

## US Department of Labor Clarifies Impact of Fringe Benefits on Overtime

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Do you offer free parking, snacks, coffee, paid leave to first responders, cell phone plans, financial assistance for adoption, loans, buy-back of unused PTO, gym memberships, wellness plans, discounts on retail goods, on-site massage therapy? These are only a few of the scores of benefits the Department of Labor (DOL) specifically addressed in a new set of rules, effective Jan. 15, 2020, addressing how these benefits can impact overtime pay. An employee's "regular rate of pay" is the employee's effective hourly wage (which could include amounts beyond base pay) that is multiplied by 1.5 when calculating overtime compensation. What other compensation and fringe benefits are included in the "regular rate" is therefore critical for employers to understand.

The new regulations are accompanied by 150+ pages of explanatory materials, discussing scores of specific benefit plans. Here are our observations about the overall effect of these rules and what you should consider in crafting your benefit package:

The new rules are intended to encourage employers to provide employees more benefits without incurring unintended overtime consequences. The most important touchstone is that the benefit NOT be linked to the quantity or quality of an employee's work. Benefits linked to quantity and quality of work will likely have to be included in the "regular rate." All of the examples listed in the first sentence above (and many others) can, if not so tied, be provided without affecting the "regular rate."

The Fair Labor Standards Act itself lists items of compensation that can be excluded from the "regular rate," 29 USC § 207(e) and those which, although excluded, can be credited against overtime compensation. § 207(h). The applicable regulations, 29 CFR Part 778, interpret and give more specificity to these statutory exclusions. It is these regulations that are now being updated.

In one minor aspect, the rules relaxed a prior requirement related to call-back pay. Call-back pay in excess of pay for the actual hours worked need not be included in the "regular rate" regardless of how frequent the practice is. The prior rule allowed the exclusion only if call-back was "infrequent and sporadic."

Competition for employees is fiercer than ever and fringe benefits are a key element in the total employment package. The Labor and Employment attorneys at Brooks Pierce are ready to assist you in evaluating the impact of these rules on any specific benefit plan you are considering.

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For more information, please contact a member of our Labor & Employment team, linked below. More information can be also found at: <https://www.dol.gov/agencies/whd/overtime/2019-regular-rate>

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