



Wroten Associates
Attorneys at Law
WROTEN PLEISS CASEY SITAR ROSS

SERVING THE UNIQUE NEEDS OF HEALTH CARE PROFESSIONALS

5510 Trabuco Road · Irvine · CA · 92620 · (949)788-1790 · www.wrotenlaw.com

CALCULATING OVERTIME JUST GOT A LITTLE TRICKIER FOR SOME EMPLOYERS

by Laura K. Sitar

Calculating overtime owed to employees can be a tricky business. The 9th Circuit Court of Appeals has just added one more consideration. In *Flores v. City of San Gabriel* (14-56421 / 14-56514) the court held payments given to an employee who foregoes healthcare coverage, often known as "cash in lieu of benefits" plans, must be included when calculating an employee's regular rate of pay and resulting overtime rate.

The Fair Labor Standards Act (FLSA) requires that employees be paid one and one-half times their regular rate of pay for all hours worked over forty hours in a workweek. California's Labor Code additionally requires overtime for all hours worked over eight hours in a day and on the seventh day worked in a workweek. To calculate an overtime rate, an employer must know what to include in an employee's regular rate of pay.

The FLSA defines regular rate of pay to include all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include:

- Expenses incurred on the employer's behalf,
- Premium payments for overtime work or true premium paid for work on Saturdays, Sundays and holidays,
- Discretionary bonuses,
- Gifts and payments in the nature of gifts on special occasions, and
- Payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Stated another way, payments that are not tied to the hours worked by an employee or the amount of services the employee performed are excluded when calculating an employee's regular rate of pay. Don't forget that includes vacation, holiday and sick pay.

When examining the issue of cash provided to an employee when that employee opts not to sign up for employee benefits the Ninth Circuit stated that a payment may not be excluded from the calculation of an employee's regular rate of pay if it is "generally understood as compensation for work, even though the payment is not directly tied to specific hours worked by an employee." In the case of *Flores v. San Gabriel* the court reasoned that the cash provided to employees who did not sign up for medical benefits was compensation for work and needed to be included in calculations to determine each employee's regular rate of pay for the purposes of calculating and overtime rate.

And, just as a reminder, there are several other types of payments that must be included when calculating an employee's regular rate of pay. They include attendance bonuses, retention bonuses and shift differentials. That \$25 gift certificate given to an employee for perfect attendance during a holiday week must be included in the employee's total pay for the week for the purpose of calculating a regular

pay rate and resulting overtime rate. And that \$1500 retention bonus payable when the employee remains on the job for six months must be included in the employee's total pay for the six months for the purpose of calculating the employees overtime rate in any given week. Happy calculating.

About the Author:

A Shareholder at Wroten & Associates, Laura Sitar defends employment, professional negligence and elder abuse cases and provides invaluable employment related risk management services to help clients avoid litigation. She litigates cases on behalf of both individuals and companies involving all types of employment actions including harassment, discrimination, wrongful termination, retaliation and wage and hour claims. Her years with Wroten & Associates have provided her with a unique understanding of the many challenges facing long term care providers.

After a 15-year career in corporate management, where she directed the human resource function of a 2000 employee, \$100 million region, Ms. Sitar became an attorney. She began her second career in law 16+ years ago as an associate with a prestigious healthcare defense firm before joining Wroten & Associates where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, where she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in U.S. District Courts throughout California.

Ms. Sitar has participated in multiple mock elder abuse trials at the University of Southern California (USC) and has presented for the California Assisted Living Association (CALA) as well as other organizations. Ms. Sitar has written numerous articles, her most recent being titled "Engaging in the Interactive Process Required by the ADA." She is a member of the Defense Research Institute (DRI) and the California Association of Health Facilities (CAHF).

To reach Laura Sitar directly email her at lsitar@wrotenlaw.com