VALLEY BOOKKEEPING SERVICE, INC.

With the new year upon us, this would be a good time to review tricky California overtime laws:

While paying employees in California is often a challenge, the regular rate of pay presents a minefield of different formulas for employers to navigate. From what amounts to include, to how the calculation should be performed, determining an employee's overtime pay rate can be a very complicated task. We provide an overview of some regular rate basics below, although employers should be aware that more specific issues can arise depending on the industry, types of employees, and method of compensation used.

Overtime Basics:

California overtime laws require non-exempt employees to earn **one-and-a-half times** their regular rate of pay when they work:

- more than **8 hours in a workday**,
- more than **40 hours in a** workweek, or
- more than **6 consecutive days** in a workweek.

Employers also must pay **double-time** for non-exempt employees working *more than*:

- 12 hours in a workday, or
- 8 hours on the seventh consecutive day in a workweek.

Here's Where It Gets Complicated:

The "regular rate of pay" is the basis for overtime compensation under the FLSA and California law. Some employers may be deceived by this simple-sounding term into thinking that there is anything "regular" or straightforward about this concept. **Do not be one of them!**

The regular rate of pay often is a complex formula that includes all “remuneration” provided for hours worked, such as hourly pay, shift differentials, salaries, piece rates, commissions, and most bonuses. It can even include meals! The regular rate also includes amounts paid for being available to perform a duty, such as time spent on call, even where the on-call hours are not considered hours worked.

Luckily, certain amounts may be excluded from the regular rate, such as sums paid as gifts, payments for vacations, holidays, or illnesses, certain “discretionary” bonuses, and meal and rest period premiums. Below are some examples illustrating how to incorporate some common forms of pay into an employee’s regular rate of pay.

Hourly Rates / Hourly Shift Differentials

When an employee is paid on an hourly basis only, the overtime premium is calculated as 1.5 times that hourly rate of pay. That one is easy! But don’t relax just yet; it gets harder.

The calculation becomes more complicated where the employee is paid multiple forms of pay, such as different hourly rates for different types of work, or hourly pay plus an hourly shift differential for some hours. In these situations, the regular rate is calculated using the weighted average of the two rates.

Under that method, each hourly rate is multiplied by the hours worked at that rate. The total earnings from each rate are added together and divided by the total hours worked. That number is then multiplied by a half-time premium of 0.5 (which is used because the employee has already received straight-time compensation for all hours worked, including overtime). The resulting overtime rate is multiplied by the number of overtime hours worked to calculate additional overtime pay due to the employee. Remember, the overtime premium rate is doubled for overtime hours compensated as double time!

For example, if an employee works 30 hours at $15/hour, and an additional 12 hours at $16/hour (because these hours include a $1 per hour night shift differential), overtime is calculated as follows: (1) calculate total earnings: (30 hours * $15/hour) + (12 hours * $16/hour) = $642; (2) divide total earnings by total hours: $642 / 42 hours = $15.29; (3) calculate the additional overtime premium due: $15.29 * 0.5 half-time premium = $7.65; (4) calculate additional overtime pay: $7.65 * 2 overtime hours = $15.30.

Commissions and Other Production-Based Incentives

Let's make it harder. Not all employees are paid only at hourly rates. Employees paid piece rates, commissions, or production-based (non-flat sum) bonuses will have variable earnings depending on their productivity. How do you calculate the regular rate in this situation?

For employees earning a combination of hourly pay and production-based incentives, the regular rate is calculated by dividing the total earnings for the week (including earnings during overtime hours), by the total hours worked during the week (including overtime hours). This amount is then multiplied by 0.5 to determine the additional half-time premium that must be paid for all overtime hours (the full amount of the premium is paid for overtime hours compensated as double time). As above, the half-time premium is used in this calculation because the employee has already received straight-time compensation for all hours worked in the form of commission or piece rate earnings (including all overtime hours worked).

Employers that pay employees on a commission or piece rate basis also need to ensure that employees are paid for rest period (and, when applicable, recovery period) time and any non-productive time at the correct rate. While many employers choose to pay underlying hourly rates of pay for all hours worked to ensure minimum wage compliance for these employees, a special formula applies to rest and recovery period time for employees paid on a piece rate basis.

Salary

In the example above, the regular rate was calculated based on all hours worked. The calculation is different for non-exempt employees paid on a salary basis.

Unlike an employee paid by piece rate, commission, or non-flat sum bonus, under California law, non-exempt employees paid by salary are not receiving additional pay through their salary for any overtime hours that they work. For this reason, the regular rate of pay for salaried employees is calculated based on a maximum 40-hour workweek, rather than all hours worked. Additionally, overtime is calculated at one-and-one-half times the regular rate of pay for each overtime hour worked, instead of the half-time premium used in the example above. *See* Cal. Lab. Code § 515(d).

Thus, if an employee is compensated by a weekly salary of $1,000 and works 50 hours in a week, overtime pay is calculated as follows: (1) $1,000 / 40 hours = $25; (2) $25 *

1.5 overtime premium = $37.50; (3) $37.50 * 10 overtime hours = $375 in overtime compensation.

Flat-Sum Bonuses: The Latest Challenge

Had enough yet? Now we turn to the one most peculiar to California! For California employees, the additional overtime premium due for flat-sum bonuses (for example, attendance bonuses) is different than the formula applicable to production-based incentives (that increase in rough proportion to hours worked).

Instead of using the total hours worked during the bonus earning period in the denominator of the calculation, the regular rate for flat-sum bonuses is calculated by dividing the bonus by the number of non-overtime hours worked during the bonus earning period. *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 542 (2018). This amount is multiplied by 1.5 (not 0.5) and is paid for each overtime hour worked. Unfortunately for employers processing payroll for employees in multiple states, this formula differs significantly from the FLSA formula. In contrast to the California approach of dividing by the total straight-time hours and multiplying by 1.5, the FLSA formula uses the total hours worked in the denominator and requires payment of only a half-time premium. As a result, the additional overtime due on a flat-sum bonus in California is more than three times the amount due under the FLSA!

For example, an employee may work 40 regular hours in a week with two additional hours of overtime. The employee is compensated at $15/hour for the 42 hours of work and also receives a flat-sum bonus of $60 for the work done in that workweek (for a total of $690). The additional overtime premiums are calculated separately for hourly pay and the flat-sum bonus as follows:

(1) hourly pay overtime premium: $15.00 x 0.5 = $7.50 x 2 hours = $15

(2) flat-sum bonus overtime premium: $60/40 = $1.50 * 1.5 * 2 overtime hours = $3.00.

Thus, under California law, the total overtime pay is $18.00. Under the FLSA, the formula would be $660/42 hours worked ($15.71) * 0.5 = $7.86 * 2 hours = $15.72.

Workplace Solutions

Your brain might be spinning after all these formulas. The important thing to remember is that the regular rate can be complicated by many factors, especially where employees receive multiple types of compensation for a given pay period. California employers must pay special attention to how they calculate overtime rates because of these regular rate complexities, as errors can lead to underpayments and severe penalties.

Let me know if you need a referral to an employment law attorney. We would be happy to provide you with a referral.

Resources:

https://www.calpeculiarities.com/2019/10/23/regular-rate-refresh-calculating-overtime-for-california-employees/#lxb_mct-form-1

https://www.shouselaw.com/ca/labor/wage-and-hour/overtime-laws/