

# LEGAL UPDATE



## HIGHLIGHTS

- On Jan. 5, 2026, the DOL issued opinion letter FLSA2026-2, addressing whether Section 7(e) of the FLSA permits an employer to exclude certain bonus payments from an employee's regular rate of pay.
- The DOL advised that the employer must include the bonus payments in the regular rate of pay in any workweek for which they are earned because the bonus payments are calculated using a predetermined plan to incentivize certain work performance.

## DOL Confirms Bonus Payments Under Predetermined Plans Must Be Included in Employees' Regular Rate of Pay

On Jan. 5, 2026, the U.S. Department of Labor (DOL) issued Opinion Letter [FLSA2026-2](#), responding to an employee's question regarding whether Section 7(e) of the Fair Labor Standards Act (FLSA) permits an employer to exclude certain bonus payments from an employee's regular rate of pay. The question concerns an employer's bonus plan that allows employees to earn supplemental performance-based bonuses for each pay period. If earned, these bonuses would apply to all hours worked in that pay period.

### Background

The FLSA generally requires employers to pay employees at least the federal minimum wage for all hours worked and 1.5 times their regular pay rate for each hour worked over 40 in a workweek. The regular rate is calculated by dividing total straight-time earnings by the total hours worked that workweek. An employee's overtime premium is calculated by dividing the regular rate in half and multiplying that amount by the FLSA overtime hours worked to obtain the FLSA overtime premium pay due for the workweek. Under Section 7(e) of the FLSA, the regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, with limited exceptions.

Section 7(e)(3) of the FLSA allows employers to exclude sums paid in recognition of services performed during a given period from an employee's regular rate if certain conditions are met. Under Section 7(e)(3) of the FLSA, the following three conditions must be met for a payment to be considered 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 that causes the employee to expect the payments to be made regularly.

### Key Highlights

The bonus plan at issue used detailed criteria and one or more formulas to determine whether a bonus was earned and calculate the hourly bonus amount. When applying the bonus plan's criteria, the employer paid the bonus in addition to the base hourly wages for each pay period, but did not include the bonus payments in calculating each employee's regular rate for the purpose of determining overtime premiums. The DOL advised that the employer must include the bonus payments in the regular rate of pay for any workweek for which they are earned because the bonus payments are calculated using a predetermined plan to incentivize certain work performance.

### Employer Takeaway

Employers must include bonuses promised in advance and triggered by conditions set by the employer in the regular rate of pay for the purpose of calculating overtime.