

# The Ultimate Backup

A Client News Bulletin

RAINS, LUCIA & WILKINSON LLP

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## THE UNEXPECTED FLSA LIABILITY FOR HOLIDAY IN LIEU PAYMENTS

*By Alison Berry Wilkinson*

Given that police officers and fire fighters work 24/7, 365 days per year, there has been a growing trend during collective bargaining to spread holiday costs over the entire fiscal year. In other words, rather than pay overtime for the holiday that the police and fire personnel have to work during the pay period in which the holiday falls, public agencies are amortizing the holiday payment over the year using “holiday *in lieu*” payments.

Holiday *in lieu* agreements usually spread the total dollar value of the holidays across the entire year, and then pay a percentage of that amount in each paycheck. That regularly received payment is then provided *in lieu* of the traditional holiday payment. In assessing the implementation of a holiday *in lieu* payment, the impact of such an agreement on overtime required by the Fair Labor Standards Act<sup>a</sup> must be taken into account.

Under the Fair Labor Standards Act, employees who work more than the specified maximum time during a pay period must receive overtime compensation at a rate of at least time and one-half their “regular rate of pay” for the excess hours worked.<sup>b</sup>

However, the FLSA does not define “regular rate” as merely the employee’s base hourly rate. Rather, the FLSA defines “regular rate” to mean “all remuneration for employment paid to, or on behalf of, the employee ...”<sup>c</sup> Consequently, holiday pay that is amortized over the entire year may result in payments to employees in every pay period that must be considered part of the regular rate for overtime purposes.

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The United States Supreme Court has stated that "the regular rate refers to the hourly rate actually paid the employee for the *normal, non-overtime workweek* for which he is employed." *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 424, 65 S.Ct. 1242, 1245, 89 L.Ed. 1745 (1945) (emphasis added)).

The Ninth Circuit, in *Local 246 Utility Workers Union of America v. Southern California Edison Co.*, 83 F.3d 292, 297 (9<sup>th</sup> Cir. 1996), stated that:

The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.

*Id.* At 297. The Ninth Circuit further stated that "[t]he key point is that the pay or salary is compensation for work, and the regular rate therefore must be calculated by dividing **all** compensation paid for a particular week by the number of hours worked in that week." *Id.* at 295. (Emphasis added).

Traditionally, the following types of remuneration are taken into account in computing the employee's regular rate under the FLSA:

- Shift differentials (*Thomas v. Howard University Hospital*, 39 F.3d 370 (D.C. Cir. 1994));
- Payments for achieving certain levels of certification, such as POST certificates;
- Educational incentives;
- Longevity premiums (*Schmitt v. State of Kansas*, 844 F.Supp. 1449 (D. Kan. 1994));
- Hazardous duty pay (*Featsent v. City of Youngstown*, 859 F.Supp. 1134 (N.D. Ohio 1993), reversed on other grounds 70 F.3d 900 (6<sup>th</sup> Cir. 1995));
- Specialty assignment pay (*Thomas v. Howard University Hospital, supra*).

This list is not exhaustive, but illustrative.

When an employee receives holiday compensation only in the pay period during which the holiday falls, that extra pay is not considered regularly received, and is, therefore, not part of the regular rate for overtime purposes.

But when, the total value of the holidays is spread across the entire year, and a percentage of that amount is paid in each paycheck, then that regularly received payment *in lieu* of the traditional holiday payment is to be included as part of the FLSA regular rate for overtime purposes.

There is a Department of Labor Administrative Letter Ruling directly on point. The ruling states, in pertinent part:

- Q. Firefighters who work for City D on 24-hour shifts are not entitled to take holidays. Instead, they receive “in lieu of holiday pay.” The fire fighters receive 5% of their base pay as ‘in lieu of holiday pay’ each and every biweekly pay period. The fire fighter gets the 5% if he works the holiday, if he does not work the holiday and even if there is no holiday in the pay period. Thus, a fire fighter gets the same 5% added to each paycheck regardless of whether he works every holiday in the year or no holidays in the year. Under these circumstances, must the ‘in lieu of holiday pay’ be included when calculating the regular hourly rate of pay?”
- A. Yes, the 5% “in lieu of holiday pay” must be included when calculating the employee’s regular hourly rate of pay.

*See*, Department of Labor Administrative Letter Ruling dated September 30, 1999, published at Page 292, App. III in the October 2001 edition of the Fair Labor Standards Handbook published by Thompson Publishing Group.

In a recent arbitration decision in connection with the FLSA lawsuit entitled *Valladon, et al. v. City of Oakland*,<sup>d</sup> Arbitrator Bonnie Bogue found FLSA liability to a holiday *in lieu* provision contained in the Oakland Firefighters Association’s collective bargaining agreement. That provision provided:

In lieu of observing holidays, bargaining unit members shall receive in lieu compensation for holidays without regard for when the holidays occur or whether the unit member actually works on a holiday. In lieu holiday compensation shall be paid to 24 hour shift unit members at the rate of 6.27 hours per pay period and to 40 hour per week unit members at the rate of 4.82 hours per pay period.

Arbitrator Bogue found that the Oakland Firefighters holiday *in lieu* pay must be included in the FLSA regular rate for overtime purposes because “they get paid a certain amount in each and every pay period to compensate for the annual total of holidays; they don’t get any holiday off unless it falls on a day off; [and] they are paid the rate every pay period, regardless of whether any holiday falls in that pay period.” Based on those facts, the arbitrator concluded that the holiday payments were not “occasional” but “regular”, and, therefore, “must be included in the ‘regular rate’ for purposes of calculating the overtime rate due firefighters under the FLSA.”<sup>e</sup>

Thus, when assessing the merits of a holiday *in lieu* plan during collective bargaining, be sure to determine the level, if any, of impact such compensation structure may have on FLSA overtime calculations.

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a 29 U.S.C. section 201 *et seq.*

b 29 U.S.C. § 207(a).

c 29 U.S.C. § 207(e).

d U.S.D.C. Northern District Case No. 99-5456 WHO; Arbitrator's Case No. 75904

e Arbitrator's Decision in U.S.D.C. Northern District Case No. 99-5456 WHO (Arbitrator's Case No. 75904) at p.7

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