Halloween has passed and we are now squarely approaching the holiday season. While this time of year brings many good things, it can also bring unwanted headaches for employers wanting to spread some “holiday cheer,” especially those who forget how bonuses may affect payment of overtime. So, while we recently discussed bonuses in general, now is a good time for a refresher on bonuses and overtime pay in the context of holiday payments.

First, don’t forget the general rule for non-exempt employees is that all compensation is to be included in the calculation of the “regular rate.” Bonuses must be included within the regular rate unless specifically excluded by law or regulation. Bonuses which do not qualify for exclusion from the regular rate must be totaled in with other earnings to determine the regular rate on which overtime is based. However, certain things are excluded from compensation used to calculate the regular rate.

The first of these is the traditional “Christmas bonus,” or more precisely, “sums paid as gifts; payment in the nature of gifts made at Christmas time or other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency.” To not be included as compensation used for calculating the regular rate, the “bonus must actually be a gift or be in the nature of a gift.” The bonus cannot be measured by the hours worked, production or efficiency. Nor can it be so substantial that it can be assumed that employees consider it as part of wages for which they work. The bonus may, however, vary between employees based on length of service. Finally, it cannot be paid pursuant to some contract. Bottom line – true Christmas gifts or holiday bonuses do not have to be included in the regular rate for purposes of computing the regular rate.

The second, and more challenging, scenario is a bonus that while paid at year-end is not necessarily a true holiday gift. As we recently addressed, the question is whether such bonuses truly are discretionary. Again, the exclusion is narrow. To be excluded from computation of the regular rate, the “sum paid in recognition of services performed in a given period” (i.e. bonus) must fall in one of two categories. One, the fact that the payment is to be made and the amount to be paid must be in the sole discretion of the employer. Further, the decision must be made at or near the end of the period in which payment is to be made and not be based on any promise, contract or agreement which causes the employee to regularly expect such payments. Or two, the compensation may be excluded from the regular rate if the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan.

Employers looking to spread holiday cheer in the form of end-of-the-year bonuses must therefore address the primary question of whether the bonus truly is discretionary. In making this determination, consider the following facts that may destroy the discretionary aspect of a bonus:

1. If the employer promises in advance to pay a bonus
2. If the amount of the bonus is conditioned on allocating a percentage of sales to the “bonus pool”
3. If the bonus is promised at the time of hire
4. If the bonus is to induce employees to work more efficiently or to remain with the employer
As examples, attendance bonuses, individual or group production bonuses, bonuses for quantity or quality of work, or retention bonuses are not discretionary and must be included in the regular rate.

So, celebrate the holidays and reward your employees, but be careful to consider whether bonuses must be included in computing the regular rate for non-exempt employees.

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