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January 27, 2026

Performance-Based Bonus Plans: A Regular-Rate Misconception Dispelled

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Welcome to the first edition of the *Wage & Hour Wire* – a companion to our periodic *Workplace Law Update* that is committed to keeping employers informed on the pesky legal issues embedded in everyone's paycheck. Today's *Wage & Hour Wire* focuses on minimizing employer liability for performance-based bonus plans under the Fair Labor Standards Act.

Performance-based bonus plans can motivate employees to work harder – if the employee does X, the employer promises to give the employee Y bonus. Sounds like a win-win, right? But there is a catch. Generally, performance-based bonuses paid to non-exempt employees in accordance with a predetermined plan need to be included in the regular rate for purposes of calculating overtime under the FLSA.

Most employers know that the FLSA requires them to pay non-exempt employees “at a rate not less than one and one-half times the regular rate at which [the employee] is employed” for “all hours worked over 40 hours in a workweek.” The confusion comes in with the calculation of the “regular rate”, which should include “all remuneration for employment paid to, or on behalf of, the employee,” with a few specific enumerated exceptions.

Part of that confusion is a common misconception that performance-based bonus plans fall within the “discretionary bonus” exception because the employer may retain some discretion as to whether the employee meets the bonus eligibility criteria. Earlier this month, the U.S. Department of Labor dispelled this misconception and warned employers against this approach. In an opinion letter issued on January 5, 2026, the DOL explained there are three elements of a discretionary bonus:

- (1) The fact and amount of the payment must be determined at the sole discretion of the employer;
- (2) The employer's determination must occur at or near the end of the period when the employee's work was performed; and

(3) The payment must not be made pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.

Importantly, the DOL emphasized that “although opinions may differ when decided whether a particular criterion is satisfied … such differences do not change the non-discretionary nature of the payment because it is not subject to the *sole* discretion of the employer – as eligibility for, and the amount of, the bonus are based on terms predetermined before performance.”

Employers should proceed with caution if they offer performance-based bonus plans to non-exempt employees. Claims for unpaid overtime can become costly very quickly, especially when payroll errors have been made on a large scale. To avoid liability for unpaid overtime, employers should review their regular rate calculations with legal counsel and provide corresponding training to human resources and payroll personnel.

Please contact the author, [Amanda McSween Empey](#), or any member of **Bodman's Workplace Law Group** if you need assistance with your wage and hour policies. Bodman cannot respond to your questions or receive information from you without establishing an attorney-client relationship and clearing potential conflicts with other clients. Thank you for your patience and understanding.

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