DOL Seeks To Undermine Fluctuating-Workweek Plans

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The U.S. Labor Department's April 5 Final Rule attempts to transform the principles of fluctuating-workweek pay plans in two ways. Remarkably, DOL apparently plans to do so, *not* by facing up to these matters by actually proposing a straightforward revision of the relevant interpretative provision at 29 C.F.R. § 778.114, but instead via remarks in the preamble accompanying the Final Rule.

The Basic Concepts

A non-exempt employee's FLSA overtime pay must be based upon his or her regular hourly rate. This is determined by dividing the employee's total compensation for a workweek by the total number of hours worked for which the compensation was paid. *See* 29 C.F.R. § 778.109.

Under a fluctuating-workweek plan, the employee receives a salary that is paid as straight-time compensation for all of his or her hours worked in a workweek, however many or few, including hours worked over 40. Thus, for overtime hours, the employee is due only an additional one-half of the rate obtained by dividing all of the workweek's hours into the salary (this rate can never be less than the minimum wage, of course). The employee's regular hourly rate therefore fluctuates, that is, it decreases as his or her hours worked increase, and vice versa. The employee is also due additional overtime premium for most other compensation he or she receives for an overtime workweek.

It is worth emphasizing from the outset that Congress has given no generalized regulatory authority to DOL where the FLSA's overtime requirements are concerned. *See*, *e.g.*, *Reich v. Interstate Brands Corp.*, 57 F.3d 574, (7th Cir. 1995), *cert. den.*, 516 U.S. 1042 (1996). Thus, the fluctuating-workweek method is not some exception, exemption, or DOL-conferred dispensation. *See*, *e.g.*, *Davis v. Friendly Express, Inc.*, 2003 WL 21488682 (11th Cir. 2003); *Samson v. Apollo Resources, Inc.*, 242 F.3d 629 (5th Cir. 2001); *Dooley v. Liberty Mutual Insurance*, 307 F.Supp.2d 234 (D. Mass. 2004). Instead, Section 778.114 simply acknowledges the arithmetical realities of applying the basic regular-rate rule in one set of circumstances. Notwithstanding the misinformed approaches of some courts in recent times, Section 778.114 does not (and may not) represent a set of prerequisites for using fluctuating-workweek plans. "The fluctuating workweek doctrine is not a benefit to be withheld . . ., but rather is an interpretive tool to give effect to the understanding of the parties." *Dooley v. Liberty Mutual Insurance*, *supra.*

Other Pay Besides The Salary

DOL's comments say that employers who rely upon fluctuating-workweek plans for non-exempt employees may not also pay these workers bonuses, premium payments, or other additional amounts. This is supposedly "inconsistent" with paying on a fluctuating-workweek basis. This is a complete reversal of the views expressed in 2008, when the Bush administration's Wage and Hour

Division proposed to make it clear that bonuses, premium pay, or other extra sums *could* be paid in conjunction with a fluctuating-workweek plan, as has been done for decades.

DOL recounts a variety of supposed horribles that it believes could result from making payments in addition to the salary, including the possibility that an employer might shift a large portion of an employee's pay away from a salary toward these other amounts. This would, DOL says, potentially cause wide disparities in an employee's wages. DOL provides no evidence that this has actually occurred in the 72 years since the law was passed, during which time innumerable employers have paid additional sums to employees otherwise compensated on a fluctuating-workweek basis. More importantly, the FLSA has nothing whatsoever to do with whether there are disparities in an employee's pay from week to week.

As for what the FLSA actually *does* address – overtime compensation – even if extra payments purportedly undercut a fluctuating-workweek plan, general regular-rate principles lead to the same amount of overtime premium. DOL recognized this long ago in *Opinion Letter of Wage-Hour Administrator No. 1016*, 69-73 CCH-WH 30,563 (June 24, 1969), in which the Wage and Hour Administrator said:

Where the salary for fluctuating hours of work method of compensation *is invalid or otherwise inapplicable* and an employee in a single workweek works at two or more different types of jobs . . . for which different nonovertime rates of pay are paid, the regular rate for that week is the weighted average of such rates. That is, the total earnings from all rates are divided by the total number of hours worked in the workweek. The employee would then be entitled to receive *one-half* of the resulting average hourly rate for the hours worked in excess of [40 in a workweek].

(Emphasis added).

DOL's other principal rationale apparently was that additional payments will somehow encourage the use of fluctuating-workweek plans, which the current administration disfavors. DOL articulated no factual or evidentiary basis for this prediction, but in any case it is not up to DOL whether this concept is to be encouraged or discouraged – fluctuating-workweek calculations are simply an arithmetical fact. And if this compensation method is so undesirable, why does DOL permit it *at all*? The answer is that DOL has no authority to do otherwise.

An Alleged "Fluctuation" Requirement

DOL's comments also claim that the fluctuating-workweek method cannot be used unless the employee's hours of work actually fluctuate. Nowhere does Section 778.114 say that the method is limited in this way, including that DOL *still* has not changed the provision to say so. DOL's remarks refer without elaboration to Section 32b04b of its internal Field Operations Handbook, which prescribes a half-time calculation for a salaried employee "if" the worker's hours fluctuate from week to week. But this discussion clearly uses "if" to mean "in this situation", rather than "on the condition that" (and the latter usage would not have legal force even so).

DOL is coy about what it means by "fluctuate". The comments do not say how often or by what magnitude this supposedly must happen, for example. DOL refers to *Flood v. New Hanover County*, 125 F.3d 249 (4th Cir. 1997)(upholding application of the fluctuating-workweek method), a case in which the employees' hours varied because they worked rotating schedules of different *fixed lengths*; so much for any meaningful use of the word "fluctuate". If DOL instead has in mind that an employee's hours must vary irregularly and unpredictably, then its research apparently failed to disclose cases rejecting such an approach. *See*, *e.g.*, *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998); *Mitchell v. Abercrombie & Fitch Co.*, 428 F.Supp.2d 725 (S.D. Ohio 2006).

In any event, once again the proper analysis leads to a half-time calculation for the hours covered by a salary whether or not there is any "fluctuation". As an illustration, assume that a non-exempt employee is paid a weekly salary of $500 which is understood to be his or her straight-time pay for up to the individual's fixed, regularly-scheduled workweek of 50 hours. Assume further that the employee's actual hours worked each workweek seldom vary above or below 50. For workweek-after-workweek, the employee's total compensation required by the FLSA is:

($500 ÷ 50 hrs.) = $10.00 Regular Rate
($10.00 × ½ × 10 OT hrs.) = $50 OT Premium
($500 + $50) = $550 Total FLSA Pay Due.

If the employee works 45 hours in an isolated workweek, the pay due is:

($500 ÷ 45 hrs.) = $11.11 Regular Rate
($11.11 × ½ × 5 OT hrs.) = $27.78 OT Premium
($500 + $27.78) = $527.78 Total FLSA Pay Due.

See, *e.g.*, 29 C.F.R. §§ 778.109, 778.325.

These half-time calculations are proper notwithstanding that the employee's hours worked are practically invariable. They are unremarkable and appropriate applications of the regular-rate principle in Section 778.109.

What To Do Now?

Employers should anticipate that DOL investigators and plaintiff's lawyers will seize upon the Final Rule's commentary in order to attack the use of a fluctuating-workweek approach in many situations. In fact, some believe that the commentary is indeed *designed* to influence courts to adopt DOL's views. Only time will tell what the outcome of these disputes will be.

One option, then, is to stop using fluctuating-workweek plans altogether. This appears to be DOL's preference. Of course, some employers might find it possible to design alternative compensation methods that have exactly the same effect, such as commissions-only pay plans or piece-rate plans.

Or, an employer might decide to rely upon the fluctuating-workweek method only where the employee's hours "fluctuate" (whatever that means), and only for employees whose compensation is limited to a salary plus the additional overtime premium pay required in an overtime workweek.

Other employers might elect to continue with the fluctuating-workweek pay plans they have without regard to DOL's commentary, recognizing that they must be prepared to defend themselves someday in a possible DOL investigation or in court.