



FLSA2019-7

July 1, 2019

Dear **Name***:

This letter responds to your request for an opinion concerning whether the Fair Labor Standards Act (FLSA) requires an employer to include a nondiscretionary bonus that is a fixed percentage of straight-time wages received over multiple workweeks in the calculation of the employees' regular rate of pay at the end of each workweek—and if not, whether the employer may, when paying the bonus, recalculate the regular rate for each workweek of the bonus period by averaging the bonus earnings across the workweeks. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You represent that your employer, under the terms of a collective bargaining agreement, pays you a quarterly bonus¹ and an annual qualification bonus based on fixed percentages of your straight-time rate and the journey straight-time rate, respectively. The quarterly bonus consists of (1) 15 percent of your contractual straight-time hourly rate for each hour you earn a straight-time rate; (2) 22.5 percent (1.5×15 percent) of your contractual straight-time hourly rate for each hour you earn a time-and-one-half rate; and (3) 18.75 percent (1.25×15 percent) of your contractual straight-time hourly rate for each hour you earn a double-time rate.² Your annual bonus is one percent of the journey straight-time hourly rate for 2,080 hours.

You represent that your employer calculates your weekly regular rate of pay without including your quarterly or annual bonus earnings. Instead, you state that when your employer pays you the quarterly or annual bonus, your employer retrospectively recalculates the weekly regular rates for the bonus period to include the bonus earnings and pays you the difference in overtime compensation. In making this recalculation for the quarterly and annual bonuses, your employer averages the bonus earnings across the workweeks of the quarterly or annual bonus period, instead of using the actual bonus earnings in a given workweek.

¹ Your letter describes this payment as a “stipend,” but it appears to be a “[s]um[] paid in recognition of services performed during a given period,” 29 U.S.C. § 207(e)(3), which WHD refers to as a “bonus” for purposes of the regular rate calculation. *See* 29 C.F.R. § 778.211 (describing such sums as “bonuses”); *see also* 29 C.F.R. § 778.502 (stating that “[t]he term ‘bonus’ is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another”).

² We assume that the term “time and one-half rate” in your letter refers to your overtime rate of pay as defined in 29 U.S.C. § 207(a)(1).

GENERAL LEGAL PRINCIPLES

The FLSA defines “regular rate of pay” to include “all remuneration for employment paid to, or on behalf of, the employee,” excluding certain types of compensation provided in 29 U.S.C. § 207(e). Nondiscretionary bonuses count as “remuneration” that an employer must include in the regular rate of pay. *See* 29 U.S.C. § 207(e); WHD Opinion Letter FLSA2009-21, 2009 WL 649023, at *1 (Jan. 16, 2009); *see also* 29 U.S.C. § 207(e)(3) (permitting discretionary bonuses to be excluded from the regular rate). A bonus is nondiscretionary if it “is the result of collective bargaining.” 29 C.F.R. § 778.211(c).

An employer may base a nondiscretionary bonus on work performed during multiple workweeks and pay the bonus at the end of the bonus period. *See* 29 C.F.R. § 778.209. In that case, the employer may “disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained.” 29 C.F.R. § 778.209(a). Once the amount is ascertainable, generally the employer must retrospectively recalculate the regular rate for each workweek in the bonus period and pay the additional overtime compensation due on the bonus. *See id.* “If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week,” the employer must adopt “some other reasonable and equitable method of allocation.” 29 C.F.R. § 778.209(b). One such method is averaging the bonus earnings across workweeks. *See id.*

An employer, however, is not required to retrospectively recalculate the regular rate if the employer pays a fixed percentage bonus that simultaneously pays overtime compensation due on the bonus. *See* 29 C.F.R. § 778.210; *Brock v. Two R Drilling Co.*, 789 F.2d 1177, 1179–81 (5th Cir. 1986). For example, a bonus that is 10 percent of straight-time wages (the contractual hourly rate × straight-time hours worked up to 40) and 10 percent of overtime wages (1.5 × the contractual hourly rate × straight-time hours worked over 40) does not require recalculation of the regular rate because the bonus includes the overtime compensation due on the bonus as an arithmetic fact, fully satisfying the FLSA’s overtime requirements. *See* 29 C.F.R. §§ 778.210, 778.503.³ Similarly, a bonus that is 10 percent of total compensation—including hourly wages,

³ This holds true, as an arithmetic fact, even when the employer separately pays other compensation that must be included in the regular rate. Section 778.210 still applies in that situation, because even though the percentage bonus is not a percentage of “all remuneration for employment,” the employer is still paying a percentage of both hourly wages and overtime owed on those hourly wages, and is therefore simultaneously paying both the bonus and the overtime compensation due on the bonus. *See* 29 C.F.R. § 778.210 (describing a percentage bonus that “provide[s] for the simultaneous payment of overtime compensation due on the bonus”). However, WHD cautions that, while a percentage bonus of straight-time and overtime wages pays overtime due *on the bonus*, the employer must still separately pay overtime due on any other compensation included in the regular rate to fully satisfy the FLSA’s overtime requirements. We note that there is no inconsistency between this letter and prior WHD opinion letters that characterized bonuses under § 778.210 as those paid as a “percentage of an employee’s total compensation,” WHD Opinion Letter FLSA2004-11, 2004 WL 3177882 (Sept. 21, 2004); WHD Opinion Letter, 2001 WL 1558953 (Feb. 5, 2001). While § 778.210 can be used to avoid recalculating the regular rate when paying bonuses that are a percentage of total compensation as contemplated in these two prior opinion letters, § 778.210’s application is not limited to only those types of bonuses. For this reason, WHD disagrees with courts that have interpreted § 778.210 to require an employer to multiply an

overtime, bonuses, commissions, etc.—does not require recalculation. *See, e.g.*, 29 C.F.R. § 778.210; WHD Opinion Letter FLSA2006-4NA, 2006 WL 4512946, at *1 (Feb. 17, 2006).

OPINION

The annual bonus you describe is not tied to straight-time or overtime hours actually worked, but instead is one percent of the journey straight-time hourly rate for 2,080 hours. Based on the facts you have provided, your employer must, after paying the annual bonus, recalculate the regular rate for each workweek in the bonus period and pay the overtime compensation due on the annual bonus. *See* 29 C.F.R. § 778.209(a). As previously discussed, however, your employer need not include the annual bonus in the regular rate calculation until the employer can ascertain the weekly amount of the bonus at the end of the bonus period. *See* 29 C.F.R. § 778.209(b) (permitting temporary exclusion of a bonus from the weekly regular rate calculation if the amount of the bonus is not yet ascertainable). In making this recalculation, because your employer can readily ascertain the proportionate amount of the annual bonus that you earn in each workweek, your employer must retrospectively include those exact proportionate amounts in the regular rate for each workweek. *See* 29 C.F.R. § 778.209(a).

However, based on the facts you have provided, after paying the quarterly percentage bonus on your straight-time and overtime wages, your employer need not recalculate the regular rate for each workweek in the bonus period to include this quarterly bonus. As referenced above, a bonus of 15 percent of both your straight-time and overtime wages would simultaneously include all overtime compensation due on the bonus as an arithmetic fact. *See* 29 C.F.R. §§ 778.210, 778.503. Accordingly, your quarterly bonus of 15 percent of your contractual straight-time hourly rate for each hour you earn a straight-time rate, and 22.5 percent (1.5×15 percent) of your contractual straight-time hourly rate for each hour you earn a time-and-one-half rate (assuming this is equivalent to 15 percent of all overtime compensation due), appears to comply with § 778.210 and thus satisfy the FLSA's overtime requirements for the bonus.⁴

We trust that this letter is responsive to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

employee's total earnings by the same percentage to satisfy FLSA's overtime compensation requirements. *See, e.g., Harris v. Best Buy Stores, L.P.*, No. 15-CV-00657-HSG, 2016 WL 4073327, at *5 (N.D. Cal. Aug. 1, 2016).

⁴ We do not address whether the portion of your quarterly bonus that pays 18.75 percent (1.25×15 percent) of your contractual straight-time hourly rate for each hour you earn a double-time rate would also comply with § 778.210, because additional information is required to make that determination (*e.g.*, whether the double-time rate is based on days or hours worked, and how many days or hours must be worked before it is paid).

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**