

Fact Sheet #56: Stock Options under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the treatment of stock options based upon the [Worker Economic Opportunity Act passed by Congress in 2000 \(P.L. 106-202\)](#). This law amended Sections 7(e) and 7(h) of the [Fair Labor Standards Act \(FLSA\)](#).

Along with the statute, Congress included a detailed statement of legislative intent in the Congressional Record ([146 Cong. Rec. S2576-81 \(April 12, 2000\)](#)). After reviewing the clear statutory language and thorough statement of legislative intent, the Department has determined that rulemaking is not necessary and refers the reader to the statute and Congressional Record for additional information.

The FLSA requires that most employees in the United States be paid at least the Federal [minimum wage](#) for [all hours worked](#) and [overtime pay](#) at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. The purpose of the stock options provision is to allow nonexempt employees (employees eligible for overtime pay) to share in workplace benefits that involve their employer's stock or similar equity-based benefits by excluding such benefits from an employee's regular rate of pay.

Exclusion

Under the law, an employer can provide its employees an opportunity to participate in a stock option, stock appreciation right or a bona fide employee stock purchase program. Further, an employer can exclude from the regular rate of pay when computing "time-and-a-half" overtime pay any value or income received by the employees as a result of the grants or rights provided pursuant to the program, provided the program meets the following criteria:

Criteria

- A. The employer must provide the employee with information that explains the terms and conditions of the program. The information must be provided either when the employee begins participating in the program or when the employer grants the employees stock options or stock appreciation rights. The statute does not specify any particular mode of communication as long as the method chosen reasonable communicates the information to employees in an understandable fashion.
- B. Generally, the stock option or stock appreciation rights must not be exercisable for at least a 6 month period after the grant and the employer cannot offer such options or appreciation rights to employees at more than a 15 percent discount off the fair market value of the stock or the stock equivalent determined at the time of the grant. That means the employees must wait at least 6 months after they receive stock options or stock appreciation rights before they are able to exercise the right for stock or cash at an exercise price that is at least 85% of the fair market value of the stock or its equivalent at the time of the grant.

Exception: An option or right may be exercisable for stock or cash in the event the employee dies, becomes disabled, or retires, or if there is a change in corporate ownership.

- C. The employee's exercise of any grant or right must be voluntary.

- D. Where the stock options or stock appreciation rights program is based on the performance of a business unit or employee, then the determinations of such options or rights must be made:
- a. based on future performance meeting previously established criteria (such as hours of work, efficiency or productivity) of a business unit consisting of at least 10 employees, or of an entire facility of any size. An employer may impose certain eligibility criteria on all employees before they may participate in a grant or right based on these performance criteria, including length of service or minimum schedules of hours or days of work; or
 - b. based on the employee's past performance, so long as the determination remains at the sole discretion of the employer and not according to any prior contract requiring the employer to do so.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/esa/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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