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## How and When Bonuses are Awarded Impact Non-Exempt Employees' Overtime Compensation

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Does your company pay employees holiday or year-end bonuses? Have you ever considered the impact these bonus payments might have on your employees' overtime premiums? If not, you could be violating FLSA rules.

If your company is considering paying an end-of-the-year or holiday bonus, you must first decide whether that payment will impact your non-exempt employees' overtime premium. When employers pay non-exempt employees a non-discretionary bonus and those employees work overtime during the period covered by the bonus payment, that bonus compensation must be included when calculating the employee's regular rate of pay for the purpose of calculating the overtime premium. When determining whether a bonus payment must be included in the calculation of an employee's regular rate of pay, the key concern is whether the bonus is discretionary or non-discretionary.

A non-discretionary bonus is a bonus payment that is agreed to or promised in advance by the employer, such as an attendance bonus, performance bonus or a bonus that is guaranteed by a collective bargaining agreement. This is a bonus that employees can expect, work toward or depend on. These bonus payments must be included in a non-exempt employee's regular rate of pay calculation for the purpose of calculating overtime payments for the period covered by the bonus payment.

On the other hand, a bonus is discretionary, and therefore not included in the computation of pay for the purpose of overtime, only if the employer retains discretion to decide whether the payment will be paid, what amount will be paid, and when there is no prior contract, an agreement or promise on which employees rely in expectation of such payment. An employer must make the decision to pay a discretionary bonus near the end of the period that it covers. In other words, if an employer announces a possible bonus to employees to induce them to meet certain production or goals, the bonus is no longer discretionary. Likewise, when an employer regularly pays a specific bonus amount at the same time each year, its discretionary status could be called into question.

If an employer's bonus payment does not meet the discretionary qualifications, it is considered non-discretionary and therefore impacts the overtime premium of the non-exempt employees receiving the payment. Failure to properly adjust employees' overtime premiums to include non-discretionary bonus payments could result in a claim under the Fair Labor Standards Act or an investigation by the Department of Labor...not exactly the holiday surprise you were expecting!