

Does Paying Your Employees A Bonus Increase Your Overtime Liability?

'Tis the season for the payment of bonuses, which come in all shapes and sizes. Some bonuses are awarded for good attendance, productivity, or safety. Others are paid at year-end based upon individual performance and company performance. Still others are given as an act of good will to all employees without regard to performance, such as a "Christmas bonus."

Unless employees are exempt based upon their duties and compensation, they are entitled to be paid overtime, which is defined as one-and-a-half times their "regular rate" for hours worked over 40 in a work week. Calculation of the "regular rate" is usually not complicated. You take the employee's total compensation for the week and divide it by all hours worked in that week to get the employee's "regular rate." This is the rate upon which overtime (i.e. time-and-a-half) is calculated.

But what if an employee works more than 40 hours during the week in which he receives a bonus? Must the bonus be included in the calculation of the regular rate? In other words, must the bonus be included in the employee's total compensation for the week into which his hours worked for the week are divided to come up with the regular rate? Including the bonus will obviously cause the overtime rate to be higher.

The general rule is that discretionary bonuses do not have to be included in the regular rate calculation. Non-discretionary bonuses must be included. A discretionary bonus is one that is determined at the sole discretion of the employer and not pursuant to a contract, agreement, or promise that would cause the employee to expect such payments regularly.

Applying this definition, attendance, production, quality, and other work-incentive bonuses are non-discretionary and must be included in the regular rate. Likewise, a bonus that is calculated based upon a formula that takes into account both the employee's and the company's performance would also be included in the regular rate. In contrast, bonuses awarded for service with the employer that are not measured by, or dependent on, hours worked, production, or efficiency, need not be included in the regular rate. Therefore, the typical "Christmas bonus" is not included in the regular rate.

The determination of whether a bonus is discretionary or not is not always clear. Often

(continued on page 2)

times, bonus programs have some elements of both. If you have a question concerning the proper treatment of your bonus payments, it would be wise to consult with counsel to be sure that employees are paid correctly.

By Trip Umbach

Medical Peer Review Privilege Will No Longer Apply in Federal Discrimination Cases

The Eleventh Circuit Court of Appeals recently, held in Adkins v. Christie, 488 F.3d 1324 (11th Cir. 2007), that the medical staff review privilege cannot be invoked in federal discrimination suits. While all fifty states and the District of Columbia recognize medical peer review confidentiality, the Adkins decision demonstrates a growing trend in the federal courts to curtail the privilege in civil rights cases.

The medical peer review privilege was developed to protect from disclosure and discovery any records containing reviews of medical professionals by their peers. While recognizing that the privilege seeks to enable candid and forthright discussions regarding oversight of physician performance, Judge Charles R. Wilson went on to note that “the privilege must be considered against a corresponding and overriding goal – the discovery of evidence essential to determining whether there has been discrimination in employment.” In essence, the Court determined that the interest in eliminating employment discrimination outweighed the confidentiality concerns that arise from the disclosure of peer review records.

Discovery Demands in Federal Discrimination Suits

The Adkins case arose when an African-American urologist, Dr. Russell E. Adkins, filed suit against Houston Medical Center (“HMC”), located in Warner-Robins, Georgia, and several HMC physicians, alleging that he had been racially discriminated against in the course of the hospital’s peer review and disciplinary process. The peer review process eventually led to Dr. Adkins’ suspension and subsequent termination of his medical staff membership and privileges at HMC due to alleged problems in patient care.

Dr. Adkins claimed that his suspension and termination were racially motivated and filed a civil rights lawsuit. During discovery, Dr. Adkins sought the production of the medical peer review information of all physicians at the hospital during the seven years he was employed. HMC refused to comply with the discovery request and moved for a protective order on the grounds that the information sought was protected under Georgia’s state law privilege. Georgia’s peer review privilege statute, which is similar to Alabama’s privilege statute, Ala. Code § 22-21-8, provides that “the proceedings and records of medical review committees shall not be subject to discovery or introduction into evidence in any civil action against a provider of health services arising out of the matters which are the subject of evaluation and review by such committee.” O.C.G.A. § 31-7-143.

(Continued on page 3)

After limiting the scope of discovery and allowing an *in camera* review of a portion of the documents requested, the trial court found no evidence of racial discrimination. Consequently, Dr. Adkins appealed, arguing that the trial court improperly recognized the state peer review privilege and thereby incorrectly limited the scope of his discovery request.

Eradicating Discrimination Trumps Confidentiality

On appeal to the Eleventh Circuit, Dr. Adkins' primary contention was that federal law should acknowledge the limited application of the medical peer review privilege in discrimination cases. In reaching its decision, the Adkins court recognized the inherent tension between the public good served by the privilege's cloak of confidentiality and a citizen's interest in determining whether there has been discrimination in employment. Ultimately, however, the Eleventh Circuit concluded that the necessity for the discovery of evidence of employment discrimination outweighed the benefits of a strictly confidential medical peer review process. Because Adkins presented a claim of race discrimination within the peer review process itself, the Court found that "the only way that Adkins can demonstrate the existence of disparate treatment in his case...is to compare his peer review with the peer review files of other physicians at" the hospital. As such, the Eleventh Circuit reversed the trial court and held that Dr. Adkins should be allowed full access to the peer review records in order to maintain his federal discrimination claim.

The Adkins court is not alone in its elevation of federal civil rights over state peer review confidentiality. Both the Seventh and the Fourth Circuits have previously rejected the application of the peer review privilege in certain federal cases. In Memorial Hospital v. Shadur, 664 F.2d 1058 (7th Cir. 1981) (per curiam), the court disregarded the privilege so that a plaintiff could support his federal antitrust claim, and in Virmani v. Novant Health, Inc., 259 F.3d 284 (4th Cir. 2001), the court refused to apply the medical peer review privilege in an employment discrimination case.

Potential Effect of Adkins on Alabama Healthcare Providers

It is critical to note that, thus far, the peer review privilege is preserved in medical malpractice suits and other lawsuits brought under state law, both in Alabama and elsewhere. However, Adkins highlights the need for hospitals, medical professionals, and health care human resource managers to be cognizant of the limited usefulness of the peer review privilege in federal courts. Though the Eleventh Circuit's ruling focused on federal civil rights claims, the application of the Adkins opinion could be expanded into other litigation, such as federal antitrust actions.

As such, Alabama healthcare providers and administrators should recognize that sensitive peer review information is now significantly more vulnerable to discovery and dissemination. The erosion of the peer review privilege in the employment discrimination arena is likely to foster a greater reluctance in physician participation during the peer review process. An increased fear among physicians of inadvertently becoming a witness in a medical malpractice action against their peers or suffering economic reprisal in the form of limited referrals from the reviewed physician are just a few of the potential ramifications stemming from the Adkins decision.

(Continued on page 4)

How Can You Protect Against Peer Review Document Disclosure?

Despite the fact that the door has been opened for the discoverability of peer review records in federal discrimination cases, Alabama healthcare providers still have protective procedures at their disposal to prevent unnecessary breaches of peer confidentiality. The Eleventh Circuit itself noted in Adkins that “district courts are well-equipped with a variety of mechanisms to ensure that peer review materials, once furnished through discovery, are not compromised by wayward hands.”

For instance, healthcare providers concerned about the circulation of peer review materials can seek, prior to producing the documents to the plaintiff, an *in camera* inspection by the court rather than a general disclosure. Additionally, providers should seek redaction of any confidential information in the peer review files that is not essential to the underlying employment discrimination suit. Obtaining a protective order to prevent the plaintiff from sharing the peer review information with third parties or using the information outside of the boundaries of the instant federal litigation is also an effective tool to protect confidential evaluations and discussions. This option should curb the potential for the information to be utilized in other lawsuits.

Healthcare providers and human resource managers are advised not only to be aware of the availability of these defensive mechanisms, but also to actively petition the court for their use when applicable. Plaintiffs in employment discrimination litigation have historically had extensive access to confidential letters, documents, and evaluations as part of the discovery process; however, healthcare employers should be aware that this broad access has recently been extended to them as well. While the promise of absolute confidentiality can no longer be extended to peer review participants, awareness of the impact of the Adkins decision in Alabama will hopefully help prevent the further dilution of the medical staff peer review privilege.

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