



# Attendance Bonuses During COVID-19 Rebuilding Can Lead To Unintended Legal Consequences

Insights

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As the nation's political leaders discuss the easing of the various shelter-in-place orders in an effort to re-start the economy, businesses have begun making their own re-start plans – and they often include bonus programs intended to incentivize good employee attendance. Because one of the key ingredients to resuming “business as usual” is an adequately staffed workforce, many employers are developing creative solutions to stabilize and reinvigorate their labor pool. This is especially true given the concern that their ability to re-start will be hampered by employee absences due to COVID-19 health concerns, generous unemployment benefits, and new paid sick leave laws. But what do you need to know about the unintended wage and hour law implications of such a move?

## Attendance Bonuses Generally Must Be Included In The “Regular Rate”

When implementing any such plan, you must be mindful of the federal Fair Labor Standards Act (FLSA) implications. The U.S. Department of Labor (USDOL) takes the position that “bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay.” This includes so-called “attendance bonuses.”

This means that once you announce an attendance bonus program to the workforce, any resulting bonus payment should be included in a non-exempt employee's “regular rate” of pay. This is the method used to correctly calculate the overtime premium due if the employee works more than 40 hours in one or more workweeks during the bonus measurement period.

## Let's Do The Math

To see how this plays out, take the following example bonus program. Assume you announced that employees will be rewarded with a \$500 bonus for achieving 90% attendance over a four-week period. Assume that non-exempt employee John Smith meets the 90% attendance threshold during the applicable four-week measurement period. Assume further that, during this period, John worked 42 hours in one of the workweeks, 50 hours in another one, and 40 hours in the others. John is paid on an hourly basis, and he has already received his proper overtime wages due at his hourly rate for the two overtime workweeks.

John's total bonus-related payment comes to:

- The workweek-equivalent bonus is \$125 ( $\$500 \text{ Bonus} \div 4 \text{ workweeks} = \$125$ );

- The overtime premium due for the 42-hour week is \$2.98 ( $\$125 \div 42 \text{ hours} \times .5 \times 2 \text{ OT hours} = \$2.98$ );
- The overtime premium due for the 50-hour week is \$12.50 ( $\$125 \div 50 \text{ hours} \times .5 \times 10 \text{ OT hours} = \$12.50$ );
- Therefore, the total bonus payment due is \$515.48 ( $\$500 + \$2.98 + \$12.50$ ).

John's FLSA overtime premium is calculated at one-half of his regular rate, because the attendance bonus represents the "one" of "one and one-half." Because John has already been paid the proper overtime compensation on his hourly based wages, you would need only figure the overtime premium due on the bonus itself.

### **Are There Any Alternatives?**

Some employers might find the "look-back" regular rate calculation above to be complicated, particularly if they have no prior experience with such calculations. These employers might find it easier to incentive good attendance during the relevant time period simply by increasing the employee's hourly pay for each workweek that the employee meets the attendance goal.

Employers who like the good attendance-incentivizing aspect of the attendance bonus program but who are concerned about the related overtime expense may want to consider an attendance lottery program. Under such a program, employees with the requisite attendance record can be entered into a lottery with a winner determined by a drawing. The USDOL has previously stated via Opinion Letter that bonuses paid pursuant to a lottery of this type may be *excluded* from the regular rate calculation.

It should be noted, however, that the USDOL reached this conclusion because the odds of winning the bonus were "very small." It is possible that the USDOL and a court might reach a different conclusion were the odds of winning more favorable.

### **Conclusion**

The main point to consider, however, is that when evaluating ways to incentivize good attendance in the COVID-19 era, you must ensure that your plans as applied comply with the FLSA and any other applicable federal, state, and local laws.

This is a constantly evolving area, with new guidance being issued nearly every day. Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any member of [our Wage and Hour Law Practice Group](#), or any member of [our Post-Pandemic Strategy Group Roster](#). You can also review the [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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