U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-1

January 7, 2020

Dear **Name***:

This letter responds to your request for an opinion on the method for calculating overtime pay for a nondiscretionary lump sum bonus under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You state that your client informs its employees in advance that they will be eligible to receive a lump sum bonus of $3,000 if they successfully complete ten weeks of training and agree to continue training for an additional eight weeks. You acknowledge that the bonus is nondiscretionary. The employee does not have to complete the additional eight weeks of training, however, to retain the lump sum bonus. For example, if an employee finishes the ten weeks of training, and signs up for the additional eight weeks of training, but completes only one more week of training, the employee will still receive the lump sum bonus.

You provide a scenario where an employee works 40 hours per week during eight weeks of the ten-week training period. In week five, however, the employee works 47 hours, and in week nine, the employee works 48 hours. You note that 29 C.F.R. § 778.209(b) provides two methods of computing overtime pay for bonus earnings that cannot be identified with particular workweeks and ask which method should be used to calculate the overtime payments resulting from the nondiscretionary lump sum bonus in this case.

GENERAL LEGAL PRINCIPLES

Section 7 of the FLSA requires an employer to pay not less than one and one-half times the employee's regular rate for hours worked over 40 in a workweek. *See* 29 U.S.C. § 207. The FLSA defines the "regular rate" to include "all remuneration for employment paid to, or on behalf of, the employee," excluding certain types of compensation provided in Section 7(e) of the FLSA. 29 U.S.C. § 207(e). Nondiscretionary bonuses count as "remuneration" that an employer must include in the regular rate of pay. *Id.*; WHD Opinion Letter FLSA2009-21, 2009 WL 649023, at *1 (Jan. 16, 2009); *see also* 29 U.S.C. § 207(e)(3) (permitting discretionary bonuses to be excluded from the regular rate).

Under 29 C.F.R. § 778.211(c), "[b]onuses which are announced to employees to induce them to … remain with the firm are regarded as part of the regular rate of pay." For example, "bonuses [that are] contingent upon the employee's continuing in employment until the time the payment

is to be made …. must be included in the regular rate of pay." *Id.* Such bonuses are considered nondiscretionary.

The regulations provide that "if the bonus covers only one weekly pay period," the bonus amount is added to the employee's other earnings (except amounts that may be excluded), and the total earnings are divided by total hours worked. 29 C.F.R. § 778.209(a). If the bonus covers a longer period and "[if] it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week," the employer may "assume that the employee earned an equal amount of bonus each *week* of the period to which the bonus relates …." 29 C.F.R. § 778.209(b) (emphasis added). If, however, "there are facts which make it inappropriate to assume equal bonus earnings for each workweek," the employer may "assume that the employee earned an equal amount of bonus each *hour* of the pay period." *Id.* (emphasis added).

OPINION

As an initial matter, the lump sum bonus paid to your client's employees must be included in the regular rate of pay as it is an inducement for employees to complete the ten-week training period. *See* 29 C.F.R. § 778.211(c); WHD Opinion Letter FLSA2005-47, 2005 WL 3308618, at *1 (Nov. 4, 2005) (advising that a "Stay Bonus" that encourages employees to remain with the firm is a nondiscretionary bonus that must be included in the regular rate of pay). Because the employer pays the lump sum bonus to employees for completing the ten-week training and agreeing to additional training without having to finish the additional training, the lump sum bonus amount must be allocated to the initial ten-week training period.

Based on the facts provided, it is appropriate for the employer to allocate the lump sum bonus of $3,000 equally to each week of the ten-week training period.[1] Each week of the ten weeks counts equally in fulfilling the criteria for receiving the lump sum bonus, as missing any week (regardless of whether the employee worked overtime in that week) disqualifies the employee from receiving the lump sum bonus. Also, there are no facts provided which would make it inappropriate to assume equal bonus earnings per workweek. *See* 29 C.F.R. § 778.209(b); *Vasquez v. TWC Admin. LLC*, 254 F. Supp. 3d 1220, 1233 (C.D. Cal. 2015) (concluding that an employer's method of dividing bonus equally among workweeks was not unreasonable merely because employees worked slightly more or less than forty hours per week).[2] The employer must then calculate the additional overtime pay due in those workweeks of the ten-week training period that the employee worked more than 40 hours. *See* 29 C.F.R. § 778.209(b) ("[A]dditional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week.").

[1] A $3,000 lump sum bonus divided by 10 weeks equals $300 in bonus allocated per workweek to be included in calculating the regular rate of pay.

[2] Field Operations Handbook 32c03(c) is being updated to reflect that allocating bonuses equally to each week of the bonus period is the appropriate method for computing overtime pay on bonus earnings that cannot be identified with particular workweeks. *See* 29 C.F.R. § 778.209(b).

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the Wage and Hour Division for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id*.

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**