



California Employment Law Alert

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No Good Deed Goes Unpunished: Employee Bonus Program Leads to Overtime Class Action

San Francisco U.S. District Judge Susan Illston denied summary judgment and granted class certification in a case where Office Depot failed to pay the named plaintiff \$0.23 in overtime compensation.¹ Judge Illston's decision opens the door for potentially large damages over what many would characterize as a few measly cents. Coming on the heels of recent employer victories in the California and U.S. Supreme Court, this case should chill employers to the bone and send a strong message that the wage and hour industry is ever evolving. Compliance with California's Labor Code and Wage Orders is essential even when the money at stake is a few cents.

The facts in the case appear relatively undisputed. Howard Provine, the plaintiff, worked at Office Depot for six months during 2010. The company offered a bonus program to award employees for superior work performance. Employees received "Bravo Cards" which were placed in a container, and then at the end of the month, were entered into a drawing for a chance to win a cash prize of \$50.00. During Mr. Provine's six months of employment, he received two \$50 awards. Office Depot did not account for the \$50 awards when it calculated earnings on 19 minutes of overtime he worked during his employment with the company for a total alleged loss of \$0.23 in unpaid overtime. Thus, since Office Depot did not pay him all wages owed at the time his employment ended, Provine contends Office Depot owes him waiting time penalties under California law. This claim totals between \$1,000 to \$2,000.

The primary legal arguments centered on whether the "Bravo Award" was a discretionary bonus. Bonuses are discretionary if "both the fact that payment is to be made and the amount of payment are determined at the sole discretion of the employer" and "not pursuant to any prior contract, agreement or promise." Understanding the distinction between discretionary and non-discretionary bonuses is crucial to employers because non-discretionary bonuses must be included when calculating the overtime rate of pay.

Office Depot argued that its Bravo Award is a discretionary bonus payment, and thus not factored into overtime calculations. Alternatively, the company argued that Provine's claims were barred because the amounts at stake were *de minimis*. These arguments were rejected when Judge Illston ruled that the Bravo bonuses are not discretionary under the California's Labor Code because the amount of payment (\$50) was fixed and known to all employees in advance of the drawing. The *de minimis* defense was also rejected when Judge Illston found that this defense is unavailable when applied to hourly employees. In addition to rejecting Office Depot's arguments on the merits, Judge Illston certified a class of California Office Depot employees who received Bravo Awards from 2008 to the present. Office Depot estimated that it distributed over 5,000 awards during that time frame.

¹ Howard David Provine, et al. v. Office Depot, Inc., United States District Court, Northern District of California Case No. C 11-00903 SI

It is too soon to know what actions, if any, Office Depot intends to take to challenge Judge Illston's rulings. However, even if overturned, the decision is a wake-up call to employers and a costly mistake for Office Depot. Office Depot has been punished dearly for its generosity towards its employees facing years of litigation over a purported failure to pay Provine less than \$0.25. Employers should expect that employees and their attorneys, especially with the anticipated decline in the amount of meal and rest break lawsuits, will feed on this trial court decision and use it as a guideline to file similar cases. Accordingly, we recommend that employers commence with the following:

- Understand the differences between discretionary and non-discretionary bonuses. Employers should also understand what other forms of compensation must be factored into the regular rate of pay when calculating overtime.
- Establish a payroll protocol to make certain that non-discretionary bonuses are taken into account when paying overtime by properly calculating the rate of pay and promptly paying.
- Consider auditing bonuses paid during the last four years to determine whether they were properly classified as discretionary or non-discretionary. If misclassified, determine whether employees are owed additional monies for overtime.
- Consult with an employment attorney to discuss your company's bonus programs and the results of your audits.

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