



## Annual Bonuses: The Gifts That Keep On Giving to Employees

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### Compensation, Obligations, and Employment Best Practices

As the end of the year approaches, you may be awarding holiday or annual bonuses to your employees. But remember, certain bonuses are the gifts that keep on giving to employees.

According to the Fair Labor Standards Act, bonuses must be included in overtime calculations with the exception of discretionary bonuses and certain holiday bonuses. In order for a bonus to be discretionary, the employee must not have an expectation to be paid the bonus through a policy, agreement, or practice. Rather, the employer must retain (and use) its sole discretion as to both (1) whether the bonus is paid, and (2) the amount of the bonus until a time quite close to the end of the period for which the bonus is paid. Holiday payments made as gifts and other special occasion bonuses, the amounts of which are not measured by or dependent on hours worked, production, or efficiency, can generally be considered discretionary and excluded from overtime.

On the other hand, non-discretionary bonuses must be included in employees' compensation for determining their regular rates of pay for overtime purposes. If a bonus is paid pursuant to a prior contract, agreement, or promise causing the employee to expect the bonus regularly, it is not discretionary and must be included in the regular rate of pay for overtime purposes. For example, if an employer announces that employees will receive bonuses for perfect attendance this year, working a certain number of hours, or hitting certain sales or performance

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benchmarks, these types of bonuses are not discretionary and must be included for overtime purposes.

Additionally, if a non-discretionary bonus is merchandise (e.g., an iPad or gift card), the actual cost of the merchandise should be included in the calculation of overtime pay. However, if you decide to give holiday turkeys to employees, but you did not promise to do so, you do not need to include the cost of the turkeys for overtime purposes.

In community housing settings, residents may choose to give staff members holiday gifts, either individually or pooled. If you become aware of this practice it is best practice for you, as the employer, not to get involved in the resident gift initiatives, as the employer's involvement may have wage and overtime implications.

Please also note that your individual state or local laws may differ and be more restrictive.