Fuzzy Thinking About Fluctuating-Workweek

Insights
7.05.13

In 2011, the U.S. Labor Department did its best to discourage the use of fluctuating-workweek pay plans under the federal Fair Labor Standards Act. It undertook this in a grab-bag release collectively titled "Final Rule", which also dealt with numerous FLSA matters unrelated to fluctuating-workweek plans. In accompanying remarks in the preamble to this document, USDOL said that these plans are supposedly "incompatible" with the payment of bonuses or comparable sums.

We wrote at the time about the fluctuating-workweek concept and the "Final Rule"; we will not repeat that content here. We continue to believe USDOL's statements to be legally unfounded, non-binding, and unworthy of deference by any judge. Even so, our expectation that its views would be urged upon the courts by private litigants has come to pass.

This means that it is more important than ever to be clear-headed and articulate in opposing the proliferation of USDOL's muddled misconception, and it is imperative not to exacerbate the situation. Some recurrent commentary by employer advocates is cause for concern on both fronts.

USDOL's View Is *Not* A "Rule"
Some authors' recent references to USDOL's remarks as a "rule" perpetuate a perilous misconception. The agency's views merely appeared in its explanation of why it *declined to clarify* the relevant interpretation in the way that the Bush administration had earlier put forward. The interpretation itself was *not* revised to include USDOL's 2011 remarks in this regard, and it does not contain them to this day. That USDOL's sentiments appeared between the covers of a document bearing the words "Final Rule" fails to grant them a status they do not otherwise possess.

Moreover, recall what actually occurred: In 2008, the Bush USDOL *proposed* the very clarification that the Obama USDOL said in 2011 that it *opposed*. This one-administration-to-the-next flip-flop by USDOL is further reason to reject any characterization of the 2011 statements as a "rule" and any contention that they are due any weight whatsoever. "Gyrations" of this kind have not fared well. *See*, *e.g.*, *Sandifer v. United States Steel Corp.*, 678 F.3d 590, 598-599 (7th Cir. 2012), *cert. granted* (February 19, 2013)(giving no weight to USDOL's back-and-forth views on an FLSA provision where the positions seemed mainly to reflect which political party occupied the White House).

The situation is further objectionable given that USDOL had divined no bonus-"incompatibility"

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

concept in the 72 years preceding its remarks. Even now, official USDOL material of recent vintage contradicts this purported "incompatibility". USDOL's attempt to promote its unprecedented view in an area of longstanding interpretation without advance warning or prior discussion is reason enough to reject it. *See Mortgage Bankers Association v. Harris*, No. 12-5246 (D.C. Cir., July 2, 2013) (significant change in definitive interpretation requires prior notice and comment).

Earlier this year, an Ohio federal judge characterized and deferred to USDOL's statements as a "Final Rule" (and inexplicably as a "Final Ruling") in *Sisson v. RadioShack*. The court's decision is unfortunate, but it is also misguided and mistaken (in this way and in others), and some other judges have seen things differently. *See*, *e.g.*, *Switzer v. Wachovia Corp.*, 2012 BL 215684 (S.D. Tex. 2012)(not discussed in, or even cited in, *Sisson*). In any event, *Sisson* is not cause for employer advocates to accept or refer to the bonus-incompatibility proposition as somehow having been established.

Why 1.5 Times A 40-Hour Rate?

And even if fluctuating-workweek plans were supposedly "destroyed" by bonus payments, what would this really mean? Interestingly, USDOL's 2011 commentary did not specifically address the computational ramifications of bonus-payment "invalidation" *at all* (neither did *Sisson*, for that matter). Nonetheless, some have written that an employee's overtime pay must then be figured at 1.5 times the rate obtained by dividing 40 into the weekly salary. But why is *that* necessarily the answer?

One illustrative recent article posed an example of an employee whose fluctuating-workweek salary is $500 a week who works 50 hours in a workweek. Under the plan, this employee would be due:

($500 ÷ 50 Hrs.) = $10 Per Hr. Regular Rate
($10 × ½) = $5 Per Hr. OT Premium Rate
($5 Per Hr. × 10 OT Hrs.) = $50 OT Premium Pay
($500 + $50) = $550 Total ST and OT Pay.

However, the author said, if the fluctuating-workweek plan has been "invalidated" by a bonus, then the inevitable "penalty" would be "paying" this:

($500 ÷ 40 Hrs.) = $12.50 Per Hr. Regular Rate
($12.50 × 1.5) = $18.75 Per Hr. OT Rate
($18.75 Per Hr. × 10 OT Hrs.) = $187.50 OT Pay
($500 + $187.50) = $687.50 Total ST and OT Pay.

Leaving aside for now other questions raised by the writer's proposition, a fundamental FLSA overtime principle is that the "regular rate" is determined by dividing the employee's total straight-time compensation for a workweek by the total number of hours worked *for which that compensation was paid*. *See*, *e.g.*, *Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942); 29 C.F.R. § 778.109. If a weekly salary includes straight-time compensation for some or all of the employee's hours worked over 40, then the required FLSA overtime premium for those hours is computed at *one-half* of the rate obtained by dividing *all* of the compensated hours, *including those over 40*, into the salary.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

over 40, into the salary.

Therefore, even if a fluctuating-workweek plan was somehow "destroyed" by bonuses, FLSA overtime pay would still depend upon (i) how many hours worked the salary compensated; and (ii) the regular rate to which this leads. No facts in the writer's hypothetical pointed to 40 hours as being the appropriate divisor, and there is no such generalized either/or, automatic, default-to-40/time-and-one-half principle as the article implied. Indeed, the circumstances surrounding a fluctuating-workweek plan are likely to provide ample evidence that the salary represented straight-time compensation for *all* of the employee's hours worked – not just 40 or any other particular number.

Of course, what this *actually* reveals is that the "invalidation" notion is fallacious in the first place. The governing FLSA overtime principles do not change simply because bonuses or analogous amounts are paid in addition to a fluctuating-workweek salary.

Eye On The Ball, Please

We realize that the current state of affairs might cause an employer to capitulate to USDOL's present stance in the interests of caution. However, any suggestion that the agency's bonus-"incompatibility" remarks are now FLSA imperatives is unsupported. It is also important to resist mistaken views about the supposed consequences of those remarks.

Our belief is that a court consensus rejecting USDOL's proposition will evolve over time. How quickly this will occur depends upon how clearly, consistently, and rigorously the FLSA's well-settled principles are advanced in refutation of what the agency has said.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.