



## Quick Quiz Answer: Bonus Based Upon Company's Annual Performance

Insights

11.11.10

The answer to our [November 4 Quick Quiz](#) is "Yes": Fair Labor Standards Act overtime must indeed be figured on the kind of bonus we described. In fact, the U.S. Wage and Hour Division's Office of Enforcement Policy ("OEP") took this position with respect to such a bonus in a May 2006 [opinion letter](#).

Under the FLSA, overtime for non-exempt employees must be calculated based upon the "regular rate" of pay. The FLSA says that the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," with only limited exceptions.

Bonuses are not excluded from this definition simply because they are earned over an entire calendar year. *See, e.g., Opinion Letter of Deputy Wage-Hour Administrator [FLSA2005-47](#)* (November 4, 2005) ("regular rate" included a retention payment designed to encourage employees to remain employed at a facility from June 6, 2002 through September 21, 2004).

Employers need not compute overtime on "discretionary" bonuses within the FLSA's meaning. However, this exception applies only if both (a) whether the payments will be made, and (b) the amounts of any such payments:

- Are within management's sole discretion;
- Are decided at or near the end of the period for which the performance of services is being recognized; and
- Are not made pursuant to any prior contract, agreement, or promise (either expressed or implied) causing the employee to expect such payments regularly.

29 U.S.C.A. 207(e)(3)(a). OEP concluded that the kind of annual bonus we described did *not* fall within these parameters, in part because the benchmarks for whether a bonus would be due suggested that the payments were promised "as an incentive for increased or sustained productive efforts." OEP also determined that the employer abandoned any discretion as to both whether payments would be made and what the amounts would be by announcing the criteria to employees well in advance, which in OEP's view appeared to be "a prior promise or agreement" to pay the bonus if those criteria were met. And although OEP did not clearly say so in explaining its

conclusion, the bonus's requirements relating to longevity and remaining employed at the time of payment also cut against its being viewed as discretionary.

Because the bonus is not excludable from the regular rate, Acme must determine whether any non-exempt employee receiving a bonus payment worked more than 40 hours in any workweek in the bonus period. For any employee who did so, it must then figure the workweek-equivalent of the bonus and must calculate overtime on that equivalent for every workweek in which the employee worked overtime.