



BY: ROBIN FORET
JUNE, 2016

THE NEW OVERTIME RULES OF THE FAIR LABOR STANDARDS ACT: THE USE OF NON-DISCRETIONARY BONUSES – CHAPTER TWO

1. New 2016 White Collar Overtime Rule

The Fair Labor Standards Act (“FLSA” or the “Act”) mandates that all employees not “exempt” from overtime pay be paid overtime for all hours “actually worked” in excess of 40 hours in any single workweek at a rate of 1 ½ times the “regular rate” of pay. Failure to pay overtime, as well as the failure to properly calculate overtime, is a violation of the Act and may be enforced either by the DOL or through private judicial proceedings. As of December 1, 2016, employers must meet new standards for employees to qualify for the executive, administrative or professional overtime exemptions (often referred to as the “White Collar Exemptions”). Beginning on that date, the minimum salary required for those exemptions will increase from \$455 to \$913 per week (from \$23,660 to \$47,476 calculated yearly).

The minimum salary requirement is only the first part of a two-part test that must be satisfied before the FLSA overtime exemptions will apply. The second part of that test requires that the exempt employee perform certain duties that will qualify him or her for one of three White Collar Exemptions. If you missed the previous article that explained the duties requirements for each exemption, see Chapter One of this series of articles located at www.saklaw.net, dated May, 2016.

2. Use of Non-Discretionary Bonuses

Under the new 2016 revisions to the Act, employers may use non-discretionary bonuses to satisfy up to 10% of the new minimum salary requirement for one of the White Collar Exemptions, as long as the bonuses are paid on a quarterly or more frequent basis. This means that up to \$4,747.60 per year may be paid in the form of a bonus to equal the required minimum salary of \$47,476. Any shortfall can be made up if paid no later than the first pay period following the end of the preceding quarter, but must equal at least \$913 per week for that preceding quarter.

The newly allowed use of a non-discretionary bonus to pay a portion of the minimum salary requirement is an exception to the general rule that non-discretionary bonuses be added to the regular rate of pay for purposes of calculating the overtime rate for the week in which a non-exempt employee is paid the bonus. Accordingly, if the full salary required is not paid because the bonus is withheld for some reason or the employment relationship is terminated before the bonus is paid, the employee will be non-exempt and eligible for overtime in any week in which he or she actually worked (physically worked) in excess of 40 hours. In that situation, bonuses previously paid would then need to be added to the week in which it was paid and used to calculate any overtime pay due.

Caution should be used when a non-discretionary bonus will supplement an employee's salary to meet the minimum salary basis requirement for one of the White Collar Exemptions to apply. For example, if an employee is terminated prior to obtaining a bonus that would be necessary for that employee to meet the minimum salary requirement, it may be better to pay that bonus than to go back and calculate overtime due to a non-exempt worker. An issue may also arise when an employee does not meet job expectations sufficient to qualify for a bonus, taking his or her salary under the minimum required for an overtime exemption to apply.

3. Non-Discretionary Bonus Defined

A non-discretionary bonus includes additional pay promised to employees to encourage them to work more efficiently or rapidly, or to remain with the company. Therefore, any incentive bonus that must be paid upon the employee's completion of some requirement is a non-discretionary bonus. Few bonuses are truly discretionary, and include Christmas bonuses and company bonuses periodically given to all employees when the company has a good year or quarter. Discretionary bonuses do not depend on any action or inaction that an employee takes while working for the employer, but are given or not given at the sole discretion of the employer. Bonuses that qualify as discretionary are not added to employee pay for purposes of calculating the regular rate, and thus, do not effect the overtime rate.

4. Regular Rate Defined

The "regular rate" refers to the number arrived at when the total amount of earnings are divided by the hours actually worked for that week. Holidays, sick days, vacation days and other days for which an employee is paid when he or she is absent from work, do not count toward the 40-hour requirement before overtime must be paid. For salary non-exempt employees, it is generally calculated based on a 40-hour workweek, which is divided by the weekly salary earned. Certain states, such as California, have additional overtime rules, making it important to check state overtime regulations along with the federal FLSA. In states like Texas, no state overtime rules exist so that compliance with the federal FLSA is sufficient.

5. Tips for Compliance when Using Non-Discretionary Bonuses

- Evaluate your existing workforce to determine if there are workers currently listed as exempt who do not earn the minimum salary required to meet the new FLSA salary requirement.
- Determine whether you want to use a non-discretionary bonus to meet the minimum salary requirement for the White Collar Exemptions. If the answer is yes, make sure that you comply with the federal FLSA requirements.
- Prior to using the non-discretionary bonus option, make sure that employees classified as exempt from overtime meet the duties test for their respective exemption. If any of those employees are misclassified, not only will overtime be due, the non-discretionary bonuses may need to be added to the total weekly salary in the week paid, to calculate overtime for that workweek.
- Remember that an alternative to using the non-discretionary bonus, is to pay the minimum salary required under the 2016 overtime exemption rules to maintain the overtime exempt status of any employee who is not current earning enough to qualify as exempt on December 1, 2016.

Please note that the information contained in this article is not designed to address specific situations, and does not include rules or regulations that apply to all states. If you have questions concerning this topic, you should consult with legal counsel of your choice to obtain advice on various fact specific matters.

Robin Foret is a Partner in the Houston office of Kennedy Law, LLP, and is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization. She can be reached at rforet@texaslaborlaw.com or by telephone at (713) 491-4644.