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Some Thoughts on Employee Appreciation Day, including a Potential Wage and Hour Pitfall

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"And you're wondering . . . am I appreciated . . . I'm not really appreciated, should I play like I'm appreciated, but I'm not that appreciated . . .but I think my employer might appreciate me . . . but do I want to be appreciated . . .. but now my employer doesn't really appreciate me . . . and then all of the sudden I'm getting, I'm starting to be appreciated. Jeremy Grey, Workplace Crashers (2005)

Okay, so I retooled that quote and the movie title slightly, but it still makes me laugh and certainly works as a nicer teaser to a post on Employee Appreciation Day, which is celebrating its 20th anniversary tomorrow, Friday, March 6.

Employers Should Appreciate Employee Appreciation

Started in 1995, Employee Appreciation Day encourages employers to focus on the contributions of their staff members. And a recent White Paper entitled [*Employee Performance: What Causes Great Work?*](#) concludes that a little employee recognition goes a long way. According to research conducted by the Cicero Group (and commissioned by the O.C. Tanner Institute), effective employee recognition may be the leading reason that employees perform at their highest level.

The Cicero Group administered an online survey to employees between the ages of 25 and 65 working in the US at companies with more than 1,000 employees across all industries. 980 employees responded to the survey and provided various answers to the open-ended question of "What is the most important thing that your manager or company currently does (or could do) that would cause you to produce Great Work?" Of the nine types of answers provided in response, a clear majority of the respondents (37%) said "recognize me." "Lead by example" came in second at 22% followed by 7 other answers that ranged from 2% to 9% of the responses. The rest of the research Cicero conducted supported this initial finding and allowed it to conclude that "[i]f you want employees that produce and innovate more, invest in recognition."

I can't say I was entirely surprised by this conclusion given my own experiences with recognition behavior in my workplace, but it was nice to see my experiences match the statistical evidence.

Employee Appreciation Bonuses and Overtime Pay

There are all sorts of things employers do to recognize their employees, whether they do it this Friday or throughout the year. From verbally praising their employee's efforts, to having an employee of the month program, to handing out gift cards, to having late arrival or early dismissal, to buying employees lunch or hosting a happy hour, to handing out bonuses. Let's focus on that last one – bonuses – for a second. As always, any employer action – no matter how well-intentioned – can have legal pitfalls, and in this case, the potential pitfall relates to an overtime violation.

When calculating overtime pay, some employers think that they should simply use the employer's*hourly rate* when determining overtime. For example, if the employee worked 45 hours and is paid $10.00 per hour, the employer may simply multiply $10.00 by 45 hours for $450 in straight time wages, and then to calculate overtime, it would multiply the $10.00 hourly rate by ½ by 5 hours of overtime for a total of $25.00 in overtime pay for a total wage payment of $475.00. In many cases that is how it's done. But not always.

The Fair Labor Standards Act and its interpreting regulations do not refer to the employee's "hourly rate" when discussing how to calculate overtime; instead, they refer to the employee's "regular rate". Believe it or not, many employers have never heard of this term before.

So what does the Act and its interpreting regulations mean by "regular rate"? Although the "regular rate" is ultimately converted into an hourly rate, it includes *"all remuneration for employment paid to, or on behalf of, the employee,"* and therefore, it includes forms of compensation other than the employee's hourly rate when calculating overtime pay due. The interpreting regulations define the types of compensation that employers should include and should not include when determining the employee's regular rate. Among those payments that employers may *exclude* from the regular rate are payments for gifts and other payments in the nature of gifts on special occasions.

The regulations say that a bonus qualifying as a gift or payment in the nature of a gift should merely be a reward for service, and it will not qualify "[i]f it is measured by hours worked, production, or efficiency," because in that case, it is considered "a payment geared towards wages and hours during the bonus period and must be included in the regular rate." Further, if the bonus payment "is so substantial that it can be assumed that employees consider it a part of the wages for which they work," it will not qualify either. At the same however, it does not matter if the employer pays the bonus with regularity (i.e. on every Employee Appreciation Day or Christmas, etc.) so that employees are led to expect it – that is, once again, as long as it is not tied to hours worked, production or efficiency.

Thus, if not devised properly, employers may have to include Employee Appreciation Bonuses as compensation when determining the regular rate, which means higher overtime costs. Let's revisit our earlier example where the employee worked 45 hours at $10.00 per hour. Say the employee worked those 45 hours in the week in which Employee Appreciation Day fell and that traditionally, as a recognition reward, the employer paid its employees a $10 appreciation bonus for each hour they worked during that week. This employer would have to now recalculate the regular rate because the bonus is more likely tied to hours worked rather than presented merely as a service award on a special occasion. The employee would have compensation totaling $900.00 (45 hours x $10.00 per hour = $450.00 weekly wage + 45 hours x $10.00 bonus = $450.00 bonus). The $900.00 in compensation is then divided by 45 hours worked for a regular rate of $20.00 – a full $10.00 increase in the regular rate in the first example. And to calculate the total wages due, you would multiply 45 hours by $20.00 (= $900.00) and the 5 hours of overtime by $10.00 (or ½ the $20.00 regular rate x 5 OT hours, which equals $50.00 in overtime) for total wages due that week of $950.

Had the employer in our example not tied the Employee Appreciate Day bonus to hours worked and merely paid the employee a special one-time $450 service bonus, then the employer could have excluded the bonus amount when determining the regular rate. The wages would have equaled $925 ($450 in straight time wages + $25 in overtime wages (5 OT hours x ½ x $10 regular rate) + $450 bonus), which amounts to a $25 difference.

A Conclusion You Can Appreciate

This is all a long-winded and technical way of saying that whenever you pay a bonus to your employees – whether it's on this Friday or at any other time, you should be careful. It is vitally important that you first determine whether the bonus amount should be included or excluded from the regular rate calculation, either as a gift or payment made in the nature of a gift on a special occasion (or also as a discretionary bonus – a type of bonus that we did not cover in this post, but which is subject to a similar analysis). The failure to address this issue properly can lead to costly wage and hour class action overtime claims, which, ironically, no employer appreciates.

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