

California Wage/Hour Update



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Avoiding “Reporting-Time” Claims

By John K. Skousen (Irvine)

In California, conditions of employment, including standards governing compensation, are set forth in the Wage Orders promulgated by the Industrial Welfare Commission. These Wage Orders are generally given legal effect to the extent that they are consistent with the California Labor Code. Unfortunately, many of these provisions go unheeded by employers despite the fact that they are published in the California Code of Regulations and have been in effect for many years.

One commonly overlooked provision is the section on “Reporting Time.” This provision puts limits on an employer’s right to call someone in to work without providing a minimum amount of working time.

When Reporting-Time Pay Is Required

The Wage Order dictates that each day an employee reports for a scheduled day’s work but is provided less than half of the employee’s usual or scheduled day’s work, the employee must be paid for half of the usual or scheduled day’s work, but in no event for less than two hours nor more than four hours, at the employee’s regular rate of pay. For example, if an employee was scheduled to work six hours, the reporting-time guarantee would be three hours on the first reporting.

Another rule applies when an employee is required to report to work a second time during the work day, but is provided less than two hours of work on this second reporting. In this case the employee must be paid for two hours at the employee’s regular rate of pay.

A few exceptions apply, including when 1) operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; 2) public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or 3) the interruption of work is caused by an Act of God or other cause not within the employer’s control. One situation that could permit the last exception to operate would be power outages caused by natural disasters, inclement weather, or community “roving blackouts.” Also excluded from the reporting-time provisions are employees on paid standby status who are called to work at a time other than their scheduled reporting time.

How to Pay Reporting-Time Premiums

Reporting-time pay is considered a “premium” wage, but will not be considered as part of the regular rate for purposes of overtime compensation because it does not represent pay for “hours worked.” A number of examples may be provided to illustrate how payment of reporting time works. For example, under the first reporting rule, if an employee is scheduled to report to work for an eight-hour shift and works for only one hour, the employee is entitled to at least four total hours of pay.

Thus, you are obligated to supplement the employee’s pay an additional three hours of reporting-time pay at the regular rate of pay. For purposes of calculating the regular rate, only the hour actually worked counts as actual hours worked under the regular rate calculation. Let’s assume that the employee was paid \$10 per hour and worked as follows:

M	TU	W	TH	F	Total Working Time
1	10	10	10	10	41 Hours
Straight-time hours: 33 hours x \$10.00 = \$330.00 [four eight-hour days Tuesday through Friday, plus one hour on Monday]					
Overtime hours: 8 hours [2 hours x 4 days] x \$15.00 = \$120.00					
Reporting-time pay for Monday: 3 hours [4 hour guarantee – 1 hour worked] x \$10.00 = \$30.00 (not included in regular rate)					
<i>Total compensation: \$480 [\$330 + \$120 + \$30].</i>					

As you can see in the above example, if some work, but less than half of the scheduled day’s work, is provided, reporting-time pay is only a *supplemental* amount paid to meet the level of minimum pay required, which in the above example is four hours. It is always paid apart from overtime and is not a factor in the calculation of the regular rate.

If an employee is required to report to work a second time in any one workday beyond the regular shift and is furnished less than two hours of work on the second reporting, he or she must be paid for at least two hours at his or her regular rate of pay. For example, if the above employee worked eight hours on Monday and is called back for another job the same day and spends a total of 1.5 hours on the “call back,” only an additional 0.5 hours would have to be paid to satisfy the Wage Order’s reporting-time pay requirement. The 0.5 hours is paid as straight time because it’s not treated as compensation for hours worked. It’s like a guarantee or bridge over to the minimum amount of time these employees should have been provided for work:

M	TU	W	TH	F	Total Working Time
9.5	8	8	8	8	41½ Hours
Straight-time hours: 40 hours x \$10.00 = \$400.00					
Overtime hours: 1.5 hours x \$15.00 = \$22.50					
Reporting-time pay for Monday: 0.5 hours [2 hours minimum – 1.5 hours worked] = \$5.00 (not included in regular rate)					
<i>Total compensation: \$427.50 [\$400 + \$22.50 + \$5.00]</i>					

Again, the 0.5 premium is not considered “compensation” for hours worked in computing the regular rate for purposes of calculating overtime.

Avoiding Reporting-Time Problems

Reporting-time pay was designed to compensate employees for the inconvenience and expense of reporting to work without being furnished at least a half day’s work subject to the minimum and maximum thresholds (two and four hours respectively). The reporting-time provisions do not operate as *pay guarantees* unless the employee is actually required to incur the expense and inconvenience of reporting to work. Consequently, use foresight in scheduling an employee’s work before the employee reports to work. If a scheduled work day is cancelled, notify the employee in advance, or by telephone, of the cancellation before being required to report to work on the cancelled work day.

Continued on next page

Annual Bonuses: Are They Factored Into Overtime?

By John K. Skousen (Irvine)

Many employers question whether annual bonuses must be considered in overtime compensation. Although California law has more protective overtime laws than most states, it sticks with federal law with regard to what is included in the “regular rate” when calculating overtime. Federal law requires “all remuneration” to be included in the regular rate except for seven specified types of payments. Among these excludable payments are *discretionary* bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans.

California similarly defines remuneration or wages as “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.” That means that all wages, whether a bonus, incentive, or commission, will be included in the regular rate of pay unless they qualify for one of the exceptions noted above.

Which Is Which?

A common question when paying annual bonuses is whether they are discretionary or non-discretionary. The California Labor Commissioner interprets a bonus as discretionary only when there are “no objective criteria” involved and the bonus is “not routine.” This is made more clear by the federal regulations, which provide that a bonus is discretionary only if “both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise

causing the employee to expect such payments regularly.” The federal regulation summarizes its analysis as follows:

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. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee’s continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay.

Many annual bonuses are *non-discretionary* because they are predicated, in whole or in part, on performance criteria, thereby triggering an employer’s obligation to include them in the regular rate calculation when paying overtime. Specific examples for calculating overtime on bonuses are beyond the scope of this article. Among other things, the regular rate for purposes of calculating overtime due on the annual bonus is determined by dividing the bonus amount by the total hours worked during the period for which the bonus applies.

The Bottom Line

Although the regular rate is enhanced by an annual bonus payment for each week of the measuring year when overtime was worked, this does not mean that you must go back and recalculate overtime due for each individual pay period. Rather, what this means in practical terms is that, because the annual bonus is paid only once each year, that bonus payment will have to include an additional overtime premium payment that reflects overtime worked for the bonus period (the bonus year) with an itemized statement just like all other payroll checks.

Questions regarding calculating overtime due on periodic annual bonuses should be handled on a case-by-case basis.

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Continued from previous page

Because reporting-time pay can be complicated with differing fact situations, it’s impossible to anticipate all fact situations that may trigger reporting-time pay provisions. Disputes may arise regarding what premium is due, or which reporting-time pay provision applies, when employees work variable schedules during the week. Employers may make mistakes simply because they do not understand how to apply the law to a specific situation.

Employees alleging unpaid reporting time could file lawsuits, or alternatively, file claims with the California Labor Commissioner, which enforces compliance with the Wage Orders, and authorizes Deputy Labor Commissioners to conduct hearings and make awards that can be converted into a judgment that has the force of law.

Although the fact-specific nature of these kinds of claims may bar their consideration in a class action, an employer’s repeated and systematic failure to pay reporting time nonetheless could be included in a class action complaint. Whether or not certified as a class claim, like many wage and hour compliance issues, prevention is much better than curing a long-standing policy that could lead to cumulative liability and unnecessary costs in defending lawsuits or administrative claims.

If you’re unsure about how to pay it correctly, give us a call.

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