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Failing to properly calculate overtime payments on day rates and bonus payments could lead to significant liability

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Recently, the United States Department of Labor (DOL) announced that it has helped more than 5,300 oil and gas workers recover nearly $4.5 million in back wages for unpaid overtime and other wage violations as a result of an "ongoing multiyear enforcement initiative" conducted by the DOL's Wilkes-Barre and Pittsburgh Wage and Hour Division offices which found significant violations of the Fair Labor Standards Act (FLSA). The DOL found that the majority of the FLSA violations were due to improper payment of overtime. In many cases, employee's production bonuses were not included in their "regular rate" of pay. In other cases, employers failed to pay overtime to employees that were paid day rates. The DOL attributed the wage violations in part to the structure of the oil and gas industry in Pennsylvania and West Virginia. According to the DOL, job sites "that used to be run by a single company can now have dozens of smaller contractors performing work, which can create downward economic pressure on lower level subcontractors," which can lead to noncompliance with wage and hour laws and regulations.

Regular rate

What exactly is the "regular rate" that the DOL mentions in its announcement? The term "regular rate" essentially means all compensation paid to an employee that must be included in determining an employee's hourly rate of pay for purposes of calculating overtime compensation. Specifically, the FLSA regulations state that the "regular rate" includes all remuneration paid to an employee, including hourly pay, commissions, incentive bonuses and non-discretionary bonuses. The "regular rate" does not include gifts, discretionary bonuses, reimbursed expenses, insurance premium payments, holiday or vacation pay, profit sharing payments and overtime pay. The employer's determination of the "regular rate" is critical because the FLSA regulations state that "overtime must be compensated at a rate not less than 1.5 times the "regular rate" at which the employee is actually employed." Therefore, if the employer fails to accurately determine the "regular rate" it is likely that the employer's non-exempt employees will receive improperly calculated overtime payments that may be uncovered in a DOL audit or could become the subject of wage and hour litigation.

Calculating overtime on day rates

Day rate compensation plans are common in the oil and gas industry. Some employers believe that paying their non-exempt employees a day rate eliminates the need to track hours or pay overtime compensation. This is a common misconception. Non-exempt employees that are paid on a day rate basis must track their hours worked and must be paid overtime for hours worked in excess of 40 each week. The FLSA regulations are clear on the manner in which overtime is to be calculated for employees that work on a day rate or shift rate basis. Specifically, the FLSA regulations provide that the "regular rate" for an employee that is "paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked." The FLSA regulation further provides that the employee is "then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek."

By way of example, if an employee's day rate is $260 and that employee works seven days in a workweek and works a total of 75 hours that week, the employee's overtime pay should be calculated as follows:

Day-rate pay — $260 [day rate] x 7 [days of work] = $1,820
Overtime pay — ($1,820 / 75 [total hours of work]) x 0.5 [half time pay] x 35 [hours worked in excess of 40 in the work week] = $424.67
Total pay — $1,820 + $424.67 = $2,244.67

Non-discretionary bonus payments

Production bonuses, attendance bonuses and other non-discretionary bonus payments are commonplace in the oil and gas industry. Under the FLSA's regulations, bonuses that are considered "non-discretionary" will increase the amount of overtime pay non-exempt employees are entitled to receive because the bonus payment will increase the employee's

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"regular rate." A bonus is considered discretionary if the bonus satisfies three general rules: (1) the employer must maintain sole discretion whether the bonus will be paid and it must keep that discretion until the end of the period in which the bonus is paid; (2) the employer must maintain sole discretion with respect to the manner in which the bonus will be calculated and it must keep that discretion until the end of the period in which the bonus is paid; and (3) there must not be a prior "custom or practice" of paying the bonus with such regularity that the employee understand that he or she will regularly receive such a bonus.

To the extent that employers provide bonus payments to their non-exempt employees, the nature of such bonus payments should be examined to ensure compliance with the FLSA. If the bonus is something that has been promised to the employee or the employer has a regular practice of making such a bonus payment, then there is a strong likelihood that the bonus is nondiscretionary under the FLSA regulations. If that is the case, the employer should ensure that retroactive overtime payments are calculated in accordance with the FLSA regulations as demonstrated below.

Calculating overtime on non-discretionary bonus payments

Generally speaking, if an employer pays a bonus to a non-exempt employee, the employer is required to retroactively pay additional overtime pay. By way of example, suppose that an employee receives a first quarter production bonus of $1,200. A production bonus is a non-discretionary bonus because it is paid with regularity and the sum is typically based upon the achievement of certain production levels. To determine the overtime payment, the employer must allocate the bonus to each work week in the period in which the bonus is based. In our example, the first quarter contains 12 weeks. Therefore, the allocation is $1,200 / 12 weeks = $100 per workweek. Thereafter, the employer must reduce the weekly $100 bonus payment to an hourly rate by dividing $100 by the total number of hours worked during the workweek. The rate must then be multiplied by the number of overtime hours and by 0.5 for the additional overtime pay since the straight time rate has already been paid. The employer must repeat this weekly calculation for each workweek in the in the bonus period. For example:

Week 1: If the employee worked 45 hours, then he or she is entitled to $5.56 in additional overtime pay for that workweek ($100 / 45 hours x 0.5 x 5 overtime hours).

Week 2: If the employee worked 75 hours, then he or she is entitled to $23.33 in additional overtime pay for that workweek ($100 / 75 hours x 0.5 x 35 overtime hours).

Liability concerns

Although the DOL's initiative began in 2012, it shows no sign of slowing. Employers in the energy industry, regardless of size, continue to receive notice of random compliance checks from the DOL. Moreover, the DOL's announcement corresponds with a noticeable increase in individual and class-action wage and hour litigation. Oil and gas industry employers should pay particular attention to FLSA and state-related wage and hour issues because violations of these laws and their regulations lead to significant damages. Following an audit where the DOL concludes that a violation has occurred, the DOL can order employers to pay employees' back wages. The DOL can also assess civil money penalties. In litigation, an employer may be ordered to pay employees' back wages for two years, plus liquidated damages that equal the amount of the back pay award, as well as court costs and attorneys' fees. If a court determines the violations to be "willful," the scope of the back pay award (and the corresponding liquidated damages) may be extended to three years.

The calculations in this article are for demonstrative purposes only and only account for federal law and regulations. They do not take into account potential nuances that may exist under state law and state regulations. Please consult with legal counsel to ensure compliance with all applicable laws. If you would like additional information about developments described in this article, contact Stephen L. Korbel at 412-394-5637 or skorbel@babstcalland.com.

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