

Bonuses and wages

Compensation sometimes counted in calculating overtime pay

XYZ Company is in trouble. The company reported another month of declining profits. The board of directors is growing frustrated and the president is afraid to answer his telephone.



Michael Santo

In a last-ditch effort to sell more widgets, the president pitches an offer to an account he's long sought. But there's a catch: To close the deal, the president promised XYZ would deliver the widgets within a week when it normally takes two weeks to make that many widgets.

The president holds a meeting at which he explains to employees the predicament XYZ faces: produce the widgets in record time or the company will close. As an incentive, the president promises the widget makers a \$500 bonus each if they complete the order on time.

Hearing this promise, employees work massive overtime hours and complete the order. As promised, the company pays everyone a \$500 bonus. But now, employees claim they're owed more overtime because the bonus increased their overtime rate of pay for the week. Can this be? It sure can!

Under the Fair Labor Standards Act, an employee is entitled to receive 1½ times their regular hourly rate for all hours worked over 40 in a workweek. But an employee's regular rate is not simply the employee's hourly rate. Instead, the FLSA requires that employers compute the "regular rate" by dividing the total compensation received in a workweek (not including overtime premiums) by the total number of hours worked that workweek.

If a bonus is entirely discretionary — an unpromised Christmas bonus, for example — then the amount can be excluded from an employee's regular pay rate. But bonuses that are announced to employees to induce them to work more steadily, rapidly or efficiently or to remain with the firm are considered part of the regular rate of pay. In those situations, a bonus must be apportioned back over the workweeks of the period during which it was earned, resulting in adjustment of the regular rate and payment of additional overtime in accordance with the adjusted regular rate of pay.

In the case of XYZ Company, assume the employees are all paid \$10 an hour and worked 70 hours during the workweek in question. Under those circumstances, regulations would require XYZ to pay each employee an additional \$107.10. Dividing the \$500 by 70 hours results in an additional \$7.14 in pay per hour. Multiplying \$7.14 by 30 hours of overtime and then multiplying again by 0.5 for the added overtime pay rate comes to \$107.10.

FOR YOUR INFORMATION

The Western Colorado Human Resource Association will host a presentation on wage and hour law as part of a membership drive set for 3 to 5:30 p.m. July 20 at Two Rivers Convention Center, 159 Main St. in Grand Junction. Michael Santo, a local attorney whose practice emphasizes employment law, will provide information designed to answer confusing questions about wage and hour law. Participants also will learn about the benefits of membership in the WCHRA. For reservations or more information, call 255-2603 by July 15.

Other compensation paid to employees also could qualify as a nondiscretionary bonus.

In one case, the court decided lump-sum payments for unused sick time constituted a non-discretionary bonus that must be added to the regular rate of pay in computing overtime. The court based its decision on its determination the buy-back is remuneration for services rendered and that one clear purpose of the plan is to encourage regular attendance. The buy-back program retroactively pays more money to those employees who work steadily because their services are more valuable than those of employees who regularly use sick leave time. The court concluded the payments are for work already done and, therefore, qualify as remuneration.

On the other hand, discretionary gifts from a company don't have to be included as part of an employee's regular rate. So, if the company makes no promise, but on April 2 the president wakes up in a good mood and passes out \$100 bills to everyone at the plant, the regular rate of pay and overtime premium isn't affected. The president can even call it a "bonus" and still not affect the overtime premium because it was discretionary.

Employers should review all bonuses provided to their employees to determine if the bonus is promised in advance as an incentive for employees to work harder or more efficiently or to work more reliably or stay longer. In those situations, the employer could owe more overtime compensation for the period covered by the bonus.

Michael Santo is a partner in Bechtel & Santo, a Grand Junction law firm that emphasizes employment law services for businesses. Santo also belongs to the Western Colorado Human Resource Association. For more information about the WCHRA, log on to www.wchra.org.

