

BONUSES ARE WAGES; MUST BE INCLUDED IN OVERTIME CALCULATIONS

QUESTION: We pay all of our employees a weekly salary, even those who are nonexempt and entitled to be paid overtime when they work more than 40 hours in a workweek. One group of employees, our assistant property closers, receives a \$50 bonus for each "closing," which is our term for a land/property transaction.

Since we have a high volume of closings during the last week of each month, the assistant closers typically work longer hours and, given the bonus, make more money that week than in others.

The issue that we are dealing with is that a new employee in payroll has informed us that we need to include the bonus dollars when we calculate the overtime amounts due to the assistant closers.

Currently we base the assistant closers' overtime pay on their salary, divided by 40 hours per week to come up with an hourly amount, and multiply that hourly amount by time-and-a-half for each hour that they work over 40 during the workweek. Then we simply pay them the total bonus amount -- \$50 multiplied by the number of closings they did -- on top of their salary and overtime pay (time-and-a-half their salary broken down into an hourly rate for each hour over 40 hours).

Should we be including the closing bonus amounts when we calculate the assistant closers' overtime pay?

ANSWER: Yes, based on the facts you provide, you need to include each \$50 bonus amount paid to assistant closers when calculating their overtime.

Both federal and state law require employers to pay overtime to nonexempt employees at the rate of one-and-a-half times their "regular rate" for all hours over 40 hours in a workweek. Therefore, to compute the overtime pay due requires knowing what that regular rate is.

The regular rate is defined as the hourly equivalent of all compensation received by an employee for work. The formula is that an employee's regular rate is the total straight time compensation received by the employee divided by the number of hours that money is intended to compensate. There may also be additional compensation received by an employee which is required to be included as part of the regular rate.

Employers may compensate employees on an hourly, salary, commission, piece-rate or other basis, but the overtime compensation due to employees must be

computed and expressed on an hourly wage rate basis. If an employee's straight time rate is purely an hourly wage, then that rate is the regular rate.

However, if the employee is paid a salary, as are the assistant closers, the employer must reduce the salary to an hourly amount as follows: Multiply the employee's monthly salary by 12 to compute the annual salary; divide the annual salary by 52 to determine the weekly salary; and divide the weekly salary by 40 hours per week (or whatever number of hours it is understood that the salary is intended to compensate). The result is the employee's regular hourly rate of pay for that workweek.

In determining an employee's regular rate the employer must include all "remuneration" paid to (or on behalf of) the employee, unless specifically excluded by statute. This includes wages and salaries, lump sum payments, non-discretionary bonuses and on-call pay.

The following statutory exclusions are components of an employee's compensation that the employer may lawfully exclude when calculating the regular rate of pay: Discretionary bonuses; gifts; expense reimbursements; pay for vacation, sick leave or holidays; profit sharing contributions; and benefits paid to third parties (for example, insurance and retirement payments).

In order to exclude bonuses paid to employees when calculating the regular rate of pay (which ultimately determines the amount of overtime compensation due), the bonus must be payable based on the sole discretion of the employer and may not be measured by or dependent on hours worked or the employee's production or efficiency.

In this case, the assistant closers' bonus of \$50 per closing transaction is a production-based bonus which does not satisfy the statutory exclusion for discretionary bonuses. Therefore, they must be included as part of assistant closers' total remuneration for those workweeks in which they are paid, which increases the regular rate of pay beyond the simple expression of the employee's salary as an hourly amount during those weeks when the employee is entitled to overtime compensation.

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