

Regular Rate of Pay: Avoiding Common Mistakes in Calculating Overtime Pay in California

By Greg Labate, Samantha Hardy, and Ralph Flick

As an independent escrow owner, you likely have some or all of your staff on a salary plus a per-file bonus or other similar performance-based bonus structure. In most cases, these employees are non-exempt, which means that you are required to pay them overtime regardless of how generous your per-file bonus might be.¹

Even if you have adopted a policy to pay overtime and have taken the time to correctly classify all of your employees, you can still run into problems when trying to determine how to pay overtime properly. Often times, you cannot just multiply their hourly or salaried rate by one-and-a-half. Why? Per-file bonuses and certain other payments to employees must be included in their "regular rate of pay" used to calculate overtime.

Overtime in California. In California, non-exempt employees are generally required to be paid regular overtime for all time worked in excess of 8 hours in any one workday and for any hours worked in excess of 40 hours in a one workweek. Even if an employee works less than 40 hours in any workweek, he still must be paid overtime for any workdays during which he works more than 8 hours. You also have to pay overtime for the first 8 hours on the 7th consecutive workday, and double time for hours over 12 on any workday or over 8 on the 7th consecutive workday.

The Regular Rate of Pay. Overtime is based upon an employee's "regular rate of pay." Mistakes are commonly made because the regular rate of pay is not simply an employee's hourly wage. "The regular rate at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee." See Division of Labor Standards Enforcement - Enforcement Policies and Interpretations Manual, Section 49.1.2.

Calculating the Regular Rate of Pay. In order to calculate an employee's regular rate of pay, you must include all remuneration received by that employee during the workweek, as set forth below.

First, you must properly classify the various forms of payments that you make to your employees as either included in, or excluded from, "remuneration." Remuneration includes all forms of pay unless an exception applies. Included in remuneration are commissions, non-discretionary bonuses, non-cash items (e.g., meals, lodging or per diem), and retroactive pay increases. Excluded from remuneration are payments not for hours worked (e.g., vacation, sick, holiday, expense reimbursement, jury duty), discretionary gifts, and special occasion payments.

Next, you are required to calculate the regular rate of pay for each workweek. The regular rate of pay may be different for each workweek depending on the number of hours worked and the amount of remuneration received during that week.

Finally, you are required to make the calculations on an hourly basis, even if the employee is salaried.

¹ Exempt/non-exempt classification is beyond the scope of this article. Please confer with your labor counsel if you have any questions about whether a particular employee is exempt or non-exempt.

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An Example. Let's assume that you employ an escrow officer who is paid a salary of \$5,000.00 per month, plus a per-file bonus of \$100 per file, payable upon the closing of an escrow. For the last workweek in June, your escrow officer worked 46 hours and closed 10 escrows. Here is how to calculate the overtime payment:

1.	Weekly Salary. Multiply monthly salary by 12 (months) and divide by 52 (weeks): $\$5,000.00 \times 12 = \$60,000.00 \div 52 =$	\$1,153.84
2.	Straight Time Rate. Divide weekly salary by maximum 40-hour workweek (regardless of how many hours actually worked): $\$1,153.84 \div 40 = \28.84	\$28.84
3.	Total Commission. 10 files at \$100.00 per file = \$1,000.00	\$1,000.00
4.	Weekly Straight Pay. Straight time worked times straight time rate: $46 \times \$28.84 = \$1,326.64$.	\$1,326.64
5.	Total Remuneration. Weekly straight pay plus total commission (and any other compensation): $\$1,326.64 + \$1,000.00 = \$2,326.64$.	\$2,326.64
6.	Regular Rate of Pay. Total Remuneration divided by total hours worked: $\$2,326.64 \div 46 = \50.57	\$50.57
7.	Overtime. One-half of the regular rate of pay times the overtime hours worked (you only pay one-half of the regular rate because it is assumed that you already paid straight time for all of the hours worked): $\$50.57 \times 0.5 \times 6 = \151.71	\$151.71
8.	Total Pay. Total Remuneration plus overtime: $\$2,326.64 + \$151.71 = \$2,478.35$.	\$2,478.35

Accordingly, your escrow officer should receive gross pay of \$2,478.35. If you were to just pay time-and-a-half for 6 hours ($6 \times \$28.84 \times 1.5 = \259.56) plus weekly salary (\$1,153.84) plus commission

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(\$1,000), you would have paid \$2,413.40. Thus, you would have underpaid by \$64.95 that week. While that does not seem like a big difference, it does add up. Multiply that by 52 weeks, then add employee taxes, penalties, interest, attorney's fees, and then multiply all of that by the number of employees you have over a four-year period, and you could face significant liability.

Conclusion. If you have already classified employees correctly and are required to pay overtime, make sure that you are calculating your overtime rate correctly or you will still be at risk. Plaintiff's attorneys who specialize in wage & hour class actions are focusing on the real estate and mortgage related industries right now. You should make sure to protect yourself and your company by calculating overtime properly to make yourself less of a lawsuit target. Consult with your labor counsel if you have any questions.

Disclaimer. This article was published for informational purposes only and does not constitute legal advice. Employers should always consult with counsel prior to implementing any labor practices or policies, including those described in this article.

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