

# DOL Offers Clarity on Calculating Overtime Pay for Piece-Rate Workers

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**T**he U.S. Department of Labor (DOL) issued an opinion letter addressing how to properly calculate overtime premiums for employees who are paid on a piece-rate basis.

Opinion letters describe how the agency would enforce statutes and regulations in specific circumstances presented by an employer, worker or other party who requests the opinion. On Nov. 30, the department clarified that the employer that requested the letter may use the piece rate to cover productive and nonproductive hours, even though the employer didn't have a formal agreement with the employees to use such a calculation. The DOL also reaffirmed the methodology that may be used to calculate overtime premiums when employees are paid on a piece-rate basis.

## Productive and Nonproductive Work

Under the Fair Labor Standards Act (FLSA), employees must be paid 1.5 times their regular rate of pay for hours worked beyond 40 in a week unless they fall under an exemption.

Calculating the regular rate of pay for piece-rate workers can be complicated because workers are paid based on the units they produce rather than the hours they work. Piece-rate workers often engage in so-called productive work and nonproductive work, explained Jeffrey Brecher, an attorney with Jackson Lewis in Long Island, N.Y.

For example, the warehouse workers discussed in the DOL's most recent opinion letter ([https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020\\_11\\_30\\_17\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_11_30_17_FLSA.pdf)) were paid based on the number and types of trucks they unloaded (the productive work) and not paid a separate rate for the time they spent waiting to unload the trucks (the nonproductive work).

So can the pay for productive work also cover the nonproductive time? Based on the facts presented, the DOL found that the employer and its warehouse workers "understand that piece-rate pay is intended to cover compensation for all hours worked, including nonproductive hours," even though they didn't have a formal agreement.

Brecher noted that the best practice for employers is to have a specific written agreement that notifies piece-rate workers that their compensation covers all hours worked whether productive or nonproductive. But the DOL won't necessarily find that the compensation only covered productive work if an agreement can be inferred from the parties' conduct.

"This DOL opinion letter is very narrowly construed based upon the facts presented," said Michelle Anderson, an attorney with Fisher Phillips in New Orleans. Courts don't have to follow DOL opinion letters, but the department's interpretations may hold weight, and employers may be given some leeway if they show that they relied on an opinion letter.

## Regular Rate and Overtime Calculations

Under the FLSA, nonexempt employees generally must be paid overtime premiums of 1.5 times their regular rate of pay. The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," except for specific categories that are excluded from the calculation, such as vacation pay and discretionary bonuses.

When employees are paid on a piece-rate basis, the employer may calculate the regular rate by adding all earnings for the week (such as the piece rate, production bonuses and any waiting-time pay) and dividing the total by the number of hours worked in the week, including productive and nonproductive time and overtime hours.

The workers may be paid the regular rate (of at least the minimum wage) for all hours worked and an additional one-half of the regular rate for each hour worked in excess of 40 during the workweek.

This method of calculating overtime premiums may be used if the employees understand and agree that the piece-rate amount is meant to cover nonproductive time.

The opinion letter addresses what is required to establish the requisite agreement. Brecher said the DOL clarified two important points:

- The agreement can be inferred from the parties' conduct and doesn't need to be in writing.
- Employees don't have to understand the mathematical formula used to compute the regular rate, rather the employees must understand that piece-rate earnings are intended to compensate them for all hours worked.

Even though the employer had nothing to memorialize its agreement with employees, Anderson noted, the DOL focused on the employer's customary practice and the employees' acceptance of payment in this manner to show a mutual understanding and agreement.

### Tips for Employers

"The key takeaway here is to proceed with caution," Anderson said. Employers with practices that directly align with this opinion letter should print a copy of the letter and place it in their files in case they need to show that they relied on it, she suggested.

Employers should note that they have the burden of showing compliance with the law. "The best practice is to always have pay plans reduced to writing, even though the law does not require written notice," she added. "Absent a tangible notice, letter, policy or other document given to the employee where the employer can prove receipt, notice will likely be a disputed issue of fact in a DOL investigation and certainly in litigation."

*[SHRM's small-business legal solution resource: SHRM LegalNetwork ([www.shrm.org/ResourcesAndTools/business-solutions/Pages/LegalNetwork.aspx?utm\\_source=shrm\\_article&utm\\_medium=shrm.org&utm\\_campaign=growth~legalnetwork~pressrelease](http://www.shrm.org/ResourcesAndTools/business-solutions/Pages/LegalNetwork.aspx?utm_source=shrm_article&utm_medium=shrm.org&utm_campaign=growth~legalnetwork~pressrelease)).*

Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington D.C., said employers can strengthen their FLSA compliance efforts by having both the employee and the employer's representative sign a written agreement, even though it's not required.

The longer such methodology is used, the greater the likelihood that written evidence may become the proverbial "ounce of prevention that prevents a pound of cure," he said, noting that documentation is useful for avoiding a future disagreement when memories are less clear and the employer's workforce changes.

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