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The Catch-Up Payment Provision for Overtime Exempt Employees

The [final rule](#) allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level if these payments are made at least on an annual basis. To enable compliance with the nondiscretionary bonus option, the final rule allows employers to make a “catch-up” payment at the end of each 52-week period. This article explains how this provision can be used.

Catch-up Payment Provision

Employers should review their EAP exempt employee’s compensation annually (every 52 weeks) to make sure all requirements for the exemption have been met. If at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid is less than the required salary level, the employer has one pay period to make up the shortfall for the 52-week period.

If the catch-up payment is not made within the pay period immediately following the 52-week period, the EAP overtime exemption does not apply and the employer will need to determine whether there are any overtime payments owed during the entire previous 52-week period.

Discretionary Versus Nondiscretionary Bonuses

As noted above, the final rule allows employers to use nondiscretionary bonuses to satisfy up to 10% of the standard salary level.

A bonus is discretionary when the employer retains the freedom to decide what should be done with that bonus. Freedom to decide may include the timing and amount of the bonus. Similarly, the bonus may be paid for any specific reason or for no reason at all. A discretionary bonus should not create an expectation of payment from the employee and it should be seen as arbitrary and almost whimsical. This means that the bonus cannot be due or tied to any prior promise, contract or agreement, or with employee performance (meeting specified goals or standards). To maintain bonuses as discretionary, employers should be careful and avoid any form of advance notice or other cautions that may, in any way, raise the expectation of payment.

Promised bonuses, such as those announced to employees to encourage them to work more efficiently or to remain with the firm, are considered nondiscretionary. Examples include bonuses based on a predetermined formula (for example individual or group production bonuses), bonuses for quality and accuracy of work, retention bonuses, and commission payments based on a fixed formula.

DOL Example

The DOL has published the following example to illustrate how the catch-up provision works.

Employee B meets the duties test for the professional exemption and is paid a salary of approximately 90% of the standard salary level (\$616) in each workweek for the year. At the end of the year, the employer tallies Employee B’s nondiscretionary bonuses and commissions for the year, which amount to \$3,300.

- $\$616 \text{ (salary)} \times 52 \text{ weeks} = \$32,032$ paid in salary on a weekly basis.

- $\$32,032$ (salary paid) + $\$3,300$ (bonuses earned) = $\$35,332$ (salary plus nondiscretionary bonus paid).

Employee B must be paid a total of $\$35,568$ per year to meet the salary level requirement ($\$684 \times 52$ weeks). Because the total of salary and bonuses paid ($\$35,332$) is less than $\$35,568$, the employer must, within one pay period, make a catch-up payment to Employee B to meet the salary level requirement in order to maintain the exemption. As shown below, the amount of the catch-up payment is $\$236$.

- $\$35,568$ (required salary for 52 weeks) – $\$35,332$ (total paid) = $\$236$ (required catch-up payment).

If the employer does not make the catch-up payment, the employee is entitled to overtime pay for any overtime hours worked during the previous 52-week time period.

Employer Resources

1. DOL Overtime Pay [website](#).
2. DOL Wage and Hour Division [General Guidance](#) on overtime pay.
3. [Fact Sheet 17U](#): Nondiscretionary Bonuses, Incentive Payments, and Part 541 Exempt Employees.
4. DOL Wage and Hour Division [E-tools](#) for overtime pay.