



January 15, 2026

DOL Opinion FLSA2026-2 and Regular Rate of Pay

On January 5, 2026, the U.S. Department of Labor's Wage and Hour Division (WHD) issued [FLSA2026-2](#), an opinion letter addressing whether certain bonus payments may be excluded from the "regular rate of pay" under Section 7(e) of the Fair Labor Standards Act (FLSA) for purposes of calculating overtime premiums. The WHD concluded that, under the specific facts presented, the employer must include bonus payments in the regular rate of pay and cannot treat them as excluded discretionary bonuses.

Background

The opinion letter arose from a wage-hour compliance inquiry submitted by an employer in the waste management industry. The employer paid non-exempt drivers a base hourly rate with additional compensation available through a "Safety, Job Duties, and Performance" bonus plan. Under this plan, drivers could earn supplemental incentive bonuses that applied to all hours worked in a pay period if they met predetermined criteria tied to safety, attendance, and task performance. However, the employer excluded these bonus payments from the regular rate when computing overtime pay, which the WHD evaluated.

Key Legal Principles

Under Section 6 and 7 of the FLSA, employers must pay non-exempt employees at least the federal minimum wage and overtime at "one and one-half times the regular rate of pay" for hours worked over 40 in a workweek. The regular rate of pay is broadly defined to include all remuneration for employment unless a statutory exclusion applies. Section 7(e) sets out limited categories of payments that may be excluded, such as *discretionary bonuses* under Section 7(e)(3).

A bonus qualifies as discretionary only if:

- Both the fact of payment and the amount are determined at the employer's sole discretion,
- The determination occurs at or near the end of the pay period in which the work was performed, and;
- The bonus is not paid pursuant to any prior contract, agreement, or promise creating employee expectations.

Payments that fail to meet these criteria, including many incentive or performance based bonuses, must be included in the regular rate.

WHD's Opinion in FLSA2026-2

In *FLSA2026-2*, the WHD found that the employer's bonus plan did not qualify as a discretionary bonus. The reasoning was:

- The bonus plan set specific criteria and formulas before work was performed and employees reasonably expected the payments once they met those criteria.
- Because the terms were predetermined and communicated in advance, the employer had effectively abandoned discretion over both the fact and amount of the payment.
- As a result, the bonus payments should have been included in the regular rate of pay for overtime computations under the FLSA.

Practical Implications for Employers

Bonus Plan Structure Matters: Plans with predetermined, formula-based criteria, even if tied to performance metrics such as safety or attendance, usually result in non-discretionary bonus payments that must be included in the regular rate of pay. Excluding them without meeting statutory conditions risks causing FLSA violations.

Overtime Calculations Must Reflect Total Compensation:

Employers relying on incentive bonuses must integrate those earnings into regular rate calculations for workweeks in which the bonuses are earned. Failure to do so can lead to underpayment of overtime premiums and associated liability.

Documentation and Communication:

Clear documentation of bonus criteria and communication to employees will help demonstrate the nature and timing of payments, though in many cases these factors create the non-discretionary nature that mandates inclusion in the regular rate.

Conclusion

FLSA2026-2 reaffirms a consistent principle in FLSA jurisprudence: bonus payments that depend on predetermined criteria and formulas are generally non-discretionary and must be included in the regular rate of pay. Labor relations professionals and employers must critically assess any incentive or performance-based pay plans to ensure compliance with Section 7(e) of the FLSA and to avoid misclassification of earnings that can lead to wage disputes and regulatory scrutiny.

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