



VIA ELECTRONIC SUBMISSION

June 12, 2019

Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

Re: RIN 1235-AA24, Notice of Proposed Rulemaking; Regular Rate Under the Fair Labor Standards Act

Dear Ms. Smith:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced notice of proposed rulemaking published in the *Federal Register* on March 29, 2019 at 84 Fed. Reg. 11888.

About Associated Builders and Contractors Inc.

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC shares the concerns and recommendations provided in comments filed to this docket by the Partnership to Protect Workplace Opportunity and incorporates them into this letter by reference.

Background

On March 29, 2019, the DOL issued a notice of proposed rulemaking to amend the regulations at 29 CFR Part 778 to clarify and update the "regular rate" requirements under section 7(e) of the Fair Labor

Standards Act, which define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.¹

As acknowledged in the NPRM, DOL is proposing updates to its regulations governing regular rate for the first time in more than 50 years in order to provide clarity to employers and employees and better reflect the 21st century workplace.

ABC's Comments in Response to the Department's Proposed Rule

ABC writes in support of the DOL's proposed rule and agrees with the Department that it is past time for clarification of how Section 7(e) of the Act applies to compensation in the 21st century workplace. Updating the regulations is essential to clarify the types of employee benefits, many of which did not exist when the previous rules were written, that should be excluded from the regular rate. Clarification will encourage more employers to provide benefits such as tuition reimbursement, public transportation subsidies, child care services and numerous similar benefits discussed below. These benefits are not provided based on hours of work, production or efficiency, nor are they provided to avoid paying overtime. It is therefore past time to clarify that such benefits are not part of the regular rate on which overtime is based.

To assist DOL in this rulemaking, ABC surveyed its member companies to determine what kinds of perks, benefits or other miscellaneous payments are currently being offered to employees in the construction industry. The survey found:

- 78% of survey respondents give their employees discretionary bonuses, including bonuses paid to employees who make unique or extraordinary efforts that are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming challenging or stressful situations and employee-of-the-month bonuses.
- 59.5% of survey respondents give payouts to employees of unused vacation and sick leave.
- 35% of survey respondents offer their employees tuition reimbursement and repayment of student loans.
- 27% of survey respondents provide accident, unemployment and legal services benefits to their employees.
- 19% of survey respondents give their employees per diem above federal levels.
- 19% of survey respondents offer wellness benefits to their employees, including gym memberships, fitness classes and on-site specialist treatments.
- 13.5% of survey respondents offer discounts on retail goods and services to their employees.

All of the foregoing perks, benefits or payments share the necessary attributes of the statutory exclusions from the regular rate under Section 7(e). Thus, they are either "in the nature of gifts" or "rewards," the "amounts of which are not measured by or dependent on hours worked, production or efficiency." See Section 7(e)(1). Alternatively, they are excluded "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause. See Section 7(e)(2). Or the above referenced perks are payments made "without regard to hours of work, production, or efficiency." See Section 7(e)(3). Applying the "fair interpretation"

¹ 84 Fed. Reg. 11888.

principle articulated by the U.S. Supreme Court in *Encino Motorcars, LLC v. Navarro*,² all of the benefits described above, as being commonly provided by construction industry employers, should be excluded from the regular rate.

ABC specifically supports DOL’s proposal to remove the word “solely” from Section 778.217(a) of the rules, to better reflect that Section 7(e)(2) of the Act does not restrict excludable expenses to those “solely” benefitting the employer. ABC recommends, however, that the Department further reinforce this principle by adding language to the effect that business expenses need not be solely or primarily incurred for the employer’s benefit.

ABC further supports DOL’s proposal to revise Section 778.217(c) to state that per diem payments paid at the federal per diem rate are “per se reasonable.” However, we are concerned that this proposal may create an unwarranted inference that payments above the federal per diem rate are somehow not reasonable. As reflected in ABC’s survey responses above, it is not uncommon for construction industry employers to pay per diem rates higher than federal standards. To guard against misinterpretation of such payments, we strongly recommend that DOL expressly state that the proposed language approving federal per diem rates should not be read as creating an inference that reimbursements exceeding the federal per diem rate are “unreasonable.” In addition, DOL should reaffirm that reimbursement of actual expenses should never be deemed to be “disproportionately large” and that employers may use other reasonable methods for approximating expenses.

For similar reasons, ABC supports DOL’s proposal to remove “lunch periods” from Section 778.320 of the proposed rules in order to address the situation where an employer pays employees for time that is not worked under Section 785.19. Construction employers sometimes choose to pay for lunch periods, though not required to do so, and they should not be penalized by including such payments in the regular rate when the payments are made specifically for time not worked. The Department should also clarify that pay for occasional absences need not be included in the regular rate, as there is no statutory basis for such an inclusion in Section 7(e)(2).

ABC welcomes DOL’s proposal to clarify Section 778.219 to exclude paid leave beyond vacation time, specifically paid sick leave, from the regular rate. Such exclusion is clearly authorized by Section 7(e)(2) of the Act and is particularly essential now to account properly for the proliferation of state and local paid sick leave laws around the country.

ABC is concerned about DOL’s intended treatment of state wage penalties or payments mandated by state or local laws that are not payments for hours actually worked. DOL should make clear that such penalties or payments that are not for work actually performed by the employees are excludable from the regular rate.

ABC supports DOL’s stated intent to clarify Section 778.224 so that “other similar payments” are recognized as excludable under the “catch-all” language of the Act. ABC recommends, however, that additional examples of “other similar payments” be provided so as to include tuition reimbursements, third-party discounts, public transit subsidies, childcare services and subsidies, gym memberships, fitness classes, use of recreational facilities, health risk assessments, biometric screenings, vaccination clinics, nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs,

² 138 S. Ct. 1134 (2018).

exercise programs and coaching to help employees meet health goals. All of these payments have in common the fact that they are not dependent on hours worked, production or efficiency of employees, nor is receipt of these benefits affected by the quantity or quality of work performed.

ABC supports DOL's continued recognition that discretionary bonuses are excluded from the regular rate under the Act but is concerned that the Department does not give specific examples of such excluded discretionary bonuses in 778.211 of the proposed rules. These should at least include "spot" bonuses, referral bonuses, sign-on bonuses and non-cash awards of de minimis value.

ABC further recommends DOL amend Section 778.215 to clarify and reaffirm the excludability of contributions to 401(k) plans, reflecting modern-day benefit designs, as well as other benefits covered by the Employee Retirement Income Security Act, a law that was passed years after the most recent revision of DOL's regular rate rules. DOL should specifically amend the current requirement that employer contributions to be excluded must be paid "irrevocably to a trustee or third person," so long as the employer is contractually obligated to provide the benefit. Employer contributions to association health plans should also clearly qualify for exclusion from the regular rate.

Finally, ABC supports DOL's proposed revision of 778.1 to clarify that Part 778 does not contain an exhaustive list of permissible compensation practices under Section 7(e) of the Act. The Department should also clarify that the forms of compensation and the methods of calculating overtime presented in the proposed rules constitute non-exclusive examples. The mere fact that an employer's payments do not fit squarely within the examples provided should not of itself create an FLSA violation. The Department should also clarify Sections 778.112 and 778.114 to make clear that employees paid under the fluctuating workweek method or via a day or job rate, as not uncommonly occurs within the construction industry, may also be paid additional types of compensation such as performance-based bonuses.

Conclusion

ABC supports DOL's proposed changes to the regular rate rules, which provide much needed modernization of outdated rules that otherwise fail to provide sufficient guidance for the 21st century workplace. Further, non-exclusive examples will be helpful in incentivizing employers to provide additional benefits to their employees, within the flexible boundaries of Section 7(e) of the Act.

Respectfully Submitted,



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