

Employment Law Newsletter

November 2014

Overtime, bonuses and commission should be included in holiday pay, rules EAT

On 4th November 2014, the Employment Appeals Tribunal ruled that UK law should be changed so that organisations will now have to include regular non-guaranteed overtime payments when calculating holiday pay. Currently, only a worker's basic pay counts towards this calculation.

Who does this affect?

According to government estimates, around one sixth of the 30.8 million workers in the UK receive some form of overtime. This means that around 5 million workers could be entitled to more holiday pay.

What are the implications for your business?

It is difficult at this stage to predict what impact this decision will have since the decision seems likely to be appealed. It is however unlikely that the principle of overtime being included in holiday pay will be overturned and Howard Beckett, Unite executive director for legal, membership and affiliated services has said "Up until now some workers who are required to do overtime have been penalised for taking the time off they are entitled to. This ruling not only secures justice for our members who were short changed but means employers have got to get their house in order."

Backdated claims?

Concerns exist that employees will be able to make retrospective claims dating back as far as 1998 (or to when their employment started) when the Working Time Directive was implemented in the UK. The current decision permits claims to be backdated for no more than three months after the last incorrect payment though there is no guarantee that this will withstand the appeal. Alternatively if three months have already passed and they are too late to bring a claim through an Employment Tribunal, workers may bring a claim through the civil courts where they may be able to claim backdated pay for the last 6 years.

What should employers do?

Some large businesses have already paid out millions of pounds in anticipation of this decision. Options do exist:

1. Employers can calculate how much backdated pay their employees would be owed if the appeals are rejected and settle claims now. This will give employers certainty and may boost workplace morale though will obviously involve a cost to employers.
2. Employers could elect not to make backdated payments but include overtime, commission and bonuses in holiday pay calculations going forward in the hope that employees do not bring claims within the prescribed 3 month period and will subsequently be out of time to do so. This provides certainty but does not oust the workers' option of bringing a claim in the civil courts.

3. It seems likely that employers will attempt to reduce the amount of commission, bonuses and overtime given to employees but this cannot be done without their employees' consent or else employers risk claims for constructive dismissal. Specialist advice should be sought on this before any attempts are made.

Conclusion

After the ruling, Business Secretary Vince Cable said he would be setting up a task force to assess the impact of the ruling but business leaders have been more outspoken; "This is a real blow to UK businesses now facing the prospect of punitive costs potentially running into billions of pounds - and not all will survive, which could mean significant job losses" said CBI director general John Cridland.

Not all solutions will be appropriate for all businesses and it is important to take specialist advice tailored to your individual business needs. Please contact Leanne Thomas on 01792 656521 or via email lt@djm.law.co.uk for a further discussion.



For more information on the variety of Employment Services
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