

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

455 Golden Gate Avenue, Room 3166
San Francisco, CA 94102
(415) 703-4150

H. THOMAS CADELL, JR., Chief Counsel

January 7, 1994

Richard S. Rosenberg, Esq.
Ballard, Rosenberg & Golper
10 Universal City Plaza, 16th Floor
Universal City, CA 91608-1097Re: Overtime Calculations Involving
Banquet Service Charges

Dear Mr. Rosenberg:

This letter is in response to your letter of November 29, 1993, regarding the above-referenced matter. I will attempt to explain and clarify the calculation of overtime premium pay on the portion of a worker's compensation which is derived from mandatory banquet service charges¹.

In your letter, it is assumed that the restaurant has agreed to distribute the service charge to the employees who work on the banquet according to a stated percentage. This added compensation is based on a percentage of the service charge and is in addition to the worker's regular hourly or salaried² rate of pay.

The Division views this amount as a "bonus". Any overtime on "bonus" wages is calculated based on the period during which the "bonus" is earned and is computed separately from the regular rate overtime calculation. The regular rate for purposes of "bonus"

¹ As we have discussed, the Division had, at one time, taken the position that these "mandatory banquet service charges" were to be considered in the category of tips which had to be distributed among the workers. However, in the face of a decision by the Office of Administrative Law which the Division agreed properly analyzed the "mandatory charges", the Division subsequently has taken the position that any charge which the patron must pay, cannot be considered in the category of a "tip" which is defined in Labor Code §351 as a "gratuity". If funds in question were, in fact, left as a gratuity by the patron the employer would be required to pay over the entire amount to the workers. (See Labor Code §351) Such a gratuity would not, however, be wages and would not be subject to overtime calculation.

² In the event the worker is paid on a salary basis you are correct in determining the regular rate of pay based on the results in the case of *Skyline Homes v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239; 211 Cal.Rptr. 792; 166 Cal.App.3d 232(c) (hrg. den. 5/29/85)

1994.01.07

overtime is calculated by dividing the total bonus earned in the period during which the bonus was earned by the total number of hours worked during that period. (See DLSE Policy and Procedure Manual, §10.84) The "bonus" overtime must be calculated separately from the premium owed for the regular hourly rate of pay. Since the service charge "bonus" is earned only for the time the worker is employed on banquets, the bonus is calculated based only on those hours. This method differs from the method which must be employed when calculating regular hourly rate of pay for salaried employees.

The rationale for the adoption of this method of calculation is that the "bonus" is designed to provide added compensation for all of the hours worked on the banquets; thus, the calculation of the premium pay should reflect that fact. Since the bonus has already compensated the worker for all of the hours, the worker has been compensated for everything but the premium pay and only the premium compensation need be paid.

Under this method of calculation the employee must be paid only the premium rate for the overtime hours. Thus, if the worker is employed nine hours on the banquet that the service charge bonus is based upon and the employee's share of the service charge is \$90.00, the worker would be entitled to recover an additional \$5.00 as the premium for the ninth hour.³ This calculation is made by dividing all of the hours worked on the banquet (9) into the total hours worked on the banquet.

Using the example you furnish with your letter we reach the following result:

	SCHEDULE						
	S	M	T	W	TH	F	SA
HRS. WORKED	8	10	13	10	9	--	6
BANQUET ALLOCATION	\$20	\$30	\$52	\$25	\$30	--	\$18
BONUS HOURLY RATE	2.50	3.00	4.00	2.50	3.33		6.00
BONUS OVERTIME (Daily)	0	3.00	12.00	2.50	1.65		18.00
TOTAL BONUS OVERTIME							= \$ 34.15
BASE RATE CALCULATION							
BASE HOURLY RATE OF PAY	\$ 5.00 X 40						= \$200.00
TOTAL OT HRS. WORKED = 16 (15 @ 1.5x; 1 @ dbl)							= \$122.50
TOTAL COMPENSATION FOR WEEK							\$356.65

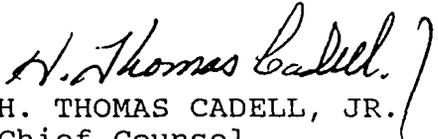
³ This is in addition, of course, to the premium pay based on the regular hourly rate of pay due the employee.

Richard S. Rosenberg, Esq.
January 7, 1994
Page 3

As your example points out, since the premium pay for the bonus is calculated based on the period covered by the payment (in this case daily) an individual may not be entitled to premium pay on the "bonus" if there are no overtime hours worked on the day the "bonus" is earned even though there may be overtime hours worked during the remainder of the week.

I hope the above explains the Division's position regarding premium pay based on service charge payments. If you have any questions please feel free to correspond with the undersigned.

Yours truly,


H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw

1994.01.07