits, such as fitness classes, nutrition classes, weight loss programs, smoking cessation programs, health risk assessments, vaccination clinics, stress reduction programs, and training or coaching to help employees meet their health goals.

Both law and practice concerning more traditional benefits, such as sick leave, have likewise evolved in the decades since the Department first promulgated part 778. For example, instead of providing separate paid time off for illness and vacation, many employers now combine these and other types of leave into paid time off plans. Moreover, in recent years, a number of state and local governments have passed laws requiring employers to provide paid sick leave. In 2011, for example, Connecticut became the first state to require private-sector employers to provide paid sick leave to their employees.<sup>3</sup> Today, 11 states, the District of Columbia,<sup>4</sup> and various cities and counties<sup>5</sup> require paid sick leave, and many other states are considering similar requirements.

Recently, several states and cities have also begun considering and implementing scheduling laws. In the last 5 years, for example, New York, San Francisco, Seattle, and other cities have enacted laws imposing penalties on employers that change employees’ schedules without the requisite notice, and various state governments are considering and beginning to pass similar scheduling legislation.<sup>6</sup> Some of these laws expressly assert that the penalties are not part of the regular rate

under state law,<sup>7</sup> but confusion abounds for employers trying to determine how these and other penalties may affect regular rate calculations under federal law.

The Department believes that its current regulations do not sufficiently reflect these and other such developments in the 21st-century workplace. In this NPRM, the Department proposes to update its regulations in part 778 to reflect these changes in the modern workplace and to provide clarifications that reflect the statutory language and WHD’s enforcement practices. In so doing, the Department intends to promote compliance with the FLSA; provide appropriate and updated guidance to employers with evolving worker benefits, including employers that offer paid leave; give clarity concerning the proper treatment of scheduling-penalty payments under the FLSA; and encourage employers to provide additional and more creative benefits without fear of costly litigation.

The proposed rule would clarify when unused paid leave, bona fide meal periods, reimbursements, benefit plans, and certain ancillary benefits may be excluded from the regular rate. The proposed rule would also revise certain sections of the regulation to adhere more closely to the Act. Additionally, the Department proposes minor clarifications and updates to part 548 of Title 29, which implements section 7(g)(3) of the FLSA. Section 7(g)(3) permits employers, under specific circumstances, to use a basic rate to compute overtime compensation rather than a regular rate.<sup>8</sup> The Department invites comments from the public on all aspects of this NPRM. The Department estimates below the economic effects of this rule. The Department estimates qualitatively the potential benefits associated with reduced litigation at \$281 million over 10 years, or \$28.1 million per year. The Department also estimates that this proposed rule, if finalized, would result in one-time regulatory familiarization costs of \$36.4 million, which results in a 10-year

annualized cost of \$4.1 million at a discount rate of 3 percent or \$4 million at a discount rate of 7 percent.

This proposed rule is an Executive Order (E.O.) 13771 deregulatory action. Additional details on the estimated reduced burdens and cost savings of this proposed rule can be found in the rule’s economic analysis.

## II. Background

Congress enacted the FLSA in 1938 to remedy “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and the general well-being of workers[,]” which burdened commerce and constituted unfair methods of competition.<sup>9</sup> In relevant part, section 7(a) of the FLSA requires employers to pay their employees overtime at one and one-half times their “regular rate” of pay for time worked in excess of 40 hours per workweek.<sup>10</sup> The FLSA, however, did not define the term “regular rate” when enacted.

Later that year, WHD issued an interpretive bulletin addressing the meaning of “regular rate,” which WHD later revised and updated in 1939 and 1940. The 1940 version of the bulletin stated, among other things, that an employer did not need to include extra compensation paid for overtime work in regular rate calculations.<sup>11</sup> It also specified that the regular rate must be “the rate at which the employee is actually employed and paid and not upon a fictitious rate which the employer adopts solely for bookkeeping purposes.”<sup>12</sup>

In 1948, the Supreme Court in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, addressed whether specific types of compensation may be excluded from the regular rate, or even credited towards an employer’s overtime payment obligations. The Court held that an overtime premium payment, which it defined as “extra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute,” could be excluded from the computation of the regular rate.<sup>13</sup> Permitting “an overtime premium to enter into the computation of the regular rate would be to allow

<sup>2</sup> See Bureau of Labor Statistics, An Overview of Employee Benefits 20 (2005), <https://www.bls.gov/careeroutlook/2005/summer/art02.pdf>.

<sup>3</sup> See Conn. Gen. Stat. P.A. 11–52.

<sup>4</sup> See Ariz. Title 23, Ch. 2, art. 8, §§ 23–363, 23–364, & art. 8.1; Cal. Labor Code §§ 245, 2810.5; Conn. Gen. Stat. P.A. 11–52; D.C. Code § 32–131.01 *et seq.*; Md. Code Ann. HB 0001; Mass. Gen. Laws ch. 149, § 148(c), (d); Mich. Comp. Laws §§ 408.961–974 (effective Mar. 29, 2019); N.J. A1827; Or. Rev. Stat. §§ 653.256, 659A.885; R.I. Gen. Laws Title 28, Ch. 28–57; 21 Vt. Stat. §§ 384, 481–485, 345; 29 Vt. Stat. § 161; Wash. Rev. Code §§ 49.46.005, 49.46.020, 49.46.090, 49.46.100.

<sup>5</sup> See, e.g., Austin, Tex., City Code 4–19 (2018); Minneapolis, Minn., Admin. Code. 40.10 (2016); Phila., Pa., Admin. Code 9–4100 (2015); N.Y.C., N.Y., Admin. Code 20–911 (2013); Seattle, Wash., Mun. Code. 14.16 (2011).

<sup>6</sup> See N.Y.C., N.Y., Admin. Code 20–1201 (2017); Seattle, Wash., Mun. Code 14.22.050 (2017); SB 828, 73rd Leg. Assemb., 2017 Reg. Sess. (Or. 2017); see also Emeryville, Cal., Mun. Code 5–39.01 (2017); S.F., Cal., Police Code art. 33G (2015).

<sup>7</sup> See, e.g., Employee Scheduling (Call-in Pay), N.Y. St. Reg. LAB. 47–17–00011–P, at § 142–2.3(a)(2) (proposed November 11, 2017) (“Minimum rate. Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.”); Or. Rev. Stat. Ann. § 653.412(7)(d) (effective July 1, 2018) (“Regular rate of pay” does not include “[a]ny additional compensation an employer is required to pay an employee under ORS 653.442 [right to rest between work shifts] or 653.455 [compensation for work schedule changes].”).

<sup>8</sup> See 29 U.S.C. 207(g)(3).

<sup>9</sup> 29 U.S.C. 202(a); see Fair Labor Standards Act of 1938, Public Law 75–718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219).

<sup>10</sup> 29 U.S.C. 207(a). The statutory maximum in 1938 was 44 hours per workweek; in 1939, it was 42 hours per workweek; and in 1940, it was 40 hours per workweek. See Public Law 75–718, 52 Stat. at 1063.

<sup>11</sup> See Interpretive Bulletin No. 4 ¶ 13 (Nov. 1940).

<sup>12</sup> *Id.* at ¶ 18.

<sup>13</sup> 334 U.S. at 450 n.3, 465–66.

overtime premium on overtime premium—a pyramiding that Congress could not have intended.”<sup>14</sup> The Court also held that “any overtime premium paid, even if for work during the first forty hours of the workweek, may be credited against any obligation to pay statutory excess compensation.”<sup>15</sup> By contrast, the Court noted, “[w]here an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor rather than an overtime premium. Such payments enter into the determination of the regular rate of pay.”<sup>16</sup>

After the *Bay Ridge* decision, in 1948 the Department promulgated 29 CFR part 778, concerning the regular rate.<sup>17</sup> This regulation codified the principles from *Bay Ridge* that extra payments for hours worked in excess of a daily or weekly standard established by contract or statute may be excluded from the regular rate and credited toward overtime compensation due, and that extra payments for work on Saturdays, Sundays, holidays, or at night that are made without regard to the number of hours or days previously worked in the day or workweek must be included in the regular rate and may not be credited toward the overtime owed.<sup>18</sup> It noted, however, that when extra payments for work on Saturdays, Sundays, holidays, or nights are contingent on the employee having previously worked a specified standard number of hours or days, such payments are true overtime premium payments that may be excluded from the regular rate and credited toward overtime compensation due.<sup>19</sup> The Department also explained that payments “that are not made for hours worked, such as payments for idle holidays or for an occasional absence due to vacation or illness or other similar cause” may be excluded from the regular rate, but could not be credited against statutory overtime compensation due.<sup>20</sup>

Congress responded to the *Bay Ridge* decision in 1949 by amending the FLSA to identify two categories of payments that could be excluded from the regular rate and, in addition, credited toward overtime compensation due.<sup>21</sup> The first

category was extra compensation for work on Saturdays, Sundays, holidays, or the sixth or seventh day of the workweek paid at a premium rate of one and one-half times the rate paid for like work performed in nonovertime hours on other days. The second category was extra compensation paid pursuant to an applicable employment contract or collective bargaining agreement for work outside of the hours established therein as the normal workday (not exceeding eight hours) or workweek (not exceeding 40 hours) at a premium rate of one and one-half times the rate paid for like work performed during the workday or workweek.<sup>22</sup>

On October 26, 1949, Congress again amended the FLSA.<sup>23</sup> The amendments added, among other things, a comprehensive definition of the term “regular rate.”<sup>24</sup> “Regular rate” was defined to include “all remuneration for employment paid to, or on behalf of, the employee[.]”<sup>25</sup> with the exception of an exhaustive list of seven specific categories of payments that could be excluded from the regular rate.<sup>26</sup> Those categories of excludable payments were: (1) Gifts and payments on special occasions; (2) payments made for occasional periods when no work is performed such as vacation or sick pay, reimbursements for work-related expenses, and other similar payments that are not compensation for hours of employment; (3) discretionary bonuses, payments to profit-sharing or thrift or savings plans that meet certain requirements, and certain talent fees; (4) contributions to a bona fide plan for retirement, or life, accident, or health insurance; (5) extra compensation provided by a premium rate for certain hours worked in excess of eight in a day, 40 hours in a workweek, or the employee’s normal working hours; (6) extra compensation provided by a premium rate for work on Saturdays, Sundays, regular days of rest, or the sixth or seventh days of the workweek; and (7) extra compensation provided by a premium rate pursuant to an employment contract or collective bargaining agreement for work outside of the hours established therein as the normal workday (not exceeding eight hours) or workweek (not exceeding 40 hours).<sup>27</sup> The October 1949

amendments also added a provision specifying that the last three of these categories are creditable against overtime compensation due.<sup>28</sup>

In 1950, the Department updated part 778 to account for the 1949 amendments to the FLSA.<sup>29</sup> These regulations explained general principles regarding overtime compensation and the regular rate, including the principle that each workweek stands on its own for purposes of determining the regular rate and overtime due.<sup>30</sup> The regulations also provided methods for calculating the regular rate under different compensation systems, such as salary and piecework compensation.<sup>31</sup> They further elaborated on the seven categories of payments that are excludable from regular rate calculations, and provided several examples.<sup>32</sup> The regulations also addressed special problems and pay plans designed to circumvent the FLSA.<sup>33</sup>

In 1961 and 1966, Congress made a few minor, nonsubstantive language changes and redesignated certain sections.<sup>34</sup> In 1968, the Department updated part 778, principally to clarify the statutory references, update the amounts used to illustrate pay computations, and reorganize the provisions in part 778.<sup>35</sup> Over the next several decades, the Department periodically made minor changes and updates to part 778.<sup>36</sup>

amendments were essentially the same as those that had been added in the July 1949 amendments as sections 7(e)(1) and (2); the October 1949 amendments eliminated them from section 7(e).

<sup>28</sup> See *id.*, Public Law 81–393, 63 Stat. at 915. This provision is currently codified at 29 U.S.C. 207(h) (payments described in sections 7(e)(5)–(7) are creditable).

<sup>29</sup> See 15 FR 623 (Feb. 4, 1950) (codified at 29 CFR 778.0–.27).

<sup>30</sup> See 29 CFR 778.2 (1950).

<sup>31</sup> See 29 CFR 778.3(b) (1950).

<sup>32</sup> See 29 CFR 778.5–.8 (1950).

<sup>33</sup> See 29 CFR 778.9.17, .21–.23 (1950).

<sup>34</sup> In 1961, Congress made nonsubstantive language changes to sections (d)(5) and (7). See Fair Labor Standards Amendments of 1961, Public Law 87–30, 6, 75 Stat. 65, 70. In 1966, Congress redesignated section 7(d) as section 7(e). See Fair Labor Standards Amendments of 1966, Public Law 89–601, Title II, § 204(d)(1), 80 Stat. 830, 836. Additionally, section 7(g), which provided that extra compensation paid pursuant to sections 7(d)(5), (6), and (7) could be credited against overtime compensation due under section 7(a), was moved to section 7(h). See *id.*

<sup>35</sup> See 33 FR 986 (Jan. 26, 1968) (29 CFR 778.0–.603).

<sup>36</sup> See 36 FR 4699 (Mar. 11, 1971) (updating § 778.214 to clarify that advance approval by the Department is not required for plans providing benefits within the meaning of section 7(e)(4)); 36 FR 4981 (Mar. 16, 1971) (updating § 778.117 to clarify commission payments that must be included in the regular rate); 46 FR 7308 (Jan. 23, 1981) (updating part 778 to increase the dollar amounts used as examples in the regulations, to respond to

<sup>14</sup> *Id.* at 464.

<sup>15</sup> *Id.* at 464–65.

<sup>16</sup> *Id.* at 468–69.

<sup>17</sup> See 13 FR 4534 (Aug. 6, 1948).

<sup>18</sup> See 29 CFR 778.2 (1948).

<sup>19</sup> See *id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Public Law 81–177, ch. 352, 63 Stat. 446 (July 20, 1949). These provisions are currently codified at 29 U.S.C. 207(e)(6)–(7).

<sup>22</sup> See *id.*

<sup>23</sup> See Fair Labor Standards Amendments of 1949, Public Law 81–393, ch. 736, 63 Stat. 910.

<sup>24</sup> *Id.* § 7, 63 Stat. at 913. This provision is currently codified at 29 U.S.C. 207(e).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*, 63 Stat. at 913–14. These provisions are currently codified at 29 U.S.C. 207(e)(1)–(7).

<sup>27</sup> See *id.* The excludable categories of payments in sections 7(d)(6) and (7) in the October 1949

In 2000, Congress added one additional category of payments that could be excluded from the regular rate, currently found in section 7(e)(8).<sup>37</sup> This amendment permitted an employer to exclude from the regular rate income derived from a stock option, stock appreciation right, or employee stock purchase plan, provided certain restrictions were met.<sup>38</sup> In the 2000 amendments, Congress also amended section 7(h) to state that, except for the types of extra compensation identified in sections 7(e)(5), (6), and (7), sums excluded from the regular rate are not creditable toward minimum wage or overtime compensation due.<sup>39</sup> In 2011, the Department updated part 778 to reflect the 2000 statutory amendments and to modify the wage rates used as examples to reflect the current minimum wage.<sup>40</sup>

Currently, the FLSA's definition of "regular rate" and the eight categories of excludable payments are contained in section 7(e) of the Act.<sup>41</sup> The Department's regulations concerning the regular rate requirements are contained in 29 CFR part 778. As noted above, the last comprehensive revision to part 778 was in 1968.<sup>42</sup>

Under certain circumstances, the FLSA permits employers to use a "basic rate," rather than the regular rate as defined in section 7(e), to calculate overtime compensation.<sup>43</sup> Congress added this provision, which is currently in section 7(g), in 1949 (at the same time that Congress added the definition of "regular rate" to the FLSA).<sup>44</sup> The requirements an employer must meet to

use a basic rate are set forth in that same section 7(g).<sup>45</sup>

In 1955, the Department promulgated 29 CFR part 548 to establish the requirements for authorized basic rates under section 7(g)(3).<sup>46</sup> It amended various sections of the part 548 regulations several times over the next 12 years to reflect statutory amendments to other parts of the FLSA, including increases to the minimum wage.<sup>47</sup> The Department has not updated any of the regulations in part 548 since 1967, more than a half-century ago.

### III. Proposed Regulatory Revisions

The Department proposes to update regulations in part 778 and part 548 to both clarify the Department's interpretations in light of modern compensation and benefits practices. The sections below discuss, in turn, each category of excludable compensation that the Department proposes to address.

#### A. Excludable Compensation Under Section 7(e)(2)

Many of the proposed updates would clarify the type of compensation that is excludable from the regular rate under FLSA section 7(e)(2). Section 7(e)(2) permits an employer to exclude from the regular rate three categories of payments: First, "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"; second, "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 third, "other similar payments to an employee which are not made as compensation for his hours of employment."<sup>48</sup>

Section 7(e)(2) contains three separate clauses, each of which addresses a distinct category of excludable compensation. For purposes of this NPRM, the Department will refer to these clauses as the "occasional periods when no work is performed" clause; the "reimbursable expenses" clause; and the "other similar payments" clause. The Department's regulations interpreting section 7(e)(2) are contained in §§ 778.216--224.

#### 1. Pay for Forgoing Holidays or Leave

The initial clause of section 7(e)(2) permits an employer to exclude "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" from the regular rate.<sup>49</sup> Section 778.218 addresses this statutory provision and provides that when payments for such time "are in amounts approximately equivalent to the employee's normal earnings," they are not compensation for hours of employment and are therefore excludable from the regular rate.<sup>50</sup>

Section 778.219 addresses a related issue, the exclusion of payments for working on a holiday or forgoing vacation leave, as distinct from the exclusion of payments for using leave.<sup>51</sup> It explains that if an employee who is entitled to "a certain sum as holiday or vacation pay, whether he works or not," receives additional pay for each hour worked on a holiday or vacation day, the sum allocable as the holiday or vacation pay is excluded from the regular rate.<sup>52</sup> In other words, when an employee works instead of taking a holiday or using vacation leave, and receives pay for the holiday or vacation leave that he or she did not take in addition to receiving pay for the hours of work performed, the amount paid for the forgone holiday or vacation leave may be excluded from the regular rate. Section 778.219 addresses only pay for forgoing holidays and vacation leave; it does not address sums paid for forgoing the use of other forms of leave, such as leave for illness.

WHD has addressed payment for forgoing sick leave in its Field Operations Handbook (FOH). The FOH states that the same rules governing exclusion of payments for unused vacation leave also apply to payments for unused sick leave.<sup>53</sup> Accordingly, when "the sum paid for unused sick leave is the approximate equivalent of the employee's normal earnings for a similar period of working time," such

statutory amendments affecting other parts of the FLSA, and to modify § 778.320 to clarify that pay for nonworking time does not automatically convert such time into hours worked); 46 FR 33516 (June 30, 1981) (correcting errors in the January 1981 update in §§ 778.323, .327, .501, .601); 56 FR 61100 (Nov. 29, 1991) (updating § 778.603 to address statutory amendment adding section 7(q) regarding maximum-hour exemption for employees receiving remedial education).

<sup>37</sup> See Worker Economic Opportunity Act, Public Law 106-202, 2(a)(3), 114 Stat. 308 (2000).

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See 76 FR 18832 (Apr. 5, 2011) (updating §§ 778.110, .111, .113, .114, .200, .208).

<sup>41</sup> See 29 U.S.C. 207(e). Additionally, section 7(h) states that only payments excludable from the regular rate pursuant to sections 7(e)(5), (6), and (7) may be credited against the employer's overtime obligation and that all other excludable payments (*i.e.*, payments that qualify as excludable under sections 7(e)(1), (2), (3), (4), and (8)) are not creditable. See 29 U.S.C. 207(h).

<sup>42</sup> See 33 FR 986 (29 CFR 778.0--603).

<sup>43</sup> 29 U.S.C. 207(g).

<sup>44</sup> See Public Law 81-393, 63 Stat. at 914-15. In 1966, Congress redesignated section 7(f) as section 7(g), with section numbers (1)-(3) remaining the same; no substantive changes were made. See Public Law 89-601, 80 Stat. at 836. 1 29 U.S.C. 207(g)(1)-(3).

<sup>45</sup> See *id.*

<sup>46</sup> See 20 FR 5679 (Aug. 6, 1955). The regulations interpreting sections 7(g)(1)-(2) are at 29 CFR 778.415-.421.

<sup>47</sup> See 21 FR 338 (Jan. 18, 1956); 26 FR 7731 (Aug. 18, 1961); 28 FR 11266 (Oct. 22, 1963); 31 FR 6769 (May 6, 1966); 32 FR 3293 (Feb. 25, 1967).

<sup>48</sup> 29 U.S.C. 207(e)(2).

<sup>49</sup> 29 U.S.C. 207(e)(2).

<sup>50</sup> 29 CFR 778.218(a). See FOH 32d03g ("Payment for absences charged against leave under a bona fide plan granting the employee a specified amount of annual, vacation, or sick leave with pay need not be included in the regular rate of pay, if the sum paid is the approximate equivalent of the employee's normal earnings for a similar period of working time. Payments for such absences may be excluded regardless of when or how the leave is taken.")

<sup>51</sup> See 29 CFR 778.219.

<sup>52</sup> 29 CFR 778.219(a).

<sup>53</sup> See FOH 32d03e.

payments are excludable from the regular rate.<sup>54</sup>

To clarify and modernize the regulations, the Department proposes to update § 778.219 to address payments for forgoing both holidays and other forms of leave. The Department is aware that many employers no longer provide separate categories of leave based on an employee's reason for taking leave—such as sick leave and vacation leave. Instead, employers provide one category of leave, which is commonly called paid time off. The Department sees no reason to distinguish between the types of leave when determining whether payment for forgoing use of the leave is excludable from the regular rate. Rather, the central issues are whether the amount paid is approximately equivalent to the employee's normal earnings for a similar period of time, and whether the payment is in addition to the employee's normal compensation for hours worked.

Accordingly, the Department proposes to clarify that occasional payments for forgoing the use of leave are treated the same regardless of the type of leave. The Department therefore proposes to revise the title of § 778.219, clarify in § 778.219(a) that payments for all forms of unused leave are treated the same for purposes of determining whether they may be excluded from the regular rate, and add an example concerning payment for forgoing the use of paid time off. The proposed changes reflect the Department's longstanding practice of applying the same principles to payments of unused holiday, vacation, and sick leave.<sup>55</sup> The proposed changes would ensure the consistent application of the same principles across differing leave arrangements.<sup>56</sup> The Department also proposes to clarify that payments for forgoing the use of leave are excludable from the regular rate regardless of whether they are paid during the same pay period in which the previously

scheduled leave is forgone or during a subsequent pay period as a lump sum.<sup>57</sup>

## 2. Compensation for Bona Fide Meal Periods

As noted above, § 778.218 addresses the clause of FLSA section 7(e)(2) concerning payments made for occasional periods when no work is performed and provides that when payments for such time “are in amounts approximately equivalent to the employee's normal earnings,” they are not compensation for hours of employment and may be excluded from the regular rate.<sup>58</sup> Section 778.218(b) states that this clause “deals with the type of absences which are infrequent or sporadic or unpredictable” and “has no relation to regular ‘absences’ such as lunch periods nor to regularly scheduled days of rest.”<sup>59</sup>

Section 778.320 addresses “hours that would not be hours worked if not paid for,” and identifies “time spent in eating meals between working hours” as an example.<sup>60</sup> Section 778.320(b) further states that even when such time is compensated, the parties may agree that the time will not be counted as hours worked.

The Department proposes to remove the reference to “lunch periods” in § 778.218(b) to eliminate any uncertainty about its relation to § 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate. As one court noted, the existing regulations in

§§ 778.218 and 778.320 “appear somewhat inconsistent” on the excludability from the regular rate of compensation for bona fide meal periods.<sup>61</sup> In 1986, WHD acknowledged in an opinion letter “that the reference to meal periods in section 778.218(b) of Part 778 may not be compatible with the position which is contained in section 778.320(b),” and indicated that the issue was under review.<sup>62</sup> The Department subsequently clarified in a 1996 opinion letter that pay provided for a bona fide meal period is excludable from the regular rate under § 778.320(b).<sup>63</sup> While the Department clarified its position in an opinion letter more than 20 years ago, the Department is nonetheless concerned that the language in § 778.218(b) may cause confusion concerning the excludability of pay for bona fide meal periods. Thus, to remove any ambiguity and to codify its interpretation in regulation, the Department proposes to delete the reference to “lunch periods” from § 778.218(b).

Bona fide meal periods are not considered “hours worked” for purposes of the FLSA's minimum wage or overtime requirements, and employers are not required to pay for such time.<sup>64</sup> The Department proposes changing § 778.320 to clarify that the payment of compensation for bona fide meal periods alone does not convert such time to hours worked unless agreement or actual course of conduct establish that the parties have treated the time as hours worked. In the Department's enforcement experience, the treatment of bona fide meal breaks is frequently not subject to formal agreement and is often established by informal policy or course of conduct. Payments for such periods need only be included in the regular rate when it appears from all the pertinent facts that the parties have treated compensated bona fide meal periods as hours worked. This proposal clarifies the existing requirements and does not substantively change either the calculation of the regular rate or the determination of hours worked.

<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See, e.g., Balestrieri v. Menlo Park Fire Protec. Dist.*, 800 F.3d 1094, 1103 (9th Cir. 2015) (holding that annual leave comprised of both sick and vacation leave need not be included in the regular rate under section 7(e)(2)). Such payments need not be included in the regular rate under section 7(e)(2) for the same reason that payments for unused vacations or holidays need not be included; it makes no difference that payments for unused annual leave or paid time off may include unused sick leave. *See also* Opinion Letter FLSA2006–18NA, 2006 WL 4512960 (July 24, 2006) (holiday payments made to employees when they forgo holidays need not be included in the regular rate pursuant to section 7(e)(2)); Opinion Letter FLSA2004–2NA, 2004 WL 5303030 (Apr. 5, 2004) (cashed-out accrued vacation time need not be included in regular rate pursuant to section 7(e)(2)).

<sup>57</sup> In some situations, employers may make payments to encourage attendance at work rather than compensating employees for forgoing the use of leave. Section 7(e)(3)(a) permits the exclusion of discretionary bonuses from the regular rate, but requires, among other things, that such bonus not be made “pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly[.]” 29 U.S.C. 207(e)(3). As an example, § 778.211(c) states that an attendance bonus promised to employees to induce them to remain with the firm or to work more steadily, rapidly, or efficiently is not excludable from the regular rate. The proposed clarification to § 778.219(a) would not affect § 778.211(c), which addresses the exclusion of discretionary bonuses from the regular rate pursuant to FLSA section 7(e)(3)(a). *See* 29 U.S.C. 207(e)(3)(a); 29 CFR 778.211(c). The facts of each case determine whether a payment is, in fact, for unused leave and therefore excludable or whether the payment is made as an attendance bonus that is required to be included in the regular rate. For example, WHD has stated in guidance that where a collective bargaining agreement provided that “[a]ll employees will be eligible for a stipend for perfect attendance,” the payment, although described as a “stipend for nonuse of sick leave,” in fact constituted an attendance bonus under § 778.211(c) and therefore was required to be included in the regular rate. Opinion Letter FLSA2009–19, 2009 WL 649021 (Jan. 16, 2009).

<sup>58</sup> 29 CFR 778.218; *see* 29 U.S.C. 207(e)(2).

<sup>59</sup> 29 CFR 778.218(b).

<sup>60</sup> *See* 29 CFR 778.320.

<sup>61</sup> *Smiley*, 839 F.3d at 331 n.5.

<sup>62</sup> WHD Opinion Letter FLSA–937 (July 22, 1986).

<sup>63</sup> *See* WHD Opinion Letter, 1996 WL 1031805 (Dec. 3, 1996); *see also 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”); WHD Opinion Letter, 1997 WL 998021 (July 21, 1997) (stating that pay for bona fide meal periods need not be included in the regular rate).

<sup>64</sup> *See* 29 CFR 785.19.

### 3. Reimbursable Expenses

The second clause of section 7(e)(2) 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[.]”<sup>65</sup> The regulation in § 778.217 states that “[w]here an employee incurs expenses on his employer’s behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses.”<sup>66</sup> The Department promulgated this section in February 1950.<sup>67</sup>

While § 778.217 limits reimbursable expenses to those “solely” in the interest of the employer, the statutory language does not include this limitation. Instead, the FLSA simply excludes all expenses incurred “in the furtherance of [the] employer’s interests[.]”<sup>68</sup> and, as explained further below, neither the Department nor the courts have since restricted excludable expenses to only those that “solely” benefit the employer. The Department is concerned that this single use of the word “solely” in § 778.217 may be interpreted as more restrictive than what the FLSA actually requires. The Department therefore proposes to remove the word “solely” from § 778.217(a) to clarify its interpretation of the reimbursable expenses clause of section 7(e)(2). This clarification is consistent with the other subsections of § 778.217, as well as court rulings and the Department’s opinion letters—which have not required that excludable expenses solely benefit the employer.

Section 778.217(d) also discusses expenses that are excludable from the regular rate. It emphasizes only whether such payments benefit the employer or the employee; it does not require them to “solely” benefit one party or the other. Thus, payments for expenses that are “incurred by the employee on the employer’s behalf or for his benefit or convenience” merit exclusion from the regular rate, but reimbursements for expenses “incurred by the employee for his own benefit,” such as “expenses in traveling to and from work, buying lunch, paying rent, and the like,” are not excluded from the regular rate.<sup>69</sup>

Similarly, the Department’s opinion letters do not analyze whether an expense is incurred solely for the employer’s convenience when discussing whether it may be excluded from the regular rate. Instead, the opinion letters analyze simply whether expenses benefit the employer.<sup>70</sup> Furthermore, since 1955, the Department’s policy in WHD’s FOH has mirrored the statutory requirement that “expenses incurred by an employee in furtherance of his/her employer’s interests” may be excluded from the regular rate, regardless of whether they “solely” benefit one party or the other.<sup>71</sup>

Consistent with the Department’s practice and guidance, courts have not analyzed whether the expenses at issue were incurred solely for the employer’s convenience when determining whether they are excludable from the regular rate. Instead, courts have emphasized the statutory requirement that the expenses need only benefit the employer.<sup>72</sup>

The Department also proposes to clarify section 7(e)(2)’s requirement that only “reasonable” and “properly reimbursable” expenses may be excluded from the regular rate when reimbursed. Current § 778.217(b)(3) permits employers to exclude from the regular rate “[t]he actual or reasonably approximate amount expended by an

supplies, tools, materials, or equipment on behalf of his employer,” travel expenses, including living expenses away from home, incurred while traveling for work for the employer’s benefit, and the cost of “supper money” to an employee in a situation where “he or she would ordinarily leave work in time to have supper at home, but instead must remain to work additional hours for the employer’s benefit.” See 29 CFR 778.217(b)(1), (b)(2), (b)(4).

<sup>70</sup> For example, the cost of food for eating meals during travel out of town for work is for the employer’s benefit; therefore, such reimbursement may be excluded from the regular rate. See Opinion Letter FLSA2004–3, 2004 WL 2146923 (May 13, 2004); see also Opinion Letter FLSA–828 (July 19, 1976) (“[r]eimbursement to an employee for expenses incurred on behalf of an employer” would not become part of the regular rate); Opinion Letter FLSA–940 (Mar. 9, 1977) (regular rate shall not include “reimbursement for expenses where an employee incurs out of pocket expenses on the employer’s behalf”); Opinion Letter FLSA–1234 (July 12, 1985) (reimbursement must be for “expenses incurred by the employee on the employer’s behalf or convenience”).

<sup>71</sup> FOH 32d05a(a).

<sup>72</sup> See, e.g., *Berry v. Excel Grp., Inc.*, 288 F.3d 252, 253–54 (5th Cir. 2002) (concluding that reimbursements of travel expenses were primarily for the employer’s benefit; therefore, such expenses were excluded from the regular rate); see also *Brennan v. Padre Drilling Co., Inc.*, 359 F. Supp. 462, 465 (S.D. Tex. 1973) (per diem for traveling expenses is “expended by the employee in the furtherance of his employer’s interest”); *Sharp v. CGG Land, Inc.*, 840 F.3d 1211, 1215 (10th Cir. 2016) (“the proper focus under section 778.217(b)(3) is whether the \$35 payments are for reimbursement of travel expenses incurred in furtherance of the employer’s interests”).

employee who is traveling ‘over the road’ on his employer’s business, for transportation . . . and living expenses away from home, [or] other [such] travel expenses[.]” Section 778.217(c) cautions that “only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as ‘reimbursement’ is disproportionately large, the excess amount will be included in the regular rate.”

The Department proposes additional explanation on what is “reasonable”—and thus not “disproportionately large”—by referring to the Federal Travel Regulation. The Department believes that the amounts set in the Federal Travel Regulation are not excessive and are easily ascertained, given its “two principal purposes” of “balanc[ing] the need to assure that official travel is conducted in a responsible manner with the need to minimize administrative costs” and “communicat[ing] the resulting policies in a clear manner to Federal agencies and employees.”<sup>73</sup> The Department thus proposes to add regulatory text explaining that a payment for an employee traveling on his or her employer’s business is per se reasonable if it is at or beneath the maximum amounts reimbursable or allowed for the same type of expense under the Federal Travel Regulation and meets § 778.217’s other requirements. Those other requirements include that the reimbursement be for the “actual or reasonably approximate amount”<sup>74</sup> of the expense, that the expense be incurred on the employer’s behalf, and that the expense not vary with hours worked.<sup>75</sup> The proposed regulatory text also clarifies that a reimbursement for an employee traveling on his or her employer’s business exceeding the Federal Travel Regulation limits is not necessarily unreasonable. This is so because a payment may be more than that required “to minimize administrative costs” yet still within the

<sup>73</sup> 41 CFR 300–1.2. Those amounts are published online annually by the General Services Administration. See GSA, Plan and Book, [www.gsa.gov/travel/plan-and-book](http://www.gsa.gov/travel/plan-and-book).

<sup>74</sup> *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041–42 (5th Cir. 2010), provides a helpful contrast to a properly excludable reimbursement. There, multiple facts indicated that the employee’s purported “per diem” was simply a scheme to avoid paying overtime. Those facts included the per diem’s rise over time without any clear connection to travel or other expenses, its variance by the hour, its cap at 40 hours per week, and its payment in combination with a well-below-market wage.

<sup>75</sup> See, e.g., *Baouch v. Werner Enters., Inc.*, 908 F.3d 1107, 1116 (8th Cir. 2018) (“Per diem payments that vary with the amount of work performed are part of the regular rate.”).

<sup>65</sup> 29 U.S.C. 207(e)(2).

<sup>66</sup> 29 CFR 778.217(a).

<sup>67</sup> See 15 FR 623.

<sup>68</sup> 29 U.S.C. 207(e)(2).

<sup>69</sup> 29 CFR 778.217(d). This is consistent with the illustrative examples in § 778.217(b) of reimbursable expenses that may be excluded from the regular rate, which include “purchasing

realm of reasonable business and industry norms.

#### 4. Other Similar Payments

Section 7(e) requires “all remuneration for employment” be included in the regular rate, subject to that section’s eight listed exclusions. Section 7(e)(2) consists of three clauses, each of which address a distinct category of excludable compensation. As discussed above, the first 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.” The second excludes “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 employee.” The third clause excludes “other similar payments to an employee which are not made as compensation for his hours of employment.”

“[O]ther . . . payments” are “similar” to those in the first two clauses because they are “not made as compensation for [an employee’s] hours of employment.” The first two clauses share the essential characteristic of having no connection to the quantity or quality of work performed. The “other similar payments” clause thus should exclude payments not tied to an employee’s hours worked, services rendered, job performance, credentials, or other criteria linked to the quality or quantity of the employee’s work.<sup>76</sup>

In a sense, every benefit or payment given an employee is “remuneration for employment.”<sup>77</sup> Certainly benefits like paid vacation or sick leave are seen as such by many employers and employees. But the section 7(e)(2) exclusions make clear that whether or not they are remuneration, they are “not made as compensation for [the employee’s] hours of employment” because they have no relationship to the employee’s hours worked or services rendered. This interpretation gives

<sup>76</sup> See *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”).

<sup>77</sup> Cf. *Minizza*, 842 F.2d at 1460 (“Employers have a finite amount to spend for the labor component of their product or service. This sum can be allocated solely as compensation on an hourly basis (in which event the payment would be fully includable in the ‘regular rate’), or it can assume any number of other forms . . . (in which case the payments may or may not be includable), in any ratio the parties care to set.”).

meaning to the third clause. It allows employers to provide benefits unconnected to the quality or quantity of work, even if those benefits are remuneration of a sort.

Interpreting the third clause as simply a restatement of the “remuneration” requirement would contravene basic principles of statutory interpretation.<sup>78</sup> Such an interpretation would equate the unique phrases “all remuneration for employment” and “compensation for [the employee’s] hours of employment,” even though Congress used different words and thus, presumably, meant different things. This is especially so when considering that one phrase uses the word “employment” when the other uses the term “hours of employment.” Such an interpretation would also render the third clause redundant, another disfavored result. And it would be difficult to reconcile with the first clause of section 7(e)(2), in which the payments are clearly remuneration yet excludable from the regular rate.

With that said, “other similar payments” cannot be simply wages in another guise, as some lump-sum, formula-based cash payments are. When a payment is a wage supplement, even if not tied directly to employee performance or hours, it is still compensation for “hours of employment.”

Payments to employees are not excludable under the “other similar payments” clause merely because the payments are not specifically tied to an employee’s hours of work.<sup>79</sup> For

<sup>78</sup> See *Reich*, 57 F.3d at 578 (“The word ‘similar’ then refers to other payments that do not depend at all on when or how much work is performed.”); *Minizza*, 842 F.2d at 1462. (“[W]e interpret the phrase ‘other similar payments’ by reading each clause of section 207(e)(2) separately. The phrase ‘other similar payments . . . not made as compensation for hours of employment’ does not mean just other payments for idle hours or reimbursements, the two types of payments set forth in the two preceding clauses of the section, but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples.”) *But 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.”).

<sup>79</sup> See *Local 246 Utility Workers Union of Am. v. S. California Edison Co.*, 83 F.3d 292, 295 n.2 (9th Cir. 1996) (“Even if payments to employees are not measured by the number of hours spent at work, that fact alone does not qualify them for exclusion under 7(e)(2).”); *Featsent v. City of Youngstown*, 70 F.3d 900, 904 (6th Cir. 1995) (“7(e)(2) does not exclude every payment not measured by hours of employment from the regular rate.”); *Reich*, 57 F.3d

example, payments such as production bonuses,<sup>80</sup> and the cost of furnished board, lodging, or facilities,<sup>81</sup> which “though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services”<sup>82</sup> are not excludable under this provision. Payments that differ only in form from regular wages by, for instance, being paid in a monthly lump sum or as hardship premiums, are better characterized as wages or bonuses than as “other similar payments” excludable from the regular rate. The other similar payments clause cannot be interpreted so broadly as to “obliterate the qualifications and limitations” placed on excludable payments specifically addressed in section 7(e)’s various other sections, which could render such limits “superfluous.”<sup>83</sup>

The interpretation the Department states here has considerable support in the case law. The Third Circuit held in *Minizza v. Stone Container Corp.* that two lump sums paid to select employees to induce them to agree to a collective-bargaining agreement were excludable as an “other similar payment” because they were not compensation for hours worked or services rendered.<sup>84</sup> The court interpreted the clause to exclude “payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples.”<sup>85</sup> The court’s decision that these payments were not compensation for employment rested in part on the fact that the “eligibility requirements were not meant to serve as compensation for service, but rather to reduce the employer’s costs,” but also in part on the fact that “the eligibility terms themselves [for the lump sums] [did] not require specific service”—it did “not matter how many hours an employee worked during that period, nor how many hours he might work in the future.”<sup>86</sup>

The Seventh Circuit espoused a similar understanding in *Reich v. Interstate Brands Corp.*<sup>87</sup> The court held

at 577 (“We cannot read 7(e)(2) in isolation. . . . It is one among many exemptions, and a glance at a few of the others shows that 7(e)(2) cannot possibly exclude every payment that is not measured by the number of hours spent at work.”).

<sup>80</sup> See 29 CFR 778.211(c).

<sup>81</sup> See 29 CFR 778.116.

<sup>82</sup> 29 CFR 778.224(a).

<sup>83</sup> *Reich*, 57 F.3d at 578.

<sup>84</sup> *Minizza*, 842 F.2d 1456, 1462.

<sup>85</sup> *Id.* at 1461.

<sup>86</sup> *Id.* at 1460–61; see also *id.* at 1462 (“If the payments were made as compensation for hours worked or services provided, the payments would have been conditioned on a certain number of hours worked or on an amount of services provided.”).

<sup>87</sup> 57 F.3d 574.



that regular, planned \$12 payments to bakers who worked weeks without two consecutive days off could not be excluded from the regular rate under section 7(e)(2). The court reasoned that the payments were materially no different from a higher base rate to compensate the bakers for taking on an unpleasant schedule.<sup>88</sup> “Other similar payments” are different, wrote the court. “The word ‘similar’ . . . refers to other payments that do not depend at all on when or how much work is performed.”<sup>89</sup> Similarly, the Sixth Circuit has held that pay differentials based on employees’ education level, shift differentials, and hazardous pay, are compensation for services rendered, unlike payments that “are unrelated to [employees’] compensation for services and hours of service.”<sup>90</sup> Some circuit courts have interpreted the “other similar payments” to not exclude payments that are “compensation for work.”<sup>91</sup> When these courts use these or similar phrases to capture the idea that the regular rate includes payments tied to work performance or that function as a wage supplement, they are correct. But insofar as they equate “compensation for work” with “remuneration for employment,”<sup>92</sup> that is difficult to reconcile with the text of the FLSA. As explained above, the FLSA uses two different phrases, “remuneration for employment” and “compensation for hours of employment,” each of which should be given unique content. And just as importantly, the first clause of section 7(e)(2) excludes vacation and sick leave, which is clearly remunerative; “other similar payments” to them can be remunerative too.

The Department believes that its interpretation espoused here, and applied in some of the clarifications to the regulations proposed below, also promotes a clear yet flexible standard for employers and employees to order their affairs. Employers can understand the standard: Payments are “other similar payments” when they do not function as formulaic wage supplements and are not tied to hours worked, services rendered, job performance, credentials, longevity, or other criteria linked to the quality or quantity of the employee’s work, but are conditioned merely on one being an employee.

(Basic commonsense conditions, such as a reasonable waiting period for eligibility<sup>93</sup> or the requirement to repay benefits as a remedy for employee misconduct, are permitted.) The standard also clarifies that there is space for a variety of creative benefits offerings, and encourages their provision to wide groups of employees instead of reserving them only for FLSA-exempt employees.

Section 778.224 of the regulations addresses miscellaneous items that are excludable from an employee’s regular rate under the “other similar payments” clause of section 7(e)(2) because they are “not made as compensation for . . . hours of employment[.]”<sup>94</sup> Section 778.224(b) currently provides the following brief, nonexhaustive set of examples of “other similar payments” excludable from an employee’s regular rate: “(1) Sums paid to an employee for the rental of his truck or car; (2) Loans or advances made by the employer to the employee; [and] (3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.”<sup>95</sup> The Department added this set of examples to the part 778 regulations in 1950,<sup>96</sup> and has not substantively amended them since. The regulation makes clear that “it was not considered feasible” to provide an exhaustive list of excludable “other similar payments” given the “variety of miscellaneous payments [that] are paid by an employer to an employee under peculiar circumstances.”<sup>97</sup>

The Department continues to believe that providing a comprehensive list of all “other similar payments” excludable under section 7(e)(2)’s third clause is infeasible. The Department recognizes, however, that an updated list of examples would further help employers understand their legal obligations by addressing some of the innovative changes in compensation practices and workplace environments that have occurred over the last 69 years. Accordingly, the Department proposes clarifying in § 778.224(b) that the following items may be excluded from an employee’s regular rate under the “other similar payments” clause of

section 7(e)(2). Adding these clarifying examples may encourage employers to provide more of these types of benefits to their employees.

#### a. Specialist Treatment Provided Onsite

The Department proposes clarifying in § 778.224(b)(3) that employers may exclude from the regular rate the cost of providing onsite treatment from specialists such as chiropractors, massage therapists, personal trainers, counselors, Employment Assistance Programs, or physical therapists. Such specialist treatment resembles “on-the-job medical care,” which § 778.224(b)(3) already identifies as an excludable “convenience furnished to the employee.”<sup>98</sup> Employers that provide onsite specialist treatment do so for a variety of reasons, including to raise workplace morale and promote employee health. Such treatment does not constitute compensation for hours of employment under section 7(e)(2).<sup>99</sup>

#### b. Gym Access, Gym Memberships, and Fitness Classes

The Department proposes clarifying in § 778.224(b)(3) that the cost of providing employees with gym access, gym memberships, and fitness classes, whether onsite or offsite, is excludable from the regular rate. These fitness benefits resemble “recreational facilities,” which § 778.224(b)(3) already identifies as an excludable convenience provided to employees. According to one survey, a substantial number of employers provided fitness benefits.<sup>100</sup> Employers may provide such conveniences for many reasons, including to raise workplace morale and promote employee health. The Department proposes to clarify that providing gym benefits and fitness classes is not included in the regular rate as compensation for hours of employment.<sup>101</sup>

<sup>98</sup> 29 CFR 778.224(b)(3).

<sup>99</sup> This proposal is not intended to affect the circumstances under which receiving medical attention is considered to be hours worked. See 29 CFR 785.43.

<sup>100</sup> See Soc’y for Human Res. Mgmt., “2018 Employee Benefits: The Evolution of Benefits,” at 23 (June 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf>.

<sup>101</sup> In circumstances where maintaining a certain level of physical fitness is a requirement of the employee’s job, the cost to the employer of providing exercise opportunities is a facility “furnished primarily for the benefit or convenience of the employer,” as described in § 531.3(d). Facilities furnished for the employer’s benefit do not qualify as wages or remuneration for employment and thus need not be included in the regular rate.

<sup>93</sup> See *Minizza*, 842 F.2d at 1460 (“A review of the eligibility terms reflects a requirement only that a payee achieve the status of an active employee for a specified period of time prior to receipt. It does not matter how many hours an employee worked during that period, nor how many hours he might work in the future.”).

<sup>94</sup> 29 U.S.C. 207(e)(2).

<sup>95</sup> 29 CFR 778.224(b).

<sup>96</sup> See 15 FR 632 (1950), codified at 29 CFR 778.7(g).

<sup>97</sup> 29 CFR 778.224(a).

<sup>88</sup> See *id.* at 578–79.

<sup>89</sup> *Id.* at 578.

<sup>90</sup> *Featsent*, 70 F.3d at 904–06.

<sup>91</sup> See *e.g.*, *Flores*, 824 F.3d at 899.

<sup>92</sup> See *Acton*, 436 F.3d at 976 (“the language ‘not made as compensation for [the employee’s] hours of employment’ posited in § 207(e)(2) is but a mere re-articulation of the ‘remuneration for employment’ requirement set forth in the preambulatory language of § 207(e)’”).



### c. Wellness Programs

The Department proposes adding an example in § 778.224(b)(4) to clarify that employers may exclude the cost of providing certain health promotion and disease prevention activities, often known as wellness programs. Examples of some common wellness programs include health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals.<sup>102</sup> Wellness programs are often provided to employees enrolled in an employer-sponsored health insurance plan, but some employers offer wellness programs to employees regardless of their health insurance coverage.

Workplace wellness programs are similar to “on-the-job medical care” and “recreational facilities,” conveniences that the regulations already specify are excludable from an employee’s regular rate.<sup>103</sup> Employers may provide such programs to, for example, reduce health care costs, reduce health-related absenteeism, and improve employee health and morale. Such programs are not intended to constitute compensation for hours of employment.

### d. Employee Discounts on Retail Goods or Services

The Department proposes adding an example in § 778.224(b)(5) to confirm that discounts on retail goods and services may be excluded from the regular rate of pay as long as they are not tied to an employee’s hours worked or services rendered. According to one survey, many employers provide employees with an option to purchase these types of goods or services at a discounted price relative to their full retail value.<sup>104</sup> Such discounts are commonly available to employees regardless of their quality or quantity of work, and it is solely the employees’ choice whether to purchase anything under the discount. When these

discounts are available to employees regardless of their hours worked or services rendered, and are not tied to any duties performed, they qualify as “other similar payments” under section 7(e)(2).<sup>105</sup> Alternatively, employee discounts could constitute “payments in the nature of gifts” under section 7(e)(1), where they are not based on the number of hours worked and are not in the nature of compensation.<sup>106</sup>

More than 50 years ago, the Department stated that such employee discounts are not included in the regular rate of pay. In a 1962 opinion letter, the Department found that the value of “concessions granted to employees . . . on charges for telephone service” was “not part of wages includible in the regular rate of pay”—in part because “[s]uch concessions appear to be similar to discounts on merchandise offered by many retail establishments to their employees which [the Department] does not regard as wages.”<sup>107</sup> Discounts like these are not fungible cash but merely a lower price on the employer’s offerings. They appeal only to the employees who want to use them and are limited to the offered selection of goods or services. Employees must expend their own funds to avail themselves of the discounts. The discounts are presumably limited in their value, since employers likely do not offer discounts that allow their employees to arbitrage large quantities of goods or otherwise materially harm the business of their employer. And employers may also place conditions on the discounts to protect their interests by, for instance, requiring that discounted restaurant meals be eaten on the premises to prevent abuse.<sup>108</sup> These discounts are not intended to be compensation for hours of employment.

This proposal, therefore, would confirm the excludability of employee discounts on retail goods and services from the regular rate of pay, provided they are not tied to an employee’s hours worked. Section 7(e)(2) provides that only payments “not made as compensation for [the employee’s]

hours of employment” are excludable from the regular rate of pay.<sup>109</sup>

### e. Tuition and Other Benefits

The Department is proposing to add an example in § 778.224(b)(5) clarifying that certain tuition programs offered by employers may be excludable from the regular rate. Some employers today offer discounts for online courses, continuing-education programs, modest tuition-reimbursement programs, programs for repaying educational debt, and the like. Such tuition programs have been the subject of litigation,<sup>110</sup> and the Department believes more clarity in this area would be desirable. As long as tuition programs are available to employees regardless of their hours worked or services rendered, and are instead contingent merely on one’s being an employee, the Department believes they would qualify as “other similar payments” under section 7(e)(2).<sup>111</sup> The Department also believes that at least some tuition programs offered by employers may be excludable from the regular rate under section 7(e)(1) as “sums paid as gifts.” Finally, the Department is considering whether certain tuition programs may also be excludable under section 7(e)(4) if provided pursuant to a bona fide plan, and, as stated more fully below, seeks comment specifically on the nature of tuition benefits provided by employers.

The Department believes that tuition programs, in the main, function as the kinds of payments excludable under section 7(e)(2). Unlike wage supplements, these tuition programs are not fungible, any-purpose cash, but must be directed toward particular educational and training opportunities. These programs are also optional, appeal only to those employees who want to use them, and are directed toward educational and training pursuits outside the employer’s workplace. Such tuition programs do not meet the basic necessities of life, such as food, clothing, or shelter. While the educational benefit may result in employees better able to accomplish the employer’s objectives, these programs are not directly connected to the

<sup>102</sup> See, e.g., Soc’y for Human Res. Mgmt., “How to Establish and Design a Wellness Program,” <https://www.shrm.org/resourcesandtools/hr-topics/pages/howtoestablishanddesignawellnessprogram.asp> (last accessed Jan. 2, 2019).

<sup>103</sup> 29 CFR 778.224(b)(3).

<sup>104</sup> See Soc’y for Human Res. Mgmt., “2018 Employee Benefits: The Evolution of Benefits,” at 31 (June 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf> (from 2014 to 2018, employers offering an employee discount on company services ranged from 31% to 34%, and employers offering employer-sponsored personal shopping (e.g., retail discounts ranged from 11% to 19%).

<sup>105</sup> See *Reich*, 57 F.3d at 578 (payments under Section 7(e)(2) are those “that do not depend at all on when or how much work is performed”); *Minizza*, 842 F.2d at 1462 (payments under Section 7(e)(2) all “share the essential characteristic . . . of not being compensation for hours worked or services rendered”).

<sup>106</sup> See, e.g., *Lemus v. Denny’s Inc.*, No. 10cv2061–CAB, 2015 WL 13740136, at \*11 (S.D. Cal. July 31, 2015); *Rau v. Darling’s Drug Store, Inc.*, 388 F. Supp. 877, 879 (W.D. Pa. 1975).

<sup>107</sup> Opinion Letter, 1962 DOLWH LEXIS 217 (Oct. 31, 1962).

<sup>108</sup> See *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 954 (2018).

<sup>109</sup> 29 U.S.C. 207(e)(2); see also 29 CFR 778.224(a).

<sup>110</sup> See *White v. Publix Super Mkts., Inc.*, No. 3:14–cv–1189, 2015 WL 4949837 (M.D. Tenn. Aug. 19, 2015); *Adoma v. Univ. of Phoenix, Inc.*, 779 F. Supp. 2d 1126 (E.D. Cal. 2011).

<sup>111</sup> See *Reich*, 57 F.3d at 578 (payments under Section 7(e)(2) are those “that do not depend at all on when or how much work is performed”); *Minizza*, 842 F.2d at 1462 (payments under Section 7(e)(2) all “share the essential characteristic . . . of not being compensation for hours worked or services rendered”).

employees' day-to-day duties for the employer.

Tuition programs could also potentially be "sums paid as gifts," depending on their nature. 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." Because the first clause, "sums paid as gifts," is separated from the second clause by a semi-colon, the first clause must address a separate set of excludable benefits from that in the second clause. There may be some overlap between "sums paid as gifts" and "payments in the nature of gifts made at Christmas time, on special occasions, or as a reward for services," but the categories are not coextensive.

Specifically, sums under the first clause are those "paid as gifts"—that is, paid with the express understanding that they are a gift—as opposed to sums under the second clause, which are not expressly given as a gift but are nevertheless "in the nature of gifts" because of their timing. The second clause in 7(e)(1) therefore expands the universe of excludable gifts from sums that are obviously "paid as gifts" to include those that are also "in the nature of gifts," but limits the latter category to those made at Christmas time, on special occasions, or as rewards for service. In either case, however, the payments must not be measured by or dependent on hours worked, production, or efficiency.<sup>112</sup>

Whether the Department ultimately excludes tuition programs from the regular rate in the final rule, and whether it does so under section 7(e)(1), (2), (4), or all or some of them, this proposed clarification excluding tuition programs from the regular rate would not affect the Department's regulations at § 531.32 referencing "meals, dormitory rooms, and tuition furnished by a college to its student employees" as an "other facility."<sup>113</sup> The college environment is a unique context in which learning, work, and daily living are inextricably connected, tightly knit, and often all provided by the same entity, that being the college.

The Department seeks comment on the following tuition-related questions: Are there other aspects of the FLSA, the Department's regulations, or parties' interactions with the Department that affect employers' and employees' conduct and that warrant consideration

when it comes to making clear that tuition programs may be excluded from the regular rate? Do employers and employees feel that express regulatory clarification on excluding tuition programs from the regular rate would be helpful? Are employers hesitant to offer employees a tuition program because of concerns about legal compliance, litigation, or other issues related to the regular rate? What sorts of tuition programs are employers offering, and why are employers doing so? How do these tuition programs work? Are employers using bona fide third-party plans for tuition programs? What terms and conditions are employers setting on tuition programs? How are employers and employees benefiting from these tuition programs?

The Department acknowledges that the above examples proposed for express exclusion from the regular rate are just a few of many types of compensation that are not compensation for work and therefore excludable under section 7(e)(2). The Department welcomes suggestions for any additional examples that the Department should add to § 778.224 to illustrate other similar payments that are not compensation for work. The Department also welcomes suggestions about whether any of the above examples are excludable under other provisions of section 7(e). Finally, the Department welcomes suggestions about whether other sections in Part 778 should be updated to clarify that any of the above-referenced compensation is excludable from the regular rate under these or any other principles under section 7(e).

##### 5. Show-Up Pay, Call-Back Pay, and Payments Similar to Call-Back Pay

Section 778.220 excludes from the regular rate "show-up" or "reporting" pay, which is defined as compensation for a specified minimum number of hours at the applicable straight-time or overtime rate on "infrequent or sporadic" occasions in which an employee is not provided with the expected amount of work after reporting as scheduled.<sup>114</sup> Payments for hours actually worked are included in the regular rate; amounts beyond what the employee would receive for the hours worked are excludable.

Section 778.221 addresses "call-back" pay. Call-back pay is additional compensation for calling an employee back to work without prearrangement to perform extra work after the employee's scheduled hours have ended. It is typically paid for a specified number of hours at the applicable straight-time or

overtime rate.<sup>115</sup> Call-back pay is treated the same as show-up pay under § 778.220.

Section 778.222 addresses "other payments similar to 'call-back' pay," which are "extra payments made to employees on infrequent and sporadic occasions, for failure to give an employee sufficient notice to report for work on regular days of rest or outside of regular hours," and "extra payments made on infrequent and sporadic occasions solely because an employee is called back to work before the expiration of a specified number of hours between shifts or tours, sometimes referred to as a 'rest period.'" <sup>116</sup> Such time is treated the same as show-up pay under § 778.220 and call-back pay under § 778.221. Sections 778.220, 778.221, and 778.222 require that the payments be "infrequent and sporadic" to be excludable from the regular rate.

As referenced above, show-up or reporting pay is paid when the employee is scheduled to work but the employer fails to provide the expected amount of work.<sup>117</sup> As such, this type of payment is excludable under the first clause of section 7(e)(2), which excludes payments made for "occasional periods" when no work is performed due to the "failure of the employer to provide sufficient work."<sup>118</sup> Section 778.220 accordingly limits exclusion of such payments to when they are made "on infrequent and sporadic occasions."<sup>119</sup>

Call-back pay and similar payments, in contrast, 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 unanticipated work.<sup>120</sup> As such, these payments do not fall under the first clause of section 7(e)(2). The Department has stated that call-back pay described in § 778.221 and the other payments described in § 778.222 instead fall under the "other similar payments" clause of section 7(e)(2)—which Congress did not restrict to "occasional periods" (unlike the first

<sup>115</sup> See 29 CFR 778.221(a).

<sup>116</sup> 29 CFR 778.222.

<sup>117</sup> Since 1940, the Department's position has been that show-up pay that exceeded pay due for hours worked was meant to compensate the employee for the consumption of his time and discourage employers from calling in employees for only a fraction of a day. Interpretive Bulletin No. 4 ¶ 70(8).

<sup>118</sup> 29 U.S.C. 207(e).

<sup>119</sup> 29 CFR 778.220.

<sup>120</sup> 29 CFR 778.221–.222.

<sup>112</sup> 29 CFR 778.212.

<sup>113</sup> 29 CFR 531.32(a).

<sup>114</sup> See 29 CFR 778.220.

clause of section 7(e)(2)).<sup>121</sup> The FLSA does not require that payments under §§ 778.221 and 778.222 be only “occasional” to be excluded from the regular rate. Accordingly, the Department proposes removing the regulatory restriction that requires the payments discussed in §§ 778.221 and 778.222 to be “infrequent and sporadic.”<sup>122</sup>

Although the Department proposes removing the words “infrequent and sporadic” from §§ 778.221 and 778.222, the Department still believes that payments excluded under these provisions should be “without prearrangement.”<sup>123</sup> For example, if an employer retailer called in an employee to help clean up the store for 3 hours after an unexpected roof leak, and then again 3 weeks later for 2 hours to cover for a coworker who left work for a family emergency, payments for those instances would be without prearrangement and any call-back pay that exceeded the amount the employee would receive for the hours worked would be excludable. However, when payments under §§ 778.221 and 778.222 are so regular that they, in effect, are prearranged, they are compensation for work. For example, if an employer restaurant called in an employee server for two hours of supposedly emergency help during the busiest part of Saturday evening for 6 weeks out of 2 months in a row, that would be essentially prearranged and all of the call-back pay would be included in the regular rate. The Department therefore proposes to clarify that such payments under §§ 778.221 (“call-back” pay) and 778.222 (other payments similar to “call-back” pay) may be compensation for employment and therefore included in the regular rate. The Department further proposes to clarify that the regulations apply regardless of whether the compensation is pursuant to established practice, an employment agreement, or state or local law.

The Department notes that certain states and localities regulate scheduling

<sup>121</sup> See Opinion Letter FLSA-574 (Nov. 18, 1964) (“turn around” payments excludable under third clause); Opinion Letter FLSA-933 (July 20, 1964) (payment for failure to provide rest period excludable under third clause); Opinion Letter (Jan. 1, 1964) (stating that extra payments “made for recall to work outside of regular working hours and for shortened ‘rest periods’ between shifts . . . may be excludable from the regular rate under the third clause” of section 7(e)(2)).

<sup>122</sup> The Department is also proposing to update the reference to § 778.222 that appears in § 778.203(d).

<sup>123</sup> 29 CFR 778.221; see also *Stewart v. San Luis Ambulance Inc.*, No. CV 13-09458-BRO (SSX), 2015 WL 13684710, at \*7 (C.D. Cal. Oct. 6, 2015) (call-back payments must be “without prearrangement”).

practices and impose a monetary penalty on employers (which is paid to employees) in situations analogous to those discussed in §§ 778.220, 778.221, and 778.222.<sup>124</sup> These state and local laws include certain penalties that potentially affect regular rate calculations. This includes, for example: (1) “Reporting pay” for employees who are unable to work their scheduled hours because the employer subtracted hours from a regular shift before or after the employee reports for duty;<sup>125</sup> (2) “clopening” or “right to rest” pay for employees who work the end of one day’s shift and the start of the next day’s shift with fewer than 10 or 11 hours between the shifts, or who work during a rest period;<sup>126</sup> (3) “predictability pay” for employees who do not receive the requisite notice of a schedule change;<sup>127</sup> and (4) “on-call pay” for employees with a scheduled on-call shift but who are not called in to work.<sup>128</sup> In light of these recent trends in state and local scheduling laws, the Department proposes to clarify the treatment of these penalty payments under the regulations.

Reporting pay pursuant to state or local scheduling laws would be treated like show-up pay under § 778.220 because it is payment for an employer’s failure to provide expected work.<sup>129</sup> Compensation for any hours actually worked are included in the regular rate; compensation beyond that may be excluded from the regular rate as payment to compensate the employee for time spent reporting to work and to prevent loss of pay from the employer’s failure to provide expected work during regular hours.

“Clopening” or “right to rest” pay under state or local scheduling laws

<sup>124</sup> A number of state and local jurisdictions have introduced laws regulating scheduling practices in recent legislative sessions. See, e.g., H.B. 2467, 53rd Leg., 2d Reg. Sess. (Ariz. 2018); S.B. 321, 2018 Reg. Sess. (Conn. 2018); H.B. 5046, 100th Gen. Assemb. (Ill. 2018); S.B. 1000, 190th Leg. (Mass. 2017-18); H.B. 1614, S.B. 1116, 2017 Reg. Sess. (Md. 2017); S109, 218th Leg. (N.J. 2018); H.B. 741, 2015 Sess. (N.C. 2015); H.B. 7515, 7634, Jan. Sess. A.D. 2016 (R.I. 2016); Chi., Ill., Mun. Ordinance O2017-4947 (introduced June 28, 2017); Employee Scheduling (Call-in Pay), N.Y. St. Reg. LAB. 47-17-00011-P (proposed Nov. 11, 2017); S.B. 828, 37rd Leg. Assemb., 2017 Reg. Sess. (Or. 2017).

<sup>125</sup> See, e.g., Seattle, Wash., Mun. Code 14.22.050 (2017).

<sup>126</sup> See, e.g., N.Y.C., Admin. Code 20-1231 (2017); Seattle, Wash., Mun. Code 14.22.035 (2017); Emeryville, Cal. Mun. Code 5-39.06 (2017).

<sup>127</sup> See, e.g., S.F., Cal., Police Code art. 33G (2015); Emeryville, Cal., Mun. Code 5-39.01 (2017); N.Y.C., N.Y., Admin. Code 20-1201 (2017); Seattle, Wash., Mun. Code 14.22.050 (2017).

<sup>128</sup> See, e.g., S.F., Cal., Police Code art. 3300G.4(d) (2015); Seattle, Wash., Mun. Code 14.22.050. (2017).

<sup>129</sup> See, e.g., Seattle, Wash., Mun. Code 14.22.050 (2017).

would be analyzed under § 778.222 and would therefore generally be excludable from the regular rate as long as the payments are not regular. The Department would also analyze “predictability pay” penalties under § 778.222, as they are analogous to payments for failure to give an employee sufficient notice to report for work outside of his or her regular work schedule. As with reporting and call-back pay, compensation “over and above the employee’s earnings for the hours actually worked at his applicable rate (straight-time or overtime, as the case may be), is considered as a payment that is not made for hours worked,” and is therefore excludable from the regular rate.<sup>130</sup>

Finally, the Department proposes to analyze “on-call pay” scheduling penalties under § 778.223, which is entitled “[p]ay for non-productive hours distinguished.”<sup>131</sup> Under this regulation, the Department may require payment for “on-call” time to be included in the regular rate when such payments are “compensation for performing a duty involved in the employee’s job.”<sup>132</sup>

#### B. Discretionary Bonuses Under Section 7(e)(3)

Section 7(e)(3) of the FLSA excludes from the regular rate “sums paid in recognition of services performed” 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.”<sup>133</sup> Section 778.211 of the regulations implements this exclusion and provides additional details concerning the types of bonuses that qualify for this exclusion. The Department proposes to elaborate on the types of bonuses that are and those that are not discretionary in § 778.211 to add clarity for employers and employees.

The Department proposes modifying language in § 778.211(c) and adding a new paragraph (d) to clarify that, under longstanding principles, neither the label assigned to a bonus nor the reason it was paid conclusively determine whether it is discretionary under section 7(e)(3).<sup>134</sup> While attendance,

<sup>130</sup> 29 CFR 778.222.

<sup>131</sup> *Id.* 778.223.

<sup>132</sup> *Id.*

<sup>133</sup> 29 U.S.C. 207(e)(3).

<sup>134</sup> See 29 U.S.C. 207(e)(3); *Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1462 n.9 (3d Cir. 1988) (observing that “what the payments are termed is not important”); *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430 (1945) (“To discover [the

production, work quality, and longevity bonuses, as those terms are commonly used, are usually paid pursuant to a prior contract, agreement, or promise causing the employee to expect such payments regularly, and therefore are non-discretionary bonuses that must be included in the regular rate, there may be instances when a bonus that is labelled as one of these types of bonuses is not in fact promised in advance and instead the employer retains discretion as to the fact and amount of the bonus until at or near the end of the period to which the bonus corresponds. The Department proposes modifying the language in § 778.211(c) and adding a new paragraph (d) to make clear that the label assigned to a bonus is not determinative. Instead, the terms of the statute and the facts specific to the bonus at issue determine whether a bonus is an excludable discretionary bonus. Under section 7(e)(3), a bonus is discretionary and therefore excludable, regardless of what it is labelled or called, if both the fact that the bonus is to be paid and the amount are determined at the sole discretion of the employer at or near the end of the period to which the bonus corresponds and the bonus is not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.

Additionally, the Department proposes to include in new section § 778.211(d) examples of bonuses that may be discretionary to supplement the examples of bonuses that commonly are non-discretionary discussed in § 778.211(c). Such bonuses may include, for example, employee-of-the-month bonuses, bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming stressful or difficult challenges, and other similar bonuses for which the fact and amount of payment is in the sole discretion of the employer until at or near the end of the periods to which the bonuses correspond and that are not paid “pursuant to any prior contract, agreement, or promise causing the employee to expect such payments

regular] rate . . . we look not to contract nomenclature but to the actual payments.”); *Donohue v. Francis Servs., Inc.*, No. Civ. A.04–170, 2005 WL 1155860, at \*1 (E.D. La. 2005) (denying an employer’s summary judgment motion over “amounts described as ‘discretionary bonuses’”). This principle comports with longstanding interpretation of other FLSA provisions; see, e.g., 29 CFR 541.2 (cautioning that “[a] job title alone is insufficient to establish the exempt status of an employee” under Section 13(a)(1) of the Act).

regularly.”<sup>135</sup> The Department recognizes that employers offer many differing types of bonuses to their employees, and that compensation practices will continue to evolve going forward. The Department therefore welcomes comment from the public about other common types of bonuses that the Department should address in § 778.211.

#### C. Excludable Benefits Under Section 7(e)(4)

FLSA section 7(e)(4) 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.”<sup>136</sup> Section 778.215(a)(2) explains that, among other things, that “[th]e primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.” 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 on account of “accident, unemployment, and legal services” to § 778.215(a)(2). The addition of “accident” derives directly from section 7(e)(4), which expressly uses the term (even though the current regulations do not). The addition of benefits for unemployment and legal services reflects the Department’s conclusion that, although employers may not have commonly offered these benefits when Congress enacted the FLSA in 1938,<sup>137</sup> they are “similar benefits” to those expressly listed in section 7(e)(4).

First, like other specifically enumerated types of benefit plans under section 7(e)(4), these benefit plans typically provide monetary benefits that are “specified or definitely determinable on an actuarial basis.”<sup>138</sup> Second,

<sup>135</sup> See 29 U.S.C. 207(e)(2); see also *Alanzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1133 (C.D. Cal. 2011) (holding that bonuses to employees who “made unique or extraordinary efforts and were not awarded according to pre-established criteria or pre-established rates” were excludable) (internal quotation marks omitted); Opinion Letter FLSA2008–12, 2008 WL 5483051 (Dec. 1, 2008) (bonuses paid without prior promise or agreement to 911 dispatchers in recognition of high stress level of their job are excludable discretionary bonuses). See 29 U.S.C. 207(e)(2).

<sup>136</sup> 29 U.S.C. 207(e)(4).

<sup>137</sup> See Bureau of Labor Statistics, An Overview of Employee Benefits 20 (2005), <https://www.bls.gov/careeroutlook/2005/summer/art02.pdf>.

<sup>138</sup> § 778.215(a)(3)(i).

benefit plans for unemployment or legal services protect employees from events that are rare but statistically predictable and that could otherwise cause significant financial hardship, just as is the case with life insurance, accident insurance, and the catastrophic-protection provisions of life insurance. Third, benefit plans for unemployment or legal services offer financial help when an employee’s earnings are (unemployment) or may be (legal services) materially affected, as is the case with the other benefit plans. Employees who retire, reach an older age, or suffer an accident or health issue may be unable to work, or have their ability to work affected.

The Department notes that other characteristics of the various types of plans excludable under section 7(e)(4) may differ, but they still remain “similar” for purposes of the statute. Under the plain text of the statute, excludable plans need not be related to physical health. Retirement benefits are excludable, for instance, even though an employee may choose to retire for reasons wholly unrelated to health. And excludable plans also need not be limited to benefits for rare or even uncommon events. Health insurance, for instance, often pays for everyday medical expenses, and retirement is an event typically planned years in advance. Moreover, the benefits listed in the statute may be subject to various forms of payment. Retirement benefits are often a recurring payment, while accident and health benefits can fluctuate, and a life insurance death benefit can be paid in a lump sum. Therefore, insofar as the proposed additional examples differ among themselves or among other expressly listed benefits by not all being related to physical health, or not all being for rare events, or not all being paid out the same way, those differences do not make the proposed examples not “similar” under the statute. Indeed, such differences are encompassed in the statutory examples themselves.

Of course, these proposed examples, like the examples already provided in regulation and statute, would have to satisfy the other various requirements outlined in § 778.215.<sup>139</sup> These additions would simply help clarify that such plans are not categorically barred from qualifying for exclusion under section 7(e)(4). The Department welcomes comments and data on the prevalence and nature of these types of

<sup>139</sup> Section 778.215(a) contains five conditions all of which must be met in order for employer contributions to be excluded from the regular rate under 7(e)(4). 29 CFR 778.215(a)(1)–(5).

programs and on whether there are other similar benefit plans that should be expressly included as examples.

*D. Overtime Premiums Under Sections 7(e)(5)–(7)*

FLSA sections 7(e)(5), (6), and (7) permit employers to exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods.<sup>140</sup> More specifically, section 7(e)(5) permits exclusion of premiums for “hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee [under section 7(a)] or in excess of the employee’s normal working hours or regular working hours, as the case may be[.]”<sup>141</sup> Section 7(e)(6) permits exclusion of premiums “for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days[.]”<sup>142</sup> Section 7(e)(7) permits exclusion of premiums “in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection [7(a)], where such 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.”<sup>143</sup> Additionally, section 7(h)(2) provides that extra compensation of the types described in sections 7(e)(5), (6), and (7) is creditable toward overtime compensation owed under section 7(a).<sup>144</sup> These are the only types of compensation excludable from the regular rate that are also creditable toward overtime compensation.<sup>145</sup>

Sections 778.202, 778.203, 778.205, and 778.207 explain the requirements for excluding from the regular rate the overtime premiums described in sections 7(e)(5) and (6).<sup>146</sup> Sections 778.202 and 778.202(e) refer to extra premium payments paid pursuant to

contracts.<sup>147</sup> Similarly, § 778.205 uses an example of an extra premium payment paid pursuant to an employment “agreement,”<sup>148</sup> and § 778.207(a) refers to “contract premium rates[.]”<sup>149</sup>

The Department proposes amending §§ 778.202 and 778.205 to remove references to employment agreements and contracts in those sections to eliminate any confusion that the overtime premiums described in sections 7(e)(5) and (6) may be excluded only under written contracts or agreements. These regulatory clarifications are consistent with sections 7(e)(5) and (6) of the FLSA, neither of which requires that the overtime premiums be paid pursuant to a formal employment contract or collective bargaining agreement. Those statutory exclusions contrast with section 7(e)(7), which explicitly requires “an employment contract or collective-bargaining agreement” to exclude premiums “for work outside of the hours established in good faith by the contract or work agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek[.]”<sup>150</sup> Exclusion of premium payments under sections 7(e)(5) and (6) turns on deviation from the employee’s normal work schedule. The removal of the word “contract” from the regulations does not change the fact that, while there need not be a formal contract or agreement under sections 7(e)(5) or (6), there must be a discernable schedule of hours and days worked from which the excess or nonregular hours for which the overtime premiums are paid are distinguishable.<sup>151</sup> Relatedly, the Department proposes to amend § 778.207 to refer to the “premium payments” instead of “contract premium rates.” This change is consistent with the description of the overtime premiums found in § 778.201 and removes any implication that all of the overtime premium payments must be paid pursuant to a formal contract.

While the regulations at §§ 778.202, 778.205, and 778.207 have, since 1950, referred to employment contracts and agreements when describing the types of overtime premiums excludable under

sections 7(e)(5) and (6),<sup>152</sup> the Department has not interpreted the use of the words “contract” or “agreement” to limit excludable overtime premium payments to only those paid pursuant to a formal contract or collective bargaining agreement.<sup>153</sup> The Department has historically evaluated the actual practice of the parties to determine if extra payments are true overtime premiums that are excludable from the regular rate.<sup>154</sup> In the initial publication of part 778 in 1948, for example, the Department emphasized the primacy of “actual practice” over any contractual terms when assessing whether extra payments were true overtime premiums that could be excluded from the regular rate.<sup>155</sup>

Consistent with the Department’s practice, most courts have not required employers using the exclusions in sections 7(e)(5) and (6) to establish the existence of any formal contract or agreement with employees.<sup>156</sup> Even apart from sections 7(e)(5) and (6), courts interpreting the FLSA do not generally require that contracts be in writing (unless specifically required by statute), and they likewise emphasize the importance of the employer’s actual

<sup>152</sup> See 15 FR 623 (the precursor to §§ 778.202, .205, and .207 was located in § 778.5 in the 1950 version of the regulations).

<sup>153</sup> The FOH sections discussing sections 7(e)(5) and (6) overtime premiums make no reference to the need for a contract, and instead instructs investigators to look to the employee’s normal hours or days of work “as established by agreement or practice.” FOH 32e01; see also *id.* 32e04 (describing criteria for 207(e)(6) overtime premium for work on special days without any reference to a requirement that the compensation be paid pursuant to contract).

<sup>154</sup> See 13 FR 4534 (Aug. 5, 1948) (codified at 29 CFR 778.2 (1948)).

<sup>155</sup> *Id.* Those regulations stated that “[t]he mere fact that a contract calls for premium payments for work on Saturdays, Sundays, holidays or at night would not necessarily prove that the higher rate is [a non-excludable shift differential] paid merely because of undesirable working hours if, as a matter of fact, the actual practice of the parties shows that the payments are made because the employees have previously worked a specified number of hours or days, according to a bona fide standard.” 29 CFR 778.2 (1948).

<sup>156</sup> See *Fulmer v. City of St. Albans, W. Va.*, 125 Fed. App’x 459, 460 (4th Cir. Jan. 7, 2005) (holding that city properly excluded overtime premiums from regular rate under 207(e)(5) even though the premiums were not included in employment contract and were mentioned only during the employment interview); *Hesseltine v. Goodyear Tire & Rubber Co.*, 391 F. Supp. 2d 509, 522 (E.D. Tex. 2005) (“If an employer voluntarily pays an employee a premium rate contingent upon his working more than eight hours in one day, then such payment may be excluded from the employee’s regular rate and credited toward unpaid overtime.”); *Laboy v. Alex Displays, Inc.*, No. 02 C 8721, 2003 WL 21209854, at \*4 (N.D. Ill. May 21, 2003) (“The court need not determine whether the parties had an agreement for purposes of [section] 7(e)(7) because the payments must be excluded from the regular rate under [section] 7(e)(5).”).

<sup>140</sup> *Id.* 207(e)(5)–(7).

<sup>141</sup> *Id.* 207(e)(5).

<sup>142</sup> *Id.* 207(e)(6).

<sup>143</sup> *Id.* 207(e)(7).

<sup>144</sup> See *id.* 207(h)(2).

<sup>145</sup> See 29 CFR 778.201(c).

<sup>146</sup> See *id.* 778.202, .203, .205, .207.

<sup>147</sup> See *id.* 778.202(a), (b), (e).

<sup>148</sup> *Id.* 778.205.

<sup>149</sup> *Id.* 778.207(a).

<sup>150</sup> 29 U.S.C. 207(e)(7).

<sup>151</sup> Section 7(e)(5) allows exclusion of premiums for hours “in excess of the employee’s normal working hours or regular working hours” and section 7(e)(6) permits exclusion of premiums for work on regular days of rest or on the sixth or seventh day of the workweek. Thus, exclusion under these provisions requires a discernable schedule.

practices in determining whether a pay practice complies with the FLSA.<sup>157</sup>

The Department proposes to clarify these regulations to eliminate unnecessary confusion concerning the excludability of payments under sections 7(e)(5) and (6).<sup>158</sup> These proposed changes would be limited to the regulatory sections discussed in §§ 778.202, 778.205, and 778.207 and are not intended to affect the Department's longstanding interpretation in other contexts that a required "contract" may consist of an oral agreement.<sup>159</sup>

#### E. Clarification That Examples in Part 778 Are Not Exclusive

The Department recognizes that compensation practices can vary significantly and will continue to evolve. In general, the FLSA does not restrict the forms of "remuneration" that an employer may pay—which may include an hourly rate, salary, commission, piece rate, a combination thereof, or any other method—as long as the regular rate is equal to at least the applicable minimum wage and non-exempt employees are paid any overtime owed at one and one-half

times the regular rate. While the eight categories of excludable payments enumerated in section 7(e)(1)–(8) are exhaustive,<sup>160</sup> the Department proposes to confirm in § 778.1 that, unless otherwise indicated, part 778 does not contain an exhaustive list of permissible or impermissible compensation practices. Rather, it provides examples of regular rate and overtime calculations that, by their terms, may or may not comply with the FLSA, and the types of compensation excludable from regular rate calculations under section 7(e). Because it is impossible to address all the various compensation and benefits arrangements that may exist between employers and employees, both now and in the future, the Department proposes to specify in § 778.1 that the examples set forth in part 778 of the types of payments that are excludable under section 7(e)(1)–(8) are not exhaustive; there may be other types of payments not discussed or used as examples in part 778 that nonetheless qualify as excludable payments under section 7(e)(1)–(8).

#### F. Basic Rate Calculations Under Section 7(g)(3)

Section 7(g) of the FLSA identifies three circumstances in which an employer may calculate overtime compensation using a basic rate rather than the regular rate, provided that the basic rate is established by an agreement or understanding between the employer and employee, reached before the performance of the work.<sup>161</sup> The third of these, identified in section 7(g)(3), allows for the establishment of a basic rate of pay when the rate is "authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time[.]"<sup>162</sup> Part 548 addresses the requirements for using such basic rates to compute overtime pay under section 7(g)(3).<sup>163</sup>

Section 548.2 provides ten requirements for using a basic rate when calculating overtime compensation.<sup>164</sup> Section 548.3 discusses six different authorized basic rates that may be used if the criteria in § 548.2 are met.<sup>165</sup> Section 548.300 explains that these basic rates "have been found in use in industry and the Administrator has determined that they are substantially equivalent to the straight-time average hourly earnings of the employee over a representative period of time."<sup>166</sup> As relevant to this proposed rulemaking, § 548.3 authorizes a basic rate that excludes "additional payments in cash or in kind which, if included in the computation of overtime under the Act, would not increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks . . . in the period for which such additional payments are made."<sup>167</sup> Section 548.305(b) explains that, under § 548.3(e), upon agreement or understanding between an employer and employee, the basic rate may exclude from the computation of overtime "certain incidental payments which have a trivial effect on the overtime compensation due."<sup>168</sup> This section provides a nonexhaustive list of examples of payments that may be excluded, so long as the payments would not increase an employee's total compensation in any workweek by more than \$0.50, including "modest housing," "bonuses or prizes of various sorts," and compensation "for soliciting or obtaining new business."<sup>169</sup> It also provides examples with specific amounts of additional payments to illustrate the application of § 548.3(e).<sup>170</sup> The \$0.50 amount is also referenced in § 548.400(b). The Department last updated these regulations more than 50 years ago, in 1966.<sup>171</sup>

The Department proposes to update the \$0.50 amount in §§ 548.3, 548.305, and 548.400. Rather than provide a specific dollar or cent amount, however, the Department proposes to replace the \$0.50 language in these regulations with "40 percent of the applicable hourly minimum wage under section 6(a) of the Act." Notably, this is the same methodology that the Department used in the past to update the threshold. In 1955, the Department set the threshold

<sup>157</sup> See *Bay Ridge*, 334 U.S. at 464 ("As the regular rate cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract."); *Singer v. City of Waco, Tex.*, 324 F.3d 813, 824 (5th Cir. 2003) (same); see also *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204 (1947) ("[I]n testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do.") (citing *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424–25 (1945) ("Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts.")).

<sup>158</sup> Although most courts do not require an employment contract before applying the overtime premium credits found in sections 7(e)(5) or (6), there is evidence that the regulations have created some confusion. See, e.g., *Scott v. City of New York*, 629 F. Supp. 2d 266, 269–70 (S.D.N.Y. 2009) ("The FLSA credits only three categories of contractual compensation towards overtime compensation mandated by the Act: premium pay for working more than a contractually-established number of hours day or week, premium pay at a rate of time and one-half for working on weekends and holidays, and premium pay at a rate of time and one-half for working outside of ordinary hours, such as a night shift.") (emphasis in original); *Jarmon v. Vinson Guard Servs., Inc.*, No. 2:08-cv-2106-VEH, 2010 WL 11507029, at \*14 (N.D. Ala. July 13, 2010) ("However, because there is no evidence of a collective bargaining agreement or an employment contract in this case, [section] 207(e)(5) is not applicable."). Moreover, the language of the regulations may cause confusion for employers who are less familiar with WHD's practices or the relevant case law.

<sup>159</sup> See 29 CFR 778.204 ("[A]n employment contract for purposes of section 7(e)(7) may be either written or oral.").

<sup>160</sup> See, e.g., *O'Brien v. Town of Agawam*, 350 F.3d 279, 294 (1st Cir. 2003); *Caraballo v. City of Chicago*, 969 F. Supp. 2d 1008, 1015 (N.D. Ill. 2013); see also 778.200(c).

<sup>161</sup> See 29 U.S.C. 207(g).

<sup>162</sup> *Id.* 207(g)(3). By contrast, section 7(g)(1) allows for a basic rate to be established for employees employed at piece rates, and section 7(g)(2) allows for a basic rate to be established for employees performing two or more kinds of work for which different hourly or piece rates apply. *Id.* 207(g)(1)–(2). Only the basic rate provided by section 7(g)(1) is limited to employees paid on a piece rate basis. The Department proposes to clarify the cross reference in § 548.1 to the regulations for sections 7(g)(1) and (2), which are at 29 CFR 778.415–421.

<sup>163</sup> See 29 CFR 548.1; see also *id.* 778.400–401.

<sup>164</sup> See *id.* 548.2.

<sup>165</sup> See *id.* 548.3.

<sup>166</sup> *Id.* 548.300.

<sup>167</sup> *Id.* 548.3(e).

<sup>168</sup> *Id.* 548.305(b).

<sup>169</sup> *Id.* 548.305(b).

<sup>170</sup> See *id.* 548.305(c), (d), (f).

<sup>171</sup> See 31 FR 6769.

for excludable amounts in § 548.3(e) at \$0.30—which, at the time, was 40 percent of the hourly minimum wage required under the FLSA (\$0.75 per hour).<sup>172</sup> Similarly, in 1966, after the minimum wage increased to \$1.25 per hour, the Department correspondingly increased the threshold amount in § 548.3(e) to \$0.50—which, again, was 40 percent of the hourly minimum wage at the time.<sup>173</sup> The current minimum wage is \$7.25 per hour, and 40 percent of \$7.25 is \$2.90. To avoid the need for future rulemaking in response to any further minimum wage increases, however, the Department proposes to replace the current \$0.50 references in §§ 548.3(e), 548.305, and 548.400(b) with “40 percent of the applicable minimum hourly wage under section 6(a) of the Act.” Relatedly, the Department also proposes to update the examples provided in § 548.305(c), (d), and (f) with updated dollar amounts, and to fix a typographical error in § 548.305(e) by changing the phrase “would not exceed” to “would exceed.” The Department invites comment as to this proposal, and specifically invites comment as to (1) whether the additional payments that are excludable if they would not increase total overtime compensation should be tied to a percentage of the applicable minimum wage under the Fair Labor Standards Act, or a percentage of the applicable minimum wage under state or Federal law; and (2) whether 40 percent of the applicable minimum wage is an appropriate threshold, or if this proposed percentage should be increased or decreased.

#### IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This NPRM does not require a collection of information subject to approval by the Office of Management and Budget (OMB) under the PRA, or affect any existing collections of information. The Department welcomes comments on this determination.

#### V. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

##### A. Introduction

Under E.O. 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and OMB review.<sup>174</sup> Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the E.O. OIRA has determined that this proposed rule is significant under section 3(f) of E.O. 12866.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected the approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

##### B. Economic Analysis

This economic analysis provides a quantitative analysis of regulatory familiarization costs attributable to the proposed rule and a qualitative analysis of other potential benefits, cost savings, and transfers. This includes a discussion of cost savings resulting from reduced litigation. As described above, this rule, if finalized as proposed, clarifies existing regulations for employees and employers in the 21st-

century workplace with modern forms of compensation and benefits. The Department believes that these updates will provide clarity and flexibility for employers interested in providing such benefits to their employees. The Department welcomes comments that provide data or information regarding the potential benefits, cost savings, and transfers of this proposed rule, which may help the Department quantify such effects in the Final Rule’s analysis.

##### 1. Overview of Proposed Changes

This NPRM proposes several changes to the existing regulatory language in 29 CFR part 778 to update and clarify the FLSA’s regular rate requirements, and proposes a change to 29 CFR part 548 addressing a “basic rate” that can be used to calculate overtime compensation under section 7(g)(3) of the FLSA when specific conditions are met. Specifically, the Department’s NPRM includes the following proposals:

- A proposal to clarify in § 778.219 that payments for unused paid leave, including paid sick leave, may be excluded from an employee’s regular rate of pay;
- A proposal to clarify in §§ 778.218(b) and 778.320 that pay for time that would not otherwise qualify as “hours worked,” including bona fide meal periods, may be excluded from an employee’s regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked;
- A proposal to clarify in § 778.217 that reimbursed expenses need not be incurred “solely” for the employer’s benefit for the reimbursements to be excludable from an employee’s regular rate;
- A proposal to clarify in § 778.217 that certain reimbursements are per se reasonable and excludable from the regular rate;
- A proposal to eliminate the restriction in §§ 778.221 and 778.222 that “call-back” pay and other payments similar to call-back pay must be “infrequent and sporadic” to be excludable from an employee’s regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged;
- A proposal to clarify in § 778.224 that the cost of providing wellness programs, onsite specialist treatment, exercise opportunities, employee discounts on retail goods and services, and certain tuition benefits may be excluded from an employee’s regular rate of pay;
- A proposal to clarify in § 778.215 the types of benefit plans that are

<sup>172</sup> See 20 FR 5679.

<sup>173</sup> See 31 FR 4149 (Mar. 9, 1966); 31 FR 6769.

<sup>174</sup> See 58 FR 51735 (Sept. 30, 1993).



excludable as “similar benefits for employees” under section 7(e)(4);

- A proposal to clarify in §§ 778.202, 778.203, 778.205, and 778.207 that employers do not need a prior contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA;

- A proposal to clarify and provide examples in § 778.211 of discretionary bonuses that are excludable from an employee’s regular rate of pay under section 7(e)(3) of the FLSA;

- A proposal to clarify in § 778.1 that the examples of compensation discussed in part 778 of the types of excludable payments under section 7(e)(1)–(8) are not exhaustive; and

- A proposal to increase, from \$0.50 to a weekly amount equivalent to 40 percent of the hourly federal minimum wage (currently \$2.90, or 40 percent of \$7.25), the amount by which total compensation would not be affected by the exclusion of certain additional payments when using the “basic rate” to compute overtime provided by § 548.3(e).

To measure potential costs, cost savings, benefits, and transfers relative to a baseline of current practice, the Department has attempted to distinguish between specific proposals that would *change* existing requirements, and those that would merely *clarify* existing requirements. Here, the Department believes that only two of the proposals described above would constitute changes to existing regulatory requirements: (1) The proposal to increase the threshold for exclusion of certain payments when using the “basic rate” to compute overtime under § 548.3(e), from \$0.50 to a weekly amount equivalent to 40 percent of the hourly federal minimum wage (currently \$2.90, or 40 percent of \$7.25); and (2) the proposal to eliminate the restriction in §§ 778.221 and 778.222 that call-back pay and similar payments must be “infrequent and sporadic” to be excludable from the regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged. Both of these proposed changes are deregulatory in nature.

The Department believes that all of the remaining proposals would be clarifications consistent in substance with the existing regulations and statute. Thus, none of the proposals in this NPRM would impose any new regulatory requirements, or require any regulated entity (*i.e.*, any employer) to change its conduct to remain in compliance with the law.

## 2. Potential Costs

The only potential costs attributable to this proposed rulemaking are regulatory familiarization costs. Familiarization costs represent direct costs to businesses associated with reviewing any changes to regulatory requirements caused by a final rule. Familiarization costs do not include recurring compliance costs that regulated entities would incur with or without a rulemaking.<sup>175</sup> The Department calculated regulatory familiarization costs by multiplying the estimated number of firms likely to review the proposed rule by the estimated time to review the rule and the average hourly compensation of a Compensation, Benefits, and Job Analysis Specialist.

To calculate the cost associated with reviewing the rule, the Department first estimated the number of firms likely to review the proposed rule, when finalized.<sup>176</sup> According to the data from the U.S. Census Bureau’s Statistics of U.S. Businesses (SUSB), there is a total of 5,900,731 firms in the United States.<sup>177</sup> The SUSB data shows that 3,643,737 firms have four or fewer employees.<sup>178</sup> These small-sized firms are less likely than larger firms to offer perks or benefits similar to those addressed in this rulemaking (*e.g.*, wellness programs, on-site medical or specialty treatment, and so forth) and are typically exempt from legislation mandating paid sick leave or scheduling-related premium pay.<sup>179</sup>

<sup>175</sup> For example, time and resources spent on an annual basis to train staff on FLSA compliance are not familiarization costs attributable to any particular rulemaking, because an employer incurs these kinds of recurring costs regardless of whether specific parts of the regulations have been recently amended. To the extent that this proposed rule would make certain regulatory requirements easier to understand, the proposed rule may achieve a reduction in these recurring compliance costs.

<sup>176</sup> The Department assumes that familiarization for this rulemaking will generally occur at the headquarters of each interested firm, rather than at the establishment level. According to a recent survey, just eight percent of surveyed employers reported that their benefits are administered locally at different “locations.” See Soc’y for Human Res. Mgmt., 2017 Employee Benefits Remaining Competitive in a Challenging Talent Marketplace, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017%20Employee%20Benefits%20Report.pdf>.

<sup>177</sup> U.S. Census Bureau, 2015 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html>.

<sup>178</sup> *Id.*

<sup>179</sup> For example, none of the predictable scheduling ordinances recently passed in New York City, San Francisco, and Seattle apply to employers with fewer than 20 employees. See, *e.g.*, S.F., Cal., Police Code art. 33G, 3300G.3 (2015) (applying to retail employers with at least 20 employees); N.Y.C., N.Y., Admin. Code 20–1201 (2017)

Thus, the Department believes that firms with fewer than five employees are unlikely to review this proposed rule. For the purposes of estimating familiarization costs across all firms, the Department believes that the 2,256,994 firms with five or more employees—approximately 38 percent of all 5.9 million firms—represent a reasonable proxy estimate of the total number of interested firms expected to dedicate time learning about the proposed rule.

Next, the Department estimated the time interested firms would take to review the rule. Because the majority of the proposals discussed in the NPRM are merely clarifications of existing regulatory requirements, the Department estimates that it would take an *average* of approximately 15 minutes for each interested firm to review and understand the changes in the rule. Some firms might spend more than 15 minutes reviewing the proposed rule, while others might take less time; the Department believes that 15 minutes is a reasonable estimated average for all interested firms.

Finally, the Department estimated the hourly compensation of the employees who would likely review the proposed rule. The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (Standard Occupation Classification 13–1141), or an employee of similar status and comparable pay, would review the rule at each firm. The mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist is \$32.29. The Department adjusted this base wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The Department used a fringe benefits rate of 46 percent of the base rate and an overhead rate of 54 percent of the base rate, resulting in a fully loaded hourly compensation rate for Compensation, Benefits, and Job Analysis Specialists of \$64.58 (= \$32.29 + (\$32.29 × 46%) + (\$32.29 × 54%)).

Therefore, regulatory familiarization costs in Year 1 for interested firms are estimated to be \$36,439,168 (=

(applying to retail employers with at least 20 employees and fast food employers with at least 30 affiliated enterprise or franchise establishments); Seattle, Wash., Mun. Code 14.22.050 (2017) (applying to retail, food service, and full-service restaurant employers with at least 500 employees). Similar coverage thresholds apply to employers under state paid sick leave laws in Maryland (15 employees), Oregon (10 employees with smaller employers required to provide equivalent unpaid sick leave), and Rhode Island (18 employees with smaller employers required to provide equivalent unpaid sick leave). See Md. Code, Labor & Emp’t § 3–1304; Or. Rev. Stat. § 653.606; R.I. Gen. Laws § 28–57–4(c).

2,256,994 firms  $\times$  0.25 hours of review time  $\times$  \$64.58 per hour), which amounts to a 10-year annualized cost of \$4,147,361 at a discount rate of 3 percent (which is \$1.84 per firm) or \$3,992,320 at a discount rate of 7 percent (which is \$1.77 per firm).

This proposed rule would not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance; therefore, there are no other costs attributable to this proposed rule. The Department invites comment on this analysis, including any relevant data or information that may further inform this estimate.

### 3. Potential Cost Savings

The Department believes that this proposed rule could lead to potential cost savings. The clarifying proposals and updated examples included in this NPRM may reduce the amount of time employers spend attempting to understand their obligations under the law. For example, employers interested in providing an employee discount program, a wellness program, or onsite exercise opportunities would know immediately from the language proposed for inclusion in § 778.224 that the cost of providing such programs is excluded from the regular rate, thereby avoiding the need for further research on the issue. In addition, the two proposals that constitute changes to the regulations would also achieve cost savings. For example, the Department expects that the changes to the basic rate regulations will permit employers that use a basic rate plan to give employees additional incidental payments without concern about the impact on their overtime obligations. Increasing the amount by which total compensation would not be affected by the exclusion of certain additional payments when using the “basic rate” to compute overtime would both eliminate avoidable litigation and expand the circumstances in which employers that meet the requirements to use a basic rate may exclude “certain incidental payments which have a trivial effect on the overtime compensation due.”

The Department expects that these cost savings will outweigh regulatory familiarization costs. Unlike familiarization costs, the potential cost savings described in this section will continue into the future, saving employers valuable time and resources.

The Department is unable to provide quantitative estimates for cost savings and other potential effects of the proposed rule due to a lack of data and uncertainty regarding employer responses to the proposals. Employers

are not generally required to report to the Department their use of these regulatory provisions, and to the Department’s knowledge, there is no publically available data on items such as employers’ use of basic rate calculations to calculate overtime due. The Department welcomes comments providing data or information regarding possible cost savings attributable to this proposed rule, which may help the Department further quantify these effects in a Final Rule analysis.

The Department is unable to provide quantitative estimates for other potential effects of the proposed rule due to a lack of data and uncertainty regarding employer responses to the proposals. The Department welcomes comments providing data or information regarding possible cost savings attributable to this proposed rule, which may help the Department further quantify these effects in a Final Rule analysis.

### 4. Potential Benefits

This section analyzes the potential benefits if the rule is finalized as proposed. The Department was unable to provide quantitative estimates for these potential benefits due to a lack of data and uncertainty regarding potential employer responses to the proposed rule. The Department does not know, for example, how many employers will begin offering wellness programs or other benefits to their employees as a result of this rule. The Department welcomes comments providing data or information regarding possible benefits attributable to this proposed rule, which may help the Department quantify these effects in a Final Rule analysis.

Distinct from the potential cost savings described above, if finalized as proposed, the rule will likely yield benefits. The Department expects that the added clarity that this rule would provide will encourage some employers to start providing benefits that they may presently refrain from providing due to apprehension about potential overtime consequences. These newly provided benefits might have a positive impact on workplace morale, employee health, employee compensation, and employee retention.

For example, the Department has proposed adding “the cost to the employer of providing wellness programs, such as health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals” to the list of miscellaneous payments excludable

from the regular rate provided in § 778.224(b). If employers know they can offer wellness programs without the threat of potentially protracted class or collective action litigation and without potentially having to track employee participation in these activities for purposes of calculating the regular rate, employers might feel more encouraged to offer such programs. An increase in the provision of wellness programs similar to those described in the proposed rule (*e.g.*, smoking cessation programs, vaccine clinics, and so forth) may improve worker health and reduce healthcare costs.<sup>180</sup> Such improvements benefit both the worker and the employer with added value to each.

The proposed rule would also provide employers greater flexibility and incentivize greater creativity in their employee-benefits practices. This room to innovate may help workers and increase retention and productivity by allowing employers the chance to provide unique benefits that their employees want and that improve workers’ physical and mental health, work environment, and morale. As noted earlier in this NPRM, the Department cannot feasibly list every permissible benefit that employers may provide employees, and employers may create new and desirable benefits in the future. But the Department believes that the changes it proposes here would foster that innovation.

In addition, the Department believes that clarifying the regulations would prevent many avoidable “regular rate” disputes. For example, the omission of unused sick leave in the current version of § 778.219 could be responsible for disputes over whether payments for unused sick leave should be included in the regular rate. Although the Department’s proposal to amend § 778.219 simply reflects the Department’s current guidance, the added clarity provided by changing the text of the regulations might prevent future expenses stemming from avoidable workplace disputes. Due to uncertainty regarding the costs and prevalence of FLSA-related settlement agreements, arbitration actions, and state court filings, the Department has only estimated cost savings attributable

<sup>180</sup> According to a recent survey, 88 percent of employers with a wellness program rated their initiatives as somewhat or very effective in improving employee health, while 77 percent indicated their wellness program was somewhat or very effective in reducing health care costs. See Soc. for Human Res. Mgmt., 2017 Employee Benefits Remaining Competitive in a Challenging Talent Marketplace, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017%20Employee%20Benefits%20Report.pdf>.

to an expected reduction in federal FLSA regular rate lawsuits—which may represent only a fraction of all regular rate litigation.

To estimate the number of federal lawsuits that the proposed rule may prevent, the Department first attempted to determine the percentage of FLSA lawsuits that predominantly or exclusively feature a “regular rate” dispute. Here, the Department studied two sets of data. First, the Department examined a randomly selected sample of federal FLSA court filings from 2014 taken from the U.S. Court’s Public Access to Court Electronic Records (PACER). After reviewing each of the 521 FLSA cases in this sample for relevant information, the Department found that 6.5 percent of the cases (34 out of 521) primarily featured a regular rate dispute. To corroborate the PACER data, the Department separately reviewed a sample of 258 federal court decisions from 2017 involving FLSA collective action certification claims,<sup>181</sup> and found that 3.9 percent of these cases primarily centered around a regular rate dispute (10 out of 258). Considering these two different percentages, the Department takes an approximate average and conservatively assumes that approximately five percent of all FLSA cases primarily or exclusively involve a regular rate dispute.

According to the Transactional Records Access Clearinghouse, 25,605 federal FLSA lawsuits were filed in Fiscal Years 2015, 2016, and 2017, averaging 8,535 lawsuits per year.<sup>182</sup> Assuming there are approximately 8,535 FLSA lawsuits per year, the Department estimates that about 427 cases, or 5 percent of 8,535, primarily or exclusively involve a regular rate dispute. Given data limitations, if the Department assumes for purposes of this analysis that this proposed rule would prevent approximately 10 percent of FLSA cases primarily or exclusively featuring a regular rate dispute then this proposed rule would prevent approximately 43 FLSA regular rate lawsuits per year.<sup>183</sup>

<sup>181</sup> Seyfarth Shaw LLP, 14th Annual Workplace Class Action Litigation Report 127–270 (2018), [https://www.seyfarth.com/dir\\_docs/publications/2018\\_workplace\\_class\\_action\\_report.pdf](https://www.seyfarth.com/dir_docs/publications/2018_workplace_class_action_report.pdf).

<sup>182</sup> TRAC at Syracuse University uses the Freedom of Information Act (FOIA) to obtain data about government enforcement and regulatory activities. According to TRAC Reports, the following numbers of FLSA lawsuits were filed in Fiscal Years 2015, 2016, and 2017: 8917, 8830, and 7858. See TRAC Reports, Fair Labor Standards Act Lawsuits Down from 2015 Peak (2018), <http://trac.syr.edu/tracreports/civil/498/>.

<sup>183</sup> The Department rounds up to 43 cases for purpose of estimating (10 percent of 427 cases equals 42.7 cases).

To quantify the cost savings for an expected reduction in FLSA lawsuits, the Department must estimate the average cost of an FLSA lawsuit. Here, the Department examined a selection of 56 FLSA cases concluded between 2012 and 2015 that contained litigation cost information.<sup>184</sup> To calculate average litigation costs associated with these cases, the Department first examined records of court filings in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases received for attorney fees, administrative fees, and/or other costs, apart from any monetary damages attributable to the alleged FLSA violations. (The FLSA provides for successful plaintiffs to be awarded reasonable attorney’s fees and costs, so this data is available in some FLSA cases.) After determining the plaintiff’s total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred.<sup>185</sup> According to this analysis, the average litigation cost for FLSA cases concluded between 2012 and 2015 was \$654,182 per case.<sup>186</sup> Applying this figure to approximately 43 federal regular rate cases that this proposed rulemaking could prevent, the Department estimated that avoided litigation costs resulting from the rule may total approximately \$28.1 million per year. Once again, the Department believes this total may underestimate total litigation costs because some FLSA regular rate cases are heard in state court and thus were not captured by PACER; some FLSA regular rate matters are resolved before litigation or by alternative dispute resolution; and some attorneys representing FLSA regular rate plaintiffs may take a contingency fee atop their statutorily awarded fees and costs. The Department solicits

<sup>184</sup> The 56 cases used for this analysis were retrieved from Westlaw’s Case Evaluator database using a keyword search for case summaries between 2012 and 2015 mentioning the terms “FLSA” and “fees.” Although the initial search yielded 64 responsive cases, the Department excluded one duplicate case, one case resolving litigation costs through a confidential settlement agreement, and six cases where the defendant employer(s) ultimately prevailed. Because the FLSA only entitles prevailing plaintiffs to litigation cost awards, information about litigation costs was only available for the remaining 56 FLSA cases that ended in settlement agreements or court verdicts favoring the plaintiff employees.

<sup>185</sup> This is likely a conservative approach to estimate the total litigation costs for each FLSA lawsuit, as defendant employers tend to incur greater litigation costs than plaintiff employees because of, among other things, typically higher discovery costs.

<sup>186</sup> The median cost was \$111,835 per lawsuit.

comments or available data on this issue.

## 5. Potential Transfers

Transfer payments occur when income is redistributed from one party to another. The Department has identified two possible transfer payments between employers and employees that could occur if the rule is finalized as proposed, flowing in opposite directions. On the one hand, income might transfer from employers to employees if some employers respond by newly providing certain payments or benefits they did not previously provide. On the other hand, income might transfer from employees to employers if some employers respond to the proposed rule by newly excluding certain payments from their employees’ regular rates without changing any other compensation practices. As discussed above, the Department is unable to quantify an estimated net transfer amount to employers or employees due to a lack of data on the kinds of payments employers presently provide, and the inherent uncertainty in predicting how employers will respond to this rule. The Department invites comment on this analysis, including any relevant data or information that might allow for a quantitative analysis of transfer effects in the Final Rule.

## 6. Summary

The Department above discussed qualitatively the potential cost savings associated with reduced litigation, and estimates those cost savings at \$281 over 10 years, or \$28.1 per year. The Department estimates that this proposed rule, if finalized, would result in one-time regulatory familiarization costs of \$36.4 million, which would result in a 10-year annualized cost of \$4,147,361 at a discount rate of 3 percent or \$3,992,320 at a discount rate of 7 percent.

## VI. Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act,<sup>187</sup> the Department examined the regulatory requirements of the proposed rule to determine whether they would have a significant economic impact on a substantial number of small entities. The Department believes that this proposed rule would achieve long-term cost savings that outweigh initial regulatory familiarization costs.<sup>188</sup> For

<sup>187</sup> See 5 U.S.C. 601 *et seq.* (as amended).

<sup>188</sup> This proposed rule would not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance. Therefore, there are no other costs attributable to this deregulatory proposed rule.

example, the Department believes that removing ambiguous language and adding updated examples to the FLSA's overtime regulations should reduce compliance costs and litigation risks that small business entities would otherwise continue to bear.

As discussed above, the Department used data from the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB) to calculate the number of firms likely to review the proposed rule, when finalized. The SUSB data show that there are 5,900,731 firms in the U.S., 3,643,737 of which have four or fewer employees.<sup>189</sup> Also, as discussed above, the Department believes that firms with fewer than five employees are unlikely to review this proposed rule, because these small-sized firms are less likely than larger firms to offer perks or benefits similar to those addressed in this rulemaking (e.g., wellness programs, on-site medical or specialty treatment, and so forth) and are typically exempt from legislation mandating paid sick leave or scheduling-related premium pay.<sup>190</sup> Familiarization costs would therefore be zero for small businesses with fewer than five employees. The Department did estimate familiarization costs across all 2,256,994 firms with five or more employees, and found that the annualized familiarization cost per firm is \$1.84 annually at a discount rate of 3 percent and \$1.77 annually at a discount rate of 7 percent.

Estimated familiarization costs would be trivial for small business entities, and would be well below one percent of their gross annual revenues. The average annual gross revenue for the smallest businesses is typically \$100,000 or higher. Therefore, the Department certifies that the rule does not have a significant economic impact on a substantial number of small entities.

<sup>189</sup> *Id.*

<sup>190</sup> For example, none of the predictable scheduling ordinances recently passed in New York City, San Francisco, and Seattle apply to employers with fewer than 20 employees. *See, e.g.,* S.F., Cal., Police Code art. 33G, 3300G.3 (2015) (applying to retail employers with at least 20 employees); N.Y.C., N.Y., Admin. Code 20–1201 (2017) (applying to retail employers with at least 20 employees and fast food employers with at least 30 affiliated enterprise or franchise establishments); Seattle, Wash., Mun. Code 14.22.050 (2017) (applying to retail, food service, and full-service restaurant employers with at least 500 employees). Similar coverage thresholds apply to employers under state paid sick leave laws in Maryland (15 employees), Oregon (10 employees with smaller employers required to provide equivalent unpaid sick leave), and Rhode Island (18 employees with smaller employers required to provide equivalent unpaid sick leave). *See* Md. Code, Labor & Emp't § 3–1304; Or. Rev. Stat. § 653.606; R.I. Gen. Laws § 28–57–4(c).

## VII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. While this rulemaking would affect employers in the private sector, it is not expected to result in expenditures greater than \$100 million in any one year. Please see Section V for an assessment of anticipated costs and benefits to the private sector.

## VIII. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

## IX. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## List of Subjects

29 CFR Part 548

Wages.

29 CFR Part 778

Wages.

Signed at Washington, DC, this 20th day of March, 2019.

**Keith E. Sonderling,**

*Acting Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the Department of Labor proposes to amend title 29 of the Code of Federal Regulations parts 548 and 778 as follows:

## PART 548—AUTHORIZATION OF ESTABLISHED BASIC RATES FOR COMPUTING OVERTIME PAY

■ 1. The authority citation for Part 548 continues to read as follows:

**Authority:** Sec. 7. 52 Stat. 1063, as amended; 29 U.S.C. 207, unless otherwise noted.

■ 2. Amend § 548.1 by revising the second sentence to read as follows:

### § 548.1 Scope and effect of regulations.

\* \* \* \* \*

The regulations for computing overtime pay under sections 7(g)(1) and 7(g)(2) of the Act for employees paid on the basis of a piece rate, or at a variety of hourly rates or piece rates, or a combination thereof, are set forth in 29 CFR 778.415–778.421.

■ 3. Revise paragraph (e) of § 548.3 to read as follows:

### § 548.3 Authorized basic rates.

\* \* \* \* \*

(e) The rate or rates (not less than the rates required by section 6 (a) and (b) of the Act) which may be used under the Act to compute overtime compensation of the employee but excluding additional payments in cash or in kind which, if included in the computation of overtime under the Act, would not increase the total compensation of the employee by more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week on the average for all overtime weeks (in excess of the number of hours applicable under section 7(a) of the Act) in the period for which such additional payments are made.

\* \* \* \* \*

■ 4. Amend § 548.305 by revising paragraphs (a), (c), (d), (e), (f) to read:

### § 548.305 Excluding certain additions to wages.

(a) Section 548.3(e) authorizes as established basic rates the rate or rates (not less than the minimum wages required by section 6(a) and (b) of the Act) which may be used under the Act to compute overtime compensation of employees but excluding additional cash or in kind payments which, if included in the computation of overtime, would not increase the total compensation of an employee by more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week on the average for all overtime weeks in the period for which such additional payments are made.

\* \* \* \* \*

(c) The exclusion of one or more additional payments under § 548.3(e) must not affect the overtime

compensation of the employee by more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week on the average for the overtime weeks.

(1) *Example.* An employee, who normally would come within the 40-hour provision of section 7(a) of the Act, is paid a cost-of-living bonus of \$1300 each calendar quarter, or \$100 per week. The employee works overtime in only 2 weeks in the 13-week period, and in each of these overtime weeks he works 50 hours. He is therefore entitled to \$10 as overtime compensation on the bonus for each week in which overtime was worked (*i.e.*, \$100 bonus divided by 50 hours equals \$2 an hour; 10 overtime hours, times one-half, times \$2 an hour, equals \$10 per week). Forty percent of the minimum wage of \$7.25 is \$2.90. Since the overtime on the bonus is more than \$2.90 on the average for the 2 overtime weeks, this cost-of-living bonus would be included in the overtime computation under § 548.3(e).

(2) Reserved.

(d) It is not always necessary to make elaborate computations to determine whether the effect of the exclusion of a bonus or other incidental payment on the employee's total compensation will exceed 40 percent of the applicable hourly minimum wage under section 6(a) of the Act cents per week on the average. Frequently the addition to regular wages is so small or the number of overtime hours is so limited that under any conceivable circumstances exclusion of the additional payments from the rate used to compute the employee's overtime compensation would not affect the employee's total earnings by more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week. The determination that this is so may be made by inspection of the payroll records or knowledge of the normal working hours.

(1) *Example.* An employer has a policy of giving employees who have a perfect attendance record during a 4-week period a bonus of \$50. The employee never works more than 50 hours a week. It is obvious that exclusion of this attendance bonus from the rate of pay used to compute overtime compensation could not affect the employee's total earnings by more than \$2.90 per week (*i.e.*, 40 percent of the minimum wage of \$7.25).<sup>14</sup>

(2) Reserved.

<sup>14</sup> For a 50-hour week, an employee's bonus would have to exceed \$29 a week to affect his overtime compensation by more than \$2.90 (*i.e.*, 40 percent of the minimum wage of \$7.25). ( $\$30 \div 50 \text{ hours worked} \times 10 \text{ overtime hours} \times 0.5$ )

(e) There are many situations in which the employer and employee cannot predict with any degree of certainty the amount of bonus to be paid at the end of the bonus period. They may not be able to anticipate with any degree of certainty the number of hours an employee might work each week during the bonus period. In such situations, the employer and employee may agree prior to the performance of the work that a bonus will be disregarded in the computation of overtime pay if the employee's total earnings are not affected by more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week on the average for all overtime weeks during the bonus period. If it turns out at the end of the bonus period that the effect on the employee's total compensation would exceed 40 percent of the applicable minimum wage under section 6(a) of the Act per week on the average, then additional overtime compensation must be paid on the bonus. (See § 778.209 of this chapter, for an explanation of how to compute overtime on the bonus).

(f) In order to determine whether the exclusion of a bonus or other incidental payment would affect the total compensation of the employee by not more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week on the average, a comparison is made between his total compensation computed under the employment agreement and his total compensation computed in accordance with the applicable overtime provisions of the Act.

(1) *Example.* An employee, who normally would come within the 40-hour provision of section 7(a) of the Act, is paid at piece rates and at one and one-half times the applicable piece rates for work performed during hours in excess of 40 in the workweek. The employee is also paid a bonus, which when apportioned over the bonus period, amounts to \$10 a week. He never works more than 50 hours a week. The piece rates could be established as basic rates under the employment agreement and no additional overtime compensation paid on the bonus. The employee's total compensation computed in accordance with the applicable overtime provision of the Act, section 7(g)(1)<sup>15</sup> would be affected by not more than \$1 in any week by not paying overtime compensation on the bonus.<sup>16</sup>

(2) Reserved.

<sup>15</sup> Section 7(g)(1) of the Act provides that overtime compensation may be paid at one and one-half times the applicable piece rate but extra overtime compensation must be properly computed and paid on additional

pay required to be included in computing the regular rate.

<sup>16</sup> Bonus of \$10 divided by fifty hours equals 20 cents an hour. Half of this hourly rate multiplied by ten overtime hours equals \$1.

■ 5. Revise paragraph (b) of § 548.400 to read as follows:

**§ 548.400 Procedures.**

\* \* \* \* \*

(b) Prior approval of the Administrator is also required if the employer desires to use a basic rate or basic rates which come within the scope of a combination of two or more of the paragraphs in § 548.3 unless the basic rate or rates sought to be adopted meet the requirements of a single paragraph in § 548.3. For instance, an employee may receive free lunches, the cost of which, by agreement or understanding, is not to be included in the rate used to compute overtime compensation.<sup>17</sup> In addition, the employee may receive an attendance bonus which, by agreement or understanding, is to be excluded from the rate used to compute overtime compensation.<sup>18</sup> Since these exclusions involve two paragraphs of § 548.3, prior approval of the Administrator would be necessary unless the exclusion of the cost of the free lunches together with the attendance bonus do not affect the employee's overtime compensation by more than 40 percent of the applicable hourly minimum wage under section 6(a) of the Act per week on the average, in which case the employer and the employee may treat the situation as one falling within a single paragraph, § 548.3(e).

<sup>17</sup> See § 548.304.

<sup>18</sup> See § 548.305.

**PART 778—OVERTIME COMPENSATION**

■ 6. The authority citation for part 778 continues to read as follows:

**Authority:** 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 778.200 also issued under Public Law 106-202, 114 Stat. 308 (29 U.S.C. 207(e) and (h)).

■ 7. Revise § 778.1 to read as follows:

**§ 778.1 Purpose of interpretive bulletin.**

(a) This part 778 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Fair Labor Standards Act (the Act). It is the purpose of this bulletin to make available in one place the interpretations of these provisions which will guide the Secretary of Labor and the Administrator in the performance of their duties under the

Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290).

(b) The Department recognizes that compensation practices can vary significantly and will continue to evolve in the future. The Department also recognizes that it is not feasible to address all of the various compensation and benefits arrangements that may exist between employers and employees, both currently and in the future. In general, the FLSA does not restrict the forms of “remuneration” that an employer may pay—which may include an hourly rate, salary, commission, piece rate, a combination thereof, or any other method—as long as the regular rate is equal to at least the applicable minimum wage and compensation for overtime hours worked is paid at the rate of at least one and one-half times the regular rate. While the eight categories of payments in section 7(e)(1)–(8) of the Act are the exhaustive list of payments excludable from the regular rate, 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.

■ 8. Revise paragraphs (a), (b), (c), and (e) of § 778.202 to read as follows:

**§ 778.202 Premium pay for hours in excess of a daily or weekly standard.**

(a) *Hours in excess of 8 per day or statutory weekly standard.* Many employers provide for the payment of overtime compensation for hours worked in excess of 8 per day or 40 per week. If the payment of such overtime compensation is in fact contingent upon the employee’s having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified in section 7(a) of the Act as the weekly maximum and such hours are reflected in an agreement or by established practice, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) of the Act and may be credited toward statutory overtime payments pursuant to section 7(h) of the

Act. In applying these rules to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, as these terms are explained in §§ 778.216–778.224, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay, due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) *Hours in excess of normal or regular working hours.* Similarly, where the employee’s normal or regular daily or weekly working hours are greater or fewer than 8 hours and 40 hours respectively and such hours are reflected in an agreement or by established practice, and the employee receives payment of premium rates for work in excess of such normal or regular hours of work for the day or week (such as 7 in a day or 35 in a week), the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited toward overtime compensation due under the Act.

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of \$12 an hour and receives, as overtime compensation under his contract, \$12.50 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee’s regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of \$13 for hours in excess of 12 per day, the extra \$1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5) of the Act, the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee’s normal or regular working hours. If the normal workday is artificially divided into a “straight time” period to which one rate is assigned, followed by a so-called “overtime” period for which a higher “rate” is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums

will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

\* \* \* \* \*

(e) *Premium pay for sixth or seventh day worked.* Under sections 7(e)(6) and 7(h) of the Act, extra premium compensation paid for work on the sixth or seventh day worked in the workweek (where the workweek schedule is reflected in an agreement or by established practice) is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee’s normal or regular workweek.

■ 9. Revise paragraph (d) of § 778.203 to read as follows:

**§ 778.203 Premium Pay for work on Saturdays, Sundays, and other “special days”.**

\* \* \* \* \*

(d) Payment of premiums for work performed on the “special day”: To qualify as an overtime premium under section 7(e)(6) of the Act, the premium must be paid because work is performed on the days specified and not for some other reason which would not qualify the premium as an overtime premium under sections 7(e)(5), (6), or (7) of the Act. (For examples distinguishing pay for work on a holiday from idle holiday pay, see § 778.219.) Thus a premium rate paid to an employee only when he received less than 24 hours’ notice that he is required to report for work on his regular day of rest is not a premium paid for work on one of the specified days; it is a premium imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his private life. The extra compensation is not an overtime premium. It is part of his regular rate of pay unless such extra compensation is paid the employee so as to qualify for exclusion under section 7(e)(2) of the Act in which event it need not be included in computing his regular rate of pay, as explained in § 778.222.

■ 10. Revise § 778.205 to read as follows:

**§ 778.205 Premiums for weekend and holiday work—example.**

The application of section 7(e)(6) of the Act may be illustrated by the following example: Suppose, based on an established practice by an employer, an employee earns \$18 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of \$12 for like work performed during nonovertime

hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of \$768 to which the employee is entitled will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra \$48 paid for work on Sunday and the extra \$48 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

■ 11. Revise paragraph (a) of § 778.207 to read as follows:

**§ 778.207 Other types of contract premium pay distinguished.**

(a) *Overtime premiums are those defined by the statute.* The various types of premium payments which provide extra compensation qualifying as overtime premiums to be excluded from the regular rate (under sections 7(e)(5), (6), and (7) of the Act and credited toward statutory overtime pay requirements (under section 7(h)) have been described in §§ 778.201 through 778.206. The plain wording of the statute makes it clear that extra compensation provided by premium rates other than those described in the statute cannot be treated as overtime premiums. When such other premiums are paid, they must be included in the employee's regular rate before statutory overtime compensation is computed; no part of such premiums may be credited toward statutory overtime pay.

\* \* \* \* \*

■ 12. Revise paragraphs (c) and (d) of § 778.211 to read as follows:

**§ 778.211 Discretionary bonuses**

\* \* \* \* \*

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a) of the Act, must not be paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Most 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 and the like are in this category; in such circumstances they must be included in the regular rate of pay.

(d) *Labels are not determinative.* The label assigned to a bonus does not conclusively determine whether a bonus is discretionary under section 7(e)(3) of the Act. Instead, the terms of the statute and the facts specific to the bonus at issue determine whether bonuses are excludable discretionary bonuses. Thus, regardless of the label or name assigned to bonuses, bonuses are discretionary and excludable if both the fact that the bonuses are to be paid and the amounts are determined at the sole discretion of the employer at or near the end of the periods to which the bonuses correspond and they are not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. Examples of bonuses that may be discretionary include 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, and other similar compensation. Such bonuses are usually not promised in advance and the fact and amount of payment is in the sole discretion of the employer until at or near the end of the period to which the bonus corresponds.

■ 13. Amend § 778.215 by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

**§ 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).**

(a) \* \* \*

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, accident, unemployment, legal services, or the like.

\* \* \* \* \*

(b) Plans under section 401(a) of the Internal Revenue Code. Where the benefit plan or trust has been approved by the Internal Revenue Service as satisfying the requirements of section

401(a) of the Internal Revenue Code, in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in paragraphs (a)(1), (4), and (5) of this section.

■ 14. Amend § 778.217 by revising paragraphs (a) and (c) to read as follows:

**§ 778.217 Reimbursement for expenses.**

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums by reason of action taken for the convenience of his employer, 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 reimbursement reasonably approximates the expense incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

\* \* \* \* \*

(c)(1) *Payments excluding expenses.* It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.

(2) A reimbursement amount for an employee traveling on his or her employer's business is per se reasonable, and not disproportionately large, if it:

(i) Is the same or less than the maximum reimbursement payment or per diem permitted for the same type of expense under the Federal Travel Regulation System, 41 CFR Subtitle F, or any successor provision; and

(ii) Otherwise meets the requirements of this section.

(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.

\* \* \* \* \*

■ 15. Revise paragraph (b) of § 778.218 to read as follows:

**§ 778.218 Pay for certain idle hours.**

\* \* \* \* \*

(b) *Limitations on exclusion.* This provision of section 7(e)(2) of the Act deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as regularly scheduled days of rest. Sundays may not be workdays in a particular establishment, 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 term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

\* \* \* \* \*

■ 16. Revise § 778.219 to read as follows:

**§ 778.219 Pay for forgoing holidays and unused leave.**

(a) As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday, vacation, or illness are not required to be included in the regular rate because they are not regarded as compensation for working. When an employee who is entitled to such paid leave forgoes the use of leave and instead receives a payment that is the approximate equivalent to the employees’ normal earnings for a similar period of working time, and is in addition to the employee’s normal compensation for hours worked, the sum allocable to the forgone leave may be excluded from the regular rate. Such payments may be excluded whether paid out during the pay period in which the holiday or prescheduled leave is forgone or as a lump sum at a later point in time. Since it is not compensation for work, pay for unused leave may not be credited toward overtime compensation due under the Act. Three examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(1) An employee whose rate of pay is \$12 an hour and who usually works a 6-day, 48-hour week is entitled, under his employment contract, to a week’s paid vacation in the amount of his usual straight-time earnings—\$576. He forgoes his vacation and works 50 hours in the week in question. He is owed \$600 as his total straight-time earnings for the week, and \$576 in addition as his vacation pay. Under the statute he is owed an additional \$60 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of \$12 per hour has not been increased by virtue of the payment of \$576 vacation pay, but no part of the \$576 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to \$576 or any other sum as vacation pay. This is a matter of private

contract between the parties who may agree that vacation pay will be measured by straight-time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period, or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides \$576 vacation pay.)

(2) An employee who is entitled under his employment contract to 8 hours’ pay at his rate of \$12 an hour for the Christmas holiday, forgoes his holiday and works 9 hours on that day. During the entire week, he works a total of 50 hours. He is paid under his contract \$600 as straight-time compensation for 50 hours plus \$96 as idle holiday pay. He is owed, under the statute, an additional \$60 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of \$12 per hour has not been increased by virtue of the holiday pay but no part of the \$96 holiday pay may be credited toward statutory overtime compensation due.

(3) An employee whose rate of pay is \$12 an hour and who usually works a 40-hour week is entitled to two weeks of paid time off per year per his or her employer’s policies. The employee takes one week of paid time off during the year and is paid \$480 pursuant to employer policy for the one week of unused paid time off at the end of the year. The leave payout may be excluded from the employee’s regular rate of pay, but no part of the payout may be credited toward statutory overtime compensation due.

(b) *Premiums for holiday work distinguished.* The example in paragraph (a)(2) of this section should be distinguished from a situation in which an employee is entitled to idle holiday pay under the employment agreement only when he is actually idle on the holiday, and who, if he forgoes his holiday also, under his contract, forgoes his idle holiday pay.

(1) The typical situation is one in which an employee is entitled by contract to 8 hours’ pay at his rate of \$12 an hour for certain named holidays when no work is performed. If, however, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of \$18 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, \$162 (9 × \$18) for the holiday work and \$492 for the other 41 hours worked in the week, a total of \$654. Under the

statute (which does not require premium pay for a holiday) he is owed \$660 for a workweek of 50 hours at a rate of \$12 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium under section 7(e)(6), and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of \$6 to meet the statutory requirements. (For a discussion of holiday premiums see § 778.203.)

(2) If all other conditions remained the same but the contract called for the payment of \$24 (double time) for each hour worked on the holiday, the employee would receive, under his contract \$216 (9 × \$24) for the holiday work in addition to \$492 for the other 41 hours worked, a total of \$708. Since this holiday premium is also an overtime premium under section 7(e)(6), it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Act. In distinguishing this situation from that in the example in paragraph (a)(2) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In the example in paragraph (a)(2) of this section, the employee received a total of \$204 attributable to the holiday: 8 hours’ idle holiday pay at \$12 an hour (8 × \$12), due him whether he worked or not, and \$108 pay at the non-holiday rate for 9 hours’ work on the holiday. In the situation discussed in this paragraph, the employee received \$216 pay for working on the holiday—double time for 9 hours of work. All of the pay in this situation is paid for and directly related to the number of hours worked on the holiday.

■ 17. Revise § 778.221 to read as follows:

**§ 778.221 “Call-back” pay.**

(a) *General.* Typically, “call-back” or “call-out” payments are made pursuant to agreement or established practice and consist of a specified number of hours’ pay at the applicable straight time or overtime rates received by an employee on occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work. The amount by which the specified number of hours’ pay exceeds the compensation for hours actually worked is considered as a payment that

is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due the employee. Payments that are so regular that they are essentially prearranged, however, may not be excluded from the regular rate. For example, if an employer retailer called in an employee to help clean up the store for 3 hours after an unexpected roof leak, and then again 3 weeks later for 2 hours to cover for a coworker who left work for a family emergency, payments for those instances would be without prearrangement and any call-back pay that exceeded the amount the employee would receive for the hours worked would be excludable. However, when payments under §§ 778.221 and 778.222 are so regular that they, in effect, are prearranged, they are compensation for work. For example, if an employer restaurant called in an employee server for two hours of supposedly emergency help during the busiest part of Saturday evening for 6 weeks out of 2 months in a row, that would be essentially prearranged and all of the call-back pay would be included in the regular rate.

(b) *Application illustrated.* The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of \$12 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening, he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or \$54, under the call-back provision, in addition to \$480 for working his regular schedule and \$18 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to \$516 pay at the \$12 rate for all these

hours, he has received under the agreement a premium of \$6 for the 1 overtime hour on Monday and of \$12 for the 2 hours of overtime work on the call, plus an extra sum of \$18 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of \$18) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra \$18 received under the call-back provision is not regarded as paid for hours worked; thus, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains \$12, and he has received an overtime premium of \$6 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

■ 18. Revise § 778.222 to read as follows:

**§ 778.222 Other payments similar to "call-back" pay.**

(a) The principles discussed in 778.221 are also applied with respect to certain types of extra payments which are similar to call-back pay, such as:

(1) Extra payments made to employees for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and

(2) Extra payments made solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period."

(b) The extra payment, over and above the employee's earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), is considered as a payment that is not made for hours worked. Payments that are so regular that they are essentially prearranged, however, may not be excluded from the regular rate.

■ 19. Amend § 778.224 by revising paragraph (b) to read as follows:

**§ 778.224 "Other similar payments".**

\* \* \* \* \*

(b) *Examples of other excludable payments.* A few examples may serve to

illustrate some of the types of payments intended to be excluded as "other similar payments".

(1) Sums paid to an employee for the rental of his truck or car.

(2) Loans or advances made by the employer to the employee.

(3) The cost to the employer of conveniences furnished to the employee such as

- (i) Parking spaces;
- (ii) Restrooms and lockers;
- (iii) On-the-job medical care;
- (iv) Treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs;
- (v) Gym access, gym memberships, fitness classes, and recreational facilities;

(4) The cost to the employer of providing wellness programs, such as health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals; and

(5) Discounts on employer-provided retail goods and services, 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).

■ 20. Revise § 778.320 to read as follows:

**§ 778.320 Hours that would not be hours worked if not paid for.**

In some cases an agreement or established practice provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. Compensation for such hours does not convert them into hours worked unless it appears from all the pertinent facts that the parties have treated such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement or established practice of the parties will be respected, if reasonable.

(a) *Time treated as hours worked.* Where the parties have reasonably agreed to include as hours worked time

devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Time not treated as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in an activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, such time will not be counted as hours worked unless agreement or established practice indicates that the parties have treated the time as hours worked. Such time includes bona fide meal periods, see § 785.19. Unless it appears from all the pertinent facts that the parties have treated such activities as hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[Docket No. USCG-2019-0001]

RIN 1625-AA09

#### Drawbridge Operation Regulation; Drawbridge Operation Regulation; Duwamish Waterway, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to revise the operating schedule that governs the South Park Highway drawbridge, across the Duwamish Waterway mile 3.8, at Seattle, WA. Due to infrequent bridge opening requests, King County, the bridge owner, is requesting to change the current regulation to reduce the bridge operating costs by eliminating the nighttime bridge operator, and replace the operator with an as needed operator. The modified rule would change from opening on-demand to a 12 hour advance notice for a late evening to early morning opening.

**DATES:** Comments and related material must reach the Coast Guard on or before April 29, 2019.

**ADDRESSES:** You may submit comments identified by docket number USCG-2019-0001 using Federal eRulemaking Portal at <http://www.regulations.gov>.

See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or email Steven Fischer, Thirteenth District Bridge Administrator, Coast Guard; telephone 206-220-7282, email, [d13-pf-d13bridges@uscg.mil](mailto:d13-pf-d13bridges@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
OMB Office of Management and Budget  
NPRM Notice of Proposed Rulemaking  
(Advance, Supplemental)  
§ Section  
U.S.C. United States Code

##### II. Background, Purpose and Legal Basis

King County owns the South Park Highway drawbridge across the Duwamish Waterway at mile 3.8, but the Seattle Department of Transportation (SDOT) operates the South Park Highway Bridge. On behalf of SDOT, King County is requesting a permanent change to the existing operating regulation. Due to infrequent bridge opening requests from 11 p.m. to 7 a.m., King County is proposing to eliminate the nighttime bridge operator. The proposed regulation change would allow SDOT to not have a bridge operator attending the subject bridge from 11 p.m. to 7 a.m. unless at least 12 hours notice has been received prior to an opening request.

Marine traffic on the Duwamish Waterway consists of vessels ranging

from small pleasure craft, small tribal fishing boats, large size pleasure motor vessels and large commercial vessels and barges. The subject bridge currently operates in accordance in 33 CFR 117.1041(a)(2). This bridge provides a vertical clearance in the closed-to-navigation position approximately 34 feet in the center of the span and 27 feet at the sides of the span above mean high water.

##### III. Discussion of Proposed Rule

This proposed rule amends 33 CFR 117.1041(a)(2) to provide specific requirements for the operation of the South Park Bridge. The 2017 South Park Bridge log book shows a low number of drawbridge opening requests during late nighttime hours. Of the 524 openings in 2017, approximately 4.5 percent, or 24 total requests occurred between the 11 p.m. and 7 a.m. Openings from 11 p.m. to 7 a.m. for 2014, 2015 and 2016 ranged from 5% to 10% of all openings. Based off of the historical data obtained from the bridge opening logs, King County is proposing that the subject bridge need not open for vessel traffic from 11 p.m. to 7 a.m. unless a 12 hour notice is given to the South Park Bridge. Further, King County is proposing between 11 p.m. and 7 a.m., vessels engaged in sea-trials or dredging activities may request a standby operator if at least a 24 hour notice is given to the South Park Bridge. Vessels able to transit under the bridge without an opening may do so at any time. If emergency responders needs a bridge opening between 11 p.m. and 7 a.m., this rule change would require the Fremont Bridge operator, across the Lake Washington Ship Canal, to open the South Park Bridge within 45 minutes from initial notification to the Fremont Bridge.

On March 13, 2018, we published a temporary test deviation entitled Drawbridge Operation Regulation; Duwamish Waterway, Seattle, WA, in the **Federal Register** (83 FR 10785). The test deviation ran from March 22, 2018 to September 17, 2018. We received three comments on this test deviation. One comment did not relate to operations of the South Park Bridge. King County submitted a rebuttal addressing the two other comments on October 17, 2018. We have read both submittals from each party, and will discuss the material herein.

A. The first commenter raises two concerns pertaining to the closure timing of the bridge. First, the commenter states that with the First Avenue South Bridge closed from 6 a.m. to 9 a.m., marine vessels would have to wait until 9 a.m. for an opening of the South Park Bridge. Second, the