



Assessing The Risk:

Wage and Hour Tip Of The Week

Many Bonus Payments Require Additional Overtime Pay

TIP: Audit bonus payments to determine if they require additional overtime payments

The Default Rule For Bonuses

As a default rule, if an employer pays a bonus to non-exempt employees, then the employer is required to calculate and issue additional overtime pay. Here's an example:

Assume an employee receives a \$30 safety bonus for the week and works 60 hours during the week. To calculate the required additional overtime pay, the employer must first distill the bonus down to an hourly rate by dividing the bonus by the total hours worked ($\$30 / 60 \text{ hours} = 50 \text{ cents}$). The rate for the additional overtime pay is one half of this amount ($50 \text{ cents} / 2 = 25 \text{ cents}$). In this example, the employee is entitled to the \$30 safety bonus and \$5.00 in additional overtime pay ($25 \text{ cents} \times 20 \text{ hours of overtime}$).

The Exception: Discretionary Bonuses

Under the FLSA, employers are not required to pay additional overtime for discretionary bonuses. However, the term "discretion" is somewhat misleading. A bonus is only considered discretionary if three rules are satisfied:

- **Discretion on whether the bonus will be paid.** The employer must maintain sole discretion on whether the bonus will be paid, and it must keep that discretion up until near the end of the period upon which the bonus is based. For example, if an employer announces in January that it will pay a bonus based on February's production numbers, then the bonus generally will not qualify as a discretionary bonus. The idea here is that the employer's announcement will induce employees to work towards qualifying for the bonus or increasing the bonus amount.
- **Discretion on how the bonus will be calculated.** The employer must maintain sole discretion on how the bonus will be calculated, and it must keep that discretion up until near the end of the period upon which the bonus is based. For example, assume an employer announces that it will pay a bonus of 1% of sales revenue, but the employer makes clear that it will only pay the bonus when the company determines in its sole discretion that the bonus should be paid. This generally will not qualify as a discretionary bonus.
- **No custom or practice of paying the bonus.** The Department of Labor takes the position that a longstanding practice of paying bonuses will also require the employer to pay additional overtime based on the bonus. According to the DOL, the analysis turns on whether there is a "custom or practice of paying a bonus with regularity sufficient to imply an understanding on the part of the

employees that they will regularly receive the bonus.” For example, if an employer has consistently paid production bonuses for fifteen years, then that payment generally will not qualify as a discretionary bonus.

Advice For Employers

Employers should examine the nature of their bonus payments. If the bonus is something that employees have come to expect — either because it has been promised or the employer has a regular practice of paying it — then there is a good chance that the bonus is nondiscretionary under the FLSA. In such circumstances, the employer should ensure that overtime payments are correctly calculated and issued to the nonexempt employees receiving the bonus.

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