

Overtime Premiums Likely Increase with Performance-Based Incentive Bonuses

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The Department of Labor's Wage and Hour Division has clarified in Opinion Letter FLSA2026-2 that most performance-based bonuses must be included in an employee's regular rate of pay when calculating overtime.

In plain terms, if guaranteed additional pay is triggered by specific performance criteria—like safety, attendance, productivity, or jobsite conduct—it is a non-discretionary bonus and must be factored into overtime premiums. For contractors and subcontractors who commonly use safety or performance incentives to drive results, the takeaway is straightforward: build these bonuses into your overtime calculations or risk back pay, penalties, and attorneys' fees.

A bonus is "discretionary" only if the employer decides both whether to pay it and how much to pay at or near the end of the period, without any prior promise or formula. Once you set criteria—which, if satisfied, triggers entitlement to additional pay—you have effectively abandoned discretion. That turns the additional pay into part of the employee's regular rate throughout the period in which the additional pay was earned. This is especially relevant for construction incentives such as incident-free days, PPE compliance, near-perfect attendance, quality scores, or production milestones.

The practical effect is a required "look back" when a non-discretionary bonus is earned. You must allocate

the bonus to the workweeks in the bonus period, recalculate the regular rate for each week, and pay an additional half-time premium for any overtime hours in those weeks. For example, if an employee works 50 hours at a base rate of \$12.00/hour and earns a \$2.00/hour production bonus for all hours worked that week, the regular rate includes both amounts (\$14.00), and the overtime premium is one-half of that regular rate (\$7.00) multiplied by the 10 overtime hours.

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The Opinion Letter also flags two compliance traps. First, mislabeling a bonus as discretionary will not protect you if eligibility or amounts are set by a plan. Second, deductions for business costs, such as equipment or property damage, cannot push wages below minimum wage or reduce overtime premiums. Employers may rely on official DOL opinion letters as a good-faith defense, but only if their facts and practices align with the guidance.

Construction employers should review bonus plans, payroll system capabilities, and communications to employees. If you need help auditing your plans or recalibrating calculations, please give us a call at (402) 898-7400. Learn more about Woods Aitken's [Labor & Employment Practice Group](#) and [subscribe](#) to our E-Briefs for the latest news, tips, and updates.



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