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Bonuses Paid by Third Parties May Not Need to Be Included in Calculating Overtime

The U.S. Court of Appeals for the Third Circuit just answered a question that many employers might not have thought to ask: When an employee receives a bonus from a third party, does it have to be included in calculating the employee's overtime compensation? In *United States Department of Labor v. Bristol Excavating, Inc.*, the court ruled only if the employer and employee have agreed that the bonus would be part of the employee's remuneration for employment.

Employers should be familiar with the requirement under the Fair Labor Standards Act (FLSA) that they must pay employees 1½ times their regular rate of pay for all hours worked in excess of 40 in a week. However, what compensation is included in determining an employee's regular rate is not always clear. The FLSA defines "regular rate" as including "all remuneration for employment paid to, or on behalf of, the employee," subject to certain enumerated exemptions. The statute does not define "remuneration for employment," which led to the dispute in *Bristol Excavating*.

Bristol Excavating contracted with Talisman Energy to provide services at Talisman drilling sites, where Bristol employees worked extensive overtime hours. Talisman sponsored a bonus program that it offered to all those working at its sites, including employees of contractors like Bristol. Bristol's employees asked Bristol if they could receive the bonuses from Talisman, and Bristol asked Talisman, which said yes. When Bristol employees qualified for the Talisman bonuses, Talisman paid the bonuses to Bristol, which distributed the payments to its employees. Bristol did not include the Talisman bonus payments in its employees' regular rate of pay when it calculated their overtime compensation.

After an audit, the U.S. Department of Labor (DOL) determined that Bristol was required to include the Talisman bonuses in its employees' regular rate of pay for overtime purposes and that Bristol had violated the FLSA by failing to do so. The DOL took the position that all compensation an employee receives for performing work qualifies as remuneration for employment and must be included in calculating an employee's regular rate of pay (unless an exemption applies), regardless of whether the payment is provided by a third party. The district court agreed and entered judgment for the DOL.

On appeal, the Third Circuit disagreed with the district court and the DOL, ruling that whether a payment qualifies as remuneration for employment depends on the employer's and employee's agreement as to what would be paid for the job. The Third Circuit based that conclusion on what it called "common sense," preventing an employer's labor costs from being decided by the whims of an outsider. As support for its commonsense decision, the court cited "no less an authority than Clark W. Griswold" in *National Lampoon's Christmas Vacation*. The court explained that, just as Clark's common sense led him to expect a Christmas bonus – and not a jelly-of-the-month club membership – from his employer after receiving one for 17 years, an employer-employee agreement as to what constitutes remuneration for employment may be implied from the parties' course of dealing.

The ultimate question is whether the employer's and employee's course of dealing with respect to a third-party bonus payment is sufficient to characterize the payment as both legitimately expected by the employee and legitimately understood as being sponsored by the employer. A threshold requirement is that the bonus be regularly and actually received by the employee. Assuming that threshold requirement is met, the Third Circuit identified several factors that should be considered, namely, whether:

> (1) the specific requirements for receiving the payment are known by the employee in advance of performing the relevant work;
>
> (2) the payment is for a reasonably specific amount; and

(3) the employer's involvement in the payment is more than merely serving as a pass-through vehicle.

If the answer to all those questions is yes, there should be a holistic assessment of the employer's level of involvement in the third-party bonus program to determine whether the employer and employee have adopted those bonuses as part of their employment agreement.

Given this case, employers should identify any third-party bonus programs in which they participate and any third-party bonuses their employees receive, and examine the factors discussed in *Bristol Excavating* to determine whether those bonuses should be included in calculating the employees' overtime compensation.

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