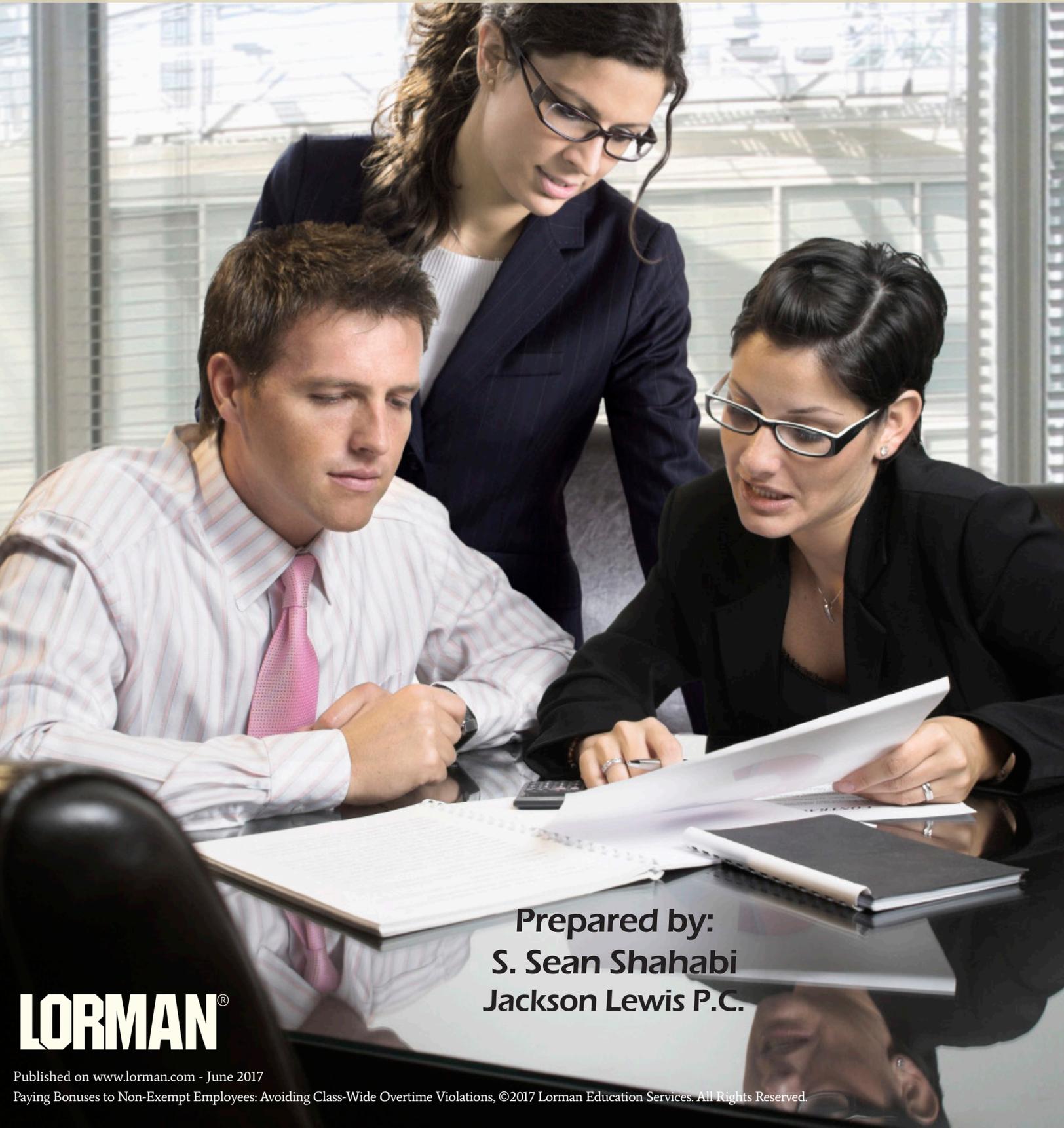


# **PAYING BONUSES TO NON-EXEMPT EMPLOYEES: Avoiding Class-Wide Overtime Violations**



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## **Paying Bonuses to Non-Exempt Employees: *Avoiding Class-Wide Overtime Violations***

*By Sean Shahabi – 2/20/17*

Employers generally recognize that their non-exempt employees must receive overtime premiums on their base pay – in most cases, their hourly wage – when they work overtime. However, not all employers are as well attuned to the requirement that overtime premiums may also be required on other, “supplemental” components of compensation to nonexempt employees. Bonuses are a common example.

By law, employers are required to pay overtime premiums on non-discretionary bonuses to non-exempt employees when those employees have worked overtime during the timeframe for which the bonus is paid (i.e., whether it is paid on a monthly, quarterly, annual, or other basis). The legal risks involved in violating overtime laws when it comes to non-discretionary bonuses is exacerbated by the fact that this violation is typically repeated as to other non-exempt employees who receive bonuses from the employer. As such, this is a type of violation that plaintiffs’ attorneys often look to bring on a class, collective, and/or representative basis.

However, as suggested by the reference above to “non-discretionary” bonuses, employers are not required to pay an overtime premium on all bonuses. Certain types of bonuses (and other “supplemental” forms of compensation) are excluded from the overtime premium requirement. Federal regulations, which California and other states

follow in making these determinations, provide that discretionary bonuses may be excluded. However, this exclusion is very limited. Moreover, like many things in the law, the line between a “discretionary” and a “non-discretionary” bonus is not always clear. Accordingly, employers face risks when they do not pay overtime premiums on bonuses on the premise that the bonus falls under the definition of a “discretionary” bonus. Amongst the guidance provided by federal regulations is that “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 sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement . . . If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it.” Conversely, “[a]ttendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee’s continuing in employment until the time payment is to be made and the like” fall in the “non-discretionary” category.

Employers who pay “holiday” or “end of the year” bonuses should also be cognizant of the potential requirement to pay overtime premiums on these payments. Federal regulations provide that “gifts made at Christmas time or on other special occasions, as a reward for service, the amount of which are not measured by or dependent on hours worked, production or efficiency” are excluded from overtime premium requirements. However, in a similar vein, if the amount of the gift, holiday or special occasion award is determined by hours worked, production, or efficiency, this exclusion is lost.

Ultimately, employers who pay bonuses and other forms of “supplemental” compensation to non-exempt employees should be cognizant of the potential requirement to pay overtime premiums on these payments and should consider seeking legal guidance in connection with their bonus programs. The need for proper guidance is especially important due to the class, collective, and/or representative action risks presented by violating this aspect of the law.

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