

Regular Rate of Pay under the FFCRA – It's Not Necessarily the Base Wage

Labor & Employment Law Update

By Sara Zorich on March 27, 2020

For purposes of the Families First Coronavirus Response Act (FFCRA), the regular rate of pay used to calculate an employee's paid leave is not necessarily the employee's base wage or salary. According to the Department of Labor (DOL) FAQs regarding the FFCRA, the pay rate for an employee's FFCRA leave is the average of the employee's regular rate over a period of up to six months prior to the date the employee takes the leave. If the employee has not worked for the employer for at least six months, the regular rate used to calculate any FFCRA paid leave is the average of the employee's regular rate of pay for each week the employee has worked for the employer.

In order to determine an employee's regular rate for a workweek under the Fair Labor Standards Act (FLSA), the formula is: Total compensation in the workweek (except for statutory exclusions) ÷ Total hours worked in the workweek = Regular Rate for the workweek.

*Note, some states may have different regular rate calculations and items that are "excludable".

For purposes of the FFCRA regular rate, employers have 2 options:

- An employer can review the weekly regular rate for a period of up to six months prior to the date the employee takes the leave and average all of those regular rates; OR
- An employer can compute the regular rate by adding all compensation that is part of the regular rate for the period of up to six months prior to the date the employee takes the leave and divides that sum by all hours actually worked in the same period.

Note, when determining the regular rate, if an employee is paid with commissions, tips, or piece rates, non-discretionary bonuses, those wages will be also need to be incorporated into the regular rate of pay calculation.

Under the FLSA, the following **can be excluded** from the regular rate IF there is no connection to hours worked and the employer has not agreed to include them as hours worked: gifts, business expenses, travel expenses, discretionary

bonuses, vacation pay, holiday pay, illness pay, gym memberships, parking, wellness programs, profit sharing plans, employer contributions to retirement plans, stock options and premium overtime pay. (See Fact Sheet #56A for additional information). However, employers should review their policies and procedures to determine if they have any agreements to include otherwise excludable items in an employee's regular rate of pay.

EXAMPLES –

- On April 1, 2020, Joe is diagnosed with COVID-19 and quarantined. He is entitled to Paid Sick Leave and makes \$100,000 per year for working 40 hours a week. Under the FFCRA, he is entitled to two weeks at 100% of his regular rate, but not more than \$511.00 per day. Joe's only compensation was his salary. When an employee is paid solely on a weekly salary, the employee's regular rate is computed by dividing the salary by the number of hours which the salary is intended to compensate. Joe's regular rate is $\$50,000 \div 26 \text{ weeks (6 months)} \div 40 \text{ hours per week} = \48.08 per hour . Under the FFCRA he would get \$384.62 per day or \$1,923.08 – which would be his normal salary because his salary is not above the \$511 cap.
- John advises his employer that he has to stay home to care for his children because their school is closed under state order. He makes a base salary of \$50,000 per year for working 40 hours a week and gets quarterly bonuses of \$10,000 based on meeting performance goals. Under the FFCRA, he is entitled to two weeks at 2/3 his regular rate, but not more than \$200.00 per day. Since John receives a non-discretionary quarterly bonus of \$10,000, that must be included in calculating his regular rate. During the past 6 months, John's compensation would be \$25,000 in salary wages and \$20,000 in non-discretionary bonuses. John's regular rate is $\$45,000 \div 26 \text{ weeks (6 months)} \div 40 \text{ hours per week} = \$43.27 \text{ per hour}/\$346.15 \text{ per day}$. Under the Paid Sick Leave he would get 2/3 of his regular rate so $\$346.15 \times 2/3 = \230.77 per day – However, since it is above the cap of \$200 per day, he would receive the max of \$200 per day or \$1,000 per week.

In summary, when an employee requests FFCRA leave, the employer will at that time need to determine the employee's regular rate of pay for the paid FFCRA leave.

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