

FLSA: Inclusion of Non-Discretionary Bonuses and Incentive Payments

How do you factor in the bonus to determine if the minimum salary has been met?

A. You can use the entire bonus amount (\$1,000) to meet the minimum salary provided that, at the end of the year, the amount of bonus used does not exceed 10% of the total compensation paid to the employee

B. You can use 10% of the \$1,000 bonus to satisfy the salary requirement, which is \$100. This amount (\$100) is then divided by 13 (the number of weeks in the quarter) – resulting in \$7.69. That amount (\$7.69) is then added to the employee’s weekly salary (\$866) – resulting in a weekly salary of \$873.69. This employee’s salary does not meet the minimum salary requirement of \$913 per week.

C. You would add the weekly salary of the 13 weeks in the quarter, to the 10% of the \$1,000 bonus and divide by 4 quarters to see if employees are on track to meet the annual equivalent of \$913 per week. If you give a “holiday” bonus at the end of the year, you can make-up any shortfalls.

D. The bonus can be used to satisfy up to 10% of the minimum salary requirement of \$913 per week, which would be \$91.30. Since the weekly salary is short by \$47, which is within 10% of the minimum salary requirement, \$47 of the bonus can be used to meet standard salary level.



The correct answer is D:

Explanation

With new salary exemption criteria going into effect on December 1, 2016, employers will be—for the first time—allowed to use non-discretionary bonuses to meet the minimum salary requirement of \$913 per week on a salary or fee basis.

According to the Department of Labor, for employees that meet all other exemption criteria, the standard salary level will be satisfied if:

- a) at least 90 percent of the minimum salary requirement (approximately \$822 per week) is received on a salary or fee basis and
- b) at least 10 percent of the standard salary level (approximately \$92 per week) is earned in non-discretionary bonuses or incentive payments (including commissions) -- provided that such payments are paid on a quarterly or more frequent basis.

Employers can establish their own quarterly (13 week) period, which would be considered a quarter, based on a “year” designated by the employer (i.e., calendar year, fiscal year, or any other consecutive 12-month period).

NOTE: It is important to remember that if the employee does not meet the salary level test at the end of the quarter, then the employee is nonexempt for that quarter and must receive overtime

pay for all overtime hours worked. In addition, any state requirements for nonexempt employees (like providing meal periods and rest periods) must be met.

Therefore, if an employer is planning to rely on the bonus to satisfy the remainder of the salary requirement, it is recommended that the employer plan for the contingency of the employee **not** earning the nondiscretionary bonus (e.g. the employee does not perform as expected).

This means that the employer should keep time records for that employee and ensure that all state requirements are met. That way, if the employee doesn't meet the salary requirement, the employer has the necessary information to pay the employee any unpaid overtime wages.

What is a nondiscretionary bonus?

A nondiscretionary bonus is one where the employer predetermines the specific criteria that is required to receive a bonus. Employees expect to earn the bonus if they meet the criteria.

Nondiscretionary bonuses include incentive payments that paid to employees for meeting a stated company goal/standard -- such as meeting production standards, attendance goals, or achieving other set company goals.

Nondiscretionary bonuses are designed to induce employees to work more efficiently or give the employees an incentive to remain with the company.

Conversely, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards.

Discretionary bonuses cannot be used to meet the minimum salary requirement.