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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
L... Section
3... an Ness Avenue, Suite 4400
San Francisco, CA 94102



March 6, 1991

Patricia K. Gillette, Esq.
Heller, Ehrman, White & McAuliffe
333 Bush Street
San Francisco, CA 94104-2878

Re: Calculation of Regular Rate of Pay

Dear Ms. Gillette:

The Acting Labor Commissioner, James H. Curry, has asked me to research and respond to your letter of February 26, 1991, regarding the above-referenced subject.

Your question is:

Are sporadic incentive bonus payments made to employees for the performance of work ancillary to their primary duties to be included as part of the regular rate of compensation for purposes of determining overtime pay?

The answer, under both federal and California law, is, yes.

The enforcement of the California overtime requirements follow federal precedent where applicable and where the federal precedent is patterned on language which is similar in intent to the California law. *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546. As with the federal law, the regular rate of pay cannot be left to a declaration by the parties. *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487; *Skyline Homes, Inc. v. D.I.R.* (1985) 165 Cal.App.3d 239.

Bonus payments, with certain exceptions¹ are included in the calculation of overtime. Bonuses based on incentive must be calculated into the employee's wages to determine the "regular rate of pay". No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the

¹ Bonus payments which are discretionary or payments in the nature of gifts on special occasions, and contributions by the employer to certain welfare plans and payments made by the employer pursuant to a profit-sharing, thrift and savings plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) are not to be considered as part of the "regular rate of pay" for purposes of determining overtime compensation.



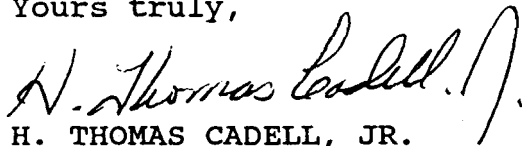
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bonus is simply added to the other earnings of the employee and the total divided by the number of straight-time² hours worked to establish the "regular rate of pay".

It is not clear from the facts you present when the bonus is "earned" for purposes of calculation. I would hazard a guess that the bonus you describe would not vest until the "customer ultimately purchases the service or product as a result of [the] referral". If that is the case, the bonus would be added to the amount of wages earned in the weekly pay period that the bonus vests for purposes of overtime calculation. The vesting, for purposes of calculation, must be based upon an objective plan. Clearly, there could be cases when the employee worked no overtime during a particular workweek and, if the bonus vested during that workweek, the bonus would have no impact on the employer's overtime obligations. However, as stated, the vesting must be determined objectively so that there is no opportunity to set the time for vesting to the advantage of the employer.

I hope this adequately addresses the question you asked in your letter. Thank you for your interest in California labor law.

Yours truly,



H. THOMAS CADELL, JR.
Chief Counsel

c.c. James Curry

² This method is somewhat changed if the employee's compensation is based exclusively on either commissions earned from sales of goods or services or a piece rate basis. Neither of those aberrations is present in the fact situation you present.