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Code: TECHNICAL LETTER
HR/SA 99-10

To: Human Resources Directors
Payroll Managers

Reference: Technical Letter HR/SA 98-13

From: Cathy Robinson, Senior Director
Human Resources Administration

Subject: Lump Sum Performance Bonuses and Computing the "Regular Rate" for Employees Subject to Overtime Provisions of the Fair Labor Standards Act (FLSA)

Contract agreements permit a lump sum performance bonus payment to an employee whose base salary is at the top of the salary range (ref: Article 20.28 of the California State Employees' Association [CSEA] contract and Article 24.9 of the International Union of Operating Engineers [IUOE contract]). This type of payment is not a permanent increase to the base salary of the individual (e.g., is not reflected in employment history).

Pursuant to Technical Letter HR/SA 98-13, a Department of Labor (DOL) review was required to determine if lump sum performance bonuses affected the pay rates of individuals differently based upon their "exempt" or "nonexempt" FLSA status. Specifically, we requested the DOL to make a determination on two issues: (1) whether or not the performance bonus should be factored into the pay rate for overtime calculations, and (2) the appropriate process for including the bonus in overtime calculations. Excerpts from two publications provided by the DOL were sufficient to conclude the following:

- Payments from performance bonus programs that do not qualify for exclusion under the "discretionary bonus" provisions of Section 7(e)(3)(a) of the Fair Labor Standards Act must be factored into the "regular rate" for overtime calculations; and
- Performance bonus amounts must "be apportioned back over the workweeks of the period during which it may be said to have been earned."

Under current MOU provisions, performance bonuses, including those paid by lump sum, are provided in response to an annual assessment of performance. FY 1998/99 performance bonus provisions cover the performance period from July 1, 1997 to June 30, 1998. Non-exempt (FLSA = "N") employees in bargaining units 2, 5, 7, 9 and 10 who received a lump sum performance bonus in fiscal year 1998/99 (Earnings ID = "SF") for the annual review period July 1, 1997 through June 30, 1998 are eligible if they:

- a. received overtime pay for hours worked between July 1, 1997 and June 30, 1998 and/or;
- b. received pay for compensatory time off (CTO) between July 1, 1997 and June 30, 1998.

(Over)

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Pursuant to Section 7(o)(4)(A&B) of the Fair Labor Standards Act of 1938 as amended, an employee who has accrued compensatory time off shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than:

- a. the average regular rate received by such employee during the last three years of the employee's employment, or
- b. the final regular rate received by such an employee, whichever is higher.

Payroll Processing Impacts:

1. The lump sum performance bonus amount must be included in the calculation of overtime pursuant to Section 778.209 of the Act for affected employees during the annual review period for which the performance bonus was awarded.
2. CTO hours cashed out during the annual review period for which the lump sum performance bonus was awarded requires an adjustment.
3. If a lump sum performance bonus is awarded within three years of an employee's termination date, an analysis to confirm the highest regular rate of pay is required.
4. Overtime payment adjustments can be processed via Std. Form 674 or via PIP. Adjustments submitted via Form 674 require a form for each pay period in which an adjustment is due. All payments are subject to federal, state and social security tax withholdings.

Adjustments paid via PIP provide for one lump sum payment for all pay periods in which adjustments are due by totaling each pay period's adjustment amount and processing the total adjustment in the most current pay period. Earnings ID "9F" is exclusively utilized for retroactive FLSA overtime adjustments:

Payment Request	Earnings ID	Day/Hour	Rate	671 Only WWG FLSA
FLSA Salary Rate Adjustment	9F	Blank	Enter Total Amount	Blank

5. Attachment C provides examples of how a lump sum performance bonus could affect overtime and/or separation pay.

Pertinent excerpts from DOL publications are provided on the following attachments:

- Attachment A: The Fair Labor Standards Act of 1938, as Amended, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, WH Publication 1318, Revised August 1991, Section 7(e), pages 9-10; 7(o), page 12.
- Attachment B: Regulations, Part 778: Interpretative Bulletin On Overtime Compensation, Title 29, Part 778 of the Code of Federal Regulations, U. S. Department of Labor, Employment Standards Administration, Wage and Hour Division, WH Publication 1262, Revised, November 1991, Sections 778.208 to 778.211, pages 20-22; Section 778.303, page 34; Section 778.331, page 46.

Campuses are responsible for monitoring non-exempt employees who received lump sum performance bonuses at their campus to ensure that compliance is maintained with these provisions. If you have any questions regarding this information, please contact Theresa Hines (562) 951-4412 in Human Resource Services. Thank you.

CR/dth
Attachments