Federal Appeals Court Rejects Narrow View of the Fluctuating Workweek

Insights
6.22.20

Coming on the heels of the U.S. Department of Labor recently issuing its final regulations clarifying the fluctuating workweek (FWW) method of overtime compensation under the FLSA, the 2nd Circuit Court of Appeals just issued a decision in *Thomas v. Bed Bath & Beyond Inc.* rejecting a narrow view of the FWW. The June 15 decision – directly affecting employers in New York, Connecticut, and Vermont – helps employers by providing the outline of a useful defense you might be able to deploy if faced with a similar claim, especially in a class/collective action.

Background
The *Thomas* case is a putative class/collective action under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL), where five named plaintiffs and 17 opt-in plaintiffs challenged Bed Bath & Beyond's (BBB's) use of the FWW to pay overtime. The plaintiffs and BBB each asked a New York federal trial court to rule on the issue of whether the FWW was properly applied, and the court ruled that BBB properly used the FWW method. The plaintiffs appealed the decision, but the 2nd Circuit upheld BBB's practice with this month's ruling.

The 2nd Circuit addressed and rejected three arguments put forth by plaintiffs: (1) that plaintiffs were not paid a fixed salary regardless of the number of hours they worked; (2) that plaintiffs' hours did not fluctuate above and below 40 hours in a week, precluding the use of the FWW; and (3) that BBB's practice of allowing plaintiffs to defer paid time off if they ended up working a previously scheduled day off amounted to extra compensation that precluded the use of the FWW. In rejecting arguments (2) and (3), the 2nd Circuit analyzed plaintiffs' arguments independent of the updates to the FWW regulations (which do not go into effect until August 2020), but noted that its reasoning was consistent with the new language of the FWW regulations. Indeed, with the new FWW regulations, it is crystal clear that hours need not fluctuate above and below 40 in a workweek, and that certain additional compensation to the fixed salary do not preclude the use of the FWW. Then again, these factors never were determinative, which is what led to USDOL's clarifications.

Court Provides Useful Tools For Employers
In rejecting plaintiffs' first argument that plaintiffs were not paid a fixed salary regardless of the number of hours they worked, the 2nd Circuit gave some useful ammunition to employers in defending their use of the FWW, especially when it comes to defending class/collective actions. In the course of discovery, the employer produced over 1,500 weeks of pay records for the plaintiffs. Plaintiffs worked fewer than 40 hours in only six of those workweeks, and in all six of those

Plaintiffs worked fewer than 40 hours in only six of those workweeks, and in all six of those workweeks, the plaintiffs at issue were paid less than their salary. Thus, plaintiffs argued that, despite the written description of their pay guaranteeing them a fixed salary for all hours worked and plaintiffs receiving that salary in all other weeks, they were not, in fact, paid a fixed salary for all hours worked.

The six weeks of underpayment were as follows:

- Three payroll errors, two of which were rectified prior to the commencement of litigation, and the third was for $50 and was later rectified;
- One week where a plaintiff's salary was reduced by the equivalent of one day due on account of FMLA leave;
- One week where the reduction was due to the plaintiff negotiating additional unpaid vacation at the time of their hire, and taking that unpaid vacation in that week; and
- One week where a plaintiff's last day of work occurred midweek and the individual was only paid the proportional amount.

The 2nd Circuit noted that the instance of a plaintiff receiving less than their full salary in their last week of work was of no concern, but examined the other instances more carefully. The court started from the premise that it "must take seriously allegations that employees have not received truly fixed weekly wages" because a fixed weekly wage is the *central* concept allowing an employer to use the FWW method. However, the court also asserted that "such skepticism should be just that and nothing more," and went on to analyze the totality of the circumstances regarding each instance of underpayment to determine whether there was a factual dispute as to the existence of an agreement to pay the plaintiffs a fixed salary for all hours worked, as the FWW requires.

In the end, the 2nd Circuit found that there was no genuine dispute of material fact that BBB complied with the FWW method by paying a guaranteed salary for all hours worked. The court first reasoned that three weeks of payroll errors out of 1,500 weeks was "no cause for alarm," especially since two of those weeks were corrected prior to the litigation commencing. The Court next looked at the week where one plaintiff received additional, unpaid vacation, and reasoned that in a certain context, agreeing to pay an employee less for working less hours in a workweek would, in fact, be contrary to the idea that there was an agreement to pay the individual a fixed salary for all hours worked. Ultimately, though, the court noted that this was individually negotiated, and only occurred once, and that BBB's multiple written descriptions of its pay practice made clear to the employee that, besides for this one exception, the employee would be paid a fixed salary for all hours worked.

In regard to the one-day deduction for FMLA leave, the court again focused on the outlier nature of this one occurrence, stating that the totality of the circumstances "precludes an inference from this single day of possible underpayment that BBB did not generally pay plaintiffs guaranteed weekly wages." In conclusion, the court noted that the six departures from the weekly wage should be judged in the "total context of the over 1,500 weeks' worth of pay records submitted," and that these

instances were unrelated to each other and did not represent some overall practice of underpayment. Indeed, the 2nd Circuit was loathe to let a mere six out of 1,500 weeks (or, 0.4%) that involved only a few of the plaintiffs tarnish the other 1,496 weeks and the otherwise-lawful pay practice for the entire collective.

The Bottom Line

The key takeaway is that employers can use this case to argue that certain one-off payroll errors may not invalidate an otherwise lawful pay practice. This is especially heightened in a class/collective action, where evidence is judged on a generalized or representational basis. And, while this case only discusses the FWW, it is not hard to envision utilizing this case in the context of a white-collar exemption misclassification case involving the question of whether class/collective members were paid on a salary basis, or some other similar question.

At the end of the day, the 2nd Circuit's refusal to let a few outlier weeks scuttle the employer's well-developed, compliant pay structure will be a useful addition to employers' arsenals in combating wage and hour class/collective actions.

Related People

Seth D. Kaufman
Partner
212.899.9975
Email

Service Focus

Wage and Hour