



Virginia Workplace Law

Risks of Overtime Multiply

By: Karen Elliott. *Friday, May 20th, 2011*

I was just checking with the [Department of Labor](#)'s local investigator regarding a [wage](#) classification issue. He informed me that the "word" has come down from HQ that the investigators are to now start calculating the penalty on wage claims at a 1.5 premium instead of the .5 premium when additional pay such as bonuses or premium payments are involved. In other words, to qualify for the flexible work week, there may be no bonuses or premium payments involved as they consider those to be "incompatible" with the [fluctuating workweek method of computing overtime](#).

This is a HUGE change in policy and procedure, and is certainly the DOL's first step in attempting to move away from the [Supreme Court](#)'s opinion in *Overnight Transportation Co. v. Missel*, 316 US 572 (1942). Plaintiffs have been arguing for years that the reliance on *Missel* to award only a .5 premium to employees who have been improperly classified as exempt is unfair. It is my understanding that the DOL will be interpreting any misclassification under this new standard. So, if the employee received bonuses or premium payments, and they were improperly classified as exempt, the argument the DOL intends to use is that since the fluctuating workweek does not apply, *Missel* does not apply and therefore the payment premium amount is 1.5 instead of .5.

In addition, last week, the DOL unveiled an [software application](#) (app) that employees may download to their phone to track hours worked. We believe this is an effort to get the first "[blackberry](#)" case going by the DOL (i.e. managers who call non-exempt employees at home to ask questions, or to email, the app will track the hours as compensable hours that should be compensated).

This is very important information, because the "heat" is really on to get those job classifications correctly analyzed.

If you have any questions, you should be contacting a [Virginia employment lawyer](#).

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