Calculating the Regular Rate of Pay for FLSA Overtime

Lisa Bergersen, Principal Attorney at EngageHR Law, Of Counsel at Buelow Vetter, Former HR Director, City of Pewaukee

Last month we examined the criteria for determining when a job position is exempt from overtime pay requirements under the Fair Labor Standards Act (FLSA). This month, we explore another wage and hour issue that is frequently misunderstood, and that is the meaning of "regular rate of pay" as applied to the calculation of overtime wages for non-exempt employees.

The FLSA requires that non-exempt employees receive overtime pay at one and one-half times the employee's *regular rate of pay* for all hours worked over 40 in a workweek. The term "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee" in that workweek.[1] The regular rate is calculated by dividing the total compensation received in the workweek by the total number of hours actually worked.

If the total compensation received by an employee in a workweek is limited to pay for actual hours worked, then the regular rate will be the employee's hourly base rate. However, if the employee receives other compensation in the workweek in addition to pay for time worked, the added compensation must be accounted for in calculating the rate to use for overtime. The U.S. Department of Labor illustrates the difference using the following examples:

Calculation of overtime in a workweek where the employee is compensated only for hours worked:

"[A] $12 hourly [base] rate will bring, for an employee who works 46 hours, a total weekly wage of $588 (46 hours at $12 plus 6 at $6). In other words, the employee is entitled to be paid an amount equal to $12 an hour for 40 hours and $18 an hour for the 6 hours of overtime, or a total of $588." 29 C.F.R. 778.110(a).

Calculation of overtime if the same employee receives a bonus in the workweek:

"If the employee receives, in addition to the earnings computed at the $12 hourly [base] rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50)." 29 C.F.R. 778.110(b).

Payments Excluded from the Regular Rate Calculation

Some payments can be excluded from the regular rate, for example, certain gifts to employees, payments for time not worked, some reimbursable expenses, certain premium payments for time worked outside of normal hours, irrevocable benefit payments, and certain types of bonuses and longevity payments.[2] On December 16, 2019, the Department of Labor issued updated guidance on the types of compensation that can be excluded.[3] This includes the cost of certain perks like parking, wellness programs, gym memberships, employee discounts for retail goods, cellphone charges, membership dues, certain travel expenses, and payments for unused paid leave, among other things.[4]

Exemptions are very narrowly construed. In addition, there are a number of factors that must be examined in determining whether some exemptions apply in a particular workplace. As an example, longevity bonuses can be excluded from the regular rate calculation when employees receive these payments solely as a reward for tenure. However, when longevity payments are made pursuant to an ordinance, policy, or collective bargaining agreement, they most likely will be treated as "part of wages" and includable in the regular rate. Specific facts related to the organization's policies and practices may be relevant in making a final determination.

Proper attention must be given to applicable wage and hour provisions to avoid costly litigation. *Gilbertson v. City of Sheboygan*, 165 F. Supp.3d 742 (E.D. Wis. 2016) serves as an example. In *Gilbertson*, the federal district court for the Eastern District of Wisconsin found that the City had failed to include certain forms of compensation in calculating the regular rate for overtime payments. Specifically, performance-based lump-sum bonuses, cash-in-lieu payments to employees who opted out of the City's health insurance,

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1. 29 U.S.C. 207(e). Remember that overtime must be calculated in each workweek, not by pay period. Your municipality must have a defined workweek that is used for payroll processing. 29 CFR § 778.105.

and reimbursements from the City's HRA plan, were determined to be compensation that should have been included in the regular rate calculation. The court ruled that the HRA payments needed to be included as compensation because the City did not make irrevocable contributions to a trustee or third-party administrator with fiduciary obligations that the court believed were required by the regulations.[5]

Conclusion

Staff charged with oversight for payroll should receive training in state and federal wage and hour laws to ensure compliance with the regular rate rules, along with the myriad of other provisions governing overtime and other compensation paid to employees. Conducting an assessment of your wage and hour practices and policies with employment counsel may also be a sound idea.

Resources for employers:

- Overtime Pay Fact Sheets: https://www.dol.gov/agencies/whd/overtime/fact-sheets
- Compliance Assistance Toolkits: https://www.dol.gov/agencies/whd/compliance-assistance/toolkits
- Overtime Calculator: https://webapps.dol.gov/elaws/otcalculator.htm

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2. This list is not exhaustive. For a complete list see: https://webapps.dol.gov/elaws/whd/flsa/otcalc/docstatexc.asp
3. The new guidance went into effect on January 15, 2020: https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act
4. U.S. Department of Labor - Fact Sheet: Final Rule to Update the Regulations Governing the Regular Rate under the FLSA (December 2019)
5. 29 U.S.C. § 207(e)(4)(Exclusions include "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits to employees."); 29 C.F.R. § 778.217(a)(The trustee or third person "must assume the usual fiduciary responsibilities imposed upon trustees by applicable law.")