



## Fluctuating-Workweek Ruling Might Be Reviewed

Insights

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Last month's "[Fuzzy Thinking](#)" post mentioned *Sisson v. RadioShack Corp.*, in which a lower federal court in Ohio deferred to the U.S. Labor Department's 2011 allegation that paying performance bonuses is purportedly "incompatible" with a fluctuating-workweek compensation plan under the federal Fair Labor Standards Act. Finding that the issue is a novel one, the court has now granted RadioShack's request to put the case on hold and to allow an immediate review by the 6th Circuit U.S. Court of Appeals (copy of ruling linked below).

In so doing, the court referred to its own "struggles" with both the underlying issue and the matter of what deference is due USDOL's commentary (which the court again mischaracterized as a "Final Rule"). The court saw the resolution of the incompatibility notion as being determinative, in part because accepting USDOL's comments supposedly means that the plaintiffs "would be entitled to additional overtime pay."

For reasons we discussed last month and in prior [posts](#), applying FLSA first-principles to specific facts and computations will quickly reveal that USDOL's statements are incorrect. Instead of considering real calculations, the lower court had continued to approach the matter as a legal abstraction. Perhaps arguments before the 6th Circuit will include actual, illustrative calculations to demonstrate once and for all that paying performance bonuses to fluctuating-workweek employees does not mean that they become "entitled to additional overtime pay" on their salaries.

But the 6th Circuit is not required to hear any appeal before the case has been concluded in the lower court. The procedure that RadioShack has invoked leaves this to the Circuit's discretion.

[Sisson v. RadioShack Order.pdf \(26.68 kb\)](#)