



"Nondiscretionary" Pay And The 90%/10% Approach

Insights

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Once the U.S. Labor Department's revised definitions for the federal Fair Labor Standards Act's Section 13(a)(1) "white collar" exemptions take effect, employers will be allowed to:

- Pay as little as 90% of the new \$913 salary threshold for up to a 13-week period, and
- Rely upon "nondiscretionary bonuses, incentives, and commissions" paid at least quarterly to make-up the remaining 10% (except for "highly compensated" employees).

29 C.F.R. § 541.602(a)(3) (effective December 1, 2016).

Employers have expressed considerable uncertainty about what kinds of bonuses or incentive payments are "nondiscretionary" for these purposes. The truth is that *most* such compensation is likely to fall within this category.

Same As Overtime Principles

USDOL's statements about the subject make clear that the agency intends "nondiscretionary" to have largely the same meaning it does when the question is whether such payments are part of a non-exempt employee's regular rate of pay for FLSA overtime purposes. In that regard, the FLSA sweeps-in "all remuneration for employment paid to, or on behalf of, the employee," with limited exceptions. 29 U.S.C. § 207(e). The breadth of this requirement makes it impossible to list the multitude of includable bonuses or other incentives.

As a rule of thumb, perhaps typical "nondiscretionary" bonuses or other incentive amounts might be viewed as those held out and paid for purposes of inducing employees to conduct themselves in ways that management sees as being in its interests or as otherwise being desirable. Examples that USDOL often gives are sums intended to cause employees to work more steadily, or more rapidly, or more efficiently, or in a safe manner. Others include so-called "longevity" bonuses, attendance bonuses, production incentives, payments based upon the quality and/or accuracy of work, amounts conditioned upon a person's being employed when the incentives are distributed, and so on.

Part of the current uncertainty seems to flow from the different concept of "discretionary" bonuses, which are *not* part of the FLSA regular rate, and which will *not* be counted toward the 10%. This narrow 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; *and*
- 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. § 207(e)(3)(a). Steps like including the word "discretion" in a bonus plan or retaining the latitude to withhold a payment in light of an employee's misconduct will not in themselves mean that a sum is a "discretionary bonus". In any event, it is fair to say that USDOL tends to view comparatively few bonuses and incentives as falling within the "discretionary bonus" label when it comes to overtime pay.

Some Other Things *Won't* Count

Of course, USDOL will consider an assortment of other payments *not* to fall within the description "nondiscretionary bonuses, incentives, and commissions". Among these are:

- ◇ Premiums management pays for employee insurance,
- ◇ Retirement-plan contributions,
- ◇ Other fringe-benefit payments of various kinds, and
- ◇ Typical telephone and travel stipends and reimbursements for work-related expenses.

And USDOL's regulations say that the minimum salary amount may not consist even in part of "board, lodging, or other facilities." *See, e.g.,* 29 C.F.R. § 541.606. This means that, as illustrations, no part of the minimum salary may include the cost or value of employer-provided meals or merchandise or rent-free housing. *Id.*

The Bottom Line

Employers should not simply *assume* that bonuses and other incentive amounts they pay to exempt employees for whom management will invoke the 90%/10% option are "nondiscretionary" ones. However, chances are good that such payments *will* meet that description, particularly if the sums involved are substantial enough to make up the difference.

But keep in mind also that, if an employee paid these bonuses or incentives is someday found to have been non-exempt instead, then the payments will increase the amount of overtime compensation due to that person. This emphasizes how important it is to make a well-founded exemption decision in the first place.