The "Fluctuating Work Week" - An FLSA Mirage

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There are mirages in the labor relations and employment desert. Concepts and principles that, for a moment, you see and understand, but moments later you have confused or misapplied. The "fluctuating work week" method of calculating overtime is one of those employment law mirages. At first glance, it appears as an oasis for employers in the FLSA desert – then, like a mirage, disappears when carefully scrutinized and correctly applied.

The "fluctuating work week" (FWW) method of calculating overtime is an alternative to the familiar "time and one-half" method for paying non-exempt employees who actually work more than 40 hours in a work week. It was first recognized more than 70 years ago by the United States Supreme Court in Overnight Motor Transport Co. v. Missel, 316 U.S. 572 (1942) and later codified in the federal wage and hour regulations. 29 C.F.R. §778.114.

Often referred to as the "half-time" measure of overtime, it applies: (1) if there is a mutual understanding between an employer and a non-exempt employee that the employee will be paid a fixed weekly salary no matter how many hours that employee works in a week, (2) if the "fixed salary" is sufficiently large so that the employee's regular rate of pay never drops below the minimum wage (federal or state), (3) if the employee's work week fluctuates both over and under 40 hours per week, and (4) if the employee is paid a "half-time" overtime premium for hours worked beyond 40 in a week. Using the "half-time" method, the employee's overtime rate is one-half (1/2) of the rate determined by dividing the employee's weekly salary by the number of hours that the employee actually works in a week. For example, the "half-time" overtime rate for an employee who is paid a fixed salary of $800 per week would be:

- $6.67 per hour if that employee worked 60 hours that week (1/2 x ($800 per week /60 hours));
- $5.71 per hour if that employee worked 70 hours that week (1/2 x ($800 per week /70 hours)); and
- $5.00 per hour if that employee worked 80 hours that week (1/2 x ($800 per week /80 hours)).

In other words, the overtime rate paid for hours worked in excess of 40 in a week declines the more hours that an employee works. Not surprisingly, employees are not quick to embrace this system, and employers must consider the "labor relations" and "employee morale" implications of using the "fluctuating work week" method, even in those limited circumstances where it can be lawfully applied.

Although the federal regulations specifically allow the "fluctuating work week" method of calculating overtime, employers who use the FWW method are subject to legal challenges on many fronts. For example, the USDOL takes the position that the FWW method may only be applied to employees whose weekly hours do not customarily follow a regular schedule and fluctuate both above and below 40 hours per week. In other words, there must be evidence that the employee's hours regularly dip below 40 in a week without any diminution in that employee's fixed salary. The federal regulations, however, are not clear about how often or how much an employee's hours need to dip below 40 in a week – a factor which only tends to encourage litigation over the FWW method. Furthermore, some courts have rejected this requirement. Second, the employee must be paid a fixed salary – obviously without deductions or offsets, but also without non-discretionary enhancements such as commissions or bonuses. Note that the "fixed salary" requirement is more stringent than the "salaried basis" test applicable to the "white collar" overtime exemptions. Several courts have found that the payment of non-discretionary bonuses (that is, earned bonuses) is inconsistent with the fixed salary requirement and, therefore, precludes the use of the FWW method. In 2011, the USDOL considered, but ultimately rejected, proposed amendments to its regulations that would have allowed employers to use the FWW method even if the employer paid employees non-discretionary earned bonuses in addition to the required "fixed salary". Clearly, the United States Department of Labor is not a fan. Finally, employer's using the FWW method must be able to prove a "clear mutual understanding" with their employees that the fixed salary is compensation (apart from overtime premiums) for the fluctuating hours worked each work week, whatever their number. The cases suggest that proving a "clear" and "mutual" understanding is harder than it may appear at first blush. Further complicating the use of the FWW method for New York employers is the open question whether this method also applies to overtime payments under New York law. Several decisions (and an older NYSDOL opinion letter) have suggested that the federal methodology for computing overtime is permissible but there is no clear precedent on this issue. See Wage and Hour Defense Institute – State-by-State Summary.

Finally, employers who currently are using the FWW method should regularly review those arrangements to insure that they continue to meet the applicable standards (fluctuating work week, fixed salary, regular rate above the minimum wage, etc.) and should also refresh the "mutual understanding" that they have with their employees in writing on a regular schedule. Employers who are considering the FWW should think twice to ensure that this FLSA "oasis" is not simply a "mirage" that will only produce unhappy employees and costly litigation. ✦

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