OAJ – Overtime and the Fluctuating Work Week Method

Kyle Anderson

As most employees are accustomed to, and as most employers practice, overtime hours are typically calculated at a rate of one and one-half (1.5) times the employees' regular hourly rate. This is a requirement imposed by a provision of the Fair Labor Standards Act, 29 U.S.C. § 207(a), which also sets requirements for minimum wage rates.

In 1942, the Supreme Court of the United States interpreted 29 U.S.C. § 207(a) and approved the fluctuating work week method as an alternative method for calculating an employee's overtime compensation.[1] Later cases explained that when an employee is, by agreement, paid a fixed weekly wage for hours that fluctuate from week to week, the proper way to calculate the employee's regular rate of pay is to divide the weekly wage by the number of hours actually worked in a particular week. This approach treats the fixed weekly wage paid to the employee as compensation at the regular rate for all hours that employee works in a week, including overtime hours.

The employer will separately owe the employee a premium for the overtime hours, but because the employee has already been compensated at the regular rate for the overtime hours by means of the fixed wage, the employer will owe the employee only one half the regular rate for those hours, rather than time and one half.

For example, John works 50 hours in week one and 60 hours in week two. His employer pays him a fixed salary of $1200 per week. During the first week, his hourly rate equals $24 per hour ($1200÷50). During the second week, his hourly rate equals $20 per hour ($1200÷60). During week one, John will receive half-rate overtime pay at $12 per hour and $10 per hour during week two. His total compensation for week one equals $1320 ($12x10 overtime hours + $1200) and equals $1400 for week two ($10x20 + $1200).

Under this method, the benefit to the employer increases as the number of hours increase and the benefit to the employee increases as the number of hours decreases. This is highlighted by the example, where John only received $80 extra from week one to week two, even though he worked 10 more hours in week two.

However, there are strict requirements that must be met in order to calculate overtime pursuant to the fluctuating workweek method. The requirements include:

(1) the employee's hours must fluctuate from week to week;
(2) the employee must receive a same fixed salary that does not vary with the number of hours worked in a week;
(3) there must be a clear, mutual understanding that the employer will pay that fixed salary regardless of the number of hours worked;
(4) the salary must be sufficient to provide an average hourly compensation of more than the minimum wage; and

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[1] Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942).

(5) the employee must receive extra compensation, in addition to such salary, for all overtime hours worked.

As time has passed, the fluctuating workweek method has been progressively invalidated when an employee receives any kind of compensation in addition to the fixed salary and overtime premiums. In doing so, litigators have focused on two elements in finding the fluctuating workweek method incompatible with an employees pay; “(2) the employee must receive a fixed salary that does not vary with the number of hours worked during the week” and “(4) the employer and employee must share a ‘clear mutual understanding’ that the employer will pay that fixed salary regardless of the number of hours worked.”

For example, in 2003, police officers, pursuant to a CBA, were paid “time and one-half” for working longer than a single shift in a given day. The First Circuit Court of Appeals found that the employer was not in compliance with the fluctuating work week method because the officers received extra pay variable with the number of hours worked during the week.[2]

In 2005, auto damage appraisers were paid a per diem payment for working on Saturday, which was later changed to hourly pay, and the court found that the payment of a premium rate for Saturday work when less than 40 hours have been worked precludes application of the fluctuating workweek method.[3]

On April 5, 2011, the Department of Labor (“DOL”) issued a Final Ruling on the fluctuating workweek method in context of bonus and extra payments. The Department stated that “unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime.”

This was affirmed in 2013 by the District Court for the Northern District of Ohio in a case where store managers were compensated via the fluctuating workweek method and were also paid quarterly and year-end bonuses based on store performance. The court found that “the DOL now considers bonus and premium payments, with the exception of overtime premium payments, incompatible with the fluctuating workweek method.”[4]

While the fluctuating workweek method benefits employers as the number of hours worked in a workweek increases, employers should be wary of potential overtime violations when paying an employee extra compensation, of any kind, in addition to overtime premiums while using the fluctuating workweek method.

[2] O’Brien v. Town of Agawam, 350 F.3d 279 (1st Cir. 2003).
[3] Dooley v. Liberty Mut. Ins. Co., 369 F. Supp. 2d 81 (D. Mass. 2005)
[4] Sisson v. Radioshack Corp., No. 1:12-cv-958, 2013 U.S. Dist. LEXIS 40135 (ND OH March 11, 2013)