

A Bonus is a Bonus is a Bonus: Or Is It? When a Bonus Impacts Your Overtime Calculation

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Many Counties compensate their employees through bonus payments and other forms remuneration in addition to the employees' base hourly wage. Certainly there is value and a beneficial return to these compensation strategies. A longevity bonus or an attendance bonus may contribute to the development of a reliable, experienced workforce. Non-recurring salary bonuses can be a viable solution to the compounding effect of annual wage increases in these challenging economic times. But, when a County opts for these types of compensation it must be sure that it is accounting for the bonus in a manner that complies with the Fair Labor Standards Act of 1938 (FLSA). If a County fails to do so, it may be liable for damages, including attorney's fees as a result of an FLSA lawsuit.

Generally, the FLSA requires that non-exempt employees be compensated at time and one-half their regular rate of pay for any time worked above forty (40) hours in a work week. [Note: there are exceptions to this general rule for some nursing home workers]. Depending on how a County structures and administers bonuses, the FLSA may require that the amount of the bonuses be incorporated into the calculation of the employee's regular rate of pay for the purpose of determining the overtime obligation.

The distinction between which bonuses must be included in the overtime calculation and which are not turns on whether the bonus is discretionary or nondiscretionary. A truly discretionary bonus is exempt from the overtime calculation; whereas, a nondiscretionary bonus must be factored in. The most common example would be a longevity bonus. But this analysis would also apply to other types of supplemental payments. For example, it is fairly common for a County to provide a flat rate to an employee in its Human Services Department or a Probation Officer to be "on call" during the evening or on weekends. The "on call" payment is merely to compensate the employee for the "hassle" of having to carry the pager or cell phone during non-traditional hours and does not include payment for the time worked after receiving the page or cell phone call.

Under the FLSA and the corresponding regulations, a bonus only qualifies as discretionary where all of the following conditions are met:

- 1) The fact that the payment is to be made remains at the sole discretion of the employer;
- 2) The amount of the payment to be made remains at the sole discretion of the employer;
- 3) The employer must retain discretion regarding the payment and amount of the bonus until a time quite close to the end of the period for which the bonus is paid; and
- 4) The bonus payment may not be made pursuant to any prior contract, agreement or promise.

Any bonus or incentive program which does not comply with all four (4) of these requirements is considered nondiscretionary under the FLSA and must be included in the employee's regular rate of pay calculation. In practice, most bonuses and/or supplemental payments will be categorized as nondiscretionary.

Unless a County retains complete, unfettered discretion regarding whether to pay the bonus and how much to pay, the bonus is nondiscretionary. Consider an attendance bonus that pays employees a \$500 annual bonus for perfect attendance and a \$200 annual bonus to any employee who misses at least one, but less than four days per year. The bonus is triggered by the occurrence of certain events. Similarly the amount of the bonus is determined by circumstances outside of the County's control; namely did the employee hit the predetermined attendance goals? In this situation the employer does not retain discretion over the fact of payment nor the amount of the bonus. Accordingly, the bonus is nondiscretionary for each reason and must be included in the overtime equation.

If a County does not retain complete discretion until a time "quite close" to the end of the period for which the bonus is paid, the bonus is nondiscretionary. As an example if an employer announces in June that a holiday bonus will be paid in December, the bonus would be properly classified as nondiscretionary. So while the bonus may have, at the outset, been discretionary, the act of declaring or promising the bonus so far in advance, commits the employer to paying the bonus and thus makes it nondiscretionary.

A bonus provided for by contract, policy or promise is nondiscretionary. Accordingly, a longevity bonus, a salary bonus or a bonus paid as compensation for periodically carrying an emergency pager/cell phone, that is provided by contract or written policy is nondiscretionary. Only bonuses paid without commitment through contract, policy or promise may be properly excluded from the calculation of the employees' regular rate of pay.

The overtime obligation that results from a nondiscretionary bonus is calculated according to the total hours worked for the period of time contemplated by the bonus. The bonus itself constitutes the straight time portion of all hours worked during the particular period of time. The additional compensation required by the FLSA is the one-half time for any overtime hours worked during the period to which the bonus is applicable.

Consider an example of an annual longevity bonus:

- Assume that the contract provides for an annual longevity bonus of \$200.
- Assume the employee worked 2,080 straight time hours and 104 overtime hours for a total of 2,184 hours worked that year.
- Divide the bonus by the total hours worked to calculate the hourly equivalent for the bonus paid: $\$200/2184 = \0.092 per hour.
- The \$200 constitutes the straight time portion of the bonus paid on all hours worked including overtime hours. Accordingly, what remains to be paid is one-half of that amount (\$0.092) for all overtime hours worked.
- $\$0.092/2 = \0.046
- $\$0.046 \times 104$ (overtime hours worked) = \$4.78

- Accordingly, adjusting for the FLSA overtime obligation, the total bonus payment is \$204.78.

The same formula should be applied whether calculating the overtime obligation on a weekly, monthly, quarterly or annual basis.

Failing to include these types of payments in the calculation of an employee's regular rate of pay, and resultantly the proper overtime rate, is a common error and often serves as the basis of a Department of Labor audit. In order to best protect a County from liability, it is recommended that County officials and human resource managers conduct a self-audit to determine if nondiscretionary bonuses are properly included into the overtime rate.