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Senior Living and Long-Term Care Blog

Perspectives on the legal trends, regulatory policy and other issues facing the senior living and long-term care industry

Bonuses, Free Meals, Gift Cards and Other Types of Additional Compensation May Create Exposure to Costly Overtime Class Action Lawsuits

By Steve Shardonofsky and Justin Curley

Non-exempt employees in the senior living and long-term care industry often receive compensation in addition to their hourly rate of pay, including, for example, incentive or attendance bonuses, shift differentials, and in-kind wages like meals and lodging. Some, if not all, of these additional items of compensation must be included when determining the employees' "regular rate" of pay for purposes of calculating overtime wages. Failure to do so may result in an investigation by the Department of Labor and/or costly class-action lawsuits.

An employee's regular rate under the FLSA is the employee's hourly rate *plus* the hourly value of other types of included compensation. The regular rate is determined by dividing the employee's total remuneration for employment (except certain statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. The only remuneration excluded from the calculation of the regular rate under the FLSA are certain specified types of payments like discretionary bonuses, gifts, contributions to certain benefit plans, and pay for foregoing holidays and vacations.

To help you avoid errors in calculating overtime pay, we have outlined below the rules for treating three common "add-ons" to hourly compensation in the senior living and long-term care industry: (1) non-discretionary bonuses; (2) shift differentials; and (3) meals and lodging.

Non-Discretionary Bonuses

Under the FLSA, discretionary bonuses are not included within the regular rate; that is, if the fact that (a) the payment is to be made and (b) the amount of the payment are determined at the sole discretion of the employer, and not pursuant to any prior agreement causing the employee to expect such bonus payments regularly, an employer may exclude the bonus from the regular rate calculation.

However, if an employer pays a non-discretionary bonus, such as a regular incentive or attendance bonus, then the employer is required to include the bonus in the regular rate. If the bonus is earned over a period of time, the employer must retroactively calculate and issue additional overtime pay. This is done by allocating the bonus over the workweeks in

which the bonus was earned to determine the regular rate. Employers may avoid the administrative hassles of calculating and issuing retroactive overtime payments by using the "percentage bonus rule," which is essentially the simultaneous payment of overtime compensation due in conjunction with the non-discretionary bonus. (The bonus is given as a percent of total compensation, including overtime earnings.)

Shift Differentials

Employees in the senior living and long-term care industry are often paid a shift differential or other premium for hours worked during certain shifts (e.g., for an overnight shift). When an employee earns a shift differential on some hours worked during the workweek, the amount of the differential must be included in the employee's regular rate of pay in that workweek. For example, assume a nursing assistant is paid $10 per hour but receives a $2 shift differential for each hour worked on an overnight shift. If the employee worked three eight-hour overnight shifts during the week, an additional $48 ($2 x 24 hours) must be included in the employee's regular rate calculation for that week. If the employee earned two different shift differentials that week (e.g., one for overnight shifts and one for evening shifts), both shift differentials would need to be included in the regular rate calculation for that workweek. The same rule would apply for weekend differential payments.

Meals and Lodging

Senior living and long-term care employers often provide meals to employees. Under the FLSA, if an employer customarily furnishes two or more meals a day to its employees, all such meals must be taken into account in computing the regular rate of pay and overtime compensation. The employer must include in the regular rate calculation the reasonable cost to the employer of the meals or the meals' fair value. However, where the employer regularly provides no more than one meal per day, the cost of that meal need not be included in the regular rate as long as the employer and employee agree to omit it from the computation of overtime.

Lodging provided by an employer to an employee is generally considered a component of the employee's wages, such that the cost of the lodging to the employer must be added into the employee's regular rate. Under the FLSA, however, when the lodging is furnished primarily for the benefit of the employer, the cost of the lodging need not be included in the regular rate. Whether lodging is primarily for the benefit of the employer or employee depends on the facts and circumstances of each situation. But the courts have found that lodging is primarily for the benefit of the employer when an employer requires an employee to live on-site in order to meet a particular business need of the employer or when an employee is required to be "on call" at the employer's behest. Many senior living and long-term care facilities require hourly managers to live on premises as a condition of their employment as live-in or resident managers, and thus provide that lodging for free. Those managers typically are required to live on premises to properly perform the duties of their job, including being available to assist the residents and perform other duties around-the-clock. In these cases, an employer could argue that there is a legitimate business need for the manager to live on-site, that the lodging is thus furnished primarily for the benefit of the employer, and therefore the cost of lodging is not required to be included in the employee's regular rate.

Senior living and long-term care employers that provide meals and lodging must also be mindful of the special meal and lodging provisions of California Wage Order No. 5, which is applicable to the senior living and long-term care industry. Wage Order No. 5 permits employers to credit meals or lodging provided to employees against the employer's minimum wage obligations, so long as there is a voluntary written agreement between the employer and employee. In addition, the amounts credited against the minimum wage may not be greater than those specified in the wage order. If an employer takes advantage of the meal or lodging credit against the minimum wage, they must take care not to double count the credit in their calculation of the regular rate.

Advice for Employers

Senior living and long-term care employers should carefully examine their compensation policies and practices to ensure they are calculating the regular rate properly for overtime purposes and to avoid potential exposure for unpaid overtime claims based on the miscalculation of the regular rate.

Keep in mind that these issues regarding the proper calculation of overtime are separate and apart from the calculation of hours worked each week. It is common for non-exempt resident managers and administrators to live on premises. Because of their irregular schedules, it is sometimes difficult or overly burdensome to track their hours worked. In this situation, the FLSA allows the employer and resident employee to enter into an agreement regarding the reasonable number of hours the employee will work each week, and the hours he or she may use for personal activities such as such as sleeping, eating, entertaining, and other periods of complete freedom from all duties. Such an agreement should normally be in writing to avoid any possible misunderstanding.

If you would like further information on this topic, please contact Steve Shardonofsky at *sshardonofsky@seyfarth.com*, Justin Curley at *jcurley@seyfarth.com*, your Seyfarth attorney, or any member of the Senior Living & Long-Term Care Team.