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Labor Relations Bulletin

FROM THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Per Diems Could Be More Costly Than You Think

- **Employers improperly classifying per diems could face millions in back pay and damages to their employees.**
- **Paying according to the Collective Bargaining Agreement does not always satisfy the law.**
- **Per diems and stipends must meet several criteria to be legitimate and not impact the employee's regular rate of pay per the Fair Labor Standards Act.**

On June 15, 2021, Engineering News-Record (ENR) reported, "In a consent judgment in a federal labor case, major specialty contractor *Henkels & McCoy Inc.* has paid about \$1.1 million in back pay and damages for allegedly not paying required overtime wages to 362 current and former workers in five states...". ENR continues with the reason for back pay and damages was determined by the Department of Labor (DOL) which, "alleges that the company disguised as 'per diems' and ... 'rental pay,' lump-sum payments that in reality had no relation to any work-related expenses and were therefore additional wages rather than reimbursements."

This is a very important and costly lesson for employers: **payments designated as stipends, reimbursements, or per diems must be legitimate, or they will be considered a taxable wage and part of the employee's regular rate of pay.**

Often in the construction industry, employees receive payments classified as per diems or stipends which would not be considered legitimate by the U.S. Internal Revenue Service (IRS) and Department of Labor and is therefore a wage. If the payment is considered a wage, the DOL says it must be included in the employee's regular rate of pay for overtime calculations. In [Fact Sheet #56A](#), the DOL specifically addresses this by stating:

When a payment is a wage supplement, even if not directly related to employee performance or hours worked, it is still compensation for "hours of employment" and must be included in the regular rate.

It should be noted in the case discussed by ENR, the penalties are independent of the collective bargaining agreement (CBA). Generally, the overtime provisions of collective bargaining agreements are more generous than the requirements of the Fair Labor Standards Act (FLSA) which says an employee must receive overtime pay of at least time and one-half the employee's regular rate of pay if the employee works more than 40 hours during a consecutive 168-hour (seven consecutive 24-hour periods) period. However, if the per diem or stipend being paid to employees is not legitimate, employers can find themselves in violation of the FLSA.

In general, employers may consider a per diem legitimate when:

- There is a business purpose.
- The amount is for reimbursement of lodging, meals, and incidentals.
- And is proven with a timely filed expense report that contains:
 - Date, time, place, amount, and business purpose of the expense
- The employee sleeps away from their home.
- The amount is not more than the amount allotted for the area into which the employee is travelling.
[Click here](#) to determine the amount for your area.

Labor Relations Bulletin / Per Diems Could Be More Costly Than You Think

This is not an all-inclusive list. Employers should consult with their accountant and/or competent legal counsel before determining the legitimacy of per diem payments to employees.

If a per diem or stipend is determined to not be legitimate, it could be very expensive for an employer. Here is an example seen very often in the construction industry in which an employer could be penalized for not correctly accounting for per diems or stipends paid to their employees:

Example:

Employee Jane Smith works for a signatory electrical contractor under a collective bargaining agreement with a rate of \$30 per hour and is also receiving \$100 of per diem for a job 30 miles from her home five days per week. Jane drives to the jobsite each day and returns home each evening. The employer is paying the per diem because the workforce is limited in the area, and this was a decision made to attract workers.

The CBA says Jane is to be compensated at time and one-half the CBA rate of pay for all hours after 8 hours in a day or 40 hours in a week.

Jane works 50 hours in one week, so according to the CBA, her pay that week should be:

$$(\$30 * 50 \text{ hours}) + (\$15 * 10 \text{ hours}) + (\$100 * 5) = \$2,150 \text{ gross pay for the week}$$

If the employer pays this, there is no violation of the CBA, but they are in violation of the FLSA. Here is how.

The FLSA defines regular rate of pay as: Total compensation in the workweek (except for statutory exclusions) / Total hours worked in the workweek.

While determining Jane's hourly rate from the CBA is easy, the regular rate according to the FLSA requires some additional math because the per diem is not legitimate (Jane is not staying overnight) and therefore, not a statutory exclusion from the regular rate of pay:

$$\frac{(\$30 * 50 \text{ hours}) + (\$100 * 5 \text{ days})}{\text{Total compensation in the workweek}} \div \frac{50 \text{ hours}}{\text{Total hours in the workweek}} = \text{\$40 per hour Regular Rate of Pay}$$

Factoring in the per diem payment, Jane's regular rate of pay is \$40 per hour (per the FLSA) when calculating overtime and must be used when calculating Jane's compensation. So, now we can determine what Jane should have received for the workweek:

$$(\$30 * 50 \text{ hours}) + (\$100 * 5 \text{ days}) + \frac{(\$40/2) * 10}{\text{Half the FLSA Regular Rate applied to hours in excess of 40}} = \$2,200 \text{ gross pay for the week}$$

According to the CBA, Jane's compensation is \$2,150 for the workweek; however, factoring in the amount being paid as a per diem, Jane should have been paid \$2,200 for the week. This accounts for \$50 difference between the amounts paid. This amount is not significant as it is only one employer for one week for a small amount of overtime. In today's job market, employers are working hundreds of employees with large amounts of overtime. Throw in per diems to attract workers to a long-term project, and another employer could find themselves in trouble with the Department of Labor if not calculating overtime properly.

If all conditions are not met, the per diem could be determined to be a wage, subject to taxes, and part of the employee's regular rate of pay. The employer should discuss their per diem payments with their accountant or competent legal counsel to determine legitimacy.

There are other factors which could reduce or increase the employer's liability in this type of situation such as the impact on gross payroll when considering fringe benefits owed pursuant to the collective bargaining agreement. Employers concerned with this issue, or any other, should contact their local NECA Chapter to gain more information.