

# One-Time Bonus and Pay for Volunteer Time Off Properly Excluded From Overtime Pay Calculation, Per Fourth Circuit

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## Article

06.24.2021

In 2020, non-exempt, hourly employees of Lowe's sued the home improvement retailer under the Fair Labor Standards Act (FLSA) for not including payment of a one-time bonus, and payment for time spent on charitable volunteer activities, in the "regular rate" used to calculate their overtime pay. The U.S. District Court for the Western District of North Carolina dismissed the suit. On June 17, 2021, the Fourth Circuit Court of Appeals affirmed dismissal, holding that the bonus and volunteer time pay were properly excluded from the calculation of overtime pay. *McPhee v. Lowe's Home Centers, LLC*. The Fourth Circuit has jurisdiction over federal courts in the Carolinas, Maryland, Virginia, and West Virginia.

The FLSA requires that employers compensate employees who work over 40 hours in a week at a rate of one and a half times their regular rate of pay. It provides that the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee," subject to several exceptions. The exceptions include:

- "[S]ums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency."
- "[P]ayments made for occasional periods when no work is performed."
- Discretionary bonuses; for a bonus to be discretionary, "the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid."

The Fourth Circuit concluded that the bonus at issue, which was paid on the occasion of passage of 2018 revisions to the federal tax code, was properly excluded from calculation of the regular rate as either a gift or a discretionary bonus. The court rejected the contention that the bonus was a nondiscretionary retention bonus.

The Fourth Circuit also concluded that pay for time spent volunteering in connection with the company's "Give Back Time" program was properly excluded because it was not pay for "work." The Give Back Time program provided eligible employees with paid leave to spend time volunteering with charitable organizations of their choice. The court gave three reasons for its conclusion:

1. The employees did not plead facts tending to show that "their volunteer work for third-party non-profits was for the primary benefit of Lowe's."
1. It was "undisputed that Lowe's did not require participation in the Give Back Time program and that those who decided to participate chose their own non-profit, determined the number of hours they would volunteer, and worked under the direction of the non-profit."
1. The employees "do not allege how Lowe's benefitted from the program, and in any event, the third-party non-profits were clearly the primary beneficiaries."

The Fourth Circuit cited a 2019 U.S. Department of Labor opinion letter that said "an employee's time spent participating in an employer's optional volunteer program ... does not count as hours worked under the FLSA, so long as [the employer] does not unduly pressure its employees to participate."

The Lowe's decision offers valuable guidance for employers in the Carolinas, Maryland, Virginia, and West Virginia seeking to set up a program to encourage employees to volunteer with charitable organizations:

- Do not directly or indirectly require or coerce employees to participate in the program;
- Do not control or direct the volunteer work; and
- Make sure the primary beneficiary of the work is the charitable organization, not the employer.

For additional insight on volunteer time off programs, see "Employee Volunteer Community Service: Compensable or Not?" Keep in mind that some states have wage and hour laws with different requirements from the FLSA.

If you have questions about this or other wage and hour issues, contact any member of the Nexsen Pruet Employment and Labor Law Group.