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FLSA Fundamentals: Calculating Regular Rate of Pay and Overtime Pay

In honor of the Fair Labor Standard Acts 78th birthday and the highly anticipated changes to the DOL overtime regulations, the Modern Workplace is running a special multipart series entitled FLSA Fundamentals which will cover the basics of this important law and end with a discussion of the final changes to the regulation upon their release.

As most employers are well aware, employees who are classified as non-exempt under the federal Fair Labor Standards Act (FLSA) must be paid overtime at a rate of one and one-half their regular hourly rate of pay for all hours worked in excess of 40 hours in a workweek.

An employees regular rate is, however, not necessarily the employees set hourly rate of pay. Instead, the regular rate of pay is the hourly rate that the employee has, in fact, received for each weeks work. Because overtime pay is normally determined on a weekly basis under the FLSA, the regular rate of pay must also be computed each week. The calculation to use is as follows:

TOTAL COMPENSATION FOR WORKWEEK

(except any statutory exclusions)

TOTAL NUMBER OF HOURS ACTUALLY WORKED IN WORKWEEK

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REGULAR HOURLY RATE OF PAY

As reflected above, the regular rate of pay must be based on compensation paid to an employee in the given workweek. While that may sound simple enough, it is not as straightforward as simply dividing weekly earnings by weekly hours worked. Why, you may ask? Because some types of non-standard payments must be included in the weekly compensation amount and other payments are excluded.

Payments that must be included in the regular hourly rate of pay calculation include the following:

- *Commissions:* Commissions earned based on a set, non-discretionary commission arrangement must be included.
- *Non-Cash Payments:* For compensation not in the form of cash, the employer must compute and include the fair market value of the non-cash compensation in the regular rate of pay calculation.
- *Non-Discretionary Bonuses:* Non-discretionary bonuses must, as a general rule, be included in calculating the regular rate of pay. This could include, for example, set production, good attendance, and other similar bonuses. These

bonuses must be attributed to the period of time in which they were earned in order to recalculate the regular rate of pay for those periods and, if needed, pay any additional overtime pay that is due.

On the other hand, payments that are not included in the regular rate of pay calculation include the following:

- Discretionary bonuses, e.g. any bonus not required by a binding agreement or plan. Employers should be aware, however, that even in the absence of a written bonus plan or agreement, a longstanding, standard practice of always paying bonuses in a certain way may, depending on the circumstances, create an obligation to include bonus income in the regular rate of pay calculation;
- Gifts or gratuities;
- Tuition or loan forgiveness programs;
- Vacation, sick leave and holiday pay;
- Profit-sharing, pension and welfare payments; and
- Certain overtime premium payments, including payment for hours worked in excess of agreed company standards.

Based on all of these intricacies, calculating the regular rate of pay can be complex. Careful calculations are necessary, though, to make sure that the employer is paying the correct overtime rate to non-exempt employees.

The next post in the FLSA Fundamentals series will tackle the sticky wicket of compensable and non-compensable working time. Stay tuned!