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

Re: *NPRM Changes to Calculation of "Regular Rate"* ***RIN 1235-AA24***

Dear Ms. Smith:

This letter provides the Department of Labor (DOL) with the collective comments of the more than 4,000 members of the National Employment Lawyers Association (NELA) and its 69 affiliates concerning the proposed changes to the regulations regarding the calculating of the "regular rate" for overtime pay purposes under the Fair Labor Standards Act (FLSA) as set forth in Parts 548 and 778 of CFR Title 29.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and often comments on relevant Notices of Proposed Rulemaking (NPRM). NELA also engages in legislative advocacy on behalf of workers throughout the United States.

NELA members represent thousands of individuals in this country who are subjected to employer violations of the wage and hour laws, as well as unlawful employment discrimination. Further, NELA members are committed to advocating for a narrow interpretation of the exemptions under the FLSA to reduce the number of workers who are exempt from the protection of the overtime rules. These workers comprise a disproportionate and growing share of the workforce and have been harmed by the erosion of the right to overtime pay. The interest

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of NELA in the proposed revisions to regulations promulgated under the FLSA is to protect the rights of its members' clients, by ensuring that the goals of the FLSA are fully realized.

These comments were drafted by members of NELA's Wage and Hour Committee who have been involved in wage and hour litigation for decades and are intimately familiar with the current regulations. These comments should not be viewed as the comments of a single organization or of a few NELA members, but as the comments of the 4,000 members of NELA whose clients are working people who do not have the resources to pay professional lobbyists to influence regulatory changes.

NELA directs its comments to three primary aspects of the NPRM. First, the DOL's proposed changes to the regulations relating to the "other similar payments" language found in 7(e)(2) of the FLSA. The DOL's proposal making certain reimbursements "per se" reasonable and excludable from the regular rate is overly broad. This is especially true in the modern economy where "in-kind" payments are increasingly intended to be part of an employee's total compensation. Second, the DOL's proposal to eliminate the restriction in Sections 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, is highly problematic. The proposed regulations do not sufficiently address the question of when such additional compensation ceases to be occasional pay for an employee's inconvenience due to "infrequent and sporadic" call backs and instead becomes regular extra pay for a chronically irregular schedule. Third, the DOL's proposal to "clarify" in Sections 778.202, 778.203, 778.205, and 778.207 that employers do not need a prior contract or agreement with an employee to exclude certain overtime premiums described in Section 7(e)(5) and (6) of the FLSA is likewise too expansive. On the other hand, NELA supports the DOL's proposed changes to Sections 778.218(b) and 778.320 to state that pay for time that would not otherwise qualify as "hours worked," such as bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

I. The Regular Rate Expressly Includes All Remuneration Not Excluded by the FLSA

The regular rate is "the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed." *Id*. at 325 U.S. at 424 (quoting *Walling v. Helmerich & Payne, Inc*., 323 U.S. 37, 40, 4 WH Cases 782 (1944)). The "regular rate" is the "keystone" to calculating the overtime rate. *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). Since 1949, the FLSA has defined the term "regular rate" to include "all remuneration for employment paid to, or on behalf of, the employee," excluding seven specific types of payments. Pub. L. No. 81-393 (codified as amended at 29 U.S.C. § 207(e)). Thus, there is a statutory presumption that remuneration in any form must be included in the regular rate calculation. The burden is on the employer to establish that any payment falls within one of the eight statutory exclusions. *Madison v. Resources for Human Dev., Inc*., 233 F.3d 175, 187 (3d Cir. 2000). Thus, determining the regular rate starts from the premise that all payments made to an employee for work performed are generally included in the base calculation, unless specifically excluded by statute.

The power to modify the regular rate, 29 U.S.C. § 207(e), rests solely in Congress. The DOL previously acknowledged its limited rule making authority regarding the regular rate of pay when it issued an opinion that the value of stock options, stock appreciation and employee stock purchase plans must be included in computing the regular rate. U.S. Dep't of Labor FLSA Op. Letter No. 2112, 1999 WL 1002365 (Feb. 12, 1999). It took an act of Congress in 2000 to clarify that such payments may lawfully be excluded from the regular rate. 29 U.S.C. § 207(e)(8).

Although NELA supports the DOL's efforts to update and modernize several regulations to provide clarity and to reflect the modern workplace, any changes to the regulations must be in keeping with the original purpose and intent of the FLSA, and within DOL's authority. This aspect of the NPRM is a change that is not consistent with the original purpose and intent of the FLSA, and should not be included in the NPRM.

II. The DOL's Proposed Changes to Regulations Relating to "Other Similar Payments" are Overly Broad

Section 7(e)(2) of the FLSA excludes from the regular rate "other similar payments to an employee which are not made as compensation for his hours of employment." Section 778.224 of the regulations addresses miscellaneous items that are excludable from an employee's regular rate under the "other similar payments" clause of section 7(e)(2) because they are "not made as compensation for…hours of employment[.]" Under the current regulations, the following three examples of "other similar payments" are excludable from an employee's regular rate: "(1) Sums paid to an employee for the rental of his truck or car; (2) Loans or advances made by the employer to the employee; [and] (3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities."

In its amended regulation, the DOL proposes adding five items to the list of payments that may be excluded from an employee's regular rate under the "other similar payments" clause of Section 7(e)(2). These are: (1) providing onsite treatment such as chiropractors, massage therapists, personal trainers, counselor and physical therapists; (2) providing employees with gym access, gym memberships, and fitness classes, whether onsite or offsite; (3) providing certain health promotion and disease prevention activities, often known as wellness programs; (4) certain wellness programs; (5) the value of certain discounts on retail goods and services and tuition benefits provided such discounts and tuition benefits are not tied to an employee's hours worked or services rendered.

NELA objects to the addition of these five categories of payments from the regulation because Section 7(e)(2) is not intended to permit the exclusion from the regular rate of certain payments which, although not directly attributable to any particular hours of work are still understood to be compensation for services. 29 U.S.C. § 207(e)(2). The inquiry that matters is whether the at-issue payments compensates the employee for work. *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 578-79 (7th Cir. 1995). If the at-issue payment compensates the employee for work, such payments are not "similar" to the examples identified in Section 7(e)(2) and must be included in the employee's regular rate. *Id*; *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016) (cash payments in lieu of health benefits was compensation for compensable time and therefore not excludable as pay for non-working time); *Callahan v. City of Sanger*, 2015 WL

2455419 (E.D. Cal. May 22, 2015) (cash payments in lieu of health payments not excludable because employee must be working to qualify for reimbursement, meaning payment is tied to employees' hours of work).

It is a reality of the modern workplace that employers frequently offer the type of "in-kind" benefits as a part of employee compensation that the DOL now proposes to exclude from an employee's regular rate of pay. These benefits as part of compensation would be excluded from the regular rate despite that such benefits are intended by the employer and employee to be an integral part of an employee's total compensation for work. In fact, these kinds of benefits are often offered by the employer to the employee to induce and encourage the employee to work long hours. Thus, there is no basis for a per se or blanket rule excluding these kinds of benefits or payments from the regular rate. Instead, consistent with the statutory language, whether a particular benefit is intended to be compensation for work requires an analysis of whether such payments were understood by the employee and employer to be compensation for labor that warrant inclusion in regular rate. 28 U.S.C. § 207(e).

The DOL's plan to eliminate tuition reimbursement is a perfect illustration on the fundamental flaw in a per se exclusion. Does the tuition reimbursement primarily benefit the employer or employee? While the employee may earn course credit, employers retain an employee with more education and a higher skill level, most often for a contractually obligated period of time. Employers reasonably obtain some advantage from any benefit that they offer their employees. "This advantage could be morale, retention, ability to pay a lower monetary wage," or the "potential improvement in quality of employee work." *Adoma v. Univ. of Phoenix, Inc.*, 779 F. Supp. 2d 1126, 1138–39 (E.D. Cal. 2011). Inasmuch "as an employer could always come up with an explanation as to why an employee benefit actually benefits the employer" thereby "allowing employers to exclude any benefit from the regular rate of pay if such benefit also benefits the employer," (*id.*) the exception would swallow the statutory default rule in Section 7(e) that all remuneration is to be included in the regular rate.

For this reason, the Department's proposed regulation identifying five additional categories of payments that may be excluded from the regular rate is inconsistent with the language of the FLSA. The better approach is for the DOL to either eliminate the five proposed additional categories of payments from the proposed regulation that may be excluded from the regular rate, or plainly state that such payments may be excluded from the regular rate only after a case by case analysis using applicable principles. *Berry v. Excel Grp., Inc.*, 288 F.3d 252, 254 (5th Cir. 2002) (holding unallocated "per diem" payments may qualify for § 7(e)(2) exclusion and must be examined on a case-by-case basis to determine if appropriate and reasonable).

III. The Elimination of "Infrequent or Sporadic" as a Limitation on Whether Show-Up or Call Back Pay May Be Excluded from the Regular Rate Is Inconsistent with the FLSA and Will Injure Low Wage Workers

Under the current version of Section 778.221 "call-back" or "call-out" payments "that may be excluded from the regular rate consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee receives on *infrequent and sporadic occasions* when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work." (emphasis

added). The current version of Section 778.222 also applies to “certain types of extra payments which are similar to call-back pay, such as: (a) extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and (b) extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a “rest period.” The DOL now proposes to eliminate the restriction in Sections 778.221 and 778.222 that “call back” pay and other payments similar to call back pay need be “infrequent and sporadic” to be excludable from an employee’s regular rate. The elimination of the “infrequent and sporadic” language is highly problematic for several reasons.

First, the DOL’s new regulations will impact low wage and other vulnerable employees who because of new sophisticated technology are often scheduled to work, or sent home, with little advance notice. This is in stark contrast to scheduling as recently as five to ten years ago when employees would be scheduled a week or more in advance. For example, as widely reported in the media Starbucks recently implemented scheduling software using sales and other data to determine the number of baristas it needed to staff its thousands of locations, often on only hours’ notice to employees. Similarly, many retailers are now able to schedule employees on a day-to-day or hour-by-hour basis in anticipation of increased sales, weather, or anticipated receipt of a delivery. Employers are likewise able to send employees home just as quickly when employing them is not profitable. Some of these employers pay call back pay when employees are required to report to work as a result of such variable and unpredictable scheduling practices. Although it is questionable whether pay that is the product of such scheduling is sufficiently “infrequent and sporadic” to warrant exclusion from the regular rate even under the current regulations, the elimination of “infrequent and sporadic” from the proposed regulations means that extra pay for consistently irregular schedules will likely not be included in the regular rate. This will most greatly impact low wage workers, single parents, and other employees who are most commonly subjected to irregular scheduling.

Second, “show-up” and “reporting” pay is often a term of collective bargaining agreements. If such pay is intended to compensate employees for the employer’s inability to provide a minimum amount of work, the pay should be rightly treated as remuneration to be included in the regular rate.

IV. Overtime Premiums Under FLSA Sections 207(e)(5) to (7)

Sections 7(e)(5) – (7) of the FLSA exclude from the regular rate extra compensation (premiums) paid by employers for specified types of overtime work. Under Section 7(h), these overtime premiums are “creditable toward overtime compensation payable pursuant to [Section 7(a)].” The FLSA, therefore, gives special consideration to overtime premiums because, as explained in the current regulations, “[n]o other types of remuneration for employment may be so credited” against overtime compensation owed under Section 7(a) for work in excess of 40 hours per week. 29 C.F.R. § 778.201(c). To qualify for exclusion from the regular rate, however, the premium must be paid because work is performed outside of or in excess of eight hours a day or 40 hours a week, contractually established daily or weekly work hours, or because work is done on certain special days, such as holidays or weekends, and not for some other reason. *Lemieux v. City of Holyoke*, 740 F. Supp. 2d 246, 257 (D. Mass. 2010) (holding that work

performed outside of firefighter's regular duty cycle is already compensated as overtime and thus excluded from regular rate calculation under §§ 207(e)(5) and (e)(7)).

The DOL proposes amending Sections 778.202, 778.203, 778.205, and 778.207 to provide that employers do not need a prior written contract or agreement with the employees to exclude certain overtime premiums described in Sections 7(e)(5) and (6). The DOL also proposes to amend § 778.207 to refer to "premium payments" instead of "contract premium rates." NELA acknowledges that the overtime premiums described in sections 7(e)(5) and (6) of the FLSA do not expressly require the overtime premiums be paid pursuant to a formal employment contract or collective bargaining agreement, unlike Section 7(e)(7), which explicitly requires "an employment contract or collective-bargaining agreement" to exclude premiums "for work outside of the hours established in good faith by the contract or work agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek[.]" However, the exclusion of premium payments under sections 7(e)(5) and (6) depends on deviation from the employee's normal work schedule. Many employees, and especially low wage workers, do not work discernable daily or weekly schedules. Thus, without "a discernable schedule of hours and days worked from which the excess or nonregular hours for which the overtime premiums are paid are distinguishable," the DOL's proposed removal of the word "contract" provides too few limitations on what extra compensation employers may treat as overtime premiums excludable from the regular rate.

NELA proposes that instead of eliminating the word "contract," the DOL should instead consider replacing the word "contract" with "contract, agreement or understanding." The term "agreement or understanding" is found elsewhere in the FLSA (see, e.g., 29 U.S.C. § 207(g)), and acknowledges that while less than a formal written contract is required, at a minimum a prior agreement or understanding must exist between the employee and employer.

For the same reason, NELA proposes that the amendment to § 778.207 should refer to "agreed upon premium payments" instead of "premium payments," which the DOL proposes replace the term "contract premium rates." This change is still consistent with the description of the overtime premiums found in § 778.201 and although it removes the implication that all of the overtime premium payments must be paid pursuant to a formal contract, makes clear that the premium payments must still be a product of an agreement or understanding.

V. Compensation for Bona Fide Meal Periods

The DOL proposes to change Sections 778.218(b) and 778.320 to state that pay for time that would not otherwise qualify as "hours worked," such as bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked. NELA supports this change.

The removal of the reference to "lunch periods" in 29 CFR §778.218(b) and the proposed amendment to §778.320 provides more clarity regarding the treatment of bona fide meal breaks, that is consistent with the Department's historical position of the issue in opinion letters and amicus briefs. See amicus curiae letter brief, *Smiley v. E.I. DuPont De Nemours and Co., et al.*, No. 14-4583 (3d Cir. Nov. 2, 2015); WHD Opinion Letter, 1996 WL 20131805 (Dec. 3 1996); WHD Opinion Letter, 1997 WL 998021 (July 21, 1997).

VI. CONCLUSION

For the foregoing reasons, NELA urges the Department of Labor to modify its proposed regulations relating to regular rate issues consistent with the comments in this letter.

Respectfully submitted,

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National Employment Lawyers Association