



# AMERICAN BENEFITS COUNCIL

June 12, 2019

*Submitted via regulations.gov*

Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Comments on Proposed Amendments to the Definition of “Regular Rate”  
under the Fair Labor Standards Act (RIN 1235-AA24)**

Dear Sir/Madam:

The American Benefits Council (“the Council”) appreciates the opportunity to provide comments on the Department of Labor’s (DOL) proposed rule<sup>1</sup> regarding modifications to the definition of “regular rate” that is used for purposes of computing overtime pay in accordance with the Fair Labor Standards Act (FLSA). We strongly support the DOL’s goal of updating its official interpretation of the regular rate in order to “provide clarity and better reflect the 21st-century workplace.”<sup>2</sup> As described below, in addition to making the changes that are included in the proposed rule, **the Council urges the DOL to make additional clarifications to the existing regulations to better ensure that certain other employee benefits are also appropriately excluded from the FLSA’s regular rate analysis.**

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

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<sup>1</sup> 84 Fed. Reg. 11,888 (Mar. 29, 2019).

<sup>2</sup> *Id.*

## SUMMARY OF REQUESTED CHANGES TO PROPOSED RULE

As described in more detail below, the Council requests that the DOL make the following additional changes to its regulations defining “regular rate” for purposes of the FLSA in order to further the DOL’s goal of “encourag[ing] employers to provide additional and innovative benefits to workers without fear of costly litigation”:<sup>3</sup>

- **Discretionary retirement plan contributions:** The DOL should clarify in the final rule that the fact that an employer makes contributions to a defined contribution retirement plan on a discretionary basis does not, in and of itself, cause such benefit plan contributions to fail to meet the condition described in DOL Regulation Section 778.215(a)(3), which requires certain benefit plans or trusts to have a “definite formula” for determining employer contributions in order for contributions to be excluded from the regular rate under Section 7(e)(4).<sup>4</sup>
- **Retirement plans meeting the requirements of certain Internal Revenue Code provisions:** DOL Regulation Section 778.215(b) treats benefit plans approved by the Internal Revenue Service (“IRS”) under Internal Revenue Code (“Code”) Section 401(a) as meeting some, but not all, of the conditions in DOL Regulation Section 778.215(a) for the exclusion of contributions to benefit plans under Section 7(e)(4). The DOL should expand this rule by providing that: (1) the rule applies to plans designed to meet the requirements of Code Section 401(a), 403(a), 403(b), 408(k), 408(p), or 457(b); and (2) such plans are considered to meet *all* conditions listed in DOL Regulation Section 778.215(a).
- **Self-funded group health benefits:** The DOL should provide that self-funded group health benefits, such as health reimbursement accounts (“HRAs”), may be excluded as “other similar payments” under Section 7(e)(2). Such an accommodation would be consistent with the DOL proposal to add examples of other similar health-related payments to the underlying regulation.
- **Student loan repayment programs:** The DOL should clarify in the final rule that the proposed exclusion of certain tuition benefits under DOL Regulation Section 778.224(b)(5) includes employer-provided programs for repaying educational debt. In addition, to the extent that such programs are offered as part of (or in conjunction with) a retirement plan or other bona fide benefit plan, the final rule should clarify that such programs are also excluded from the definition of regular rate, and that the availability of such program does not affect the

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<sup>3</sup> *Id.*

<sup>4</sup> References to “Section” herein are references to the FLSA unless specified otherwise.

exclusion of employer contributions to the retirement plan or other bona fide benefit plan.

- **Incentive compensation:** The DOL should clarify that incentive compensation programs such as those providing for “phantom” stock and restricted stock units (RSUs) may be excluded under Section 7(e)(8) if the conditions of that section are met.

## NEED TO CLARIFY AND MODERNIZE THE DOL INTERPRETATION OF “REGULAR RATE” UNDER THE FLSA

Very generally, the FLSA requires employers to pay overtime compensation to covered employees at a rate that is at least one and one-half times the “regular rate” at which the employee is employed. Section 7(e) defines “regular rate” for this purpose as “all remuneration for employment paid to, or on behalf of, the employee.” Despite this expansive definition, Section 7(e)(1)-(8) provides eight broad categories of various payments, contributions, compensation, and income that the statute excludes from the regular rate.

A number of the exclusions listed in Section 7(e)(1)-(8) are used for a variety of payments made by employers that are connected to the provision of employee benefits.<sup>5</sup> Employers rely upon these exclusions to provide valuable benefits to employees without being subject to overtime liability with respect to such benefits. Despite the fact that nearly all of the statutory exclusions from the regular rate were enacted more than 50 years ago, the rather broad statutory language has nevertheless served to accommodate many of the forms of employee benefits that have evolved substantially or been newly developed since the exclusions’ enactment.

Similar to the statute, the DOL regulations that interpret the definition of “regular rate” under the FLSA have also remained largely unchanged for more than 50 years. As with the statute, in a number of cases, these regulations have also accommodated more modern forms of employee benefits. But in other cases, the additional regulatory conditions for exclusion and the examples that the DOL set forth decades ago with respect to the “regular rate” are creating increasing uncertainty for employers with respect to both emerging benefit trends and certain long-standing benefit plan designs.

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<sup>5</sup> These exclusions include: (1) “payments made for occasional periods when no work is performed due to vacation, holiday, illness, . . . , or other similar cause” as well as “other similar payments”; (2) certain payments that are “made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan”; and (3) “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. Section 7(e)(2)-(4).

The DOL regular rate regulations create uncertainty not only with respect to an employer's overtime payment liability, but also with respect to litigation and enforcement risk.<sup>6</sup> Together, these uncertainties hamper the development of innovative employee benefits and cause employers to question whether to continue offering certain valued benefits. For these reasons, the Council and its members strongly support the DOL effort to modernize the regular rate regulations, which we believe is very achievable in a manner that is entirely consistent with the statute. **As the DOL works to finalize the regulations, we encourage the DOL to consider the Supreme Court's recent rejection of the principle that courts should narrowly construe the exemptions in the FLSA.<sup>7</sup> Instead, the Court instructed that such exemptions be given a "fair" interpretation<sup>8</sup> – an approach that we believe should equally apply to agency guidance.**

Although the proposed rule takes an important step forward in modernizing the regular rate regulation and makes several very helpful updates, we urge the DOL to take this opportunity to much more broadly review the regulation and consider whether the DOL believes that certain provisions or requirements continue to be necessary. We have, however, described below a number of specific, additional revisions that our members have identified that would be particularly helpful in clarifying that certain employee benefit-related payments are properly excluded from the regular rate – benefits that in some cases have already been the subject of litigation under Section 7(e). We believe that the plain language of the statute, as well as the current and proposed regulations, support these additional revisions.

#### REQUEST FOR ADDITIONAL AMENDMENTS TO THE "REGULAR RATE" REGULATIONS

For the reasons described above, the Council and its members urge the DOL to make the following additional amendments to the regulations defining "regular rate" for purposes of the FLSA:

##### 1. Discretionary Retirement Plan Contributions

Section 7(e)(4) excludes from the definition of regular rate "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees." Existing DOL regulations refer to plans providing such benefits as "benefit plans," and they clarify that Section 7(e)(4) governs whether any employer

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<sup>6</sup> As discussed below, in a number of cases this litigation risk has in fact materialized.

<sup>7</sup> *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

<sup>8</sup> *Id.* (quoting A. SCALIA & B. GARNER, *READING LAW* 363 (2012)).

contributions made to such plans are included or excluded in determining an employee's regular rate.<sup>9</sup>

DOL Regulation Section 778.215(a) sets forth five conditions that an employer's contributions to a benefit plan, including a retirement plan, must meet in order for such contributions to be excluded from the regular rate under Section 7(e)(4). The third such condition provides in pertinent part that:

**(3) In a plan or trust, either:**

...

**(ii) There must be both a *definite formula for determining the amount to be contributed by the employer* and a definite formula for determining the benefits for each of the employees participating in the plan; or**

**(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under Section 7(e)(4) of the Act.**

...<sup>10</sup> [Emphasis added.]

The Council's members have long been concerned that the above language in DOL Regulation Section 778.215(a)(3) does not address the exclusion of discretionary employer contributions to defined contribution retirement plans in a manner that is sufficient or explicit enough to deter unwarranted litigation. More specifically, the exclusion of such contributions from the regular rate has been questioned on the grounds of whether an employer's discretion in making contributions to a retirement plan necessarily results in the contributions failing to meet the condition that contributions be determined by a "definite formula." We believe that such a proposition is clearly erroneous and is not supported by the language of the regulation because discretionary contributions and the inclusion in a plan or trust of a definite formula for determining the amount to be contributed by the employer are in no way mutually exclusive. However, the failure of the regulation to directly address discretionary contributions has created an opening for plaintiffs to challenge employers on this point.

As an example of this litigation risk, the plaintiffs in *Russell v. Government Employees Insurance Company*, 2018 WL 1210763 (S.D. Cal. Mar. 8, 2018) argued that the defendant employer's contributions to its profit sharing plan (the amount of which is "determined by the Board in its sole discretion") failed the requirement in DOL Regulation Section 778.215(a)(3) that benefits be determined on an actuarial basis or by a definite formula. Although the district court in this case correctly concluded that the plan's formula was nevertheless definite and that the regulations do not require a minimum contribution, not all courts may reach the same conclusion – including the Ninth Circuit, where this

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<sup>9</sup> DOL Regulation Section 778.214(b).

<sup>10</sup> DOL Regulation Section 778.215(a)(3).

case is currently on appeal – and the defendant employer was still forced to defend its application of the exclusion in Section 7(e)(4) to a very commonly-used benefit plan design.

Because the DOL regular rate regulations were last updated at a time when neither defined contribution plans nor discretionary employer contributions were nearly as prevalent as they are today, we urge the DOL to finalize its amendments to the regulations in a manner that clearly allows for the exclusion of discretionary employer contributions from the regular rate under Section 7(e)(4). For example, the DOL could achieve this result by amending DOL Regulation Section 778.215(a)(3)(ii) to read as follows (recommended changes in red text):

**(3)(ii) There must be both a definite formula for determining the amount to be contributed by the employer, including when such amount is determined at the discretion of the employer, and a definite formula for determining the benefits for each of the employees participating in the plan.**

In addition, our members' concerns with respect to discretionary employer contributions could also be addressed (either additionally or in the alternative) by making our requested change to DOL Regulation Section 778.215(b), which is described immediately below in Section Two. Finally, in the event that the DOL is willing to consider more substantial changes to the regular rate regulations, we ask the DOL to consider the continuing merits of the condition described in DOL Regulation Section 778.215(a)(3), which has little apparent connection to the statutory exclusion in Section 7(e)(4), and whether eliminating this condition from the regulations would be a more appropriate action to take.

## **2. Retirement Plans under the Internal Revenue Code**

DOL Regulation Section 778.215(b) provides that a benefit plan or trust that has been approved by the IRS as satisfying the requirements of Code Section 401(a) will be considered to meet the following three out of five conditions established by the DOL for exclusion under Section 7(e)(4), in the absence of evidence to the contrary:

- Contributions must be made pursuant to a plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees.<sup>11</sup>
- The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement.<sup>12</sup>

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<sup>11</sup> DOL Regulation Section 778.215(a)(1).

<sup>12</sup> DOL Regulation Section 778.215(a)(4).

- The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer’s contributions in cash instead of the benefits under the plan (unless payments of cash are an incidental part of the plan and other criteria are met).<sup>13</sup>

Plans approved as satisfying Code Section 401(a) are *not*, however, automatically deemed as satisfying the remaining two conditions set forth in the regulations for exclusion under Section 7(e)(4):

- The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.<sup>14</sup>
- In the plan or trust, either (1) the benefits must be specified or definitely determinable on an actuarial basis, (2) there must be a definite formula for determining the amount of the employer contribution and for determining the benefits of participating employees, or (3) there must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method that is consistent with the purposes of the plan or trust.<sup>15</sup>

Under the proposed rule, the DOL has proposed minor, non-substantive changes to the text of DOL Regulation Section 778.215(b).<sup>16</sup>

The Council believes that it would be appropriate and consistent with the language and intent of the FLSA and the DOL’s existing regulations to expand the scope of DOL Regulation Section 778.215(b) so that a retirement plan that is designed to meet the requirements of Code Section 401(a) will, absent any evidence to the contrary, be considered to meet *all five* conditions for exclusion as provided for in DOL Regulation Section 778.215(a).

The laws governing retirement plans have developed substantially in the decades since the regulation was first promulgated, not least of which was the enactment of ERISA, as well as numerous changes to the Code. There can be little doubt that a retirement plan that is designed to meet the requirements of Code Section 401(a) and is subject to ERISA has as its primary purpose the systematic provision for the payment of retirement benefits, as required under DOL Regulation 778.215(a)(2). Furthermore, plans designed

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<sup>13</sup> DOL Regulation Section 778.215(a)(5).

<sup>14</sup> DOL Regulation Section 778.215(a)(2).

<sup>15</sup> DOL Regulation Section 778.215(a)(3).

<sup>16</sup> The most significant change made by the proposed rule to DOL Regulation Section 778.215(b) is to update the name of the IRS from the “Bureau of Internal Revenue” to the “Internal Revenue Service.”

to meet Code Section 401(a) must generally specify how benefits are determined or a definite formula for employer contributions,<sup>17</sup> as required under DOL Regulation Section 778.215(a)(3). We therefore urge the DOL to revise DOL Regulation Section 778.215(b) in the manner described above to better reflect the requirements already imposed by law on plans described under Code Section 401(a), which account for all five conditions described in DOL Regulation Section 778.215(a).

Note, too, that we recommend updating the regulation to require that the plan be “designed to meet the requirements of” Section 401(a) instead of requiring that a 401(a) plan be “approved” by the IRS in order for this special rule to apply. This modification (1) reflects the recent elimination of significant aspects of the IRS’s determination letter program, resulting in fewer plans receiving “approval” from the IRS, and (2) accommodates the addition of different types of retirement plans within the rule, as described in the following paragraph.

In addition to the changes described above, we ask the DOL to expand DOL Regulation Section 778.215(b) to other common types of retirement plans, namely Code Section 403(a), 403(b), 408(k), 408(p), and governmental 457(b) plans. These other types of retirement plans are subject to a number of requirements under the Code that in many cases are the same or similar to the requirements imposed on Code Section 401(a) plans. And, because the employer contributions that are made with respect to such plans are consistent with the statutory exclusion in Section 7(e)(4) that contributions be irrevocably made by an employer to a trustee or third person pursuant to a bona fide retirement plan, we believe that this change is consistent with and supported by the FLSA.

To achieve the requested changes described above, we recommend making the following amendments to DOL Regulation Section 778.215(b) in the final rule (recommended changes in red text):<sup>18</sup>

**(b) Plans under ~~section 401(a)~~ of the Internal Revenue Code. Where the benefit plan or trust ~~has been approved by the Internal Revenue Service as satisfying is designed to meet~~ the requirements of section 401(a), ~~403(a), 403(b), 408(k), 408(p), or, for employers described in 457(e)(1)(A), 457(b)~~ of the Internal Revenue Code, in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in ~~paragraphs subsection (a)(1), (4), and (5)~~ of this section.**

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<sup>17</sup> Treas. Reg. Section 1.401-1(b)(1)(i)-(ii); *see also* ERISA Section 402(b)(4).

<sup>18</sup> The following text reflects the amendments that the DOL proposed to DOL Regulation Section 778.215(b) in the proposed rule.



### 3. Self-Funded Group Health Benefits

To help address rising healthcare costs and meet workers' medical needs, employers are increasingly looking to a variety of types of health-related benefits, such as HRAs, to offer their workers. In some cases, these benefits involve employer monetary commitments that are made as part of a plan or program does not utilize an irrevocable trust or other formal funding device. In many cases, these benefits constitute an employee welfare benefit plan for purposes of ERISA, subjecting such benefits to the many participant protections that ERISA imposes on welfare plans. However, because employer contributions to self-funded group health plans are not paid "irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement," which is required by the DOL regulations in order to be exempt under Section 7(e)(4), many employers are reluctant to offer what may otherwise be much-appreciated and highly valued health-related benefits for employees because the DOL regulations appear to preclude self-funded benefits from being eligible for exemption under Section 7(e)(4).<sup>19</sup>

To provide certainty for employers and encourage the provision of these helpful and evolving forms of health-related benefits, we ask the DOL to clarify that self-funded group health benefits may be excluded under Section 7(e)(2) as "other similar payments to an employee which are not made as compensation for his hours of employment."

Section 7(e)(2) authorizes the exclusion of:

**payments made for occasional periods when no work is performed due to vacation, holiday, *illness*, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and *other similar payments to an employee which are not made as compensation for his hours of employment....* [Emphasis added.]**

Today, the DOL regulations specify that, in order for a payment to be excluded under Section 7(e)(2) as "other similar payments," such payments must "be 'similar' in character to the payments specifically described in Section 7(e)(2)."<sup>20</sup> The regulations note that it was not considered feasible to attempt to list all miscellaneous payments that could qualify as another similar payment, but the regulations include as an

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<sup>19</sup> Employer contributions made to HRAs have already been the subject of FLSA litigation, with the court finding against the employer's argument that such contributions were excludable from the regular rate, although the court reached its conclusion based on its analysis of Section 7(e)(4) and a partial analysis of Section 7(e)(2). The court did not consider whether the HRA contributions may be properly excluded as "other similar payments" under Section 7(e)(2), which is discussed further below. *Gilbertson v. City of Sheboygan*, 165 F. Supp. 3d (E.D. Wisc. 2016).

<sup>20</sup> DOL Regulation Section 778.224(a).

example “[t]he cost to the employer of conveniences furnished to the employee such as...on-the-job medical care...”<sup>21</sup> In its proposed amendments to this rule, the DOL has proposed adding the following additional health-related examples of excludable payments under Section 7(e)(2):

- Treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs; and
- The cost to the employer of providing wellness programs, such as health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals.

In discussing these proposed changes, the DOL notes that the “other similar payments” clause in Section 7(e)(2) “allows employers to provide benefits unconnected to the quality or quantity of work, even if those benefits are remuneration of a sort.”<sup>22</sup> The DOL further states that “[e]mployers may provide [wellness] programs to, for example, reduce health care costs, reduce health-related absenteeism, and improve employee health and morale.”<sup>23</sup> Because self-funded group health benefits are also unconnected to the quality or quantity of work, and they are typically provided for reasons that include reducing health care costs, health-related absenteeism, and improving employee health and morale, we believe that they could also be appropriately excluded as “other similar payments” under Section 7(e)(2).

#### **4. Employer-Provided Student Loan Repayment Programs**

In the preamble to the proposed rule, the DOL asks whether employers feel that express regulatory clarification on excluding tuition programs from the regular rate would be helpful.<sup>24</sup> The Council’s members strongly believe that such clarification on excluding tuition programs – including, as described below, programs for repaying educational debt – would be very helpful in providing comfort to employers as they increasingly look to offer such programs to employees.

In this regard, the DOL discusses its proposal to clarify through the addition of a new example in DOL Regulation Section 778.224(b)(5) that “certain tuition programs

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<sup>21</sup> DOL Regulation Section 778.224(b)(3).

<sup>22</sup> 84 Fed. Reg. at 11,894.

<sup>23</sup> *Id.* at 11,896.

<sup>24</sup> *Id.* at 11,897.

offered by employers may be excludable from the regular rate” as “other similar payments” under Section 7(e)(2).<sup>25</sup> The DOL notes that:

**Some employers today offer discounts for online courses, continuing-education programs, modest tuition-reimbursement programs, programs for repaying educational debt, and the like. Such tuition programs...**<sup>26</sup> [Emphasis added, footnotes omitted.]

The reference to “[s]uch” tuition programs in the passage quoted above indicates that the term “tuition programs” includes the examples listed in the preceding sentence, including “programs for repaying educational debt.” The preamble thus clearly indicates that the DOL intended to propose that programs for repaying educational debt may be excludable from the regular rate as “other similar payments” under Section 7(e)(2) of the FLSA.

Despite the preamble language, however, the accompanying regulatory example that the DOL has proposed to add<sup>27</sup> consists of the following text:

**(5) Discounts on employer-provided retail goods and services, and tuition benefits, provided such discounts and benefits are not tied to an employee’s hours worked, services rendered, or other conditions related to the quality or quantity of work performed....**<sup>28</sup> [Emphasis added.]

It is unclear whether the DOL intended to use the term “tuition programs,” which is the term used in the preamble discussion described above, in the proposed regulatory example instead of the term “tuition benefits.” Regardless of the term that is ultimately used in the final rule, we urge the DOL to clarify in the final regulatory text that “tuition benefits” and/or “tuition programs” include programs for repaying educational debt. Absent such clarification, practitioners who consult the regulation in the future without carefully reading the preamble may very reasonably assume that programs for paying educational debt are *not* included within the term tuition benefits or tuition programs. As such, we request that the DOL make the following clarification to the example in Proposed DOL Regulation Section 778.224(b) (recommended changes in red text):

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<sup>25</sup> *Id.* at 11,896.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (“The Department is proposing to add an example in § 778.224(b)(5) clarifying that certain tuition programs offered by employers may be excludable from the regular rate.”).

<sup>28</sup> Prop. 29 C.F.R. § 778.224(b)(5).

**(5) Discounts on employer-provided retail goods and services, and tuition benefits, including programs for repaying educational debt, provided such discounts and benefits are not tied to an employee's hours worked, services rendered, or other conditions related to the quality or quantity of work performed....**

In addition, due to the growing interest among employers of providing programs for repaying education debt as part of (or in connection with) a retirement plan or other benefit plan,<sup>29</sup> we urge the DOL to ensure that any updated guidance provided under Section 7(e)(4) of the FLSA clarify, either in the final regulation or in the preamble to the final rule, that (1) programs for repaying education debt may also be excluded from the regular rate when offered as part of (or in connection with) a bona fide benefits plan, and (2) such programs do not affect whether employer contributions to the bona fide benefit plan qualify for an exclusion under Section 7(e)(4) of the FLSA.

## **5. Phantom Stock and Restricted Stock Units**

In 2000, Congress amended the FLSA to add a new category of payments that may be excluded from the "regular rate" under Section 7(e). New Section 7(e)(8) excludes "any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable" under Section 7(e)(1)-(7), if certain conditions are met.<sup>30</sup> In Fact Sheet #56 (revised July 2008), the DOL Wage and Hour Division concluded that rulemaking with respect to the new exclusion was not necessary due to the "clear statutory language and thorough statement of legislative intent."

Since the addition of Section 7(e)(8) to the FLSA in 2000, incentive compensation programs such as phantom stock plans and RSUs have become increasingly commonplace. Although such programs are similar in many ways to the programs enumerated in Section 7(e)(8), they often lack one or more of the defining features of the latter in that, for example, phantom stock may be valued based on the price of a company's actual stock, but the recipient does not obtain actual equity interest through the receipt of actual stock.

Despite many overall similarities, the differences between phantom stock plans, RSUs, and similar programs as compared to the programs listed in Section 7(e)(8) have created uncertainty for employers who are unsure whether these newer and increasingly utilized forms of incentive programs may be excluded under Section

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<sup>29</sup> As the DOL is likely aware, many employers are exploring or have introduced programs under which, for example, an employee may qualify for an employer "matching" contribution to his or her 401(k) plan based on the employee's qualified student loan repayments.

<sup>30</sup> The four conditions are listed in Section 7(e)(8)(A)-(D).

7(e)(8). As such, we request that the DOL issue guidance under Section 7(e)(8) to clarify that any value or income derived from phantom stock programs, RSUs, and other similar forms of incentive compensation programs may also be excluded from the regular rate under Section 7(e)(8) if the conditions of Section 7(e)(8)(A)-(D) are met. We believe that adding this clarification would be consistent with Congress' intent in adding Section 7(e)(8) to the FLSA, which was to "allow employees to share in the future success of their companies" by encouraging employers to provide stock options and similar programs without additional overtime payment liability.<sup>31</sup> It is also keeping with the intent of the sponsors of the legislation that Section 7(e)(8) "be flexible and forward-looking and that the DOL apply and interpret it consistently with this vision."<sup>32</sup>

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Thank you for your consideration of our comments. If you would find it helpful to discuss any of these matters with us, please contact me at 202-289-6700 or [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org).

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley".

Lynn D. Dudley  
Senior Vice President, Global Retirement and Compensation Policy

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<sup>31</sup> 146 Cong. Rec. S2577 (April 12, 2000).

<sup>32</sup> *Id.* at S2578.