USDOL Should Retract Fluctuating-Workweek Commentary

Insights
2.07.17

Readers will recall that, in 2011, the U.S. Department of Labor undertook to discourage the use of fluctuating-workweek pay plans under the federal Fair Labor Standards Act.

This compensation method calls for paying a non-exempt employee a salary that represents straight-time compensation for *all of* his or her hours worked in a workweek, including all hours worked over 40. The salary itself is the "one" of "one and one-half" for those overtime hours, so the FLSA-required overtime premium due for that work is figured at one-half of the average or "regular" hourly rate (of at least the minimum wage). The regular rate is computed by dividing the salary by all of the workweek's hours worked.

In 2008, the Bush Administration proposed to clarify the interpretative discussion of these plans at 29 C.F.R. § 778.114 by adding that making additional payments to fluctuating-workweek employees was consistent with this approach. The Obama Administration rejected the proposal in 2011, leaving the provision unchanged (except for a few, non-substantive editorial revisions).

Legally-Unfounded Remarks
However, the Obama USDOL *also* sought to undermine fluctuating-workweek plans by means of two assertions:

◊ That an employer's paying bonuses, non-overtime premium amounts, or other sums in addition to the salary is allegedly "incompatible" with these plans; and

◊ That the method supposedly cannot be used unless the employee's hours fluctuate in some unspecified way.

The agency claimed that these purported restrictions and conditions were necessary to avoid encouraging such plans and/or to ameliorate what it saw as shortcomings.

Even so, USDOL promulgated no actual rule or regulation to either effect, perhaps implicitly conceding that it had no legal authority to do so. Instead, it made these statements in prefatory *comments* accompanying changes being made in a variety of FLSA-related interpretations and other provisions.

For reasons we explained at the time and later on (and as we continue to believe), the agency's contentions were and are:

◊ Without legal foundation,

◊ Contrary to longstanding FLSA overtime principles, and

◊ Both non-binding and unworthy of any court's deference.

Intended Consequences?
As we pointed out in 2011, "if this compensation method is so undesirable, why does USDOL permit it *at all*? The answer is that USDOL has no authority to do otherwise."

We surmised that USDOL intended to achieve its ends *indirectly* by giving courts the impression that the agency had spoken authoritatively on these matters. Sure enough, fluctuating-workweek plans became the focus of an increasing number of lawsuits, many of which were expressly predicated in whole or in part upon USDOL's remarks.

Some courts have deferred to the agency's views, while some have not, but the confusion, uncertainty, contradictions, and disruption USDOL provoked continue even today. If this state of affairs is to be remedied, the first step will be for USDOL to repudiate and retract the 2011 commentary.

The Bottom Line
The agency engaged in no actual rulemaking in this regard in 2011, and none will be required now to begin to undo the damage.

The preferable course will be for USDOL to withdraw the earlier statements *and* affirmatively to make it explicit that there are no such conditions of or limitations upon fluctuating-workweek pay plans.

But at a minimum, USDOL should clearly state that what was said in 2011 is repudiated and does not represent the agency's position.