

## Do Bonuses and Overtime Count Towards the Minimum Wage?

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### Decision

A decision of the Federal Labour Court of 25 May 2016 (5 AZR 135/16) involved a dispute as to whether vacation pay and Christmas bonuses or extra pay for overtime or work at night, on Sundays and on holidays can be counted towards the minimum wage called for under the Minimum Wage Act (*Mindestlohngesetz* – MiLoG).

In the case at issue, the plaintiff's employment contract called for special pay premiums as well as a vacation bonus in the amount of 50% of a month's salary and a Christmas bonus in the same amount in addition to her basic wage (< € 8.50). According to her employment contract, the vacation bonus was to be paid in May and the Christmas bonus in November. In December of 2014, i.e., shortly before the Minimum Wage Act went into effect, the defendant entered into a works agreement with the works council that called for payment of both the vacation and Christmas bonuses in 12 monthly installments.

The plaintiff then argued that her monthly salary, annual bonuses and the pay premiums called for under the agreements covering her employment should be based on the legal minimum wage in the amount of a gross hourly wage of €8.50. The Higher Labour Court essentially rejected the appeal, but did find that the plaintiff was entitled to a shift differential in the amount of a gross €0.80 per hour for night work.

The plaintiff's appeal was unsuccessful. According to the decision of the Federal Labour Court, the plaintiff was not entitled to an increase in her monthly salary, annual bonuses and pay premiums. The court ruled that the plaintiff's employer had to pay the minimum wage for

every hour actually worked and in fact satisfied this requirement by paying the amount called for in agreements covering the employment relationship in consideration for work performed. This does not apply to payments that the employer makes independently of work performed by the employee or to payments based on a specific legal requirement such as, for example, that contained in § 6(5) of the Working Hours Act (*Arbeitszeitgesetz* – ArbZG). For that reason, the shift differential for night work does not count towards the minimum wage. The unconditional and irrevocable payment of one-twelfth of the monthly wages each month qualifies as consideration for the purposes of compliance with the minimum wage requirement.

### Implications for practice

The Federal Labour Court's decision for the most part supports the argument to the effect that components of compensation other than the actual wages also count as wages for the purposes of compliance with minimum wage legislation. In particular, the judgment confirmed that vacation and Christmas bonuses that are paid unconditionally and irrevocably are the equivalent of wages for such purposes. This applies in any case if payment takes place within the period specified in § 2(1) of the Minimum Wage Act (*Mindestlohngesetz* – MiLoG), i.e., at the very latest on the final business day of the month following the month during which the corresponding work was performed. The Federal Labour Court confirmed that premium pay for overtime or work performed on Sundays and holidays counts as part of wages for the purpose of compliance with minimum wage requirements. Shift differentials for night work represent the sole exception to the provision contained in § 6(5) of the Working Hours Act.

# Legal Update

## Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Lena Jordan on +49 221 33660-544 or by email to [ljordan@goerg.de](mailto:ljordan@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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