

# The Regular Rate of Pay May Not Be As Obvious As It Seems

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## Working Together

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This blog has previously addressed various complications in establishing the regular rate of pay on which the calculation of overtime is based. See our November 21, 2016 post *Importance of Establishing An Employee's Regular Rate of Pay* here.. To recap, overtime pay is calculated at the rate of one and one half times an employee's regular rate of pay. The regular rate of pay seems simple, since the pay of a non-exempt employee is usually stated in terms of an hourly rate, and indeed Connecticut law requires an employer to advise an employee of the "rate of remuneration" at the time of hire.

What makes things complicated is the requirement of the Fair Labor Standards Act that the regular rate for calculation of overtime include all compensation paid to an employee, subject to certain exceptions. A common example is premium pay for work outside normal working hours; in other words, a shift differential. An employee with base pay of \$12 per hour who works from 9-to-5 has an overtime rate of \$18, but if he works the late shift one week, and receives a \$2 hourly shift differential, his overtime rate for that week will be \$21.

Other add-ons to the base rate are less obvious than shift differentials. For example, some employers have policies which reward employees who do not need to enroll in the employer's health care plan (typically because they have coverage under a spouse's plan). One of our clients pays an amount equal to 50% of the single coverage premium to employees who sign a waiver of participation in the company health plan, thus sharing the cost savings with the employee and providing an inducement to end unnecessary double-coverage.

Does the employer have to include these payments when it calculates the employees' regular rate of pay? In a recent case from the Ninth Circuit Court of Appeals, [Flores v. City of San Gabriel](#), 824 F. 3d. 890 (9<sup>th</sup>. Cir. 2016) (which the U.S. Supreme Court declined to review), the City allowed employees, upon submission of proof of alternate medical coverage, to receive a cash payment for the unused portion of health benefit allotments. However, the City did not include these payments in the calculation of an employee's regular rate of pay for purposes of overtime.

The Court held that the cash payments were in the nature of compensation for services rendered and should have been included in the overtime calculation. Of course, employer-provided health benefits are part of an employee's overall compensation package, but the Fair Labor Standards Act provides a separate exclusion

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from the regular rate of pay for money paid to an insurance provider or health benefit plan. However, when the cost of the insurance benefit is merely used to establish a formula for an extra cash payment, that payment is more like a non-discretionary bonus, and must be included in the regular rate of pay on which overtime pay is calculated.

Since these opt-out payments are not required by law, an employer concerned about the increased cost of overtime could simply reduce the formula for the cash payment (that is, it could pay employees who decline coverage a smaller proportion of the health premium as an incentive payment) and balance its overall payroll budget. But the City's failure to comply with the requirements of the Fair Labor Standards Act, plus a finding by the Court that the City did not even investigate the possible compliance issue, cost the City not only the additional overtime wages due the affected employees, but also double that amount in liquidated damages, along with the employees' attorneys' fees.

The take-away here does not have to be mastery of the complexities of wage and hour regulation. The basic premise is that the regular rate of pay for overtime calculation may not be as obvious as it seems, so if in doubt, investigate and seek legal advice under the adage that an ounce of prevention is worth a pound of cure, or in this case, one and one-half times the cost of cure plus liquidated damages and attorneys' fees.

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