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# Briefly

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## DOL FINALIZES REVISIONS TO FLSA'S *REGULAR RATE OF PAY* REGULATIONS

For the first time in more than 50 years, the U. S. Department of Labor's (DOL) Wage and Hour Division (WHD) released a final rule updating the regulations governing regular rate requirements under the Fair Labor Standards Act (FLSA). Regular rate requirements define what forms of additional payments beyond regular hourly or salaried wages must be included or may be excluded in the "time and one-half" calculations when determining workers' overtime rates.

The Final Rule focuses primarily on clarifying whether certain kinds of benefits or "perks," and other miscellaneous items must be included in the regular rate. Specifically, the final rule clarifies that employers may offer the following perks and benefits to employees *without risk of additional overtime liability*:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program, and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred "solely" for the employer's benefit, and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expense are per se "reasonable payments";
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples and;
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

In the preamble to the Final Rule, there is a great deal of discussion regarding what makes certain of these perks and benefits excludable from the regular rate and what makes other ones not excludable. Most of these perks and benefits relate to what constitutes the "other similar payments" that are excludable from the regular rate under FLSA §7(e)(2). To be excludable, such payments cannot depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee's work. Frequent reference is made to perks and benefits that are conditioned only on being an employee, without any ties to quality or quantity of work. For example, sign-on bonuses with no "clawback" provision are excludable from the regular

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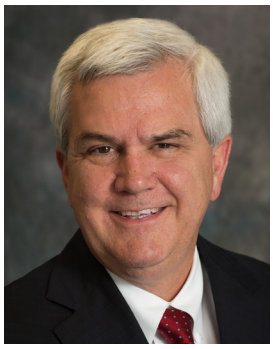
# AT THE NLRB, EVERYTHING OLD IS NEW AGAIN



**Howard B. Jackson**

"[The] NLRB overturned existing precedent and returned to previous longstanding rules on several topics …"

In a series of decisions and one rule making announcement – all occurring in December - the National Labor Relations Board ("NLRB" or "Board") overturned existing precedent and returned to previous longstanding rules on several topics, and relaxed several deadlines in its representation case election rules. These actions are summarized below.

## Employer-Owned E-mail Systems.

The Board has long balanced employer property rights against employees' rights to organize and engage in other activities under Section 7 of the National Labor Relations Act ("Act"). In a 2014 decision, *Purple Communications*, the Board held that employees who were provided with the ability to use employer-owned e-mail systems were presumptively permitted to use those systems for Section 7 activities, such as union organizing.

In *Caesar's Entertainment* the Board overruled *Purple Communications*. In so doing, the Board ruled that employees have no statutory right to use employer-owned IT equipment, including e-mail, for Section 7 purposes. The Board observed that employers "unquestionably" have a property right in such systems. Further, in the modern workplace employees have a variety of means to communicate with each other, including the typical means of face-to-face contact as well as via personal e-mail and social media. Accordingly, finding that employees do not have a statutory right to use employer-owned systems does not unduly restrict employees' ability to communicate with each other.

The Board created an exception to the rule where e-mail is the "only reasonable means for employees to communicate with each other." That would seem to be a very rare exception indeed.

## Confidentiality Rules With Respect to Investigations.

In *Banner Estrella Medical Center*, a 2015 case, the Board held that confidentiality rules with respect to employer investigations must be examined on a case-by-case basis, and generally required employers to provide a specific legitimate need to maintain confidentiality in any given investigation.

In *Apogee Retail, LLC*, the Board overruled *Banner Estrella Medical Center*. Under the newly announced standard the Board will examine confidentiality rules under the standards for analyzing employer rules from *Boeing Co.*, Under *Boeing Co.*, the Board analyzes facially neutral rules that can potentially impact Section 7 rights by evaluating: "(1) the nature and extent of the potential impact of the rule on NLRA rights, and (2) legitimate justifications associated with the rule." After conducting that analysis, the rules are placed in one of three categories:

- Category 1 rules are lawful because they do not prohibit or interfere with Section 7 rights or the potential limitation on Section 7 rights is outweighed by justifications supporting the rule.
- Category 2 rules require individualized inquiry as to whether the rule prohibits or interferes with rights under the Act, and if so, whether the impact on such rights is outweighed by legitimate justifications.
- Category 3 rules are unlawful because they prohibit or interference with the exercise of rights under the Act and their impact is not outweighed by legitimate justifications.

Against the analytical backdrop just described, the Board ruled in *Apogee Retail* that investigative confidentiality rules are lawful Category 1 rules where the rule by its terms applies only for the duration of the investigation. If the rule does not clearly provide that the confidentiality requirement ends at the conclusion of the investigation then it is a Category 2 rule and subject to the analysis of whether its potential impact on Section 7 rights is, or is not, justified by legitimate considerations supporting the rule.

This represents a shift in favor of permitting employers to maintain reasonable rules that provide confidentiality during investigations. Based on the many and varied phrasings of such rules and the multiple justifications for them in various industries, the determination of whether a particular rule will be found lawful will not be obvious in many instances. Employers who have confidentiality requirements relative to investigations should examine the language of such policies carefully (preferably with the assistance of a qualified attorney) to determine whether the policy is compliant.

## Deferral to Arbitration.

The Board has long recognized that the Act encourages parties to resolve all sorts of issues voluntarily and pursuant to mutual agreement. One mechanism for doing so in many situations is by including grievance and arbitration provisions in a collective bargaining agreement between the employer and the union. Using such grievance and

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arbitration processes allows the parties to resolve all manner of issues.

One question has long been whether the Board should defer to arbitral procedures when the issues at arbitration include fact allegations that could also constitute an unfair labor practice under the Act. In a 2014 decision, *Babcock & Wilcox Corp*., the Board established a new standard for deferral. Under *Babcock* the Board would defer to an arbitral decision only if the arbitrator had been expressly authorized to decide the unfair labor practice issue, was presented with and considered the issue (or was prevented from doing so by the party opposing deferral), and NLRB law reasonably supports the arbitral award. The burden of proof was on the party urging deferral to the award.

In *United Parcel Service*, the Board overruled Babcock and returned to the standard that had previously been in place for years. Under this standard, the Board will defer to the award of an arbitrator where: "(1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the contractual issue was factually parallel to the unfair labor practice issue; (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (5) the decision was not clearly repugnant to the purposes and policies of the Act." Also, the burden will be on the party opposing deferral to show defects in the process or the award.

As a practical matter, this standard will lead to greater deferral to arbitral awards. This state of affairs promotes finality and resolution of disputes by the parties based on a process and procedure they have agreed upon via the collective bargaining agreement.

Further, the Board adopted its previous standard for pre-arbitration deferral to the grievance and arbitration process. Under that standard, where the collective bargaining agreement contains a grievance and arbitration procedure and there is a reasonable belief that the process will be conducted in a manner consistent with the post-arbitration deferral standard (i.e. that the proceedings will be fair and regular and the arbitrator will be presented with the appropriate facts), then the Board will defer to the arbitral process. Adoption of this standard will lead to greater deferral to arbitration where parties file charges with the NLRB that are by their nature susceptible of resolution via the contractual grievance and arbitration mechanism.

**Dues Check Off.**

When a collective bargaining agreement expires is the employer required to continue deducting union dues from the paychecks of employees who have authorized the deduction and remitting the dues to the union? Under a previous decision the answer was yes.

In *Valley Hospital Medical Center, Inc*., the Board reversed that rule. Under *Valley Hospital*, if the collective bargaining agreement expires the employer is no longer obligated to continue deducting union dues from the employees' wages and remitting payment to the union. Note that the employer may continue to do so. But it is not obligated to do so under the Act.

**Do we Still Have "Quickie" Elections?**

On December 13, 2019 the Board issued a notice of modifications to the rules that apply to election procedures. The modifications will be effective April 16, 2020.

A detailed discussion of the revisions is beyond the scope of this article. In general, the rule relaxes various time frames for pre-election procedures. This will allow the parties to reasonably address matters such as who should and should not be included in the voting unit in advance of the election. The revisions also provide somewhat more time for the employer to provide information and comply with required postings. Again, the idea is to allow both the Board officials involved and the parties to address pre-election matters in an orderly manner so that all parties can have a greater understanding and better information before the election is held.

Application of these rules will result in some lengthening of the time between the filing of a petition and the date the election is held in cases where matters such as the make up of the bargaining unit are in dispute. The time frames for submissions remain relatively short, however, and the Regional Director retains significant control over the pre-election litigation process. Accordingly, the new rules give the parties some breathing room but do not drastically alter the anticipated timing of elections.

rate, but a sign-on bonus which is contractually dependent on length of service is considered essentially a longevity bonus and must be included in the regular rate. Similarly, tuition programs that are available to employees regardless of their hours worked or services rendered and are instead contingent merely on one's being an employee would qualify as "other similar payments" under §7(e)(2).

The further preamble also discuses that "other similar payments" do not include benefits which would be considered as wages under §3(m) of the FLSA. For instance, routinely-provided childcare qualifies as an in-kind reimbursement for "expenses normally incurred by the employee for his own benefit," and as such are wages that must be included in the regular rate. In contrast, the preamble states that discounts for online courses, continuing-education programs, modest tuition reimbursement programs and programs for repaying educational debit are not "fungible, any-purpose cash" and are excludable as long as they are available to employees regardless of their hours worked or services rendered.

With regard to what constitutes a discretionary bonus that is excludable from the regular rate, the regulation in §778.211(d) provides a few examples:

- Bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria;
- Severance bonuses;
- Referral bonuses for employees not primarily engaged in recruiting activities;
- Bonuses for overcoming challenging or stressful situations; and
- Employee-of-the-month bonuses.

Such bonuses are usually not promised in advance and the fact and amount of payment is in the sole discretion of the employer.

Finally, the DOL made two substantive changes to the existing regulations. First, the DOL eliminated the restriction in 29 CFR §§778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate. The DOL added language to §778.222 stating that in order to excludable from the regular rate, the payments must be made without prearrangement.

The second substantive change was to update the regulations on "basic rate," which is authorized under FLSA §7(g)(3) as an alternative to the regular rate under specific circumstances. Under the previous regulations, employers using an authorized basic rate could exclude from the overtime computation any additional payment that would not increase total overtime compensation by more than $0.50 a week on average for overtime workweeks. The Final Rule updates the regulation to change the $0.50 limit to 40 percent of the higher of the applicable local, state or federal minimum wage.

The Final Rule is effective on January 15, 2020.