It's Past Time To Dispel The "Half-Time" Fog

Insights
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A decision by the 5th Circuit U.S. Court of Appeals (with jurisdiction over Louisiana, Mississippi, and Texas) both illustrates and exacerbates the utter and unwarranted morass into which the calculation of overtime pay has descended in so-called "failed exemption" cases under the federal Fair Labor Standards Act. The proper application of the law is ill-served by perpetuating or acquiescing in the topic's equivalent of urban myths.

In *Black v. SettlePou*, the issue arose in the context of a ruling that a law firm's employee had been unlawfully treated as exempt from the FLSA's overtime requirement. The court did not distinguish itself in reversing an erroneous ruling justifiably but via a flawed and unnecessary rationale. Understanding why this is so requires a little background.

Fundamental Concepts
As have numerous others, the *SettlePou* court first addressed the "fluctuating-workweek" method of complying with the FLSA's overtime requirement (discussed by the U.S. Labor Department at 29 C.F.R. § 778.114). We have summarized fluctuating-workweek principles elsewhere.

Many courts have applied Section 778.114 in these situations, whereas for varying reasons some have not. But no matter how many courts have engaged in that analysis, and to whatever result they have done so, it remains the case that Section 778.114 has nothing whatsoever to do with the computation of overtime damages in these disputes. As the 7th Circuit correctly observed in *Urnikis-Negro v. American Family Property Services*, Section 778.114 is "forward looking" and consequently "says nothing about how a court is to calculate damages where . . . an employer has breached its obligation to pay the employee an overtime premium."

The task requires nothing more than correctly determining the overtime "regular rate" of pay under basic FLSA principles. This involves the uncomplicated arithmetic of dividing the employee's total straight-time compensation for a workweek by the total number of hours worked for which that compensation was paid.

When a salary is paid to compensate *all* hours worked, the salary itself is the "one" of "one and one-half". FLSA overtime premium is therefore figured at one-half of the rate obtained by dividing the weekly salary by all of the workweek's hours worked. The U.S. Supreme Court embraced this approach for salaried employees in those circumstances more than 70 years ago in *Overnight Motor*

Transportation Co. v. Missel, before Section 778.114 *even existed*.

When a salary is instead paid to compensate *only 40* hours in a workweek, the regular rate is figured by dividing the weekly salary by 40. This scenario necessarily means that the individual has received neither overtime premium *nor straight-time pay* (*i.e.*, neither "one" nor "one-half") for hours worked over 40 in a workweek. The employee is therefore due FLSA wages for those hours at 1.5 times the regular rate.

There are other variations on this theme. For example, a salary might also be paid to compensate *some* but *not all* hours worked over 40 in a workweek. In this situation, the correct multiplier is one-half of the regular rate for the compensated hours and 1.5 times that rate for the ones that the salary does not compensate.

Needless Complication

Against this backdrop, the *SettlePou* concurrence's final paragraph reveals that the court's back-pay discussion consists almost entirely of *dictum* (including some that is incorrect). We learn there of the parties' *stipulation at trial* "that the weekly wage [said to be $1,153.77] was paid for only 40 hours." This fact standing alone completely resolved the back-pay question, rendering superfluous most of the eight-plus pages devoted to the matter.

The stipulation meant that Black's regular rate for an overtime workweek was a *non-fluctuating* ($1,153.77 ÷ 40 hrs.) = $28.85 (although inexplicably the parties also stipulated that the rate produced was $28.89). Black was therefore due 1.5 times this rate for her over-40 hours. Issue closed.

But the court nevertheless went on to:

◊ Misconstrue the question as being whether the lower court erred in supposedly applying "the 'Fluctuating-Workweek' (FWW) method by . . . multiplying . . . overtime hours . . . by one-half of [Black's] regular rate of pay."

What the court referred to as "FWW" is a way to compute the regular rate *itself*, from which the required overtime multiplier logically *follows*. "FWW" is not some talismanic dispensation to pay half-time premium rather than what the court characterized as a "standard" time-and-one-half calculation. For one thing, "FWW" *does* result in "standard" overtime pay at a rate of not less than 1.5 times the regular rate. More to the point, the lower court's having computed overtime damages at one-half of the stipulated 40-hour-derived rate represented *neither* "FWW" *nor* the proper application of the FLSA regular-rate principles in any other form;

◊ Engage in a confused and confusing discussion disavowing Section 778.114 as being remedial but thereafter continuing to speak of "FWW" in ways that are already contributing to continued misapprehension on this score;

◊ Explore whether Black had explicitly "agreed" to "FWW", saying that *Missel* purportedly requires this.

With all respect to the court, it is simply not so that *Missel* "direct[s]" that "the FWW method may only be applied to calculate overtime premiums when there is a contractual agreement between the employer and the employee that the employee will be paid a fixed weekly wage for hours that fluctuate from week to week."

First, it is highly doubtful that any such supposedly-necessary "contractual agreement" was present even in *Missel* itself, notwithstanding that terms like "contract" and "employment contract" appeared in the three opinions. Moreover, while a "contractual agreement" to that effect would call for the *Missel* approach, nothing in *Missel* says or even implies that *only* a "contractual agreement" does so. This is unsurprising in light of *Missel*'s citation to USDOL's 1940 *Interpretative Bulletin No. 4* (link to reproduction below), which said not a word about a "contractual agreement", "contract", "agreement", "understanding", "clear mutual understanding", or any other such thing in this regard.

The Bottom Line

Getting drawn down the rabbit-hole of "FWW", the inapplicable Section 778.114, and sophistries about *Missel* will only prolong the current chaos, as will failing to refute the erroneous premises of a number of court rulings to date.

Advocates can dispel the murk surrounding these matters only by clearly, carefully, consistently, confidently, and rigorously articulating and advancing the straightforward FLSA principles.

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