

DOL Opinion Letter Provides a Compliance Roadmap for Including Bonuses in Overtime Calculations

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In early 2026, the U.S. Department of Labor's (DOL) Wage and Hour Division [issued](#) six opinion letters providing guidance on the federal labor standards under the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act. In [one](#) of these letters, the DOL addressed a key topic for employers: how and when bonuses are incorporated into overtime calculations. In particular, the DOL explained the circumstances under which bonus payments may be excluded from an employee's regular hourly rate of pay and, when they cannot, how those bonuses must be factored into the employee's regular rate and overtime calculation. [Opinion Letter FLSA2026?2](#).

I. Legal Framework: When Bonuses Must Be Included in the Regular Rate

Section 7 of the FLSA requires employers to pay nonexempt employees an overtime rate of at least 1.5 times their regular rate of pay for each hour worked over 40 hours in a workweek. 29 U.S.C. § 207(a)(1). Whether bonuses must be included in an employee's "regular rate" for purposes of calculating the amount of overtime due depends on what type of bonus is paid. Some bonuses are statutorily exempt and, thus, do not need to be included in an employee's regular rate, while others are not. One common statutory exemption is a discretionary bonus. 29 U.S.C. § 207(e)(3).

To qualify as a discretionary bonus, all three of the following conditions must be met under the FLSA:

1. Both the fact and amount of the payment are determined at the sole discretion of the employer;
2. The employer makes that determination at or near the end of the period in which the employee's work is performed; and
3. The payment is not made pursuant to any prior contract, agreement, or promise that would cause the employee to expect such payments regularly.

29 U.S.C. § 207(e)(3).

If any of these conditions are not met, the bonus is nondiscretionary and must be included in the regular rate.

For example, in Opinion Letter FLSA2026-2, the employer implemented a bonus plan under which drivers could earn a set bonus amount based on punctuality, attendance, and completion of daily safety tasks. Two of the three criteria for a discretionary bonus were not satisfied: the employer announced the bonus plan well in advance of the period in which the employee's work is performed, and both the fact and amount of the bonus were determined before the end of the work period. As such, the DOL determined that this was nondiscretionary and had to be included in the drivers' regular rate.

II. How Are Rates Calculated for Nondiscretionary Bonuses?

When a bonus is nondiscretionary, the employer must include it in the employee's regular rate of pay for the purpose of calculating an overtime rate.

Below is an example adapted from Opinion Letter FLSA2026-2 to demonstrate how nondiscretionary bonuses should be calculated into the regular rate and overtime rate.

Assume an employee:

- Has a base hourly rate of **\$12**;
- Works **50 hours** in a single workweek (*i.e.*, 10 overtime hours); and
- Under a predetermined incentive plan, earns an additional **\$5.60 per hour** as a nondiscretionary bonus for all hours worked that week.

Calculation

1. Hours and rates

- a. Base hourly rate: **\$12**
- b. Nondiscretionary bonus rate: **\$5.60** per hour
- c. Total hours worked: **50** (40-hour workweek + 10 overtime hours)

2. Straight-time earnings (all 50 hours)

- a. Base pay: total hours × base hour rate = $50 \times \$12 = \mathbf{\$600}$
- b. Bonus pay: total hours × nondiscretionary bonus rate = $50 \times \$5.60 = \mathbf{\$280}$
- c. Total straight-time earnings: base pay + bonus pay =
 $\$600.00 + \$280.00 = \mathbf{\$880}$

3. Regular rate

- a. Regular rate = total straight-time earnings ÷ total hours =
 $\$880 \div 50 \text{ hours} = \mathbf{\$17.60 \text{ per hour}}$

4. Overtime:

- a. Half-time rate: (regular rate) × 0.5 =
 $\$17.60 \times 0.5 = \mathbf{\$8.80 \text{ per overtime hour}}$
- b. Overtime: overtime hours × half-time rate = $10 \times \$8.80 = \mathbf{\$88}$

5. Total pay for the week

- a. Total pay for the week = straight time + overtime =
 $\$880 \text{ (straight time)} + \$88 \text{ (overtime)} = \mathbf{\$968}$

Employers that use bonuses or incentive pay for non-exempt employees should periodically review their pay practices to identify which bonuses are nondiscretionary and confirm that all nondiscretionary bonuses are properly incorporated into the regular rate of their employees for overtime purposes. Opinion Letter FLSA2026-2 offers a practical roadmap, but it also underscores how easy it is to misclassify bonuses or miscalculate overtime — errors that can lead to costly back-pay liability, liquidated damages, and attorneys' fees. Employers should work closely with counsel to audit bonus plans, update written policies, and train payroll and HR personnel on regular rate calculations to help ensure compliance with the FLSA and applicable state laws.

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