



EMPLOYEE PAY CONSIDERATIONS

A COVID-19 Update from Questco – April 29th, 2020

Many businesses are now planning to re-open in response to various shelter-in-place orders being lifted, and there are multiple challenges to consider when developing your plan to resume operations. Because one of the key ingredients in resuming business as usual is an adequately staffed workforce, employers are seeking out ways to reengage their workforce, maintain their current workforce and provide the appropriate incentives to encourage good attendance in the workplace.

This is especially true based on factors that can impact COVID-19 driven absences, including generous unemployment benefits available to recently furloughed employees, employee fear regarding workplace conditions, health concerns, continued limitations for parents that have children in school and new paid sick leave programs. All of these are sound reasons for clients to be concerned.

Regular Rate of Pay and Bonuses

Bonuses are being offered as ways to incentivize employees to return to work. And if a company has received a loan under the Paycheck Protection Program, such bonus payments qualify as a component of the payroll costs used in computing the loan forgiveness amount. However, there are some things you need to consider about unintended wage and hour law implications when creating bonus programs such as this. Per the Department of Labor, a bonus payment is paid in addition to the employee's regular earnings. Under the Federal Labor Standards Act (FLSA), all compensation for hours worked, services rendered, or performance is included in the regular rate of pay.

This means that once you establish a "formal" policy for a bonus program for your employees, any bonus payments should be included in a non-exempt employee's "regular rate" of pay. This method is used to correctly calculate the overtime premium due if the employee works more than 40 hours in one or more workweeks during the bonus measurement period.

To avoid this additional burden on compensation costs, there are specific statutory provisions that enable the exclusion of certain bonuses from the regular rate of pay.

Discretionary Bonuses

Discretionary bonuses are **excluded** from the regular rate of pay. A bonus is discretionary only if the following requirements are met:

- The employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine whether to pay the bonus;
- The employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine the amount of the bonus; and
- The bonus payment is not made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly.

Examples of some common discretionary bonuses that **may be excluded** from the regular rate of pay if they meet the above statutory requirements:

- Bonuses for overcoming a challenging or stressful situation;
- Bonuses to employees who made unique or extraordinary efforts not awarded according to pre-established criteria;
- Employee-of-the-month bonuses;
- Severance bonuses; and
- Referral bonuses to employees not primarily engaged in recruiting activities (subject to additional criteria).

Nondiscretionary Bonuses

A nondiscretionary bonus is a bonus that **fails** to meet the statutory requirements of a discretionary bonus. Nondiscretionary bonuses **are included** in the regular rate of pay unless they qualify as excludable.

Examples of nondiscretionary bonuses that must be included in the regular rate include:

- Bonuses based on a predetermined formula, such as individual or group production bonuses;
- Bonuses for quality and accuracy of work;
- Bonuses announced to employees to induce them to work more efficiently;
- Attendance bonuses; and
- Safety bonuses (i.e., number of days without safety incidents).

Such bonuses are nondiscretionary because the employees know about and expect the bonus. The understanding of how an employee can earn a particular bonus may lead to an expectation to receive the bonus on a regular basis. The fact that the employer has the option not to pay the promised bonus does not on its own make the bonus discretionary.

This means any bonus payment resulting from a program that is formally announced should be included in a non-exempt employee's "regular rate" of pay and will be subject to inclusion in the overtime premium calculation.

Alternative ways to incentivize good attendance or returning to work during a particular time period include simply increasing the employee's hourly pay for each workweek that the employee meets a goal or allowing those who achieve the desired goal participate in a lottery-like program with selected winners.

It is important to ensure that any plans to reward attendance in the COVID-19 era should be evaluated in the context of FLSA compliance.

Unemployment Insurance

State and federal governments have expanded unemployment insurance funding. As a result, employers are faced with how to manage employees currently receiving unemployment benefits and how to handle a situation where employees refuse to return to work.

Generally, if employees are offered work and refuse, they become ineligible for unemployment. State regulations will allow an employer to notify the unemployment division of the offer and refusal of employment that may disqualify the employee from benefits.

If an individual earns at least \$1 of state unemployment, that individual is eligible to receive the additional \$600 flat weekly payment under the Federal Pandemic Unemployment Compensation program. And an individual who is **partially** employed may be eligible for unemployment. However, if the individual's actual earnings for the week exceed the weekly benefit amount earned under the regular UE program, then the individual receives \$0 in regular UC. In this case, the employee then will not receive the \$600. Note that the amount of the weekly benefit amount earned under the regular UE program is calculated at the state level based on the actual number of hours worked.

This will create challenges for any employer who wants to bring back employees and have them work reduced schedules. Employers will need to contemplate the amount of pay the employee will earn versus the amount they would be eligible to receive through unemployment to determine if it makes sense for employees to come back at a limited work schedule.

In this constantly evolving business climate, new guidance is being issued each day with respect to employer and employee relief programs and guidance on workplace employment regulations. Questco is here help you manage your payroll and compliance matters. Please contact us with any questions.