



The U.S. Department of Labor’s Wage and Hour Division (WHD) recently issued an opinion letter addressing whether daily expense reimbursement payments can be excluded from an employee’s regular rate when calculating overtime pay under the Fair Labor Standards Act (FLSA). Though opinion letters are not binding in court, employers may rely on letters issued by the administrator as a good faith defense and bar to liability for wage claims arising under the FLSA.

In [FLSA2024-01](#), an oil and gas services company sought guidance regarding employees who perform inspections and similar services on pipelines and associated materials. The company, which previously paid inspectors tool and equipment payments totaling \$25 per day for using their personal tools and equipment, asked whether it could exclude higher tool and equipment payments (ranging from \$150-\$200 per day) from the

regular rate of pay for employees who use their personal mobile phones, cameras, computers, and other equipment for work.

The FLSA requires that the regular rate of pay includes all remuneration for employment, subject to specific statutory exclusions. One permissible exclusion is for “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of [their] employer’s interests.” To qualify for exclusion, the payments must be legitimate reimbursements for expenses actually incurred by the employee.

Based on the facts provided, the WHD opined that the \$150 to \$200 per day tool and equipment payments would likely *not* be excludable from employees’ regular rates, as this amount was six to eight times greater than the current payment and the facts did not indicate that the employees actually incurred such significant ongoing expenses in using their tools and equipment on the employer’s behalf. The WHD noted, however, that if the employer *did* make the larger payment, it could exclude from the regular rate the portion of the payment which reasonably approximates the expenses incurred on behalf of the company. In doing so, the opinion letter reaffirmed that the analysis of this issue under the FLSA is fact-intensive, as the WHD does not require or endorse a specific method to approximate employees’ expenses for reimbursement.

Key Takeaways for Employers:

- Employers should review their reimbursement practices to ensure that they are providing reasonable approximations of actual expenses incurred by employees.
- Employers are required to document the amount and nature of each payment excluded from the regular rate. Records may include vouchers or other payment data.
- Only legitimate expense reimbursements are allowed to be excluded from the regular pay rate. Artificially inflating expense payments to reduce the regular rate of pay and, consequently, the amount of overtime pay is not permissible under the FLSA.

The WHD’s opinion letter underscores the importance of accurately determining and documenting expense reimbursements to ensure compliance with the FLSA. Employers with questions about this new DOL opinion letter should consult experienced counsel.

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