

■ SPECIAL FEATURE

Recent Developments in FLSA Litigation

By William E. Hannum III

On the somewhat arcane topic of paying non-exempt employees under the federal Fair Labor Standards Act's "fluctuating workweek" method, there have been some significant developments in 2011.

Under the FLSA, employers can pay non-exempt employees under the method by paying a fixed salary for fluctuating work hours and paying one-half the regular hourly rate for any hours worked over 40 in a week.

In 2011, the U.S. Department of Labor published new regulations and made clear that such non-exempt employees *cannot* receive an additional bonus or incentive. However, it is still not clear whether they are permitted to receive commissions.



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Finally, late in 2011, a federal judge rejected an employer's attempt to use the fluctuating workweek method retroactively as a means to reduce liability for employees who were misclassified as exempt.

These developments serve as reminders to employers using the fluctuating workweek method to audit their payroll practices and ensure compliance with the strict requirements imposed by federal regulations.

The basics

The FLSA's fluctuating workweek regulation allows an employer to pay a non-exempt employee who works fluctuating hours from week to week a fixed salary as "straight-time compensation" for *all* hours worked in a workweek. To use the fluctuating workweek method of payment, certain requirements must be met:

- The employee's workweek must fluctuate such that the employee works more than 40 hours in some weeks and less than 40 hours in other weeks.
- The employee must be paid a fixed salary regardless of the number of hours worked each week. Thus, an employee working 30 hours one week must receive the same weekly salary as when he works 40 hours another week.
- The salary must be sufficient to ensure that the regular rate of pay will never

drop below the minimum wage. Where an employer is subject to both the federal and state minimum wage laws, the employee is entitled to the greater of the two minimum wages.

- If the employee works in excess of 40 hours in a workweek, the employer may calculate the employee's overtime rate by dividing the salary by the total number of hours worked and dividing the resulting rate in half. The half-time rate is then paid (in addition to the fixed salary) for all hours worked in excess of 40 hours.
- There must be an understanding between the employer and the employee that the employee will be paid using the fluctuating workweek method and how it works. Ideally, the mutual understanding should be reflected in a policy or agreement signed by the employee.

Bonuses precluded under method

In April 2011, the DOL rejected a proposed amendment to the FLSA regulations that allowed the payment of bonuses and incentives under the fluctuating workweek method.

Subsequently, courts have held that an employer clearly violates the FLSA when it pays an additional bonus or incentive but continues to use the fluctuating workweek method for calculating overtime.

The DOL's change in direction on the issue appears to have been motivated by the stiff opposition mounted by plaintiffs' attorneys and labor unions, which sought to discourage the use of the fluctuating workweek. In short, they seemed to prefer that non-exempt employees receive standard overtime (time and one-half) for hours worked above 40 in a week.

The proposed clarifying language of the FLSA would have made clear that, in addition to a fixed salary, an employee also could be paid bonuses and other non-overtime premiums without invalidating the fluctuating workweek method. That bonus or incentive payment would have helped employers motivate employees to work longer hours and weekends under the fluctuating workweek method.

In rejecting the proposed rule, the DOL acknowledged that bonus payments and other forms of premium payments generally can be beneficial to employees.

Nevertheless, the DOL ultimately rejected the proposed amendment. It concluded that the proposed clarifying language could have the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of an employee's compensation into bonus and premium payments. That could potentially result in wide disparities in an employee's weekly pay, depending on the particular hours worked, which is exactly the type of disparity the fluctuating workweek method was intended to avoid.

Thus, the DOL concluded, payment of such bonus or premium amounts is incompatible with, and therefore invalidates, the fluctuating workweek method.

In the absence of a valid fluctuating workweek method of paying overtime, an employer must pay non-exempt employees 1.5 times the regular rate for all hours in excess of 40 in one workweek, unless some other form of overtime pay is available (such as a Belo plan).

Recent court decisions addressing the fluctuating workweek method are consistent with the DOL's limitation on the fluctuating workweek.

For instance, in the October 2011 decision *Brantley v. Inspectorate America Corp.*, the U.S. District Court for the Southern District of Texas referred to the DOL's recent rejection of the proposed FLSA amendment and made clear that an employer that pays salary premiums may not apply the fluctuating workweek method for calculating overtime.



Connecticut held that employers cannot use the fluctuating workweek retroactively to reduce their liability in misclassification cases. As the court pointed out, there is a circuit split on that question, with the 1st and 10th circuits finding that such retroactive use is possible.

The District Court further suggested that due to the DOL's rejection of the proposed FLSA amendment, for violations occurring after April 2011, an employer would no longer have reasonable grounds for believing that its payment of salary premiums was valid under the FLSA, thus exposing the employer to liability for liquidated damages.

Commissions may still be allowed

Several cases have recently challenged an employer's use of the fluctuating workweek method for employees who also receive commission payments. Neither the current nor the recently rejected FLSA regulations specifically addressed commission payments. Thus, plaintiffs' attorneys are now arguing that the DOL's rejection of any bonus or incentive payments should also invalidate an employer's use of the fluctuating workweek

method for employees who are paid a fixed salary for fluctuating hours and receive commissions in addition to that fixed salary.

However, the issue has not been resolved by the DOL or the courts, and at least one court has approved the payment of commissions.

No retroactive application

A recent decision from the District of Connecticut held that employers cannot use the fluctuating workweek retroactively to reduce their liability in misclassification cases.

As the court pointed out, there is a circuit split on that question, with the 1st and 10th circuits finding that such retroactive use is possible.

In contrast, however, several federal appeals and district courts have held that applying the fluctuating workweek method to a misclassification violates the plain language of the fluctuating workweek rule.

Recommendations for employers

In light of the developments, employers who use the FLSA's fluctuating workweek method of payment are recommended to do the following:

- review payroll practices to ensure strict compliance with the fluctuating workweek regulations;
- cease payment of any bonuses or non-overtime premium or incentive payments, such as attendance or safety bonuses and shift-differentials;
- review contractual obligations, if any, to pay bonuses, commissions or non-overtime premium payments to employees; and
- if the employer prefers to keep bonus or other types of incentive compensation in its payroll practices, the employer should move to alternative forms of payments rather than the fluctuating workweek method.

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