

First Circuit Holds that Variable “Per Diem” Payments May be Part of an Employee’s Regular Rate of Pay for Calculating Overtime

Written by Allison Anderson

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On April 18, 2014, the U.S. Court of Appeals for the First Circuit held in *Newman v. Advanced Technology Innovation Corp.*, that a per diem payment that is based on the number of hours worked by an employee must be considered part of the regular rate of pay for calculating overtime. In *Newman*, two former employees claimed they were owed additional overtime pay under the Fair Labor Standards Act (FLSA), because their employer failed to include per diem payments when calculating their regular rate of pay. The per diem payments were intended to reimburse the employees for travel expenses incurred, and the employer had a practice of reducing the per diem payment depending on the number of hours worked by the employee. The district court for Massachusetts granted summary judgment for the defendant, explaining that per diems generally are excluded from the calculation of an employee’s regular rate for overtime purposes.

On appeal, the First Circuit reversed and ordered that judgment be granted in favor of the plaintiffs. Although the FLSA states that an employee’s regular rate of pay does not include, “reasonable payments for traveling expenses” incurred by employees, the Department of Labor had taken the position in a handbook that a per diem payment is part of the regular rate of pay when it is calculated based on hours worked. The First Circuit accepted this position, and because the employer had adjusted the per diem payments based on hours worked, the Court concluded that the per diems should have been included in the plaintiffs’ regular rate of pay for overtime purposes.

The decision in *Newman* is a reminder that in order to properly treat a per diem as a non-wage, the method of calculating the per diem should not be based on hours worked. A per diem can be partially discounted and still not be considered a wage, but the discount must not be hours-based. The *Newman* decision also warns that courts will “pierce the labels parties affix to the payments” and consider the realities of how employees are being compensated. To be safe, employers should carefully examine how their per diem policies are written and enforced in order to ensure that they do not incur unanticipated overtime liability

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