

NEWS & INSIGHTS

Six figure settlement highlights the perils of bonuses and regular rate calculations

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A recent investigation by the U.S. Department of Labor (DOL) led to [its recovery of \\$165,653 in back wages](#) for approximately 3,000 employees of The Giant Company LLC (Giant) in Pennsylvania, Virginia, West Virginia and Maryland. According to the DOL, Giant failed to include bonuses paid in calculating employees' regular rate for purposes of overtime.

Bonus miscalculation led to overtime rate oversight

According to the DOL, beginning in March 2020, Giant increased the hourly rate for employees by \$2. This practice continued until May 2020 when the company reduced employees' hourly rate by \$2 and instead paid lump sum bonuses. Although Giant calculated employees' overtime rate correctly from March through May 2020, it subsequently failed to include the bonuses in the regular rate of employees when calculating overtime pay. This apparent oversight by Giant resulted in employees receiving lower overtime rates than those required by law.

Overtime rate must include nondiscretionary bonuses

As a reminder, under the Fair Labor Standards Act (FLSA), all compensation for hours worked, services rendered or performance must be included when calculating an employee's regular rate for overtime purposes. This includes nondiscretionary bonuses. The DOL-provided examples of nondiscretionary bonuses include but are not limited to: bonuses based on a predetermined formula, such as individual or group production bonuses; bonuses for quality and accuracy of work; bonuses announced to employees to induce them to work more efficiently; and attendance and safety bonuses (i.e., number of days without safety incidents). The primary consideration as to whether a bonus is nondiscretionary relates to expectation: essentially, is the employee aware of and expecting the bonus?

Overtime rate does not include discretionary bonuses

Conversely, discretionary bonuses are excludable when calculating an employees' regular rate of pay for overtime purposes. The DOL has stipulated that a bonus is discretionary only if all the statutory requirements are met: (1) the employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine whether to pay the bonus; (2) the employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine the amount of the bonus; and (3) the bonus payment is not made according to any prior contract, agreement or promise causing an employee to expect such payments regularly.

Ultimately, employers need to be aware of the potential pitfalls associated with failure to properly calculate overtime, which include not only the backpay owed, but liquidated or double damages and the employee's attorneys' fees.

For legal issues related to wage law compliance or disputes, seek professional legal advice

If you have questions or are in need of legal advice regarding any aspect of wage, labor or employment law for your business, Saxton & Stump attorneys [Richard L. Hackman, Esq.](#) and [Stephen J. Fleury Jr., Esq.](#) are available. Our [Labor and Employment Group](#) can help develop internal best practices designed to minimize the risks to employers, help you seek resolution to disputes or represent your interests if litigation is necessary.

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