Fluctuating-Workweek Follies: First Principles Are Unchanged

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The U.S. Labor Department's unfounded April fluctuating-workweek commentary (earlier post here) continues to complicate many pre-existing pay plans and to cause employers to narrow their views of the available compensation alternatives. This is the foreseeable (and apparently intended) result of what DOL said. Unfortunately, some observers are compounding the impact of DOL's commentary by suggesting that its ramifications are more dire than ought to be the case.

We have previously noted that the federal Fair Labor Standards Act grants no regulatory authority to DOL to make such pronouncements. Probably for this reason, the commentary purported to draw substance from sprinkled-in references to the seminal U.S. Supreme Court case of *Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942), which embraced the concept underlying the fluctuating-workweek calculation. But DOL's effort is an illusion.

For example, *Missel* does not support DOL's assertion that paying bonuses, incentive payments, or other additional amounts is "incompatible" with figuring overtime on a fluctuating-workweek basis. The Court did not address this proposition *at all*; it simply proceeded from the facts as they were presented (which involved a weekly wage for whatever hours the employee worked) and explained how FLSA overtime was to be computed on those facts. The Court did not say, or so much as even imply, that the fluctuating-workweek calculation was inappropriate where other forms of pay are in the picture.

DOL also opined that fluctuating-workweek overtime might create an incentive to work employees long hours because it "results in a regular rate that diminishes as the workweek increases . . .." On this premise, DOL found it inappropriate "to expand the use of this method of computing overtime pay beyond the scope of the current regulation." Of course, the FLSA does not prescribe and in fact does not even address any maximum number of hours employees can be required to work. Moreover, DOL is not authorized to decide whether to "expand" or contract the use of the fluctuating-

workweek method for computing overtime. The Supreme Court's reading of the FLSA trumps DOL's musings in this area, and DOL must have overlooked this statement in *Missel*:

It is true that the longer the hours, the less the rate and the pay per hour. This is not an argument, however, against this method of determining the regular rate of employment for the workweek in question.

316 U.S. at 580.

Having thrown sand in the gears, DOL has offered no specific elaboration upon what the actual effects of its commentary might be. Others have filled this gap with suppositions that are not anchored in first principles.

As an illustration, assume that an employee receives a salary of $500 each workweek as straight-time pay for all hours worked and is also paid commissions on her sales made during all her hours worked each workweek. Assume also that, in one workweek, she works 50 hours and is due $100 in commissions, for total gross pay of ($500 + $100) = $600. Even if her commission pay is supposedly "incompatible" with fluctuating-workweek overtime, how much FLSA overtime pay is she due for that workweek?

Some have suggested that her overtime must be computed this way:

($600 ÷ 40 hrs.) = $15 Per Hr. "Regular Rate"
($15 × 1.5 × 10 OT hrs.) = $225,

for total FLSA pay of ($600 + $225) = $825. In our view, dividing by 40 hours and paying an extra 1.5 times the resulting rate for overtime hours is not required under the FLSA, notwithstanding what DOL said.

Under *Missel*, the FLSA "regular rate" is determined by dividing the employee's total compensation for a workweek by the total number of hours for which that compensation was paid. This is so whether the straight-time wages are paid for a fixed number of hours or for a varying number of hours, and it remains the bedrock principle underlying FLSA overtime pay. *See*, *e.g.,* 29 C.F.R. § 778.109. Where the straight-time wages

were paid for *all* of the employee's hours worked, the proper FLSA overtime premium is one-half of a regular hourly rate that declines as the hours worked increase. *See*, *e.g.*, 29 C.F.R. § 778.118.

And, more to the immediate point, *this is all still true even when a fluctuating-workweek approach is "invalid or otherwise inapplicable." See*, *e.g.*, *Opinion Letter of Wage-Hour Administrator No. 1016*, 69-73 CCH-WH ¶30,563 (June 24, 1969)(discussed in our earlier post). In other words, 40 is *not* automatically the default divisor, and 1.5 is *not* the inevitable multiplier, even if a fluctuating-workweek approach has been undercut for some reason. Whatever the basis for the employee's pay is, and even if that basis is somehow legally flawed in whole or in part, the FLSA regular rate and the overtime due still depend upon the number of hours for which the compensation was paid. *Cf.* Section 32g07(b), *Field Operations Handbook* (U.S. Labor Department, February 28, 1986)(40 hours not used as the default divisor even for an invalid "Belo" plan).

Because our hypothetical facts show that the employee's straight-time wages were paid for *all* of her hours worked, the correct FLSA calculation is:

($600 ÷ 50 hrs.) = $12 Per Hr. "Regular Rate"
[($12 ÷ 2) × 10 OT hrs.) = $60 OT Premium Pay
($600 + $60) = $660,

or $165 less than the first computation. The principles leading to this approach are independent of whatever DOL's policy preference is, and DOL has no power to curtail them.

That said, unless and until DOL withdraws or repudiates its April statements, or until a court consensus rejecting them emerges, employers should expect investigators and plaintiff's lawyers to press those statements to the hilt. Even so, the underlying FLSA overtime principles remain unchanged, and employers who are willing to do so should be ready to assert them.