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'Spiffs' don't count when establishing overtime exemption

Employees who earn more than one and one-half times the minimum wage, and for whom commissions constitute more than half of their compensation, are exempt from the Fair Labor Standards Act (FLSA) overtime payment requirement.

That sounds simple enough until you try to figure out what to count as “commission.”

If you have an incentive system in which employees who sell a particular item get an additional set payment—commonly called a “spiff”—on top of other payments for selling the item, you can't count the spiff as part of the commission. An example of a spiff is an extra $5 payment for each table sold.

If the other commissions don’t amount to more than half of the employee’s compensation, you’ll owe overtime for any hours the employee works over 40 in any given workweek.

Recent case: Several salespersons for Liberty Medical Supply sued over alleged FLSA violations. The company had classified them as exempt commissioned salespersons, and they received no overtime pay.

At the heart of the dispute was whether the company could add a flat-fee, per-item incentive—or spiff—to the commission payments to hit the 50% or greater commission requirement. The firm added a $3 spiff it paid for every glucose meter sold.

The court concluded spiffs were not commissions. When the spiffs were not added, the employees fell below the 50% threshold and were eligible for overtime because they were incorrectly classified as exempt employees. (*Ealy-Simon, et al., v. Liberty Medical Supply*, No. 05-14059, SD FL, 2007)

Final note: Structuring commissioned sales-compensation plans is not for the faint of heart. Always get expert guidance.

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