

Blog Post

DOL Issues Guidance on Payroll Rounding, Overtime Calculations, and Certain Paralegals

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Employers looking for guidance on payroll rounding practices, classification of certain highly compensated paralegals, and calculating overtime where employees receive non-discretionary bonuses will be glad to know the Department of Labor (DOL) has issued three new Opinion Letters on those subjects. DOL Opinion Letters are issued by the Wage and Hour Division of the DOL and offer insight into the DOL's interpretation of the Fair Labor Standards Act (FLSA) as applied to a given set of facts. Employers facing wage claims may avoid liability for liquidated damages if they can show they acted in good faith by relying on a DOL Opinion Letter.

Payroll Software and Rounding Practice Accepted

In Opinion Letter [FLSA2019-9](#), the DOL considered the permissibility of the payroll rounding practice used by a nonprofit that employed individuals with disabilities under government contracts subject to the Service Contract Act (SCA), which uses principles applied under the FLSA to determine hours worked. The DOL stated that the payroll software that rounds employees' hours to two decimal points and was neutral on its face complies with the FLSA. In this case, the payroll software converted hours for each work period on each

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working day to calculate a numerical figure for daily hours and extended the time out to six decimal points. The software rounded the number to two decimal points—if the third decimal was less than .005, the second decimal stayed same (e.g., 6.784999 hours worked rounds down to 6.78 hours); but if the third decimal was .005 or greater, the second decimal rounds up by 0.01 (e.g., 6.865000 hours worked in a work day rounds up to 6.87 hours). The payroll software then calculated the daily pay by multiplying the rounded daily hours number by the SCA prevailing wage.

The DOL stated that under 29 CFR Section 785.48(b), it is common and acceptable for employers to round time in determining an employee's hours worked as long as it "will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." The Opinion Letter noted that it has been the DOL's policy to accept different methods of rounding, for example, to the nearest five minutes or one-tenth of an hour, so as long as the rounding leads to employees receiving compensation for all the time they actually worked.

Thus, employers that use payroll software that utilizes a rounding practice that is neutral on its face and averages out so that it fully pays employees for all time that they actually work will comply with FLSA regulations.

Certain Paralegals Exempt from Minimum Wage and Overtime Requirements

In Opinion Letter FLSA2019-8, the DOL stated that a trade organization's paralegals were exempt from minimum wage and overtime requirements under Section 13(a)(1) of the FLSA and qualified under the highly compensated exemption of the FLSA because they made over \$100,000 annually and regularly performed administrative work.

In the Opinion Letter, the paralegals' duties included keeping and maintaining records; "assisting the finance department with bank account matters, and budgeting—that are 'directly related to management or general business operation'" and stated that at least one of the paralegal duties was an exempt administrative employee duty. Because the paralegals performed one or more of the exempt administrative duties "customarily and regularly" and more than "occasionally," the DOL said it was "enough to qualify as a highly compensated employee."

The DOL noted that the highly compensated exemption does not require a detailed analysis of the employee's job duties and "only one exempt paralegals' duties must be of an executive, administrative, or professional character, and customarily and regularly performed by the paralegal." The DOL stated that because a "high level of compensation is a strong indicator of an employee's exempt status," the level of scrutiny as to the duties performed is "considerably relaxed."

The DOL has proposed increasing the highly compensated exemption salary threshold from \$100,000 to \$147,414. As a result of the new threshold proposed by the Department of Labor on March 7, 2019, some commentators estimate nearly 1.1 million employees previously exempt from overtime will likely become entitled to overtime based solely on their salary. The final rule regarding an increase to the salary threshold is expected to go into effect in 2020.

Factoring Nondiscretionary Bonus into Employees' Pay

In a technical Opinion Letter [FLSA2019-7](#), the DOL was tasked with addressing the calculation of overtime pay where nondiscretionary bonuses are paid on a quarterly and annual basis. In this case, the employer, pursuant to a collective bargaining agreement, paid a quarterly bonus and an annual

qualification bonus based on fixed percentages of the employee's straight-time rates and journey straight-time rate, respectively. The employer calculated the employees' weekly regular rate of pay without including his quarterly or annual bonus earnings. Instead, the employer retrospectively recalculated the weekly regular rates for the bonus period to include the bonus earnings and paid the employee the difference in overtime compensation. In making that recalculation for the quarterly and annual bonuses, the employer averaged the bonus earnings across the workweeks of the quarterly or annual bonus period, instead of using the actual bonus earnings in a given workweek.

Nondiscretionary bonuses are considered remuneration that an employer must include in the regular rate of pay to an employee. The DOL said that employers can base nondiscretionary bonuses on the work performed during a workweek and pay a bonus at the conclusion of a bonus period.

Employers have to recalculate the regular rate of pay for an employee for each workweek in the bonus period and pay the additional overtime compensation due on the bonus. However, the DOL said that employers do not have to recalculate an employee's regular rate if the employer pays a fixed percentage bonus that also pays the employee's overtime compensation due on the bonus. The DOL stated that the employer's method of factoring the quarterly bonuses of 15 percent of the employee's straight-time hourly rate and 22.5 percent for straight-time hourly rate for each hour earned at time-and-one half rate complied with the FLSA's overtime compensation requirements. The DOL did note, however, that after paying the annual bonus, the employer must recalculate the regular rate for each workweek in the bonus period and pay the overtime compensation due on the annual bonus.

Employers who pay non-discretionary bonuses must be careful when calculating an employee's regular rate of pay for purposes of determining overtime compensation, as it is easy to run afoul of

the FLSA. For assistance with complicated FLSA wage and hour issues, contact your Akerman employment lawyer.

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