

avoid abuse, but the circumstances in which you can ask for documentation are limited.

Because each circumstance is unique, it's important to consult with employment counsel to navigate the application of this new law and the protections it affords.

*Shannon S. Pierce and MaryJo E. Smart are attorneys with Fennemore Law in Reno, Nevada, and can be reached at [spierce@fennemorelaw.com](mailto:spierce@fennemorelaw.com) and [msmart@fennemorelaw.com](mailto:msmart@fennemorelaw.com). ■*

## OVERTIME

# Cracking the code: Adding bonuses to FLSA overtime calculations

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

*The Fair Labor Standards Act (FLSA) requires employers to pay overtime to nonexempt employees based on their regular pay rate and the number of hours worked in a workweek. While this sounds straightforward on paper, employers commonly fail to realize that nondiscretionary bonus payments must be included in calculating the regular pay rate and, ultimately, the amount of overtime owed. Arizona hasn't codified an overtime statute, so Arizona employers (and employers in any state that doesn't have a codified overtime statute) must look to the FLSA for overtime compliance. How can employers that pay nondiscretionary bonuses properly calculate the regular pay rate for overtime purposes?*

## When is a bonus factored into the regular pay rate?

The FLSA distinguishes between discretionary and non-discretionary bonuses when determining whether the bonus should be included in an employee's regular pay rate. A discretionary bonus is essentially any bonus that isn't guaranteed, based on performance, or expected by the employee. A discretionary bonus is excludable from the regular pay rate.

Any bonus that doesn't fit within all the statutory requirements of a discretionary bonus is considered a non-discretionary bonus. Nondiscretionary bonuses include:

- Attendance bonuses;
- Productivity bonuses;
- Safety bonuses; and
- Bonuses made as part of a contract.

Additionally, commissions, incentive pay, or perfect attendance awards are considered bonuses. Nondiscretionary bonuses must be included in the regular pay rate.

## Calculating regular pay rate when paying nondiscretionary bonuses

Once you determine whether other compensation (e.g., nondiscretionary bonuses) should be included when calculating the regular pay rate, you must take steps to properly calculate the regular pay rate so you can pay the correct overtime.

To start, identify what timeframe the bonus covered. Was the bonus paid for a certain level of production in a week or based on a quarterly project? If the timeframe is for the past quarter, you will need to go back to recalculate the compensation for anyone who worked overtime during that period.

Next, calculate the total straight-time compensation. This is done by multiplying the hours worked by the employee's straight-time rate and adding the bonus for the timeframe in which overtime is being calculated.

Once total compensation is calculated, the new regular pay rate needs to be determined by dividing the total compensation (including the bonus, excluding statutory exclusions) by the total number of hours worked.

## Can you provide an example?

Jane makes \$16 per hour and received a \$100 bonus based on a special order she completed during the week. She worked 44 hours during that week. Here's how you calculate her overtime in that week:

- Multiply her hourly rate by hours worked:  $\$16 \times 44 = \$704$ .
- Add straight-time pay to bonus pay:  $\$704 + 100 = \$804$ .
- Divide total compensation by total hours worked to obtain new regular pay rate:  $\$804 \div 44 = \$18.27$  per hour.
- Multiply her regular rate by .5 (remember, you've already paid straight-time compensation):  $\$18.27 \times .5 = \$9.14$ .
- Multiply the half-time rate by overtime hours worked to figure out the overtime pay due:  $\$9.14 \times 4 = \$36.56$ .
- Her total compensation, including overtime comes to \$840.56.

Other examples of calculations from the Department of Labor (DOL) are available in Fact Sheet 56(c).

## What if I have not been properly calculating overtime?

After reading this article, if you discover your company hasn't been properly calculating the regular pay rate for the purpose of paying overtime, you must complete a comprehensive audit of overtime payments with a lookback period of at least two years. The statute of



### **Remote workers less likely to be promoted.**

A survey from Resume.com shows that in 2023, remote workers were the least likely to be rewarded at work, receiving fewer promotions and raises. However, remote workers were equally as likely or more likely to report being more productive, happier, and less stressed than hybrid and fully in-office employees. The survey was launched November 29, 2023, and was conducted online. It consisted of 417 remote workers, 567 hybrid workers, and 206 fully in-office workers. The survey also found that fully in-office workers reported more stress and unhappiness at work. All three groups reported similar levels of connectedness to their company, co-workers, and bosses. Half of fully in-office workers said they will look for a new job in 2024, compared to 36% of remote workers and 43% of hybrid workers. The survey also found that 92% of remote workers like their current work-location arrangement, compared to 35% of in-office workers and 69% of hybrid workers.

**Survey finds caregiving workers more stressed.** A new workplace wellness survey report released in December by the Employee Benefit Research Institute and Greenwald Research found that caregiving workers are slightly older on average, more likely to work part time, stressed about finances, and challenged to juggle work and caregiving responsibilities than non-caregivers. Key findings include that, overall, caregivers are similar to non-caregivers in their self-rated estimations of their own mental health and workplace well-being. However, the two groups differ in two key areas. Caregivers are less likely to rate their own personal health as excellent, and they are more likely to give a lower rating of their household's financial well-being.

**Study finds more than half of companies plan to increase hiring.** The State of U.S. Hiring Survey from business consulting firm Robert Half shows that 57% of respondents planned to add new permanent positions in the first six months of 2024, while another 39% anticipated hiring for vacated positions. More than two-thirds (67%) expected to hire contract workers as part of their staffing strategy. Among managers who planned to increase hiring, 66% cited company growth as the primary factor influencing their hiring decisions for the first half of 2024. In addition, 77% of managers who had to put projects on hold in 2023 said they plan to pick them back up in 2024. The survey also found that hiring challenges remain. Ninety percent of hiring managers reported difficulty finding skilled professionals, and 58% said it takes longer to hire for open roles compared to a year ago. Retention is another area of concern noted in the survey, with 91% of managers citing retention of top talent as a concern. ■

limitations on an overtime claim is two years, but it extends to three years if underpayment of overtime was willful.

Seek out competent employment counsel to walk you through paying back overtime wages to employees and former employees to avoid a potential wage claim. The DOL has found this to be a common compliance issue among employers, so you should review your practices to determine whether a bonus program for your nonexempt employees has been properly implemented.

*Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on HR matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082. ■*

#### SETTLEMENT AGREEMENTS

## Navigating the minefield: Hidden taxation and IRS reporting in employment settlements

AK AZ HI NV OR WA

by Shannon S. Pierce and Stephen A. Good, Fennemore Law

*Many businesses are familiar with the reasons that drive settlements in employment lawsuits. Even in cases when the facts generally support the employer's version of events, practical considerations, such as avoiding the time and cost of protracted litigation, often lead businesses to reach reasonable settlements with former (or even current) employees. So, the lawyers and their clients put down their proverbial swords, and they get to work on drafting a written settlement agreement. What's often overlooked in this process, however, is the taxation of the settlement payments. Here are some key issues to consider before signing a final settlement agreement.*

### **Taxation of settlements, generally**

Settlement payments are almost always taxable to the recipient, particularly in the context of an employment lawsuit.

If some or all of the settlement proceeds are attributable to alleged lost wages, then the business is obligated to withhold income and employment taxes as required by law and issue a Form W-2 to the employee (or former employee) for that portion of the payment.

### **Emotional distress versus actual physical injury/sickness**

Often, under a misguided belief taxation can be avoided, counsel for the settling employee will attempt to characterize the settlement payment as being attributable to "compensatory damages," "emotional distress," or something similar. Here, again, a more precise analysis is needed to determine whether the settlement proceeds constitute taxable income to the employee.