

# Amazon Holiday Pay Case Underscores Overtime Challenges

By **James Looby** (October 23, 2024)

In *Hamilton v. Amazon.com Services LLC*, decided on Sept. 9, the Colorado Supreme Court held that Colorado state law requires employers to include premium pay tied to hours worked on holidays when calculating a Colorado employee's regular rate of pay.

The *Hamilton* decision underscores why employers must always consult applicable state law and regulations — in addition to federal law — when determining how to properly pay employees who work more than 40 hours in a workweek.



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## Case Background

In *Hamilton*, the plaintiff filed suit against Amazon.com Services LLC in the U.S. District Court for the District of Colorado, alleging on behalf of himself and a class of Colorado employees that Amazon failed to pay employees overtime "at rate of one and one-half times the regular rate of pay," as required by Colorado law.[1]

Specifically, *Hamilton* claimed that Amazon's holiday incentive pay — which consisted of the employee's standard hourly pay rate plus a 50% premium amount per hour when the employee worked on designated holidays, such as Thanksgiving or Labor Day — was required to be included in his regular rate, and that Amazon violated the Colorado Wage Act by failing to do so.

Amazon denied the plaintiff's allegations.

The parties agreed that the Colorado Division of Labor was authorized to prescribe the "conditions and rules" governing overtime compensation, including what remuneration must be included in an employee's regular rate of pay.[2] The Division of Labor promulgated Rule 1.8.1 of the Code of Colorado Regulations, which during the relevant period provided:

The regular rate includes all compensation paid to an employee, including set hourly rates, shift differentials, minimum wage tip credits, non-discretionary bonuses, production bonuses, and commissions used for calculating hourly overtime rates for non-exempt employees. Business expenses, bona fide gifts, discretionary bonuses, employer investment contributions, vacation pay, holiday pay, sick leave, jury duty, or other pay for non-work hours may be excluded from regular rates.[3]

In contrast, the Fair Labor Standards Act, or FLSA, provides that an employee's regular rate includes "all remuneration for employment paid to, or on behalf of, the employee" except for the remuneration set forth in Section 207(e). Section 207(e)(6) expressly provides that employers may exclude from an employee's regular rate of pay:

[E]xtra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days.[4]

## **District Court Proceedings**

Amazon moved to dismiss the complaint on two grounds.

First, Amazon argued that its holiday incentive pay is a form of "holiday pay" under Rule 1.8.1 and properly excluded from the regular rate of pay under Colorado law.

Next, Amazon argued in the alternative that if the court determined that holiday incentive pay was not holiday pay under Rule 1.8.1, then Colorado law was silent on the issue, and the court should read into Colorado law the FLSA's additional exclusions in Section 207(e)(6).

Because there was no dispute that the holiday incentive pay fell within the confines of Section 207(e)(6) or that Amazon complied with the FLSA, Amazon argued the court should find Amazon did not violate Colorado law.

In response, Hamilton argued that the holiday incentive pay was a "shift differential" — not holiday pay — under Rule 1.8.1 because the holiday incentive pay was pay for undesirable hours worked, and the exclusions listed in the rule were only for nonwork hours.

Additionally, Hamilton noted that "Colorado law 'incorporates principles from the FLSA in some circumstances,'" so the lack of a specific reference in Rule 1.8.1 to premium pay tied to hours worked on holidays must have been intentional.[5] According to Hamilton, "[i]n most instances, Colorado Wage and Hour law provides rights that are greater than those provided by [federal law]," and this situation was no different.[6]

The district court sided with Amazon and dismissed the complaint.[7] The court rejected Amazon's argument that the holiday incentive pay was holiday pay under Rule 1.8.1.

However, the court ultimately agreed with Amazon that because Rule 1.8.1 did not specify whether premium pay for hours worked on holidays must be included in — or could be excluded from — the regular rate of pay, Amazon could comply with Colorado law by following the FLSA's additional exclusions in Section 207(e)(6).

Thus, the court held that Amazon complied with Colorado law when it complied with the FLSA.

## **Appellate Proceedings**

Hamilton appealed the dismissal to the U.S. Court of Appeals for the Tenth Circuit which, in turn, certified the following question to the Colorado Supreme Court:

Whether Colorado law includes or excludes holiday incentive pay from the calculation of "[r]egular rate of pay" under [Colorado Rules 1.8 and 1.8.1].[8]

The Colorado Supreme Court answered the question in favor of Hamilton, holding that Colorado law does not exclude premium pay for holiday hours worked from the calculation of an employee's regular rate of pay.[9]

The court's determination was based on three primary rulings.

First, the court held that Amazon's holiday incentive pay was a shift differential because it was additional pay for undesirable work hours, and Rule 1.8.1 expressly states that shift

differentials must be included in an employee's regular rate.

Next, the court agreed that the holiday incentive pay was inherently different from the exclusion examples set forth in Rule 1.8.1, which are tied to nonwork hours.

Third, the court disagreed with the district court's conclusion that Colorado law and the FLSA should be read in harmony.

Instead, the court held that Rule 1.8.1's lack of a reference to holiday premium pay tied to hours worked should be construed as an intentional decision by the Colorado Division of Labor not to include in Colorado law the FLSA's additional exclusions.

The Colorado Supreme Court sent the case back to the Tenth Circuit, which subsequently reversed the district court's order granting Amazon's motion to dismiss and remanded the case.[10]

### **Reminders for Employers Regarding Federal Law Compliance**

The Colorado Supreme Court's decision in Hamilton provides an important reminder to employers that "states are free to provide employees with benefits that exceed those set out in the FLSA." [11] That is particularly true when it comes to calculating overtime pay for workers.

Some states do not have their own minimum wage or overtime laws. Some states have laws closely tracking the FLSA. And as Hamilton illustrates, some states have laws departing from federal law in material respects, including with respect to how an employer must calculate an employee's regular rate of pay.

Accordingly, companies employing workers in multiple states must be careful when calculating the overtime pay owed to their employees in the same manner, regardless of location.

### **Types of Remuneration Excluded From a Regular Pay Rate Calculation**

An employee's regular rate typically includes all remuneration an employee receives except for amounts otherwise excluded by law. But the types of pay that may be excluded from the calculation often vary under federal and state law.

For instance, under certain circumstances, the FLSA allows employers to exclude premium compensation tied to (1) hours worked in excess of eight in a day or "in excess of the employee's normal ... or regular work hours" [12]; (2) hours worked on "Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek" [13]; and (3) certain hours worked "in pursuance of an applicable employment contract or collective-bargaining agreement." [14]

As Hamilton makes clear regarding Colorado law, however, federal and state law take different approaches with respect to premium pay for hours worked.

The Washington State Department of Labor and Industries has explained that payments tied to working hours may not be excluded from an employee's regular rate of pay under Washington law unless they are "overtime premiums." [15] Some states like Minnesota permit an employer to exclude premium pay tied to some hours worked, such as hours worked on holidays, but not others, such as hours worked in excess of eight in a day or

outside an employee's normal work hours.[16]

And still other states, such as Maryland, which expressly excludes any "[e]xtra compensation paid at a premium rate pursuant to a statutorily valid employer-employee agreement," have adopted unique exclusionary language regarding premium pay for hours worked that may be broadly — or narrowly — interpreted.[17]

Federal and state law likewise may differ as to the FLSA's requirement that any "value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under [Section 207(e)(1)-(7)]" must be included in the regular rate.[18] The FLSA permits such remuneration to be excluded, provided certain conditions are satisfied.[19] In contrast, a number of states' laws — such as those in Indiana, Pennsylvania and West Virginia — do not include such an express exclusion.[20]

State law may also take a position different from the FLSA regarding whether an employer may properly exclude certain bonus or commission payments,[21] and service charges[22] from an employee's regular rate.

### **Other Remuneration Exclusions**

Knowing what types of pay may be excluded from a regular rate of pay calculation is only part of the challenge. Federal and state law often vary with respect to the circumstances under which a particular type of remuneration may be excluded from an employee's regular rate.

For example, the FLSA provides that any compensation provided at "a premium rate" under the circumstances set forth in Section 207(e)(5), including when an employee works more than eight hours in a day, need not be included in an employee's regular rate.[23] Notably, there is no minimum "premium rate" for purposes of Section 207(e)(5), so under federal law any amount in addition to the employee's base hourly rate of pay may be excluded from the regular rate if the premium pay relates to the type of hours worked in Section 207(e)(5).[24]

The same may not be true under Illinois law.

The regulations underlying the Illinois Minimum Wage Law provide that an employer may exclude "[e]xtra compensation provided by a premium rate" for hours an employee works "in excess of eight [in] a day" when "such premium rate [i.e., the base rate plus the extra premium compensation] is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days."[25] While this language mirrors the FLSA's minimum premium rate requirements in Sections 207(e)(6) and 207(e)(7), it incorporates a standard omitted from Section 207(e)(5).

If a court interpreting Illinois law followed the Colorado Supreme Court's reasoning in *Hamilton*, the court would likely conclude that Illinois law requires employees to receive a higher premium rate, as compared to federal law, for an employer to exclude the same type of pay from the regular rate calculation. In that scenario, an employer could comply with the FLSA but still owe overtime pay under Illinois law.

Conversely, New Jersey law expressly excludes from the regular rate "[a]dditional premium compensation for hours worked in excess of eight hours per day, or for work on Saturdays, Sundays, holidays, or regular days of rest," and "[o]vertime premiums."[26] There is no

minimum pay-rate requirement for the premium pay for those hours to be excluded from an employee's regular rate of pay.

That is different from the FLSA, which only allows an employer to exclude extra compensation for hours worked on Saturdays, Sundays, holidays and regular days of rest when the premium rate for such hours worked is "not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days."<sup>[27]</sup> Thus, an employer could comply with New Jersey law but still be liable for unpaid overtime under the FLSA.

These are only a select few examples of where federal and state law may differ, but they underscore the challenges an employer faces in determining when it can properly exclude a particular type of remuneration from an employee's regular rate of pay.

## **Conclusion**

As Hamilton illustrates, federal and state law often differ in material respects when it comes to properly compensating employees.

Employers should always be mindful of how they are calculating employees' overtime pay, including knowing (1) whether a particular type of remuneration is properly excluded from the regular rate calculation; and if so, (2) under what circumstances.

A failure to consult federal and state law — and the cases interpreting them — may lead to costly class or collective action litigation, in addition to unhappy employees.

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[1] Colo. Rev. Stat. § 8-6-111(4).

[2] *Id.*; see also *Jordan v. Maxim Healthcare Servs. Inc.*, 950 F.3d 724, 727-28 (10th Cir. 2020) (describing the statutory and regulatory scheme).

[3] 7 Colo. Code Regs. §§ 1103-1:1.8.1 (2022) ("Rule 1.8.1").

[4] 29 U.S.C. § 207(e)(6).

[5] *Hamilton v. Amazon.com Servs. LLC*, No. 22-cv-00434, 2023 WL 2375080, at \*2 (D. Colo. Mar. 3, 2023).

[6] *Id.*

[7] *Id.* at \*4.

[8] *Hamilton v. Amazon.com Servs. LLC*, No. 23-1082, 2024 WL 158760, at \*4 (10th Cir. Jan. 12, 2024).

[9] *Hamilton v. Amazon.com Servs. LLC*, No. 24SA12, 2024 WL 4116007, at \*8 (Colo. Sept. 9, 2024).

[10] *Hamilton v. Amazon.com Servs. LLC*, No. 23-1082, 2024 WL 4284082, at \*1 (10th Cir. Sept. 25, 2024).

[11] *Hamilton*, 2024 WL 4116007, at \*8 (citations omitted).

[12] 29 U.S.C. § 207(e)(5).

[13] *Id.* § 207(e)(6).

[14] *Id.* § 207(e)(7).

[15] See Wash. State Dep't of Labor & Indus., Overtime & Exemptions, <https://lni.wa.gov/workers-rights/wages/overtime/> (explaining that "[a]ll hourly rates" (except "overtime premiums"), "[w]ages per unit of work," "[n]on-discretionary bonuses," and some other pay types must be included in the regular rate calculation but that other pay (such as discretionary bonuses and reimbursed expenses) may be excluded); see also Rev. Code of Wash. § 49.46.130(1); Wash. Admin. Code § 296-128-550; Wash. ES.A.8.1(5.1)-(5.2) (rev. 4/6/23) (employers may exclude certain "[e]xtra compensation" for "hours worked in excess of eight in a day or in excess of 40 in a workweek," and hours "for work on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek as such").

[16] See Minn. R. 5200.0140(B) (employers may exclude from the regular rate of pay "premium payments for overtime work or work on Saturdays, Sundays, holidays, or scheduled days off, if the premium rate is at least 1-1/2 times the normal rate").

[17] Md. Code Regs. 09.12.41.19(E)(6).

[18] 29 U.S.C. § 207(e)(8).

[19] *Id.*

[20] See Ind. Code § 22-2-2-4(g)(3); 34 Pa. Code § 231.43; W. Va. Code § 21-5C-3(b).

[21] See 454 Mass. Code Regs. 27.02(a).

[22] Wash. ES.A.8.1(5.9); Wash. State Dep't of Labor & Indus., Overtime & Exemptions, <https://lni.wa.gov/workers-rights/wages/overtime/>.

[23] See 29 U.S.C. § 208(e)(5).

[24] See 29 C.F.R. § 778.202(c).

[25] Ill. Admin. Code tit. 56 § 210.410(e).

[26] N.J. Admin. Code § 12:56-6.6(a)(6)-(7).

[27] 29 U.S.C. § 207(e)(6); see also *id.* § 207(e)(7).