

# Overtime Pay Consequences of Common Employee Benefits

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On December 16, 2019, the Wage and Hour Division of the U.S. Department of Labor (DOL) published final regulations on “regular rate of pay” for overtime pay purposes under the Fair Labor Standards Act (“FLSA”). The final regulations address common employer-provided benefits as well as other workplace practices, which were not specifically addressed in previous DOL guidance.

## ■ Common Employer-Provided Benefits Addressed in DOL Final Regulations

The following benefits are **excluded** from “regular rate of pay” for overtime pay purposes:

- Employer contributions to an employee’s health savings account (HSA) with a custodian or trustee, when such contributions are communicated to employees.
- Employer contributions to a benefit plan, where the primary purpose of the plan is to provide payment of benefits to employees on account of:
  - death,
  - disability,
  - illness,
  - hospitalization,
  - accident, or
  - legal services.
- Employer’s cost to provide parking benefits to employees (e.g., parking spaces near the business premises of the employer).
- Reimbursements to employees for the following expenses incurred for the employer’s convenience or benefit:
  - cell phone,
  - non-mandatory credentialing exam fees, or
  - organization membership dues.
- Payments for occasional periods when no work is performed, including:
  - family medical leave,
  - military service,
  - voting,
  - attending child custody or adoption hearings,
  - attending funeral services, or
  - any other paid leave required under state or local law.

The following benefits are **excluded** from “regular rate of pay” for overtime pay purposes, provided employee eligibility for the benefit does not depend on hours worked, services rendered, job performance, or other criteria based on the quality or quantity of the employee’s work:

- Benefits from a self-funded employee benefit plan, including a self-funded health reimbursement arrangement (HRA).
- Employer’s cost for the following conveniences furnished to the employee:
  - on-the-job medical care,
  - on-site treatment provided by specialists such as chiropractors, massage therapists, physical therapists, or personal trainers, or
  - counselors or Employee Assistance Programs.
- Employer’s cost for providing wellness programs, such as:
  - health risk assessments,
  - biometric screenings,
  - vaccination clinics (e.g., flu vaccination),
  - nutrition classes or weight loss programs,
  - smoking cessation programs,
  - stress reduction or mental health wellness programs,
  - exercise programs,
  - coaching to help employees meet health goals, or
  - financial wellness programs or financial counseling.
- Employer’s cost of providing gym access, gym memberships, and fitness classes furnished as a convenience to the employee.
- Tuition benefits, whether paid to the employee, an education provider, or a student loan program.
- Adoption assistance, including financial assistance, legal services, and information and referral services.
- Emergency childcare services provided by the employer in the case of unforeseen circumstances (e.g., when schools or daycare centers are closed for bad weather).
- De minimis gifts or prizes (e.g., coffee mugs or t-shirts) provided to employees in connection with a contest or raffle.

The following benefits are **included** in “regular rate of pay” for overtime pay purposes:

- Cash payments to an employee made in-lieu of receiving health insurance provided through employer contributions to a section 125 cafeteria plan.
- Commuter subsidies paid by the employer (other than employer-provided parking spaces and parking benefits).
- Childcare services provided by the employer on a routine basis.
- Surrogacy assistance from the employer, which tends to consist solely of payment or reimbursement of medical expenses (typically outside of a medical plan).
- Employer’s payment of an employee’s accumulated educational debt.

The DOL final regulations also address other important employer practices, such as pay for forgoing holidays, compensation for bona fide meal periods, call-back pay, and discretionary bonuses. The DOL acknowledges in the final regulations that it is impossible to address all of the various compensation and benefits arrangements that may exist between employers and employees, both now and in the future. The above list is therefore not intended to be exhaustive.

## ■ Employer Action

Employers should review the DOL’s final regulations on “regular rate of pay” for overtime pay purposes under the FLSA and review their common employer-provided benefits to ensure compliance with the final regulations. For further assistance in evaluating the effect of the final regulations on their overtime pay practices, employers should contact their employment-law attorney or resource.