



FLSA "Per Diem" Claims On The Rise

Insights

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A recent U.S. Labor Department press release highlights a growing area of scrutiny under the federal Fair Labor Standards Act: Paying "per diem" amounts to non-exempt employees.

USDOL recently announced that a labor recruiting/staffing company catering to oilfield services and maritime fabrication facilities along the Gulf Coast had agreed to pay over \$1.6 million to more than 1,500 current and former employees. This resulted from USDOL's investigative determination that "per diem" sums (the exact nature of which was not described in the release) were wages that the employer should have included in its calculations of the recipients' overtime premium pay.

Reimbursements, "Per Diem", And The "Regular Rate"

A non-exempt employee's FLSA overtime compensation must be based upon his or her "regular rate" of pay. This is not necessarily just the employee's stated hourly rate or other straight-time wage. Instead, it also includes all "remuneration for employment" that is not otherwise excludable from the regular rate.

One such exclusion deals with "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer . . ." 29 U.S.C. 207(e)(2). USDOL interprets this to refer to reimbursements that reasonably approximate the sums an employee expends on the employer's behalf and for its benefit. *See, e.g.,* 29 C.F.R. § 778.217. For example, if an employer reimburses an employee for airfare and lodging expenses that the employee incurs in traveling to perform work away from his or her regular workplace, this reimbursement is probably excludable from the FLSA regular rate.

"Per diem" amounts falling within these parameters are not the problem. But employers attach this label to an endless variety of payments and arrangements. Potential liability arises when, because of its nature or its amount, such a sum does *not* fit the exclusion.

So How Might This Happen?

One illustration of this might be a situation in which an employee receives a "per diem" payment of \$50 or \$100 for each workday but seldom or never incurs any properly-reimbursable work-related expenses. Another example would be circumstances in which the "per diem" amount is disproportionately large as compared to the expenses that the employee typically incurs.

Also, USDOL's enforcement position is that "per diem" payments based on an employee's number of hours worked should be included in the regular rate. It is not obvious that this always squares with USDOL's acknowledgement elsewhere that employers may make "proportionate" payments when an employee is working away from home for part of a workday. Nevertheless, making "per diem" payments on an hourly basis might be especially vulnerable to attack.

To see how "per diem" payments can affect FLSA overtime compensation, assume that an employee's hourly rate is \$20, that he receives a regular weekly "per diem" payment of \$200, and that his work never requires him to incur expenses or other costs on his employer's behalf or for its benefit. Assume also that, in a particular workweek, this employee worked a total of 50 hours. It is likely that USDOL or a court would deem the employee's FLSA regular rate for that workweek to be, *not* \$20 per hour, but instead:

$$[(50 \text{ hrs.} \times \$20 \text{ per hr.}) + (\$200 \text{ "per diem"})] = \$1,200$$

$$(\$1,200 \div 50 \text{ hrs.}) = \$24 \text{ per hour.}$$

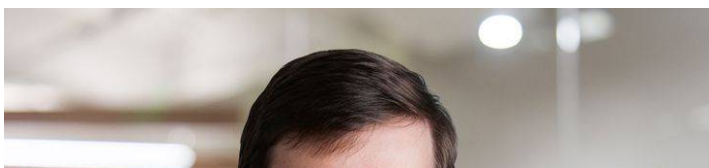
The employee's overtime premium due would therefore be $[(\$24 \div 2) \times 10 \text{ OT hrs.}] = \120 . His total pay FLSA due for the workweek is therefore $(\$1,200 + \$120) = \$1,320$. Under this analysis, paying the employee only $[(40 \text{ ST hrs.} \times \$20) + (10 \text{ OT hrs.} \times 1.5 \times \$20)] = \$1,100$ would mean that he has received $(\$1,320 - \$1,100) = \$220$ less than the FLSA requires.

The Bottom Line

This latest USDOL "per diem" enforcement action involves an unusually large dollar amount, but it is just one of many such investigative efforts in recent times. Moreover, an increasing number of FLSA lawsuits brought by private plaintiffs now include similar claims. Employers making "per diem" payments should immediately review their practices in this regard, both under the FLSA and under any applicable wage-hour requirements of other laws and other jurisdictions.

These matters can also implicate various tax laws. We have previously written about USDOL's enforcement pacts with the U.S. Internal Revenue Service and with a number of states. One thing we observed was that USDOL's understanding with the IRS appeared to be open-ended. Against this background, it is worth noting the passage in USDOL's press release that, "[p]ursuant to the department's partnerships with the IRS and the Louisiana Workforce Commission, this case has also been referred to those agencies for review under their respective laws."

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