U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-3

March 26, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether payments made by the City of *, Alabama (City), pursuant to a resolution of the City's Board of Commissioners, to full-time employees at Christmas time based on their length of service must be included in the employees' regular rate when calculating overtime pay 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

In January 1981, the City's Board of Commissions passed a resolution (1981 Resolution) providing that: "All eligible employees of the City … shall be entitled to receive an incentive award in the form of longevity award." An employee is eligible if he or she works full time and has "been on the regular general fund payroll for a period of not less than five (5) full years." The resolution further provides that each eligible employee "shall receive" a longevity award in the amount of $2 per month for each whole year of the employee's tenure. You state that, currently, the longevity award is paid every two weeks, but the City is contemplating paying out the award in a one-time lump sum each year around Christmas time.

GENERAL LEGAL PRINCIPLES

The FLSA requires payment "at a rate not less than one and one-half times the regular rate at which [an employee] is employed" to all non-exempt employees for all hours worked in excess of forty hours in a workweek. 29 U.S.C. § 207(a)(1). The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," subject to eight statutory exclusions. 29 U.S.C. § 207(e). In interpreting these exclusions, the Department is mindful of the Supreme Court's instruction to give the exclusions a "fair (rather than a narrow) interpretation" because the FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks and citation omitted). "And that is as should be expected, because employees' rights are not the only ones at issue and, in fact, are not always separate from and at odds with their employers' interests." *Sec'y U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) (citing *Encino* in resolving a regular rate issue).

One of the § 207(e) exclusions covers "payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." 29 U.S.C. § 207(e)(1). The

Department's regulation provides that if a "bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift," it is excludable "even though the amounts paid to different employees or groups of employees vary … according to their length of service with the [employer] so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency." 29 C.F.R. § 778.212(c). The Fifth Circuit in *Moreau v. Klevenhagen*, for instance, held that longevity pay to sheriff deputies based on their length of tenure was excludable under § 207(e)(1) as a reward for service. 956 F.2d 516, 521 (5th Cir. 1992); *see also Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, 2016 WL 6571270, at *26 (C.D. Cal. Mar. 21, 2016) (finding tenure-based "Long Term Service Award" paid every five years to be excludable under § 207(e)(1)).

The Department's regulation further explains that if a "bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it …." 29 C.F.R. § 778.212(c). But if the bonus "is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift." 29 C.F.R. § 778.212(b). Further, "if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift." *Id.* Similarly, longevity payments required by law are part of an employee's regular earnings, and so are not excludable as gifts. In *Featsent v. City of Youngstown*, for instance, the Sixth Circuit held that longevity payments made to police officers that were required by both a collective bargaining agreement and a city ordinance must be included in the regular rate. 70 F.3d 900, 902 & n.3, 905 (6th Cir. 1995); *see also Moreau*, 956 F.2d at 521 (distinguishing longevity payments that are excluded as gifts from "longevity payments made pursuant to a city ordinance … [that] must be included in 'regular rate of pay'").

OPINION

Based on the facts you have provided, the City's longevity payments made to employees pursuant to the 1981 Resolution are not excludable as "payments in the nature of gifts" under § 207(e)(1). The 1981 Resolution states: "All eligible employees of the City … *shall* be entitled to receive an incentive award in the form of longevity award." (emphasis added). While the resolution leaves the form and time of payment to the City's discretion, it does not provide City officials with discretion to deny the full amount of the longevity award to any eligible employee. Thus, longevity payments to eligible employees are *required* by the 1981 Resolution and therefore do not constitute excludable "payments in the nature of gifts." *See Featsent*, 70 F.3d at 905 (citing *Moreau*, 956 F.2d at 521). Rather, such longevity pay required by law must be included in the regular rate.

If, on the other hand, the City's Resolution stated that "eligible employees of the City *may* be entitled to longevity pay" of up to a maximum amount that depends on tenure and left the actual amount of longevity pay, if any, up to City officials to determine each year at Christmas time, any such payments would be not be *required* but merely *authorized* by a city ordinance. Additionally, the payments would not be measured by or dependent on hours worked, production, or efficiency. As such, the longevity payments could be excluded from the regular rate as "payments in the nature of gifts" under § 207(e)(1). *See Moreau*, 956 F.2d at 521 (holding that longevity payments were excludable where "no such ordinance or bargaining

agreement binds the County to make longevity payments").[1] Under these circumstances, even if the City were to make longevity payments at Christmas time with such regularity that employees expect such payments each year, the payments could still be excluded from the regular rate as "payments in the nature of gifts" under § 207(e)(1). *See* 29 C.F.R. § 778.212(c).

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD 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).**

[1] Of course, to be excludable as a gift under § 207(e)(1), all of the relevant statutory and regulatory criteria must be satisfied, including the requirement that such a payment may not be "so substantial that it can be assumed that employees consider it a part of the wages for which they work." 29 C.F.R. § 778.212(b). Here, the payment of $2 per month for each year of tenure would not violate this "so substantial" standard in most cases.