

The Holidays are coming... Make sure you have addressed your wage and hour compliance

Labor & Employment Law Update

By Sara Zorich on December 20, 2018

Around the holiday season, many employees take time off and businesses close down. Additionally, some businesses pay out bonuses to employees around the holiday season. All of these scenarios can impact overtime pay for non-exempt employees.

CLOSURE OF BUSINESS

Non-Exempt Employees

Non-exempt employees generally (exceptions follow) only need to be paid for hours they actually work – and not for holidays or weather-related office closings and are entitled to overtime for hours worked over 40 in a workweek. For example:

1. Non-exempt employees do not need to be paid for New Year's Day if they are given the day off.
2. If the business is closed during inclement weather (e.g., snow days, burst pipes), non-exempt employees do not need to be paid when the business is closed and they are not working.
3. If employees report to work and are sent home early (e.g., due to imminent ice storm), then non-exempt employees only need to be paid for the hours they worked, and not for the time that they were sent home early and are not working.

Where non-exempt employees perform work on a holiday (federal, state, etc.), they only need to be paid overtime (time-and-a-half) if they have worked over 40 hours in the workweek (or 8 hours in a day in some states): For example: An employee who works New Year's Eve and New Year's Day does not receive a shift premium (sometimes referred to as "overtime") merely by virtue of working a holiday, unless the employee has actually worked more than 40 hours – in which case, overtime is paid only for those hours worked over 40 in the week.

Exceptions: Various state wage laws, employer policies (e.g., employee handbooks) and other contracts may obligate an employer to pay employees for certain holidays or business closings, and even pay shift premiums for working on holidays. Further, an employer policy may state that the holiday is counted as "hours worked" for overtime purposes. Make sure to review your policies carefully when administering payroll for holidays and closure.

Exempt Employees

Exempt employees are those who are not covered by the FLSA's overtime requirements. When paid on a salary basis, these employees' salaries may not be reduced in any week in which they work, except for limited circumstances (e.g., the employee's personal absence not for sickness or disability, first/last week of employment). These exceptions do not permit an employer to reduce a salaried, exempt employee's wages for holiday or inclement weather closures. Thus, these employees must be paid their regular, full salary, even though the business is closed for a holiday or due to weather (assuming the weather closure was for less than a week).

BONUSES

Employers must be careful when paying out bonuses at the end of the year to non-exempt employees. As with other bonuses, a holiday bonus must be included in overtime calculations for nonexempt employees **unless** it is completely discretionary or is a gift. If a bonus is promised or expected or is dependent on the quality, quantity or efficiency of production or hours worked, it must be included in the regular rate used for determining overtime pay. This becomes even more complicated at the end of the year. For example, if on January 1, the company promised a bonus if the production department made 10,000 widgets by December 15, 2018. If the production department achieved this goal and each non-exempt employee was paid a \$100 bonus, that bonus would have to be allocated over the applicable period (50 weeks from 1/1 – 12/15). Then each non-exempt employee would become entitled to additional overtime for each week they worked overtime during that entire 50 week period based on the fact that the \$100 bonus payment increased their regular rate and therefore the applicable overtime rate.

Bottom Line: Employers need to be cognizant of how holiday closures and bonuses may impact their overtime requirements for non-exempt employees.

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