

Employment Law Advisory for 7/20/2011

Remember to calculate overtime pay based on your employees' "regular rate of pay"

Employers sometimes assume that an employee's rate of pay for overtime work is simply 150% of his or her hourly wage for hours worked in excess of eight in a day or 40 in a week, or 200% of the hourly wage for hours worked in excess of 12 in a day or in excess of eight on the seventh consecutive day within a single work week.

When a non-exempt employee is entitled to overtime compensation, the hourly rate of pay from which the overtime compensation is calculated is known as the employee's "regular rate of pay." If an employee subject to California's Wage Orders works nine hours in a day, for example, he or she would be entitled to payment at 150% of his or her regular rate of pay for the ninth hour of work during the day.

In general, an employee's regular rate of pay is equivalent to his or her total compensation during the week divided by the total number of hours worked. Although an employee's regular rate of pay will often be equal to his or her straight-time hourly wage, the regular rate of pay can vary from the straight-time wage, since it includes other forms of compensation as well.

If an employee earns commissions, for example, his or her regular rate of pay will be equivalent to the sum of hourly wages plus commissions, divided by total hours of work. Bonuses (if based on current productivity) can also be included in an employee's regular rate of pay, and the Labor Commissioner has taken the position that stock option profits also constitute income that must be included in the calculation of an employee's regular rate of pay. Since commissions, bonuses and the like often vary from week to week, an employee's regular rate of pay can also vary from week to week, posing obvious challenges for the employer.

Employers whose non-exempt personnel receive compensation which includes items other than straight-time hourly wages should confer with counsel to assure that they are calculating overtime compensation using the appropriate regular rate of pay. Failure to include items such as commissions and productivity-based bonuses in overtime calculations will result in underpayment of overtime wages. Errors in calculating the regular rate of pay, or overlooking the issue in its entirety, are common and are increasingly the subject of claims by employees.

If you have any questions about calculating the regular rate of pay for your employees, or any other issue relating to employment law, please contact one of our attorneys:

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