

Electronic Alert

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Update: BOLI's Revised Guidance on Daily and Weekly Overtime Requirements

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Earlier this month, we reported that BOLI had issued a new interpretation of the interplay between daily and weekly overtime requirements for employees working in a “mill, factory, or manufacturing establishment.” Under that new interpretation, BOLI stated that the two overtime laws operate independently, requiring the employer to pay overtime under both laws, not simply the greater of the two amounts (as stated in BOLI's previous interpretations).

Interaction with the CBA Exemption

One open question was whether this new interpretation would impact employers who are parties to a collective bargaining agreement. While the daily overtime statute contains an exemption for “employees who are represented by a labor organization for purposes of collective bargaining with their employer,” BOLI's Technical Assistance states that “a valid collective bargaining agreement *may* set aside the provisions of ORS 652.020.” While the language used by Technical Assistance could be clearer, BOLI has confirmed that the collective bargaining exemption is unchanged under the new interpretation.

Scope of Definition of “Manufacturing Establishment”

What is still unclear is the extent of the reach (for BOLI enforcement purposes) of the definition of “mill, factory, or manufacturing establishment.” The pending court case at the center of the overtime dispute involves a commercial bakery, Portland Specialty Baking. Most would not consider a bakery to fall into one of these three classifications. An expansive reading opens the door for additional enforcement actions against unsuspecting employers engaged in businesses that are not typically considered to be a mill, factory, or manufacturing establishment.

BOLI Enforcement

While a claim for unpaid overtime can go back two years, BOLI's Wage and Hour Division has stated that it will only apply the new interpretation to time worked on or after January 1, 2017, and it will not seek to apply the new interpretation prior to that date. However, employees may still choose to pursue a private right of action including on time worked prior to January 1, 2017.

Calculation Corrections

BOLI's Frequently Asked Questions page regarding manufacturing establishments now includes revised examples showing how to calculate how much is owed to employees working both daily and weekly overtime in the same workweek. In short, employers should pay the regular rate on all hours worked, plus half the regular rate on all daily overtime hours worked, as well as half the regular rate on all weekly overtime hours worked.

Going Forward

The Portland Specialty Baking case is still being litigated and a decision could create even more changes in the world of overtime. Additionally, we could see a legislative fix out of Salem this session. Accordingly, employers should keep a close eye on this issue and, in the meantime, consider eliminating situations where employees work both daily and weekly overtime in the same workweek. In situations where this can't be avoided, employers should check whether a collective bargaining agreement may include an exemption and review overtime pay practices and policies to confirm that employees are paid in accordance with BOLI's new interpretation.

We will keep you updated on any additional developments.