



LEGAL UPDATES

There's Nothing Regular About the Regular Rate of Pay

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Simply put, when a non-exempt employee is entitled to overtime compensation, the hourly rate of pay on which overtime calculations are based is known as the employee's "regular rate of pay." If an employer improperly calculates the regular rate of pay, the employer will also calculate overtime pay incorrectly, thus exposing itself to potential liability for the nonpayment of wages, as well as derivative claims for inaccurate wage statements and penalties (among other claims).

If an employee's hourly rate of pay includes only hourly wages during the pay period, then determining that employee's regular rate of pay for purposes of calculating overtime is simple. However, when the calculation to determine an employee's regular rate of pay includes other forms of compensation, such as bonuses paid for working a particular less-desirable shift, productivity bonuses, or a bonus related to the quality of an employee's work, an employee's regular rate of pay can deviate from that employee's straight-time rate.

Failure to properly calculate the regular rate of pay can set the stage for a company getting sued on a class or representative basis where potential damages and attorneys' fees can quickly (and easily) reach six or seven (or more) figure amounts.

Below is a high-level review of what types of payments must be included and may be excluded when calculating the regular rate of pay. By no means is the list below meant to be exhaustive.

What bonuses must be included in the regular rate of pay?

Nondiscretionary bonuses must be included in the calculation to determine the regular rate of pay for computing overtime when the bonus represents compensation for hours worked, production or proficiency, or if the bonus is meant to incentivize the employee to remain employed. Incentive bonuses may

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also include flat sum bonuses, as well as quarterly and annual nondiscretionary bonuses that are tied to employee performance.

To calculate overtime when a flat sum bonus was paid, the bonus amount must be divided by the maximum number of regular hours worked in the bonus-earning period. This is different than dividing the bonus by the total hours worked in the bonus-earning period. This calculation produces the regular rate of pay on the flat sum bonus earnings. Overtime on a flat sum bonus must then be paid at 1.5 times (for regular overtime hours worked) or 2 times (for double time hours worked) this regular rate calculation for any overtime hours worked in the bonus-earning period.

Overtime on production bonuses, which are bonuses designed to incentivize increased production for each hour worked, are computed differently from flat sum bonuses. To compute overtime on a production bonus, the production bonus is divided by the total hours worked in the bonus earning period. This calculation will produce the regular rate of pay on the production bonus. Overtime on the production bonus is then paid at 50% or 100% of the regular rate for all overtime hours worked in the bonus-earning period.

Overtime on either flat sum bonuses or production bonuses may be due on either a daily or weekly basis and must be paid in the pay period following the end of the bonus-earning period.

By way of example, if an employee earns only straight hourly wages of \$20 per hour, their regular rate of pay is \$20 per hour. Simple enough, right? However, if that same employee earns both hourly wages and a flat-sum bonus (e.g., a bonus for working a weekend shift), their regular rate of pay is obtained by dividing their total earnings in the workweek, (i.e., the total of their hourly wages plus the amount of the nondiscretionary bonus) by all of the non-overtime hours they worked during that workweek. For instance, assume an employee works an 8-hour shift each day from Monday through Friday, and then also works a 6-hour shift on Saturday, and the employee is paid \$20/hour and earns a \$40 attendance bonus (i.e., the equivalent of two hours of work) for working the Saturday shift. To calculate the regular rate of pay, the \$40 bonus is divided by the total non-overtime hours worked (40 hours) for a per-hour value of \$1.00, giving the employee a regular rate of \$21.00, instead of the employee's normal \$20 rate of pay. In this example, the employee's total wages for the week would amount to \$1,029.00, consisting of 40 straight-time hours at \$20.00 per hour, six overtime hours at \$31.50 per hour (150% of the regular rate of \$21.00 per hour), and the \$40 bonus.

Are there types of payments that are not included in the regular rate of pay calculation?

Yes, certain types of payments are excluded from the regular rate of pay. Although not an exhaustive list, these payments include: sums paid as gifts for holidays or other special occasions; expense reimbursements; payments made for occasional periods when no work is performed due to vacation, holiday, illness, or failure of the employer to provide sufficient work; premium pay for Saturday, Sunday, or holiday work (where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days); and certain discretionary bonuses, such as a reward for good service, where the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer.

What about those pesky meal and rest break, and recovery premiums?

As we previously covered in detail, the California Supreme Court recently decided that the term "regular rate of compensation" for meal, rest, or recovery period premiums must be paid at the regular rate used for overtime calculations.

What Should Employers Do Now?

- Employers should immediately identify the bonuses, if any, being paid to employees, and review their policy and process for calculating the regular rate of pay to assure that the calculations are consistent with current law.



- Employers should also review their current practices for recording noncompliant meal and rest periods and paying meal and rest period premiums to assure that the premiums are paid at the regular rate of pay and not at base hourly rates.
- Employers should continue to review new developments in California.

If you have any questions about issues regarding the regular rate of pay, or any other issue relating to employment law, please contact one of our attorneys.