

# OP-ED: BOLI's guidance on overtime requirements overturned

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Late last year the Oregon Bureau of Labor and Industries (BOLI) quietly changed its interpretation of the interplay between daily and weekly overtime requirements. The change was in response to a lawsuit filed by the employees of Portland Specialty Baking.

Most employers are aware that overtime pay is required for hourly employees that work more than 40 hours in any given workweek – known as weekly overtime. Employers may be less familiar with the accompanying Oregon law that requires overtime pay when workers “employed in a mill, factory or manufacturing establishment” work more than 10 hours in one day – known as daily overtime.

BOLI's guidance before the December 2016 change advised employers that they only had to pay the greater of the two overtime pay amounts, but not both. BOLI's new interpretation states that the two laws operate independently, so the worker must receive overtime under both laws, and not simply the greater of the two amounts.

For example, consider an employee works 12 hours on Monday, eight hours on Tuesday, five hours on Wednesday, five hours on Thursday, and 11 hours on Friday for a total of 41 hours in the workweek. Before BOLI revised its interpretations, this employee was entitled to only three hours of daily overtime pay. Under the revised guidance, the employee is entitled to four hours of overtime pay: three hours based on the daily overtime worked on Monday and Friday, and one hour of weekly overtime, because the employee worked a total of 41 hours that week.

The revised guidance created significant liability for employers in the traditional mill, factory and manufacturing industries, but also exposed employers like industrial bakeries and others to significant overtime expenses.

There was also concern that BOLI may attempt to apply this interpretation retroactively and reach back to correct payments made over the prior, two-year statute of limitations period. BOLI's Wage and Hour Division indicated that it would not apply the new interpretation retroactively, but only to time worked on or after Jan. 1, 2017. However, even if BOLI did not go after employers for noncompliance with the new rules,

employees could still choose to sue their employer to recoup overtime pay for hours worked prior to Jan. 1, 2017.

Union members were the only employees unaffected by the revised interpretation. BOLI's technical assistance also stated that "a valid collective bargaining agreement may set aside" the statute's requirements. That language could be clearer, but BOLI indicated that the collective bargaining exemption was unchanged under the new interpretation.

In a ray of hope for employers, on March 9, 2017, Multnomah County Circuit Court Judge Kathleen Dailey held that employees working in mills, factories and manufacturing establishments are entitled to only the greater of daily or weekly overtime pay in a workweek, but not both as encouraged under BOLI's revised guidance.

In the opinion, Judge Dailey explained that BOLI's new rules failed to properly interpret the relationship between Oregon's weekly overtime law and the particular daily overtime law for workers in mills, factories and manufacturing establishments. The court ruled that BOLI's pre-December 2016 interpretation of the two overtime laws is the proper interpretation. While the opinion may be appealed, it provides relief for many Oregon employers by requiring them to pay only the greater of the daily or weekly overtime amounts owed to employees. This decision is likely to stick even if appealed, because Judge Dailey was not even swayed by a sworn statement from the labor commissioner explaining the reasoning behind BOLI's revised rules.

The Oregon Legislature also has pending Senate Bill 984, which would codify the "greater of the two" calculation method, but the question of what constitutes a "mill, factory or manufacturing establishment" remains unclear. In the meantime, Judge Dailey's decision applies to all employers through the state of Oregon and allows employers to return to the old way of paying overtime – by providing the greater of either daily or weekly overtime. As always, affected employers should contact their labor and employment counsel to confirm proper payroll procedures.

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