



Holiday Incentive Pay Must Be Included in Overtime Calculation Under Colorado Law

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The Colorado Supreme Court ruled that holiday incentive pay must be included in the “regular rate of pay” for purposes of calculating overtime under Colorado law, a decision which differs from the federal Fair Labor Standards Act (“FLSA”) and could have significant implications for Colorado employers. This issue was presented to the Colorado Supreme Court as a certified question from the Tenth Circuit Court of Appeals in *Hamilton v. Amazon.com Services LLC*, a putative class action.

The plaintiff, Dan Hamilton, worked at an Amazon warehouse in Aurora, Colorado. The employer, Amazon.com Services LLC (“Amazon”), offered both holiday pay and holiday incentive pay. Holiday pay was provided to employees at their regular rate on company holidays regardless of whether they actually worked that day. Holiday *incentive* pay was provided to employees who actually worked on these holidays, at one and one-half times their regular hourly rate.

Similar to the FLSA, Colorado wage and hour law requires that employees be paid an overtime rate of one and one-half times their “regular rate of pay” when they work more than 40 hours in a workweek. “Regular rate of pay” means the “hourly rate *actually paid* to employees for a standard, non-overtime workweek.”

Hamilton sued Amazon under the Colorado Wage Act, arguing it failed to pay him all overtime due to him for the weeks he worked on company holidays by failing to include holiday incentive pay in his “regular rate of pay.” He also sought certification of “hundreds if not thousands” of other employees who also worked overtime during weeks with company holidays.

Amazon argued that holiday incentive pay can be excluded from the regular rate of pay just like ordinary holiday pay, relying in part on FLSA regulations by analogy.

Amazon removed the case to federal district court where Hamilton's complaint was dismissed. Hamilton appealed to the Tenth Circuit Court of Appeals, which certified the following question to the Colorado Supreme Court (the "Court"):

Whether Colorado law includes or excludes holiday incentive pay from the calculation of "[r]egular rate of pay" under 7 Colo. Code Regs. § 1103-1:1, secs. 1.8 and 1.8.1.

The Court held that, unlike under the FLSA, holiday incentive pay must be included in the regular rate of pay for overtime calculations under Colorado law.

The Court explained the regular rate of pay must include *all payments* that the parties have agreed would be received during the workweek (excluding overtime payments). These payments include "shift differentials," which the Court described as when an employee receives a higher wage because of undesirable hours or disagreeable work.

The plain language of sections 1.8 and 1.8.1. of the Colorado regulations permits an employer to exclude pay for "*non-work hours*" (such as holiday pay) from the regular rate. Holiday incentive pay, on the other hand, is for time *actually worked* by the employee. Therefore, the Court reasoned, holiday incentive pay is not the same as holiday pay under state law.

Further, Amazon's holiday incentive pay fell within the meaning of "compensation paid to an employee," which, under Colorado law, must be included in the regular rate. The Court determined that holiday incentive pay is also a "shift differential," which must be included in the regular rate.

This decision marks a significant difference between the FLSA and Colorado law when it comes to calculating overtime, and it could have major ramifications for Colorado employers offering similar types of shift differential or incentive payments to hourly employees. Based on this decision, employers should review their payroll policies to ensure they are properly calculating overtime for non-exempt Colorado employees.

Given that the *Hamilton* decision is an interpretation of existing law, it is conceivable that current and former employees could bring claims for unpaid overtime. If you have any questions about this ruling or how to comply with Colorado's wage and hour laws, please contact the authors or any member of Frost Brown Todd's [Labor and Employment Practice Group](#).

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