Legal Update Article

Recent Court Ruling Creates Holiday Incentive Pay Twist for Colorado Employers

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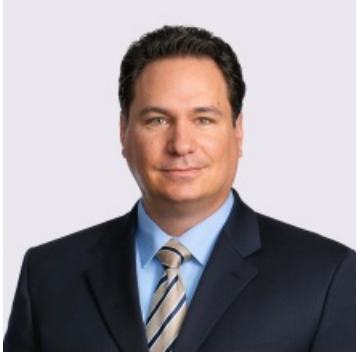

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Takeaways:

- A recent Colorado Supreme Court decision deviates from federal law by requiring holiday incentive pay to be included in the regular rate for overtime purposes.
- Employers covered by Colorado's COMPS Order 39 should not follow the FLSA when considering holiday pay for purposes of overtime calculation.
- Colorado employers should review their pay policies and practices and consider drawing a clear distinction between "holiday pay" and "holiday incentive pay" in their policies and practices.

Related link:

- *Hamilton v. Amazon.com Services LLC*

The Colorado Supreme Court has ruled that Colorado law is not like federal law when it comes to holiday pay. The Court found that the Colorado Minimum Wage Order (currently, COMPS Order 39) requires holiday incentive pay be counted in the regular rate of pay for calculating overtime for non-exempt employees in Colorado. *Hamilton v. Amazon.com Services LLC.*

Before this decision, employers in Colorado that provide holiday pay generally followed the Fair Labor Standards Act (FLSA) when considering holiday pay for purposes of overtime calculation. FLSA regulations (29 C.F.R. § 778.203(c)) states that "extra compensation" paid to workers on holidays can be considered an "overtime premium" and *not* counted toward the regular rate of pay so long as it is not less than time and one-half of the regular rate.

The Court arrived at its conclusion based on Rule 1.8.1 of the COMPS Order, which excludes "holiday pay" from the regular rate but includes "all compensation paid to an employee" and "shift differentials."

The Court said that "holiday pay" properly can be excluded from the regular rate under the COMPS Order. It found, however, that "holiday incentive pay" was not the same thing. The Court explained that "holiday pay" is money paid to an employee for "non-work hours." On the other hand, "holiday incentive pay" is money paid to an employee for actual work performed. The Court found this key distinction resulted in "holiday incentive pay" being considered wages applicable to the regular rate under Rule 1.8.1 because (1) it is part of "all compensation paid to an employee" and (2) a shift differential.

The Court stated that holiday incentive pay for actual work performed on a holiday was necessarily part of "all compensation paid" for performing work and thus in the category of pay that must be counted toward the regular rate.

The Court further explained that holiday incentive pay also was essentially the same thing as a shift differential. Finding that a shift differential is a "higher wage or rate because of undesirable hours or disagreeable work," the Court reasoned that holiday incentive pay is the same thing: extra pay for employees who choose to work an undesirable holiday schedule.

Finally, the Court resolved the apparent friction with the FLSA by ruling that a shift differential is "different" than an overtime premium. In any event, it said Colorado law was more protective than the FLSA, which merely "set a floor" for employee compensation.

The takeaway is that, in Colorado, employers covered by the COMPS Order should review their policies and practices and consider drawing a clear distinction between "holiday pay," which is pay for *non-work* hours on a holiday, and "holiday incentive pay," which is wages paid to employees for working on a holiday. For holiday incentive pay, employers should include any holiday incentive pay in the regular rate for overtime purposes.

Employers should ensure compliance with applicable federal, state, and local wage and hour law where they operate. Please contact a Jackson Lewis attorney with any questions.