

Unwary employers risk being caught in nondiscretionary bonus, regular pay rate trap

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The regional director for the Wage and Hour Division (WHD) of the Department of Labor (DOL) has recently underscored the compliance obstacle that continues to confound employers: whether to include bonuses in the “regular rate” when calculating the overtime pay rate for nonexempt employees. Nondiscretionary bonuses must be considered when determining the regular pay rate, while purely discretionary bonuses are excludable. Most bonuses are nondiscretionary, and employers often forget to factor them into the regular pay rate when determining the correct overtime rate. So, what is a truly discretionary bonus under the Fair Labor Standards Act (FLSA)?

What does discretionary mean?

Put simply, a discretionary bonus is one paid at the sole discretion of the employer and is not expected by the employee. The DOL has issued [fact sheet 56\(c\)](#) to guide employers on treatment of bonuses under the FLSA. The fact sheet is clear that “a bonus is discretionary *only* if all of the statutory requirements are met”:

- The bonus paid is within the sole discretion of the employer, until at or near the end of the period that corresponds to the bonus;
- The amount of the bonus is within the sole discretion of the employer, until at or near the end of the period that corresponds to the bonus; *and*
- The bonus isn’t made according to any previous contract or promise that causes an employee to expect such payments regularly.

The rule of thumb is that if the bonus isn’t guaranteed, based on performance, or expected by the employee, it’s likely properly classified as discretionary.

What is a nondiscretionary bonus?

Any bonus that doesn’t fit within all of the statutory requirements of a discretionary bonus is a nondiscretionary bonus. They include:

- Attendance bonuses;
- Productivity bonuses;
- Safety bonuses; and
- Bonuses made under a contract.

Nondiscretionary bonuses are included in the regular pay rate.

How do I calculate a bonus into the regular pay rate?

The FLSA requires all nonexempt employees to be paid overtime at time and a half of their “regular rate of pay” for all hours worked over 40 in a workweek. The regular rate can include more than their normal hourly pay rate.

Therefore, first you must determine whether the other compensation (e.g., nondiscretionary bonus) should be included when calculating the regular rate. If a bonus should be included in the calculation, the next step is to identify what timeframe the bonus covered.

To determine the regular rate, you should take the total compensation for the week (except the statutory exclusions) and divide it by the total number of hours worked in the week. Examples of

calculations from the DOL are available in fact sheet 56(c).

There's more

Gifts and payments in the nature of gifts on special occasions (e.g., holidays or rewards for service) may be treated like discretionary bonuses and excluded from the regular pay rate. To do so, they may not be dependent on hours worked, production, or efficiency. An example may be a longevity bonus or sign on bonus (so long as it isn't made under a collective bargain agreement or city ordinance).

The DOL has found this to be a major compliance issue among employers. If you have or are considering a bonus program for your nonexempt employees, you should run it by your employment counsel for guidance and proper implementation.

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