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Healthcare Update

"What's My Rate Of Pay?" The Answer May be Trickier Than You Think

By Karen Luchka

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The first question often asked by new employees or job applicants is "what is my rate of pay?" In this economy, more than ever, your response is critical to employees and may be closely scrutinized. For legal and practical reasons, employers should obviously be accurate and careful in responding, especially where various differentials, specialty pay, on-call pay, clinical ladders, special pool rates, bonuses, and other bells and whistles could potentially give rise to legal claims. Setting and tracking the regular rate of pay for non-exempt employees forms the foundation for establishing lawful payroll practices.

Even where employees appear to have a fixed base rate of pay, their "regular rate" for purposes of compliance with the Fair Labor Standards Act (FLSA) or any applicable state laws could vary every week. Thus, this issue merits continuing attention.

The Basic Rule

The regular rate of pay is the keystone for calculating employees' overtime rate. At its most basic, the regular rate is simply the hourly rate paid to an employee for the non-overtime workweek.[1] As a starting point, if an employee's regular rate of pay is $20/hour, the overtime rate will be $30/hour. Although this basic rule is simple, it quickly becomes complicated by variable add-ons and work schedules.

Calculating The Regular Rate

Employers are required to compensate employees one and a half (1.5) times the regular rate of pay for all overtime work performed. The regular rate of pay is presumed to include *all* remuneration paid to or on behalf of the employee, in whatever form. While there are some exceptions, the employer bears the burden of establishing that a form of remuneration is excluded from the regular rate of pay.

As a result, employers must include a wide range of compensation and benefits in the regular rate of pay, including pay differentials, incentive pay, and many bonuses. Therefore, even if an employee's base hourly rate of pay is $20/hour, the "regular rate of pay" for purposes of calculating overtime is increased if the employee receives additional compensation in the form of shift premium or production bonus for the workweek. Although not readily apparent, differentials and on-call pay alone can significantly increase employees' regular rate for purposes of the overtime calculation.

Failure to include all remuneration paid to an employee in the regular rate of pay determination would result in the underpayment of overtime and expose the hospital to liability. If such failures affect groups of employees, omissions or errors can prove costly indeed. For example, in June 2010, the Department of Labor (DOL) announced that an employer paid 173 workers nearly $1 million in back wages based, in part, on the DOL's finding that the employer violated the FLSA by not including shift differentials in the calculation of the regular rate of pay.

The 8/80 Plan

The FLSA requires employers to pay the overtime rate of pay for all work in excess of 40 hours in a workweek. But hospitals have another option. They may elect to pay non-exempt employees the overtime rate of pay for all hours worked in excess of 80 hours in a designated 14-day work period. Under this option, however, they must also pay the overtime rate to employees who work more than eight hours in any workday if that "daily" overtime amount is greater than the "over-80" amount in the particular 14-day period. Though not applicable to all employers, the 8/80 plan allows hospitals and certain other institutions to agree with their employees to calculate overtime in this manner. In some instances, the 8/80 plan may allow some greater flexibility in scheduling.

Nevertheless, questions arise regarding application of the 8/80 plan to employers who use 10 or 12-hour shifts. For many healthcare employers, such shifts are preferable and popular among both employees and supervisors. But employers that use the 8/80 plan and 12-hour shifts must pay significant amounts of overtime each pay period. For example, if an employee is scheduled to work three 12-hour shifts in a week, the employer would be required to pay the employee 12 hours of overtime (four hours of overtime each workday for exceeding eight hours) under this system.

Some employers who use the 8/80 plan offer employees the option of working a 12-hour shift schedule in exchange for a lower base hourly rate. (The rate must of course exceed the applicable minimum wage). The lower base hourly rate helps offset the expense of overtime obligations while preserving other benefits of the 8/80 system. This practice was recently reviewed and approved by the U.S. Court of Appeals for the 9th Circuit.

A California hospital that used the 8/80 plan gave nurses the option of working eight-hour shifts or 12-hour shifts. Nurses who worked 12-hour shifts were paid at a lower rate of pay. Because the hospital was required to pay overtime for all hours worked in excess of eight hours a day, the weekly wages earned by employees on 12-hour shifts were comparable to the wages of employees on eight-hour shifts.

A class action lawsuit filed against the hospital alleged that the use of different hourly rates violated the FLSA. In December 2010, the 9th Circuit determined that the payment of different rates of pay was lawful, so long as the rate reduction was not designed to circumvent employees' rights under the law. In particular, the Court found there was nothing that prohibited an employer from paying employees different rates of pay when they were assigned to different shifts.

Correctly Calculating Compensation

Calculating an employee's regular rate of pay can sometimes be complicated and time-consuming. Especially in hospitals and other healthcare settings, the result is often far different from what meets the eye. Mistakes can be costly. It's a good idea to review your payroll practices to ensure that the regular rate of pay is being calculated correctly. It may also be helpful to assess whether the 8/80 option could be appropriate for all or some of your employees.

For assistance, employers can consult the federal Department of Labor's Fact Sheet #54: "The Healthcare Industry and Calculating Overtime Pay," or contact your local Fisher & Phillips attorney.

For more information contact the author at kluchka@laborlawyers.com or 803-255-0000.

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[1] This article will not delve into or attempt to explain systems such as the fluctuating workweek, except to note that other such arrangements may be used.