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EMPLOYMENT LAW LETTER

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EMERGENCY PREPAREDNESS

Winter is coming: FLSA and your pay obligations during inclement weather

During the winter months, the threat of the weather turning frightful is on everyone's mind. No matter what business you may be in, inclement weather and treacherous road conditions can cause many headaches—including issues with employee payroll. Many employers grapple with the question of how to pay employees when the business is closed because of bad weather and whether deductions from pay for closures are allowed. Let's explore what the Fair Labor Standards Act (FLSA) requires of employers when Mother Nature wreaks havoc.

Partial business closures

When weather conditions cause you to either delay opening your business or to close early on a particular day, the FLSA doesn't require you to pay nonexempt employees during the partial closure. That's because employees are unable to provide work during that time frame.

On the other hand, if you close your offices for only part of the day because of inclement weather, you cannot make a deduction from an exempt employee's salary without risking the loss of his exemption.

Complete business closures

If you close your business for a full day because of severe weather, you aren't required under the FLSA to pay nonexempt employees for the day because they're unable to provide any work. That's the case even if they were scheduled to work that day.

Conversely, you may not take deductions from an *exempt* employee's salary for a full-day inclement weather closure, or you risk losing the individual's exempt status. You have more flexibility if the closure lasts for one week or more. In that case, you may choose not to pay exempt employees for that week.

Employee absences due to weather

If you have employees who commute significant distances or from rural areas, you may face the situation of the company being open but individual employees being unable to get to work.

Nonexempt employees. If you're open for business but inclement weather stops *nonexempt* employees from reporting to work, there is no requirement to pay them. You may dock their wages for a weather-related absence because they don't need to be paid for hours they don't work.

Exempt employees. When you're open for business but *exempt* employees cannot report to work because of inclement weather, the rule varies slightly. Specifically, you no longer risk losing their exempt status if you make deductions from their wages in that situation. According to the U.S. Department of

AGENCY ACTION

NLRB reports progress in case processing. The National Labor Relations Board (NLRB) has reported improved case processing statistics for fiscal year (FY) 2019. The NLRB issued 303 decisions in contested cases during FY 2019. Adopting a case processing pilot program, the Board focused on issuing decisions in some of the oldest cases. As a result, the median age of all cases pending before the Board was reduced from 233 days in FY 2018 to 157 days at the end of FY 2019. The NLRB also said it reduced the number of cases pending before it to its lowest level since 2012. As of the end of FY 2019, the number of pending cases was reduced from 281 at the end of FY 2018 to 227 when the report was released on October 7. Also, the NLRB regional offices made strides toward meeting the Board's strategic goal to reduce case processing time by 20 percent over four years. In just one year, the regions overall nearly met the four-year goal by reducing the time of filing to disposition of unfair labor practice cases from 90 to 74 days, a decrease of 17.5 percent.

OFCCP provides compliance assistance for educational institutions. The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) in October released a new Technical Assistance Guide (TAG) for Educational Institutions to assist them in meeting legal requirements and responsibilities as federal contractors. The OFCCP published the new TAG to reflect current regulations and provide compliance assistance resources for universities, senior colleges, and junior/community colleges with federal contracts. The TAG, available at www.dol.gov/ofccp/CAGuides/files/OFCCP-EI-TAG.pdf, is designed to help educational institutions that are federal contractors understand legal and regulatory obligations and prepare for compliance evaluations by highlighting best practices and providing references.

DOL announces more opinion letters. The DOL announced three more opinion letters in September. The letters address compliance issues related to the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Consumer Credit Protection Act (CCPA). FMLA2019-3-A addresses whether an employer may delay designating paid leave as FMLA leave because of a collective bargaining agreement. FLSA2019-13 addresses the ordinary meaning of the phrase "not less than one month" for purposes of FLSA Section 7(i)'s representative period requirement. CCPA2019-1 addresses whether employers' contributions to employees' health savings accounts are earnings under the CCPA. The DOL offers a search function available at www.dol.gov/whd/opinion/search/fullsearch.htm that allows users to search existing opinion letters by keyword, year, topic, and other filters. ✤

Labor (DOL), when an exempt employee is absent because of severe weather but the business is open, the absence will be considered an absence for "personal reasons." You may thus deduct the day's earnings from the employee's salary without losing the exemption.

Remember that exempt employees must take the entire day off because of severe weather for the modified rule to apply. Should they simply choose to come into work late or leave early because of the weather, no deduction should be taken from their salary because that would jeopardize the exemption.

Closing business for bad weather

Some businesses that provide critical services, including healthcare employers, simply cannot close. Many of them have severe-weather policies requiring employees to stay after their shift is over to be ready for the next shift or to help cover the shift if other employees can't make it to work. Most prudent critical services employers allow their stranded employees time to relax or sleep. So, is their resting time compensable under the FLSA?

If nonexempt employees are required to stay at the worksite, determining whether you must pay them for the time is quite tricky:

- First, FLSA regulations state that an employee who is required to be on duty for less than 24 hours is "working" even though he is permitted to sleep or engage in personal activities.
- Second, an employee who is required to be on duty for 24 hours or more may agree to exclude from his compensable time any bona fide regularly scheduled sleeping periods of no more than eight hours so long as the employer furnishes adequate sleeping facilities.
- If there is no agreement, the entire sleeping period is compensable.

If the sleeping period is interrupted by a call to duty, the interruption is compensable. If the employee cannot get at least five hours of sleep, the entire eight-hour sleeping period is compensable.

Further, if the employee must spend his sleeping time with the proverbial "one eye and one ear open" to ensure the safety or well-being of people in his charge (e.g., hospital patients), the time is compensable.

Obviously, stranded employees wouldn't spend their entire off-duty time sleeping. Is time simply spent "waiting" compensable? Much of the answer hangs on whether the employee is required to stay or chooses to do so of her own free will (e.g., because she was afraid to travel). Also relevant is whether the employee can be asked to pitch in outside of her regularly scheduled shift time (perhaps to help cover a short-staffing situation). If so, it's likely the employee would be considered on call.

Bottom line

Severe winter weather can cause a lot of chaos and confusion. The least opportune time to worry about FLSA liability is

when you're in the midst of the mayhem. If you're uncertain about your employees' FLSA status or your obligations, consult competent employment counsel before you're left out in the cold. ✤

ADMINISTRATIVE AGENCIES

Looking back at 2019 and to what's ahead for federal agencies in 2020

The National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Department of Labor's (DOL) Wage and Hour Division (WHD) all ramped up their enforcement endeavors in 2019. The NLRB has refocused its efforts on unionized businesses, the new EEOC chair is pushing to settle old cases, the OFCCP director is aiming to end the year with the largest settlement total in the agency's history by resolving or litigating old audits, and the WHD has filed a record number of enforcement cases against employers.

DOL's WHD releases overtime rule

The biggest news came out of the DOL this year when the WHD released its final rule updating the overtime eligibility requirements for workers under the Fair Labor Standards Act (FLSA). The new rule bumps up the minimum salary threshold required for workers to be considered exempt under the FLSA's "white-collar" exemptions. The new threshold of $35,568 is a significant increase over the previous threshold of $23,660, an amount that had not been revised since 2004. It fell short, however, of the $47,476 level proposed during the Obama era in 2016 but later scuttled by a Texas federal judge.

The final rule makes no changes to the current "duties test" for exemptions—a hotly debated subject during the rulemaking process. Nor does it call for an automatic update of the salary threshold, another controversial feature under the blocked Obama rule.

According to a WHD press release, the final rule will make 1.3 million American workers eligible for overtime pay. While it is set to go into effect January 1, 2020, worker advocate groups are expected to challenge it in the courts.

NLRB shifts into high gear

One thing is certain: The current NLRB is willing to take controversial actions. The general theme of the Board's moves is a return to the state of federal labor law before the days of the Obama administration, which means refocusing labor law on the union-management

FROM THE PUBLISHER

New breadth, focus, identity for your *Employment Law Letter*

by Dan Oswald
CEO/Publisher, Business and Legal Resources

At Business and Legal Resources (BLR), our goal is to provide employers and HR professionals like you with the most up-to-date information on changes that affect your department. After reviewing our product line, we have decided to give your *Employment Law Letter* a much-needed upgrade.

Starting with your January 2020 issue, your newsletter will become the *Southeast Employment Law Letter* and contain more robust content from more attorneys. The five states in the region are Alabama, Florida, Georgia, Louisiana, and Mississippi.

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Dan Oswald has been CEO/Publisher of BLR, a Simplify Compliance brand, since 2011. He joined M. Lee Smith Publishers as president in 2003 and purchased the company from Lee Smith in January 2005. ✤

nexus and withdrawing its reach from nonunion businesses. The results include:

- Limitations on union organizing opportunities, including access to businesses;
- Restrictions on the definition of "concerted activity";
- Reductions in the number of "employees" who can be organized; and
- Expansion of management rights.

Many of the NLRB's recent decisions have been criticized as undermining unions at the same time that public sentiment is said to have swung back to a more favorable view of unionization. Businesses, stressed by unpredictable federal trade and fiscal policies, are welcoming the Board's rulings as rare tangible relief from government mandates. Still to come: the Board's regulation on subcontractors, independent contractors, and franchisors.

EEOC balks at extending EEO-1 Comp 2, chips away at caseload

The EEOC announced it wasn't requesting an extension of the short-lived "Component 2" pay data collection for EEO-1 reports. Chair Janet Dhillon faced a hostile House Subcommittee on Civil Rights and Human Services in September when she defended the agency's decision not to ask the OMB to renew the Comp 2 piece. She told the subcommittee the agency had determined the burden on employers to collect and provide the data is "actually more than 10 times higher than had been originally estimated." The period for collecting the pay data expired on September 30.

In the same session, Dhillon announced the agency had formed an internal task force to look at "vulnerable workers." She said she is committed to the EEOC's mission "to prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace."

Dhillon also responded to complaints about the EEOC's slow resolution of its backlog of complaints. She said the agency has trimmed the backlog by focusing on charges "at the intake stage" and noted the smaller inventory allows it to "tackle the charges when they are new, and it's easier to do so; memories are clearer, evidence is more readily available."

OFCCP enforcement on the rise

At a National Industry Liaison Group (NILG) Conference, OFCCP Director Craig Leen revealed the number of agency audits finding discrimination had increased from 2% in 2016 to 5% in 2018. He also said he sees disability discrimination as being as important as race or gender discrimination.

Leen indicated the OFCCP will look at the type of parental leave contractors give employees because men should have the same access as women do. At a town hall in New York City, he expressed the agency's concerns about the lack of promotions for women and minorities in law firms. He also said all federal contractors should be looking at their promotion practices.

Based on concerns raised by a Government Accountability Office (GAO) report, Leen is continuing to develop processes allowing contractors to certify they have developed their affirmative action plans (AAPs). Ultimately, the agency wants to require contractors to submit their AAPs annually. Exactly what contractors will be required to submit is unclear, but the director is moving forward with his plan.

100,000-plus comments on religious exemption proposal

The OFCCP's proposal to substantially revise its religious exemption received more than 100,000 responses by the end of the comment period even though it lasted only 30 days (instead of the customary 60). The 107,295 comments were the highest number for any proposal brought by a civil rights agency since online comments began being accepted in 2003.

The OFCCP argued the proposal merely codifies existing law, but the American Bar Association urged the agency to withdraw it because the religious protections are too broad, to the disadvantage of other protected groups.

Democratic attorneys general (AGs) from 17 states and the District of Columbia also urged the rule's withdrawal, maintaining it "would open the door for large, for[-]profit organizations to claim the exemption at the expense of workers." While the AGs recognized the importance of respecting sincerely held religious beliefs, they contended the "proposed rule . . . would create a new version of the religious organization exemption, broader and less defined than any previous version."

A group of Democratic senators demanded the OFCCP withdraw the proposal, which they say would allow "taxpayer-funded employment discrimination." LGBT advocates also have publicly opposed the rule, believing it can and will be used against them, while religious advocates praised the proposal as bringing "welcome clarification." ✤

SEXUAL ORIENTATION DISCRIMINATION

SCOTUS decision on LGBTQ workplace protections coming in 2020

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against employees or job applicants on the basis of race, color, religion, sex, or national origin. In recent years, controversy over whether the term "sex" as used in Title VII includes sexual orientation and gender identity has arisen among the federal circuit courts of appeals. The U.S. Supreme Court has agreed to resolve the split. No matter where the Court falls on the issue, the decision will supersede existing precedent in at least some circuits and will have a lasting impact for decades to come.

Title VII claims based on gender stereotypes

Although the question of discrimination based on sexual orientation and gender identity is still up in the air, the U.S. Supreme Court held in a 1989 case, *Price Waterhouse v. Hopkins,* that Title VII prohibits discrimination based on gender stereotypes. In other words, an employer can't discriminate against women who dress or act "masculine" or men who dress or act "feminine."

The Court didn't base its decision on sexual orientation, but LGBTQ employees pursuing claims they were discriminated against or harassed at work have relied on the *Price Waterhouse* case many times over the years. The argument is that discriminating based on gender identity is essentially discriminating against someone because she isn't fulfilling certain gender stereotypes about how women should look and act. Discriminating based on sexual orientation is essentially discriminating against someone because he isn't conforming to stereotypes about whom he should be attracted to based on his sex.

Circuit courts, federal agencies split

Whether the term "sex" in Title VII includes sexual orientation and gender identity has been hotly contested in recent years, leading to a circuit split on the issue.

The U.S. 1st, 3rd, 5th, 6th, 8th, 9th, 10th, and 11th Circuit Courts of Appeals take the position that Title VII doesn't prohibit employment discrimination based on sexual orientation. The 2nd and 7th Circuits have ruled that Title VII does prohibit employment discrimination based on sexual orientation. The 6th Circuit has ruled that Title VII protects employees from discrimination on the basis of either their transgender—or transitioning—status or their failure to conform

WORKPLACE TRENDS

Research finds HR leaders predicting huge change. A new study has found that 82% of HR leaders expect their role to be unrecognizable in 10 years, thanks in large part to the transformation from HR to a "people" function and the adoption of technology. The report from cloud business management firm Sage also found that 43% of HR leaders surveyed believe their organization won't keep up with related changes in technology in the next 10 years. Key findings show that 24% of those surveyed use artificial intelligence for recruitment, and 56% plan to adopt it within the next year; 42% say HR/people decisions are data-driven, and 51% are planning to access data in real time within the next year; 57% say they can't invest in new technology because of resourcing restrictions; and just 25% rate their team as being experts with HR technology.

Organizations urged to get "age-ready." A new report from workforce solutions provider Mercer urges employers to actively leverage their older, experienced workforce (defined as workers 50 and older) to be best positioned for the future of work. The report, "Next Stage: Are You Age-Ready?" says the need to be "age-ready" is important for both businesses and economies because of the impact of the twin forces of a rapidly aging labor force and an uncertain global economic growth rate. The report says experienced workers are valuable to employers since they often lower costs because they are less likely to leave; as supervisors, they tend to retain, develop, and engage more junior employees; they increase productivity of those around them through knowledge sharing; they strengthen group cohesion, collaboration, and resiliency; and they enable innovation and strengthen customer connections.

Report finds more employees staying put. Research from business research firm Gartner found that 53% of U.S. workers planned to stay with their current employer in 2019's second quarter, a 10% increase from 2019's first quarter. The data from Gartner's second-quarter Global Talent Monitor showed that this record-high intent to stay coincides with other workplace indicators that reflect definitive changes in employees' perceptions of and behaviors within the U.S. labor market. In the second quarter, just 12.5% of U.S. workers indicated they were actively looking for another job, well below the global average of 20.2% and a significant drop from almost 45% of workers in the first quarter of 2019. The second quarter also saw a 2.4% decline in employees' business confidence, with the global business confidence index hitting its lowest point since the third quarter of 2016. ✤

to sex stereotypes. The 5th, 7th, 8th, 9th, and 10th Circuits have ruled it doesn't.

Confusing things further, there is also sharp disagreement within the federal government over Title VII's range. The U.S. Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) have taken opposite positions on this significant issue: The EEOC has maintained that Title VII extends to sexual orientation and gender identity, while the DOJ has taken the position that it does not. In fact, in one of the cases pending before the Supreme Court, the EEOC argued in favor of LGBTQ protections in opposition to attorneys from the DOJ.

SCOTUS to have final word

Here's a quick look at the three cases the Court is reviewing:

- In *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC,* the 6th Circuit reasoned that gender identity is fundamentally tied to biological sex. Therefore, the court ruled that an employer violated Title VII when it terminated a transgender employee for failing to conform to gender norms.
- In *Altitude Express v. Zarda,* a skydiving company is asking the Court to overturn the 2nd Circuit's ruling that a former employee established a viable Title VII claim when he alleged the company fired him because of his homosexuality.
- In *Bostock v. Clayton County, Georgia,* the 11th Circuit ruled that an employee's claim that he was fired after his employer learned he had joined a gay softball league wasn't legally cognizable under Title VII. That ruling, of course, is in direct conflict with the 2nd Circuit's decision in *Zarda.*

Bottom line

The Court's opinion likely will arrive sometime in early 2020. Regardless of the outcome, the decision will overturn current precedent in some federal circuits and have wide-reaching effects on employment decisions across the country. Any ruling extending protections to LGBTQ individuals also will likely apply to other types or facets of discrimination, such as harassment claims:

- If the Court decides Title VII doesn't prohibit discrimination based on sexual orientation and gender identity, further analysis will be needed to figure out if discrimination based on gender stereotypes is still prohibited (i.e., whether *Price Waterhouse* has been overruled).
- If discrimination based on gender stereotypes is still prohibited, employers will toe a very fine line if they choose to discriminate against employees on the basis of sexual orientation or gender identity because those forms of discrimination are very closely related to the former. Until we have an answer from the Court, the safest route is to implement policies that protect, and are inclusive of, all your employees, irrespective of their sexual orientation and gender identity. The Court's decision to address whether Title VII applies to LGBTQ employees may shine a new spotlight on the potential for expanded protections under Title VII, and workers may very well become aware of the issue for the first time. ✤

EMPLOYEE MORALE

Truth about holiday season? It's not always what it's nut-cracked up to be

Many of us are fully involved in the crush of festivities and holiday shopping that traditionally mark the beginning of the sprint to New Year's Eve. This is the season of peace on earth and good will toward our fellow man, right? Well, not always.

Hallmark Card celebration vs. reality

Historically, the holiday season conjures up images of happy get-togethers, friends and family, food and spirits, gifts and parties, and the warm feeling one gets from knowing that all is well with the world. Everyone we encounter is expected to be happy and "in the spirit"! But not everyone experiences the holidays in that way.

The season is one of the busiest times of the year for mental health professionals. It has the uncanny ability to produce high levels of stress, feelings of depression, and misdirected anger. Most of us attempt to do too much during this limited time frame. We have a tendency to schedule too many events, indulge in food and drink, and spend too much on gifts, leaving a sense of exhaustion and even resentment toward family, friends, and coworkers.

Those without close family or loved ones feel the weight of spending the holidays alone. Left unchecked, those negative feelings and stressors can lay the groundwork for short tempers, organizational conflict, and inappropriate behavior, up to and including workplace violence and suicide. As HR professionals, you are charged with protecting the enterprise, which surely includes protecting your most important resource—the human resource!

What you can do during this challenging season

As guardian of the corporate culture, you are uniquely positioned to provide a sense of support and inclusion to those in need through educational programs,

immediate intervention, and psychological support in the form of employee assistance programs (EAPs).

We often expect supervisors to know how to effectively intervene and interact with a troubled employee without providing them with the basic tools they need to identify someone in distress. Behaviors including isolationism, lack of humor, lack of focus, negativity, excessive conflict with associates, trouble sleeping, absenteeism, and a generally bleak outlook on life all can be signs of depression. Those feelings and behaviors can be exacerbated during the holiday season—sometimes with deadly consequences.

While there may be valid reasons for temporary periods of questionable conduct, prolonged or intensifying displays of behaviors similar to those described above can indicate a more serious problem. Supervisors should be taught to:

- Recognize the signs and symptoms of inappropriate behavior.
- Intervene as soon as possible or appropriate.
- Document all interactions and recommendations made to the employee.
- Suggest appropriate internal resources and support programs, usually in the form of HR and the EAP.
- Impose discipline and corrective actions.
- Assist the employee in reintegrating into the workforce.

You always have the right—and, in fact, the obligation—to intervene around behaviors that endanger the well-being of coworkers and the success of your organization. Your intervention might get the employee the help he needs to survive, and even enjoy, a stressful holiday season.

Remind supervisors about the appropriate use of EAP and work-life programs. The programs, offered as an employee benefit, can range from "800" telephone numbers giving immediate referrals to programs that include face-to-face counseling and support. Some organizations support mandatory referrals while others do not. It's important supervisors understand the specific model and intricacies of your program.

4 more ways to help employees enjoy the season

Here are four more steps HR can take to help employees enjoy a happy, healthy, and safe holiday season:

- Since holidays often center around families, consider being more flexible with employees' schedules.
- If your organization celebrates with a holiday party, remember diversity. It's important to honor and include all your employees.
- It's a good idea to limit or exclude alcohol from company-sponsored holiday celebrations.
- Remember that this is not a joyous time for everyone. Monitor employees who may be struggling, and be prepared to extend a compassionate hand. ✤

WAGE AND HOUR LAW

Proposed rule aims to expand use of fluctuating workweek

A new proposed rule from the U.S. Department of Labor (DOL) intends to clarify that employers that pay nonexempt workers bonuses or other incentive-based pay in addition to a fixed salary can use the fluctuating workweek (FWW) method of paying overtime as a way to keep costs down as long as other requirements for using the method are met.

The proposal would revise the regulation for computing overtime compensation for salaried nonexempt employees who work hours that vary each week (i.e., a fluctuating workweek) under the Fair Labor Standards Act (FLSA). The DOL is touting the proposed rule, published in the Federal Register on November 5, as a way to expand access to bonuses to employees whose hours vary from week to week.

If finalized, the rule would likely encourage more employers to use the FWW method of computing overtime since employers interpreting current rules might be hesitant to use the method if they also pay bonuses or other premium payments. The proposed rule clarifies that employers whose employees qualify for the FWW method can use it as long as the bonuses or other payments are included in the employee's regular rate of pay.

How the method works

Not all jobs qualify for the FWW method, and employers that don't meet the requirements can find themselves liable for unpaid compensation an employee who is paid on an hourly basis would have earned. Employers using the FWW method must meet these requirements:

- Nonexempt employees (i.e., those who are eligible for overtime pay) must be paid on a salary basis, meaning they earn a fixed amount regardless of the number of hours worked in a week;
- The employer and employees must have a mutual understanding of the fixed salary;
- The fixed salary must be high enough to at least equal the minimum wage, even during weeks when the greatest number of hours are worked; and
- The employees' hours must actually fluctuate from week to week.

Under the method, employees earn a set weekly salary even if they don't work a full 40-hour week. Since

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they are nonexempt, they also must be paid a premium if they work more than 40 hours in a week.

The FLSA requires nonexempt employees to be paid overtime at time and one-half the regular hourly rate for any hours worked over 40 in a workweek, so an employer must calculate how much a nonexempt salaried employee earned per hour to determine the overtime rate. That rate is paid for all the hours worked, giving the employees the "time" part of the overtime premium. Then the hourly rate is divided in half to get the "half" part the law requires.

So, an employee earning a base salary of $400 a week makes $10 an hour for 40 hours of work. If the worker works 50 hours in a week, that $400 base salary is divided by 50 for an hourly rate of $8. That rate is paid for all 50 hours, and half the $8 hourly rate is used to calculate the overtime pay for the 10 hours of overtime. Half of $8 is multiplied by the 10 hours of overtime, so the employee's weekly pay plus overtime would be $440.

By contrast, an employee paid on an hourly basis at a $10-an-hour rate would earn $400 for the first 40 hours and $15 an hour for the 10 hours of overtime (time and a half of a $10-an-hour wage) for a total of $550 for the week.

Under the proposed rule, employers using the FWW method and paying bonuses would have to include the bonus payment when calculating the hourly rate. ✤

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Editorial inquiries should be directed to G. Thomas Harper at The Law and Mediation Offices of G. Thomas Harper, LLC, 1912 Hamilton Street, Suite 205, Post Office Box 2757, Jacksonville, FL 32203-2757, 904-396-3000. Go to www.EmploymentLawFlorida.com for more information.

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