



Navigating Incentive Pay, Per Diems, and Overtime

- **Regular rate of pay is the amount that must be used when determining the employee's minimum compensation for statutory overtime.**
- **Regular rate of pay is not always the same as the CBA rate of pay.**
- **Calculating it incorrectly by failing to include non-exempt payments could lead to backpay and damages being owed to employees.**

Often, employers use per diems, incentive pay, or other forms of payment to attract workers to a project. Recently, this practice has attracted the attention of the Department of Labor (DOL) and resulted in unfavorable findings for the employers involved. When attempting to determine the reasons for the findings, the focus seems to land on the per diem and/or incentive payments. However, the culprit is the employee's regular rate of pay under the Fair Labor Standards Act (FLSA).

When determining the employee's regular rate of pay, an employer must perform this calculation properly to ensure the employee receives the correct compensation when overtime is worked. Failure to perform this correctly could result in backpay and damages owed to the employee.

To comprehend how this impacts the employees' overtime payments, the regular rate of pay must be understood.

1. What is the regular rate of pay under the Fair Labor Standards Act?

The FLSA defines the regular rate of pay on a per-week basis:

From [eCFR §778.109](#) - *The regular hourly rate of pay of an employee is determined by dividing his/her total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.*

2. What must be included in the employee's regular rate of pay?

The FLSA states an employee's "total remuneration (compensation) for employment (except statutory exclusions). The Act does not provide a list of what must be included. Instead, it discusses the items that may be excluded. In other words, if it cannot be excluded, it is included.

This is where the improper per diem payments and incentive pay become problematic. The Labor Relations team issued a bulletin which demonstrates this issue. For more information, please read the [Per Diems and Overtime Labor Relations Bulletin](#).

3. What may be excluded from the employee's regular rate of pay?

While the answer to this question can get very nuanced, the general items are:

- Gifts and payments in the nature of gifts on special occasions
- Payments for occasional periods when no work is performed due to vacation, holidays, or illness; reimbursable business expenses; and other similar payments
 - This item captures payments such as proper per diems, show-up pay, and employment “perks” such as parking, tuition payments, wellness programs, etc.
- Discretionary Bonuses
- Profit-Sharing Plans
- Employer Contributions to Benefit Plans
- Premium Payments for Non-FLSA Overtime
 - This item exempts overtime payments such as double-time, shift work, and premium payments for work on weekends so long as they exceed time and one-half the regular rate of pay
- Stock Options

4. How is the regular rate of pay calculated?

The regular rate of pay is calculated using the following formula:

$$\text{(Total compensation in a workweek – statutory exclusions [see Question 3])} \div \text{Total hours in the workweek} = \text{Regular rate of pay}$$

This formula produces a rate on which all hours after 40 in a workweek must be paid at the FLSA minimum of time and one-half.

For example applications of this formula, please see the [Per Diems and Overtime Labor Relations Bulletin](#) discussed in Question 2.

5. Is the regular rate of pay under the FLSA the same as the “straight time rate of pay” or the “regular rate of pay” in the Collective Bargaining Agreement?

No. The negotiated rate of pay in the CBA is used for determining the minimum hourly rate, overtime, and premium payments required in the Agreement. This answer changes to a yes if the parties have historically seen the CBA rate and regular rate of pay under the FLSA as being one in the same; however, this is very uncommon.

The regular rate of pay under the FLSA can differ from the CBA rate if payments which are not able to be excluded are made to the employee thus complicating the employers' obligation per the FLSA requirements.

It should be noted, the regular rate of pay is used for calculating the minimum overtime an employee should be paid pursuant to the FLSA. It is not the amount which must be paid for every straight time hour worked.

6. Does the regular rate of pay under the FLSA have to be paid for all hours worked?

No. The regular rate of pay is used for determining if the employee received, at minimum, time and one-half of the rate for all hours worked over forty (40) hours in a week. The employer may pay whatever rate is determined for the type of work being performed for all hours up to forty (40) hours in a week so long as the rate exceeds the federal/state minimum wage. The employer must also comply with the CBA rate for hours worked.

The employer need only be concerned with the regular rate of pay when calculating the minimum overtime for an employee under the FLSA.

7. If the regular rate of pay is higher than the CBA rate and the CBA requires double-time on some hours, does the employer pay double the regular rate of pay or double the CBA rate?

Double the CBA rate. The FLSA does not require anything more than time and one-half the regular rate of pay. Double-time will almost always exceed this.

8. Since the law does not require double-time, shift premiums, and vacation/sick pay (except in some states), does the payment of these impact the regular rate of pay?

Payment of double-time, shift premiums, and vacation/sick pay does not impact the employee's regular rate of pay under the FLSA. They are exempted as premium payments for non-FLSA overtime and/or special work. [See eCFR §778.201.](#)

9. When would the regular rate of pay exceed the CBA rate?

This will happen when an employer makes a payment to an employee that cannot be excluded from the employee's regular rate of pay as discussed in Question 3.

The most common scenario is an employer classifying a payment as a per diem or incentive pay when it is a wage as it does not meet the requirements of being a proper per diem or other exclusion. In this case, it is recommended to review the [Labor Relations Bulletin](#) which discusses this scenario in depth.

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