



Employment Law Update

Employee Pay Practices: Staying Competitive *and* Compliant in 2022

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Tight Labor Market

- In December 2021, 49% of small business owners reported job openings they could not fill. (Historical average is 22%).
 - A net 48% (seasonally adjusted) of small business owners reported raising compensation (a record high).
 - A net 32% plan to raise compensation in the next 3 months.

Source: NFIB Monthly Economic Report—January 2022

Employers and The Great Resignation

- In November 2021, 4.5 million workers quit their jobs.
- One in four workers plan on quitting in 2022.
 - 50% will quit to seek better pay and benefits.
 - 42% want to find a job they are more passionate about.

Source: [Resumebuilder.com Survey](https://www.resumebuilder.com/survey) (mid-Dec. 2021)

- Data shows those who switch jobs are getting significantly faster pay increases than those who stay in their jobs.

*Source: “More quit jobs than ever, but most turnover is in low-wage work”
(NY Times 1/4/22)*

Fierce Competition for Talent

1. Offering bonuses—signing, referral, and retention bonuses
2. Higher starting salaries/wages and other benefits
3. Remote work and flexible schedules

Each of these can impact wage and hour compliance.

Signing, Referral, and Retention Bonuses

Understanding the Regular Rate

Nonexempt employees must be:

1. Paid at least minimum wage, and
2. An overtime premium for hours beyond 40 in a workweek.

Overtime Premium: 1.5 times the employee's "regular rate" of pay

- **Regular rate** = all compensation earned in a workweek
 - Regular rate formula = the average hourly rate calculated by dividing the total pay for employment (*except statutory exclusions*) in a workweek by the total number of hours actually worked

Bonuses May Impact the Regular Rate

- A discretionary bonus is **not** factored into the regular rate for purposes of calculating the overtime premium.
- BUT a nondiscretionary bonus is factored into the regular rate.
- **Rules to remember:** (1) labels are not determinative, and (2) many bonuses are nondiscretionary.

What Is a Discretionary Bonus?

1. Both the fact that the bonus will be paid **and** the amount is determined at the employer's sole discretion **at or near the end of the period** to which the bonus corresponds; AND
2. The bonus is not made according to any prior contract, agreement, *or* promise causing an employee to expect such payments regularly.

Discretionary Vs. Nondiscretionary

May be Discretionary

- Referral bonus for employees not primarily engaged in recruiting activities
- Bonus to employees who made unique or extraordinary efforts, not awarded according to preestablished criteria
- Severance bonus
- Bonus for overcoming challenging or stressful situations
- Employee-of-the-month bonus

May be Nondiscretionary

- Bonus based on predetermined formula
- Bonus for quality and accuracy of work
- Bonus announced to induce employees to work more efficiently
- Attendance bonus
- Safety bonus

Impact of Bonuses on the Regular Rate

- Signing bonuses—usually discretionary but look at how is it earned
- Referral bonuses—discretionary if it meets certain criteria
- Retention bonuses—usually nondiscretionary, but not always

Remember: Labels are not determinative!!

Signing Bonus

- Discretionary or nondiscretionary?
 - A true sign-on bonus is usually discretionary (i.e., excludable)
 - A sign-on bonus with a clawback serves as a longevity bonus, which is nondiscretionary (i.e., not excludable), *unless* the bonus is a “gift.”
- What is considered an excludable “gift”?
 1. Unrelated to hours worked, production, or efficiency;
 2. Not paid pursuant to a contract (e.g., CBA), agreement, or promise; **and**
 3. Not so substantial that it can be assumed employees consider it a part of the wages for which they work. (29 C.F.R. § 778.212(b))

U.S. Department of Labor – Signing Bonuses

“In summary, sign-on bonuses with no clawback provision are excludable from the regular rate; sign-on bonuses with a clawback provision pursuant to collective bargaining agreement (CBA), or city ordinance or policy are included in the regular rate; and sign-on bonuses with a clawback provision not pursuant to a CBA, city ordinance or policy, or other similar document that complies with § 778.212, are excludable from the regular rate.”

Source: Preamble to 2019 DOL Final Rule: Regular Rate Under the FLSA (84 FR 68751)

Referral Bonus

This type of bonuses may be discretionary if:

- 1) Employee participation is strictly voluntary;
- 2) Employee's recruitment efforts do not involve significant time; **and**
- 3) The activity is limited to after-hours solicitation done only among friends, relatives, neighbors, and acquaintances as part of the employee's social affairs.

Source: Preamble to 2019 DOL Final Rule: Regular Rate Under the FLSA (84 FR 68756)

Retention Bonus (Longevity Bonus)

If announced to employees in advance, this type of bonus would normally be included in the regular rate of pay because this “type of bonus is contingent on an employee continuing in employment until the time the payment is made.”

29 CFR § 778.211(c)

But could it be an excludable gift?

1. Unrelated to hours worked, production, or efficiency;
2. Not paid pursuant to a contract (e.g., CBA), agreement, or promise; **and**
3. Not so substantial that it can be assumed employees consider it a part of the wages for which they work. (29 C.F.R. § 778.212(b))

U.S. DOL Opinion Letter (3/26/20)

- **Facts:**
 - Employer referral bonus program, payable in two equal installments
 - Program appears to satisfy the necessary requirements (e.g., voluntary participation, only non-HR/recruiting employees are eligible).
 - First installment is paid when referred employee is hired.
 - Second installment is paid on referred employee's 1-year anniversary, **if both employees are still employed.**
- **DOL's Conclusion:**
 - First installment should be excluded from the regular rate.
 - Second installment must be included because it is essentially a "longevity bonus" that rewards the referring employee for an additional year of service, *unless* it qualifies under the "gift" exclusion.
 - Was it a gift? It was unclear whether the referral program created a contractual right to the second installment or the referral program merely pronounces the timing and amount of the payment.

Source FLSA2020-4 (Opinion Letter)

Why Does It Matter (*Really*)?

- Exposes an employer to claims of unpaid overtime
- Exposed to liquidated damages in the same amount
- Could give rise to class-based claims
- FLSA provides for the recovery of attorneys' fees and costs
- U.S. Department of Labor complaint may lead to investigation

Conclusion: Think before you leap, or you may pay for it later.

Higher Starting Salaries

Things to Consider

- Salary and/or wage costs associated with the new hire
- Broader financial impact on the business
 1. Adjusting pay for existing employees to prevent pay compression
 2. Impact on benefits – profit sharing, bonuses
 3. Pay equity issue
- Salary range disclosure laws
- Salary reporting requirements

For example: Large Illinois employers must obtain an equal pay registration certification from the IDOL, which requires submitting:

 1. Wage records—EEO-1 Report, list of employees (with gender, race, ethnicity), county in which the employee works, d.o.h., and total wages paid during past calendar year, AND
 2. Equal pay compliance statement—business must certify the approach it takes in determining the level of wages and benefits to pay its employees.

Pay Compression

- Evaluating starting salaries to those of existing employees
 - Recruiting talent may lead others to jump ship!
- Developing a strategy for addressing it
 - Increase salary for existing employees?
 - Setting salary bands for positions?
 - Offer a one-time bonus?
 - Offer other perks?

Pay Equity Laws

- Under the federal Equal Pay Act, claims are evaluated under a “substantially equal work” standard.
- However, some state laws use a different standard.
 - Illinois (compare jobs requiring “substantially similar” skill, effort, and responsibility)
 - Connecticut (“comparable work”) and Colorado (“substantially similar work”)
- Private right of action under many state laws
- Title VII claims (easier test)

Is It Time to Do a Pay Equity Audit?

- Consider conducting a pay equity audit.
- Engage counsel.
- Consider federal and state law.
- Pull demographic information and determine appropriate groupings.
- Pay disparities will need a detailed analysis to determine if they are true comparators.
- Develop an effective strategy for making any necessary changes.

COVID-19 Impact on Bonuses

FMLA Absences Impact on Bonuses

“... if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, **then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.** For example, if an employee who used paid vacation for a non-FMLA purpose would receive the payment, then the employee who uses paid vacation leave for an FMLA-protected purpose also must receive the payment.”
 29 C.F.R. § 825.215(c)(2) (emphasis added)

Consider State COVID-19 Laws

- Some state and local laws provide paid leave to employees who must isolate or quarantine.
- Many state and local leave laws prohibit retaliation against employees who exercise rights under those laws (e.g., taking protected leave).
- Many of those laws do not address bonuses.

Other considerations: Leave taken under voluntary FFCRA program?

Evaluating Exempt Status

FLSA Exemptions

- Administrative
- Executive
- Professional (learned and creative)
- Computer professional
- Outside sales

FLSA Exempt Status Test

1. Must be paid on a salary basis;
2. That salary must be at least \$684.00 per week; and
3. Satisfy the applicable duties test (i.e., primary duty).

Exceptions to the general rule:

- Computer professionals—can also be paid by the hour (\$27.63/hr minimum)
- Outside sales—salary threshold does not apply

Assessing Exempt Status Today

- Many states have higher minimum salary thresholds for exempt status than the FLSA (e.g., California, New York, Colorado).
- Employees are now working remotely, possibly in one of those states.
- Duties may have changed during the pandemic.

Outside Sales Exemption

The FLSA's outside sales exemption has two requirements:

1. The employee's primary duty is (a) making sales or (b) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the customer; and
2. The employee is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

Outside Sales Exemption

- Outside sales employees include employees who make sales at the customer's place of business or, if selling door-to-door, at the customer's home.
- Outside sales does not include sales made by mail, telephone, or the internet unless such contact is used merely as an adjunct to personal visits.
- Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business.

Outside Sales Exemption

- “Customarily and regularly” does not mean a majority of the time; it means a frequency that must be greater than occasional, but which may be less than constant.
- Tasks or work performed “customarily and regularly” includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.
- DOL Opinion Letter FLSA2007-2 (Jan. 25, 2007): Sales employees satisfied the “customarily and regularly” requirement where they made sales away from the employer’s place of business “one or two hours a day, one or two times a week.”
- DOL Opinion Letter FLSA2020-6 (June 25, 2020) cited DOL Opinion Letter FLSA2007-2 (Jan. 25, 2007) with approval.

Outside Sales Exemption (cont.)

- The DOL has not addressed the applicability of the outside sales exemption in the context of the COVID-19 pandemic.
- Employers have a few options:
 - Consider the employee to be exempt from minimum wage and overtime requirements under the outside sales exemption and make sure the employee is customarily and regularly engaged away from the employer's place of business;
 - Reclassify the employee as nonexempt; or
 - Classify the employee as exempt from overtime requirements under the Section 7(i) exemption.
- Employers must comply with federal and applicable state laws; state laws may have different requirements with respect to exemptions.

Section 7(i) Overtime Exemption

- The FLSA's Section 7(i) overtime exemption has three requirements:
 - The employee must be employed by a retail or service establishment;
 - The employee's regular rate of pay must exceed 1.5 times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked; and
 - More than half the employee's total earnings in a representative period must consist of commissions.

Section 7(i) Overtime Exemption (cont.)

- A retail or service establishment is an establishment 75% of whose annual dollar volume of sales of goods or services is not for resale and is recognized as retail in the particular industry.
- The employer must select a “representative period” that is at least 1 month but no longer than 1 year.
- The employee must receive at least minimum wage, and the employer must track all hours worked.

Offering Remote and Flexible Work

DOL Field Assistance Bulletin No. 2020-5

- DOL Field Assistance Bulletin No. 2020-5 (Aug. 24, 2020) applies to telework or remote work arrangements that arose in response to COVID-19 and other telework or remote work arrangements.
- Employers must track the hours of compensable work performed by nonexempt employees who are teleworking or otherwise working remotely.
- Time is compensable if employer knows or has reason to believe work is being performed.
- The FLSA does not require an employer to pay for work it did not know about and had no reason to know about.

Remote Work – Time Tracking

- Courts consider whether the employer exercised *reasonable diligence* to acquire actual or constructive knowledge of hours worked.
 - An employer may exercise reasonable diligence by providing a reasonable reporting procedure for nonscheduled time and compensating for all reported hours of work.
- Cannot prevent or discourage an employee from accurately reporting the time the employee has worked.
- If an employee fails to report unscheduled hours worked through the procedure, the employer is generally not required to undergo *impractical efforts* to investigate further to uncover and pay for unreported hours of work.
 - Though an employer may have access to non-payroll records of employees' activities (e.g., records showing employees accessing work-issued electronic devices outside of reported hours) reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether employees worked hours beyond what they reported.

Tips

- Adopt a procedure for reporting unscheduled hours worked that employees can use from any location, not only the employer's worksite.
- Adopt a timekeeping policy informing employees that they:
 1. Must accurately record all hours worked using the designated timekeeping procedure,
 2. Cannot perform off-the-clock work,
 3. Should contact a designated position/department (e.g., HR) if asked to perform off-the-clock work, and
 4. Are subject to discipline if they perform off-the-clock work.
- Pay for unauthorized work but issue discipline.
- Educate employees and supervisors about the policy.

Thank you!



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