

Holiday Pay and Year-End Gifts/Bonuses – Frequently Asked Questions

As the end of the year approaches, employers should review their holiday leave and year-end gift and bonus pay practices as these policies/benefits could have unintended overtime consequences.

HOLIDAYS

There is no Michigan law, and with the exception of some federal contractors subject to either the Service Contract Act or the Davis Bacon Act, no federal law that requires an employer to provide time off, paid or otherwise, to employees on nationally recognized holidays. Most employers do, however, provide time off and many employers pay a premium to employees who work on a holiday. This article does not address holiday pay and bonus payment issues under either of the above-referenced statutes.

Must holiday time off be paid?

For non-exempt (hourly) employees, no. An employer does not have to pay hourly employees for time off on a holiday. An employer is only required to pay hourly employees for time actually worked. On the other hand, exempt employees (salaried employees who do not receive overtime) who are given the day off, must be paid their full weekly salary if they work any hours during the week in which the holiday falls.

Must paid time off be counted as hours worked in determining whether an employee is entitled to overtime?

No. If an employer provides paid holidays, it does not have to count the holiday time as hours worked for purposes of determining whether an employee is entitled to overtime compensation. An employee must actually work 40 hours in a week before he/she is entitled to overtime. Paid time off (holidays, vacation, sick leave, etc.) is not considered time worked.

Are employees who work a holiday entitled to premium pay?

No. While it is common to pay a premium to an employee who works on a holiday, there is no legal requirement to do so. If an employee is paid a premium for working on a holiday and also works overtime in that week, the employer does not have to factor in the premium payment in determining the amount of overtime due. In this situation, overtime pay can be calculated based on the employee's regular hourly rate.

YEAR-END GIFTS/BONUSES

Employers who give non-exempt (hourly) employees a year-end gift or bonus may have to pay additional overtime to employees, depending on the nature of the payment.

Can a year-end payment result in increased overtime due an employee?

Yes, under some circumstances. Overtime compensation for hourly employees is based on an employee's "regular rate." The regular rate, which is a rate per hour, is determined by dividing an employee's total remuneration in any work week by the total number of hours worked in that week. Thus, if a year-end payment is considered "remuneration," and an employee works more than 40 hours in a week for which a payment is made, an employer may be required to pay overtime at a higher rate.

How does this rule apply to holiday or year-end gifts?

The regular rate does not include payments in the nature of holiday or year-end gifts, as long as the gift is not measured by or dependent on hours worked, production, or the employee's efficiency. Thus, a gift not tied to an employee's performance will not have overtime implications.

What about year-end bonuses?

Bonuses are divided into two categories: discretionary and nondiscretionary. *Discretionary* bonuses are sums paid in recognition of services performed during a given period if: 1) both the fact that the payment will be made and the amount of the payment are determined at the sole discretion of the employer, and 2) the payment is not made pursuant to any prior contract, agreement or promise causing the employee to expect such payment. Such discretionary bonuses are *not* included in the employee's regular rate, and, thus, have no effect on the employee's overtime compensation.

Thus, where an employer pays its employees a share of the profits of its business or a lump sum at the holidays, without having previously promised, agreed, or arranged to pay such a bonus, that bonus is discretionary and does not need to be taken into account when computing the employee's regular rate.

Nondiscretionary bonuses, on the other hand, must be included along with other earnings to determine an employee's regular rate on which overtime pay must be computed. A bonus is regarded as nondiscretionary if the employer contracts, agrees or makes promises to pay it. Examples include: bonuses that are announced to employees to induce them to work more steadily, more rapidly or more efficiently; bonuses to remain with the employer; attendance bonuses; individual or group production bonuses; and bonuses for quality and accuracy of work.

What if a bonus covers a several week or month period?

When a bonus covers a multi-week period, it must be apportioned back over the work weeks of the period during which the bonus was earned by the employee. The employer must then examine every work week in that period and calculate the additional overtime pay owed the employee for those weeks in which an employee worked more than 40 hours. This is determined by dividing the weekly bonus amount by the hours worked that

week to get an average hourly bonus. The additional overtime would then be determined by multiplying the average hourly bonus by one-half times the employee's overtime hours during the time period. For example, a \$2,600 bonus which covered 13 weeks, would equate to \$200 per week. If an employee worked 50 hours in one of these weeks, his/her average hourly bonus would be \$4.00 ($\$200 \div 50/\text{hours}$). The employee would then be entitled to additional overtime pay of \$20.00 ($\$4.00 \times 10/\text{hours} \times .5$).

Is there a way to avoid recalculating the regular rate?

Yes. A bonus paid as a percent of an employee's total earnings, both straight time and overtime, automatically accounts for overtime compensation. Thus, when the bonus is based on a percentage basis, no additional overtime is due.

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