OVERTIME APPLIES TO RETROACTIVE ONE-TIME PAYMENTS, EVEN IF THE PARTIES AGREE OTHERWISE
By Karen Sutherland

A 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.'"

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at ksutherland@omwlaw.com