LEGAL UPDATES

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Colorado Supreme Court Rules That Regular Rate of Pay Includes Holiday Incentive Pay for Calculating Overtime

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Last week, the Colorado Supreme Court issued a highly anticipated decision, finding that the "regular rate of pay" under Colorado law does include holiday incentive pay for purposes of calculating overtime. The Tenth Circuit, which is reviewing the dismissal of a statewide overtime class action case brought by a group of non-exempt hourly warehouse workers, had asked the state's Supreme Court to answer this question as it relates to Colorado wage and hour law. The Supreme Court's ruling allows that case to proceed, and it significantly impacts how Colorado employers calculate overtime rates for employees not exempt from state overtime requirements.

Background

The Supreme Court's decision comes in *Hamilton v. Amazon.com Services LLC*, a case pending in the Tenth Circuit Court of Appeals. The plaintiff in that case is a former warehouse employee who received holiday incentive pay during his employment, which entitled him (and other employees) to one and one-half times their regular hourly pay rate when working on a company holiday.

Under the Colorado Overtime and Minimum Pay Standards Order (COMPS Order), Colorado employers are required to pay overtime to non-exempt employees at a rate of one and one-half times an employee's "regular rate of pay" when, as relevant here, the employee works more than 40 hours in a week. Rule 1.8 of the COMPS Order defines the "regular rate of pay" as "the hourly rate actually paid to employees for a standard, non-overtime workweek." Under Rule 1.8.1, this "regular rate" includes:

> [A]ll compensation paid to an employee, including set hourly rates, shift differentials, minimum wage tip credits, nondiscretionary bonuses, production bonuses, and commissions used for calculating hourly overtime rates for non-exempt employees. [But excludes] [b]usiness expenses, bona fide gifts, discretionary bonuses, employer investment contributions, vacation pay, holiday pay, sick leave, jury duty, or other pay for non-work hours[.]

In January 2022, the plaintiff filed his class action lawsuit claiming that he and other employees had not been paid for overtime hours they worked during weeks in which they had also worked on a company holiday. The plaintiff alleged that his employer had failed to include holiday incentive pay in the "regular rate of pay" to calculate overtime and therefore failed to pay all of the overtime that he and other employees had earned during those weeks.

A federal district court dismissed the plaintiff's complaint for failure to state a claim, finding that because (1) the exclusion of holiday incentive pay from the regular rate of pay calculation complied with the federal Fair Labor Standards Act (FLSA) and (2) "Colorado law is silent on the topic of holiday premium pay," the employer's practice of following the FLSA did not violate Colorado law. The plaintiff appealed the dismissal to the Tenth Circuit which, in turn, certified the following question to the Colorado Supreme Court: "Whether Colorado law includes or excludes holiday incentive pay from the calculation of 'regular rate of pay' under [the COMPS Order]."

The Colorado Supreme Court's decision

The Supreme Court ruled on September 9 that Colorado law **does** include holiday incentive pay for the "regular rate of pay" calculation. The court cited two reasons for its decision.

First, the court found that holiday incentive pay falls within the plain and ordinary meaning of "all compensation paid to an employee" under the COMPS Order because the incorporated definition of "compensation" includes "[a]ll amounts for labor or service performed by employees." According to the court, holiday incentive pay falls within the meaning of "all compensation" under the COMPS Orders given that the incentive pay compensated employees for the hours they worked on a company holiday.

Second, the court agreed with the plaintiff that holiday incentive pay classifies as a "shift differential" — a higher wage rate paid for an employee to work untraditional hours — which Rule 1.8.1 of the COMPS Order lists as pay to be included in the "regular rate."

In reaching this decision, the court rejected the employer's argument that a "standard, non-overtime workweek" (language in Rule 1.8's definition of the "regular rate of pay") refers only to those weeks in which there are no company holidays or "unusual days off." In the court's view, "the hourly rate actually paid to employees for a standard, non-overtime workweek" under the COMPS Order refers to

the amount an employee is paid for all hours worked during the employer's predetermined seven-day period, excluding any overtime paid to the employee as a result of the calculation.

The court also rejected the argument that the COMPS Order must be read harmoniously with the FLSA, which excludes "extra compensation provided by a premium rate paid for work by the employee on … holidays" from the federal law's regular rate of pay. The court noted that states are free to provide employees with better benefits than those in the FLSA and that the FLSA "sets a floor, not a ceiling, on compensation that employees must receive." Moreover, the court observed that Colorado law is not identical or substantially similar to the FLSA with regard to this issue.

Finally, the court dismissed the contention that including holiday incentive pay within the regular rate calculation would unfairly surprise Colorado employers who had no notice of this "new" interpretation of Colorado law.

What Colorado employers should do

Colorado employers should immediately review their overtime policies to ensure that they are properly calculating the "regular rate of pay" for non-exempt employees to align with the Supreme Court's decision. If an employer offers holiday incentive pay, or anything similar, they should factor that into "regular rate of pay" calculations for overtime purposes. Also, employers should prepare themselves for employees who request re-calculations of past overtime wages. The court's decision may be construed to apply retroactively despite this "new" interpretation of Colorado law. Therefore, employers should anticipate claims from employees (and plaintiffs' attorneys) asserting that past overtime calculations violated Colorado law by not accounting for holiday incentive pay or similar shift differentials.

Contact us

If you have any questions about this decision or other employment law issues, contact Barbara Grandjean, Ashley Jordaan, Shawna Ruetz, Keith Ybanez, Owen Davis, Marina Fleming, or your Husch Blackwell attorney.