Quick Quiz Answer: Pay For Being In On-Call Status

Insights
9.29.14

The answer to our September 22, 2014 Quick Quiz is, "Yes, even though the payments are not tied to the on-call hours he works." In declining percentage order, the responses were:

◊ "Yes, even though the payments are not tied to the on-call hours he works.": (67.2%)

◊ "No, because the payments are not tied to the on-call hours he works.": (16.4%)

◊ "No, because his on-call time between calls is not FLSA worktime.": (10.4%)

◊ "No, because the payments are not made at an hourly rate." (6.0%)

The Payments Raise The "Regular Rate"
The $50 payments Chris receives for being in on-call status affect his federal Fair Labor Standards Act overtime compensation by increasing his "regular rate" of pay.

The principle at work here is that a non-exempt employee's FLSA overtime compensation must always be based upon that rate. This is not necessarily just the employee's stated hourly rate or other straight-time wage. The regular rate also includes, as the FLSA puts it, all "remuneration for employment paid to, or on behalf of, the employee" that the law does not exclude from the calculation.

Where payments for being in on-call status are concerned, the U.S. Labor Department's position has long been that, even though the pay is not attributable to any specific work hours, "it is clearly paid as compensation for performing a duty involved in the employee's job" and does not fit within any exclusion. 29 C.F.R. § 778.223. USDOL says, "The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work." *Id.*

The same analysis applies to on-call-status payments made on an hourly basis.

Illustrating The Impact
If Chris is paid $30 an hour, works exactly 50 hours in an on-call workweek, receives on-call-status pay of (7 days × $50 a day) = $350 for that workweek, and is not paid any other sums that affect the regular rate, then his FLSA wages due are:

[($30 × 50 hrs.) + ($350) = $1,850 ST Wages

[($1,850 ÷ 50 hrs.) = $37 per hr. Regular Rate

[($37 ÷ 2) × 10 OT hrs.] = $185 OT Premium Due

($1,850 + $185) = $2,035 Total FLSA Wages Due.

It would not satisfy the FLSA's requirements if Chris's employer paid him for that workweek only:

[($30 × 40 ST hrs.) + ($30 × 1.5 × 10 OT hrs.) = $1,650 Hourly Wages

($1,650 + $350 On-Call-Status Compensation) = $2,000.

The Bottom Line

An increasingly-common FLSA claim is that the employer has computed insufficient overtime compensation by basing the calculations upon regular rates that are too low. Management should check right away to ensure that all payments to non-exempt employees either are being properly included in computing FLSA overtime or may lawfully be excluded from that calculation.