U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2025-04

September 30, 2025

Dear **Name***:

This letter responds to your request for an opinion addressing whether "emergency pay" provided to you and other firefighters in your city can be excluded from the regular rate of pay when calculating overtime premiums under section 7(e) of the Fair Labor Standards Act (FLSA) or, alternatively, how to include this payment in the regular rate.

It is our opinion that, under the circumstances presented and limited to the specific facts set forth in the request, the "emergency pay" is not excludable from the regular rate of pay because the fact and amount of the payment are not within the sole discretion of the employer at or near the end of the work period, and the pay does not otherwise fit within a statutory exclusion. Accordingly, the employer at issue should include "emergency pay" earned for hours worked within the regular rate for purposes of overtime premium calculations using the method described below.

This opinion is based exclusively on the facts as presented below that you provided to the Department and may not apply to different facts in this or other situations.

BACKGROUND

You describe yourself as a firefighter/paramedic employed by a city government in Texas. The city has a written policy for emergency pay through which—in relevant part—firefighters and certain other non-exempt employees are paid a premium payment of one half the employee's regular hourly rate of pay, which we assume means an employee's base or usual hourly rate, for every hour worked during an "emergency period." The city's policy defines emergency periods as periods when, due to a disaster or emergency declaration as defined by the city, only some "designated emergency employees" must work. You state that although employee job duties "substantially remain the same" during certain emergency pay periods, "the extreme weather environment makes those duties more likely to cause physical hardship" for firefighters.

You assert that the emergency pay at issue should be included in the regular rate of pay used to calculate employee overtime premiums on the basis that it does not fall within any of the statutory exclusions from the regular rate provided in section 7(e) of the FLSA. *See* 29 U.S.C. § 207(e). Additionally, you assert that, as to firefighters specifically, the emergency pay constitutes "hazard pay," which, in your understanding, should be included in the regular rate.

GENERAL LEGAL PRINCIPLES

The FLSA requires payment "at a rate not less than one and one-half times the regular rate at which [the employee] is employed" to all non-exempt employees for all hours worked over 40 hours in a workweek. 29 U.S.C. § 207(a)(1). The "regular rate" must include "all remuneration for employment paid to, or on behalf of, the employee," and must reflect all payments earned during the workweek, exclusive of overtime payments. *Id.* at § 207(e); *Bay Ridge Operating Co. v. Aaron*,

334 U.S. 446, 461 (1948); *see also Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 187 (3d Cir. 2000) ("[T]here is a statutory presumption . . . that remuneration in any form is included in the regular rate calculation.").

The regular rate is subject to eight statutory exclusions provided in section 7(e) of the FLSA. 29 U.S.C. § 207(e). Relevant to this letter, section 7(e)(3) permits an employer to exclude from the regular rate "sums paid in recognition of services performed during a given period" if "both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not made pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly." *Id*. at § 207(e)(3); *see also* 29 CFR 778.211. Such a payment is often termed a "discretionary bonus."

Additionally, sections 7(e)(5), (6), and (7) of the FLSA provide that certain premium payments made by employers for work in excess or outside of specified daily or weekly periods or on certain special days are regarded as overtime premiums which may be excluded from an employee's regular rate of pay. *See* 29 U.S.C. § 207(e)(5)–(7). However, "extra compensation provided by premium rates other than those described in the statute," such as "nightshift differentials" and "premiums paid for hazardous, arduous[,] or dirty work," "cannot be treated as overtime premiums." 29 CFR 778.207. When such premiums are paid, they must be included in a non-exempt employee's regular rate of pay. *Id*.

OPINION

Based on the specific facts described in your letter, the emergency pay at issue does not qualify as a discretionary bonus that may be excluded from an employee's regular rate of pay. The emergency pay also does not fall under any other exclusion from the regular rate of pay under section 7(e) of the FLSA. Accordingly, under the facts you provided, in workweeks when the city pays emergency pay, the emergency pay must be included when determining the regular rate of pay used to calculate employee overtime premiums.

The FLSA requires that three conditions be satisfied for a payment to qualify as an excludable discretionary bonus: (1) the fact and amount of the payment must be "determined at the sole discretion of the employer"; (2) the employer's determination must occur "at or near the end of the period" when the employee's work was performed; and (3) the payment must not be made pursuant to "any prior contract, agreement, or promise" causing employees to expect such payments regularly. 29 U.S.C. § 207(e)(3). Here, regardless of whether the city's policy would constitute a prior contract, agreement, or promise, the first two conditions are not satisfied. Although the existence and terms of when emergency pay is available may be at the employer's discretion, the emergency pay at issue is not "determined at the sole discretion of the employer" once the employee has performed the work under those terms. Specifically, the policy leaves no discretion as to whether to provide emergency pay during an emergency period when emergency work is performed, nor does it leave discretion regarding the amount of the payment as the amount is set at one half of the employee's base hourly rate of pay. Moreover, the fact and amount of the emergency pay are determined well before the emergency work is performed—further evidence that the payment is non-discretionary in nature. *Id*. Accordingly, the emergency pay, as described, does not meet the criteria of a discretionary bonus under section 7(e)(3).

Similarly, the emergency pay under the specific facts described in your letter also does not qualify as an excludable overtime premium under sections 7(e)(5), (6), or (7) for the following reasons:

- The emergency pay is not excludable under section 7(e)(5) because it is not contingent upon the employee working in excess of any particular amount of hours, *i.e.*, working beyond 8 hours in a day, 40 hours in a workweek, or the employee's "normal working hours or regular working hours." 29 U.S.C. § 207(e)(5).

- The emergency pay is not excludable under section 7(e)(6) because it is not contingent upon the work being performed "on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek." 29 U.S.C. § 207(e)(6). The emergency periods described in the city's policy may or may not fall on such "special days," and, importantly, the emergency pay is not limited to or paid because of such days.

- The emergency pay is not excludable under section 7(e)(7) because, regardless of whether the city's policy would constitute an employment contract, the pay is not contingent upon the work being performed outside "the basic, normal, or regular workday … [or] workweek" of the employee. 29 U.S.C. § 207(e)(7).

Rather, based upon your representations, we agree with you that the emergency pay does not qualify as an excludable overtime premium. As such, the emergency pay should be included in the regular rate of pay used to calculate overtime premiums for any non-exempt city employees who receive such pay.

To determine the FLSA's overtime premium pay, the employer first must calculate the employee's regular rate. The regular rate is calculated on a workweek-by-workweek basis.[1] "The rule for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any workweek". *Bay Ridge Operating Co.*, 334 U.S. at 460–61; *see also Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942) ("Wage divided by hours equals regular rate").[2]

First, the employer must total the employee's "straight-time" earnings (except section 7(e) statutory exclusions) *actually paid* for that workweek. Then, the employer must total all the hours *actually worked* in that same workweek. Once the straight-time earnings and hours worked are ascertainable, "the determination of the regular rate becomes a matter of mathematical computation". *Bay Ridge Operating Co.*, 334 U.S. at 461 (citations and quotes omitted). To calculate the regular rate, the employer must divide the total straight-time earnings by the total hours worked. Finally, to obtain the overtime premium owed for that workweek, the employer

[1] Section 7(k) of the FLSA provides a partial overtime exemption for any employee of a public agency engaged in fire protection activities or any employee engaged in law enforcement activities. *See* 29 U.S.C. 207(k). Under this provision, whether overtime pay is owed may be determined based on a "work period" of 7 to 28 consecutive days. Section 7(k) impacts the determination of *whether* overtime pay is due and therefore does not impact this opinion letter—which concerns how to calculate the regular rate when overtime pay *is* due.

[2] You asked whether overtime could be determined in accordance with 29 CFR 778.115. The regular rate computation as described here, and in the example provided below, are first principles. The provision at 29 CFR 778.115, on the other hand, is an illustration that would produce the same result.

must divide the regular rate in half and multiply that amount, per hour, by all overtime hours worked.

By way of example:

> John earns a base hourly rate of $20.00 per hour and works a total of 50 hours in a workweek, 20 hours of which are during emergency pay hours for which he receives a premium of one-half his base hourly rate. His total straight-time earnings would be (50 hours × $20) + (20 hours × $20 × 0.5) = $1,200. His regular rate for the workweek would therefore be ($1,200 ÷ 50 hours) = $24.00. Thus, he would be entitled to an additional $12 for each overtime hour worked ($24 × 0.5), for a total of $120 ($12 × 10 overtime hours), and a grand total of $1,320.

Finally, you asked whether, as to firefighters, the emergency pay would qualify as "hazard pay" given that firefighters' work during emergency periods is "more likely to cause physical hardship." The Department need not address this question because it is unnecessary to determining whether the "emergency pay" is included in the regular rate.

We trust that this letter is responsive to your inquiry.

Sincerely,

James R. Macy
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).** You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for any litigation that commenced prior to your request. This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This is an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.