

## Payroll Based Journal: Legal Answers to PBJ Questions

CMS recently updated their position about including all hours worked by exempt employees when the nursing center pays the employee a reasonable “bonus” and can verify that payment was made. Read what we learned when we checked with our consultants at Jackson Lewis P.C. to ensure this was appropriate and within the Fair Labor Standards Act (FLSA).

**Question:** Is the following acceptable/legal from an FLSA perspective?

CMS states: Facilities must submit the number of hours each staff member (including agency and contract staff) is paid to deliver services for each day worked. Do not count hours paid for any type of leave or non-work related absence from the facility or for any unpaid time worked. For example, if a salaried employee works 10 hours but is only paid for 8 hours, only 8 hours should be reported. *If a facility is paying a salaried employee a bonus for additional hours worked, those hours may be reported under the following conditions: The payment must be directly correlated to the hours worked and must be distinguishable from other payments. (e.g., cannot be a performance-based or holiday bonus). Additionally, the bonus payment just be reasonable for compensation for the services provided. (from Electronic Staffing Data Submission Payroll-Based Journal: Long-Term Care Facility Policy Manual)*

**Answer from Jackson Lewis P.C.:** Yes, the *italicized* provision is consistent with the fair labor standards act. If an exempt employee is paid on a salary basis, in an amount over the required federal and state thresholds, then the employee can earn amounts over the salary basis, and not destroy the exempt status. This concept is discussed by the United States Department of Labor in its regulations at 29 CFR 541.604(a). The regulation states that an employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirements, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis. Thus, an exempt employee guaranteed at least \$913 each week paid on a salary basis may also receive a bonus in addition to the salary, even if the bonus is hours-based. The receipt of this bonus will not, by itself, adversely impact the overtime exempt status of the individual. The provision [from CMS] requires employers paying bonuses to tie said bonuses to the amount of hours worked and to distinguish it from the receipt of other payments. They are also requiring the bonus to be in a reasonable amount, considering the services provided. These provisions should not adversely impact the exempt status of a salaried employee.

**Question:** Since CMS is only interested in collected hours paid for salaried employees, is that all I have to track?

**Answer from Jackson Lewis P.C.:** One provision of PBJ states that in reporting hours to CMS, a salaried employee should report his/her hours paid, as opposed to actual hours worked. This is perfectly fine from a CMS administrative perspective. However, for FLSA purposes, all overtime eligible employees must record their actual hours worked, and be paid for hours worked as opposed to hours scheduled. Although there is no requirement to record the hours worked for a salaried, exempt employee, should there be a classification issue at a later date, an employer should have an accurate record of all hours worked, and not just hours paid for. Further, an RN is exempt only if paid on a salary or fee basis. If an RN is paid on an hourly basis, then the RN will be overtime eligible. (AHCA Note: Accurately recording all hours worked would be considered a best practice.)