Payment of Non-Exempt Commissioned Employees Can Be Complicated (Part 1 of 2)

02/09/26

Employers often are confused by how to pay a non-exempt employee when their compensation includes commissions. A non-exempt employee is one who must be paid a minimum hourly wage and overtime rate consistent with the regulations of the federal Fair Labor Standards Act and any state wage and hour laws.

Pursuant to New Jersey's Wage Payment Law ("NJWPL"), commissions are considered wages. A 2025 case, Musker v. Suuchi, Inc., decided by New Jersey's Supreme Court confirmed this issue. Because commissions are considered wages, New Jersey employers must adhere to the NJWPL's requirements as to when and how wages should be paid and which deductions can be taken from employee commissions.

Steps to Ensure Correct Compensation of Non-Exempt Commissioned Employees

Generally, non-exempt employees must be paid overtime (i.e. one and one half times a worker's hourly rate for any hours worked over 40 hours in a defined workweek). However, some industries that employ commissioned non-exempt workers are not required to pay overtime. For example, retail and service businesses are exempt in certain circumstances. Employers should check to determine if they meet the legal circumstances for exemption.

The key to determining how to pay non-exempt commissioned employees is to determine the number of hours that each employee works each workweek. These employees may work at home or outside of regular business hours, including completing sales orders and reports or other sales-related tasks. Because they often work beyond 40 hours each week, if not paid correctly, an employer may risk potential significant financial liability. In New Jersey this is a particular danger because the State's Wage Theft Act provides for treble damages if an employee is not correctly paid overtime.

Examples of How To Correctly Calculate Compensation of Non-Exempt Commissioned Employees

- Employee A: A Non-Exempt Employee Paid Only on a Commissioned Basis

Determine the employee's regular rate of pay by dividing the amount of commission earned by the employee in each week by the number of hours the employee worked during that week. For example, Employee A earned $2000 in commissions and worked 50 hours during Week One. Employee A's regular rate of pay is $40 per hour. Employee A must be paid 40 hours of pay at her regular rate of $40 per hour ($1600) plus 10 hours of pay at 1.5 times her regular rate of pay ($40 x 1.5 = $60 per hour) ($60 x 10 hours =$600). Therefore, Employee A is paid $1600 plus $600. This totals $2200 in compensation for Week One. Thus, even though the employee only earned $2000 in commission pay, the Employer is obligated to pay the employee $2200.

- Employee B: A Non-Exempt Employee Paid A Mix of Commissions And Hourly Rate of Pay

Employee B also worked 50 hours during Week One and earned $2000. However, Employee B was paid $1500 in hourly wages and $500 in commission for Week One. To determine Employee B's regular rate of pay, use the same formula as used with Employee A: divide the total amount of pay earned by Employee B ($2000) by the number of hours the employee worked during that week (50). Employee B's regular rate during Week

One is $40 per hour. However, Employee B's total compensation for the week is calculated by his total earnings (including hourly pay and commission) plus 10 hours at one-half of his regular rate of pay. So, $2000 + 10 hours at $20 per hour, or $2000 plus $200 ($2200).

- Employee C: A Non-Exempt Employee Paid Hourly Wages and Commissions Where Overtime Is Miscalculated

Employee C worked 50 hours for $15 per hour and received a 5% commission on sales ($100) during Week One. Employee C is paid for 50 hours of work at $15 per hour or $750 plus his commission or $100 or $850. However, his employer did not correctly calculate Employee C's regular rate (which includes his commissions) when determining his pay. The hourly rate should have been calculated by dividing $850 by 50 hours, or $17 dollars per hour for 50 hours ($850). Overtime should have been calculated separately. So, Employee C should have been paid $850 plus an additional 10 hours at $8.50 per hour (.5%) or $85.00 for a total of $935 for Week One.

- Employee D: A Non-Exempt Employee Paid Commissions Plus Salary Where the Employer Intends the Salary to Cover More Than 40 Hours Per Week

In the scenario when the employer pays a non-exempt employee commissions and salary and the employer intends the salary to cover more than 40 hours of work per week, compensation is calculated differently. Employee D is paid $2000 per week, which is intended to compensate her for 50 hours of work. Her hourly rate is calculated by dividing $2000 by 50, or $40 per hour. She also earned $500 of commissions during Week One. Her employer should pay her base salary ($2000) plus her commissions ($500) ($2500 total) plus 10 hours at one-half her regular rate of pay (10 x $20 or $200). Employee D's total compensation is $2700 for Week One.

Although this may be tricky with commissioned employees, employers must always check to ensure that their employees are receiving minimum wage and time and one-half for overtime for each week that they work over 40 hours. Part 2 of this blog series will address how to properly compensate exempt employees whose pay includes commissions.

If you are an employer who needs assistance regarding the regulations or calculations for a non-exempt commissioned employee, the New Jersey Wage Payment Law or any other employment law, please contact Stephanie Gironda or any member of the Wilentz Employment Law Team

Attorney

- Stephanie D. Gironda

Practice

- Employment Law