

## Per Diem Deal Goes South: Overtime liability risks

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Per diem pay is fundamental, especially in the travel-heavy energy industry. But if it's done wrong, per diem pay can trigger overtime liability.

What if a company pays an employee \$12.50 per hour, up to 40 hours in a week, as a per diem? The employee scores some extra bucks, while the company saves per diem expenses. Fair deal, right? Not exactly. In [\*Gagnon v. United Technisource\*](#), the Fifth Circuit ruled that the company had shorted the employee on overtime pay.

Here's the math. Overtime wages must be paid at 1.5 times an employee's "regular hourly rate," which generally includes everything an employee is paid for his work (except for overtime pay). The company assumed that the "regularly hourly rate" only included hourly wages, but the court said the per diem pay had to be included too. That drove up the price of an overtime hour.

Paying the per diem hourly got the company into hot water. The Department of Labor believes that per diem pay must be included in the "regular hourly rate" if the per diem changes with the number of hours worked. The court agreed. Also, it smelled like the company was trying to avoid paying more for overtime hours. The company promised to pay the employee minimum wage, plus overtime hours at \$20. No matter how many hours the employee worked, his hourly wage stayed about \$20 because of the \$12.50 hourly per diem.

Per diem pay is normally safe if it's a fixed amount for a single day's work that is reasonably close to the employee's actual business expenses. Straying from that formula risks getting second-guessed by a court. And the dollars can be staggering. Scores of employees and ex-employees who had per diem pay may join the lawsuit.



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