

DOL's First FLSA Opinion Letter of the Decade Provides a Reminder—And Guidance—For Reconciling Non-discretionary Bonuses and Overtime Pay

Labor & Employment Law Update

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On January 7th, the U.S. Department of Labor's Wage and Hour Division issued its first Opinion Letter of 2020, and the Letter serves as a reminder to businesses that retroactive overtime payments may be necessary if non-discretionary bonuses are paid to non-exempt (hourly-paid) employees.

The scenario at issue in the Letter is that an employer had an announced policy through which employees were paid a \$3,000 bonus after they completed ten weeks of training. A particular employee worked 40 hours per week in eight of those ten weeks. But in the fifth week he worked 47 hours, and in the ninth week he worked 48 hours, so he was entitled for overtime pay for those two weeks.

A bonus like this is considered non-discretionary under federal law because it was announced to employees in advance and not limited by any sort of discretionary language. (Limiting discretionary language could take the form of a statement that the bonus would only be paid "when, in management's sole discretion, company performance warranted bonus payments.") But there was no limiting, discretionary language, so the bonus is non-discretionary.

And the characterization of the bonus as non-discretionary is critical because non-discretionary bonuses must be included in an employee's regular rate of pay for purposes of determining the overtime pay rate for workweeks in which an employee works more than 40 hours.

Calculating overtime pay when a non-discretionary bonus covers a single week is relatively simple. The employer multiplies the employee's hourly rate by the total hours worked for the week, adds the bonus amount to that result, and then divides by the total hours worked to get the "regular rate" for the workweek. Employees are to be paid 1.5 times the regular rate for each overtime hour worked.

But in situations in which a bonus applies to more than one workweek, the amount of the bonus must be apportioned, for overtime pay purposes, over the workweeks the bonus covers—and retroactive overtime payments must be made for each workweek in which an employee worked more than 40 hours. Generally speaking, this means that the bonus must be divided equally among the workweeks at issue if it seems the bonus was earned in equal parts each workweek. However, in other circumstances involving, e.g., performance-based bonuses, it might be more reasonable to apportion the bonus payment by the hour, not the week—particularly if the total hours worked varied significantly from week to week within the bonus period.

For the ten-week training bonus, the DOL stated it was reasonable to consider the bonus earned in equal parts each week, so \$300 was allocated to each of the workweeks. And to be clear, that \$300 only factors into the two workweeks in which the employee worked more than 40 hours. No additional payment was owed for the eight weeks in which the employee worked only 40 hours.

The bottom line is that, in the new year—particularly in Illinois in light of the state's increased penalties for wage and hour violations—it is critically important for employers to remember that retroactive overtime payments must be made for non-exempt employees who work more than 40 hours in any workweek for which a non-discretionary bonus is paid. This may seem like a tremendous burden, particularly for small businesses, but rest assured that it is far less burdensome than defending a wage and hour lawsuit brought by one or more employees who were not properly paid under the law.

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