A NEW TWIST ON OVERTIME: IT APPLIES TO RETROACTIVE ONE-TIME PAYMENTS, EVEN IF THE PARTIES AGREE OTHERWISE

By Karen Sutherland

LEGAL BACKGROUND:

A recent Washington Court of Appeals decision surprised both of the parties to an agreement by ignoring the parties' intent and awarding overtime to employees for a one-time incentive payment. Although the decision was rendered in the context of a collective bargaining case, it applies to any employer who decides to give employees a retroactive raise or any kind of retroactive payment based on hours worked.

The decision is called Hisle v. Todd Pacific Shipyards. The unionized employees at Todd were represented by the PSMTC. After the expiration of the 1993 collective bargaining agreement ("CBA"), Todd and the PSMTC reached a tentative agreement on a new CBA, but the union members rejected it in a ratification vote. After months of negotiations, another proposal was tentatively agreed to between the PSMTC and Todd, but the union members rejected that proposal as well. A third proposal was agreed upon between Todd and the PSMTC that provided for a wage and fringe benefit increase of $0.60 per hour, effective upon ratification, and a one-time retroactive payment of $0.60 for each attendance hour from August 1, 1996 until the execution date of the contract. There are some key points about the one-time payment:

- This one-time payment applied to all non-Washington State Ferry employees who were actively employed on the execution date of the contract or had seniority rights as of the execution date of the contract.

- The parties agreed that "attendance hours" meant actual hours worked in the shipyard.

- Both parties agreed that the one-time retroactive payment was intended to serve as a contract ratification inducement.

- Both parties agreed that overtime hours would be paid at the same rate as regular hours because the payment was intended as a ratification inducement that happened to be measured by hours worked, not retroactive additional compensation for hours worked.

The union members failed to ratify this proposal. The parties then went to arbitration, and the arbitrator adopted the proposal.

Todd paid the one-time ratification inducement to the union members on December 10, 1997. Todd did not pay time and a half to the employees who had worked overtime during the retroactive period, but instead paid all hours worked at $0.60 per hour. Subsequently, about 200 union members sued the union for breach of the duty of fair representation. After that lawsuit was settled, several employees brought suit against Todd claiming that they and 877 unionized workers were owed overtime on the one-time $0.60 per hour contract ratification inducement payment.

The court of appeals held that the parties' agreement that overtime did not apply to the $0.60 per hour one-time payment was immaterial because the wage statute is a "nonnegotiable statutory right." The court held that strong policy considerations favor treating contract ratification incentives that are tied to the number of hours worked as compensation for hours worked. As the court noted, "This is especially true in Washington, which has a 'long and proud history of being a pioneer in the protection of employee rights.'"

PRACTICAL GUIDELINES

- Be aware that some rights are non-negotiable, including overtime, minimum wage, equal pay, discrimination and harassment, among others.

- Do not tie an incentive for executing a contract to the employee's hours worked.

- If you must tie an incentive for executing a contract to the number of hours (or, for that matter, weeks or months) worked, then be aware that overtime will be owed to employees who worked more than 40 hours per week, and adjust the amount you offer accordingly (this assumes that there are no statutory exceptions to the 40-hour workweek rule that apply to your employees, *e.g.,* that they are nonexempt).

- If you give employees a raise that is retroactive, then you will need to pay them overtime for hours worked over 40 during the period covered by the raise (this assumes that there are no statutory exceptions to the 40-hour workweek rule that apply to your employees, *e.g.,* that they are nonexempt).

The above suggestions are broad, general comments only, and are not legal advice. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C. Karen Sutherland can be reached at (206) 447-7000 or by e-mail at ksutherland@omwlaw.com.