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Bonus Dispute Makes DOL Seem Like 'Department Of Languor'

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Allen Kinzer, a partner in the Vorys Columbus office and a member of the labor and employment group, authored an article titled "Bonus Dispute Makes DOL Seem Like 'Department Of Languor'" for *Employment Law360*. The article outlined two district court decisions at odds over whether a company's use of the fluctuating workweek method for overtime pay violates the Fair Labor Standards Act. The full text of the article is included below.

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Bonus Dispute Makes DOL Seem Like 'Department Of Languor'

A federal district court in Ohio ruled that RadioShack Corp.'s bonus compensation plan violated the Fair Labor Standards Act in *Sisson v. RadioShack*. A few months later, in *Wills v. RadioShack*, a federal district court in New York ruled that RadioShack's exact same bonus compensation plan was lawful under the FLSA. Thus, there is a federal court split over the same bonus compensation plan. The origin of this split lies with the U.S. Department of Labor. The DOL is supposed to provide clarity and guidance on the FLSA, but in this instance has appeared bewildered and confused by its own actions.

RadioShack compensates its nonexempt store managers by paying a salary and overtime pay calculated under the FLSA's fluctuating workweek method. Additionally, RadioShack pays performance bonuses to those managers based on the store's sales performance. The federal court in Ohio ruled that the performance-based bonuses violated one of the FLSA's requirements for calculating overtime pay under the fluctuating workweek method. Consequently, the Ohio federal court found that RadioShack's calculation of overtime pay was short by a factor of two, meaning the company still owed these managers double the amount of overtime pay it had already paid them.

The New York court, however, found that RadioShack's payment of performance-based bonuses to those store managers did not violate the fluctuating workweek method. Accordingly, the federal court in New York found that RadioShack's use of the fluctuating workweek method properly compensated the store managers for their overtime hours.

To understand the split, we must review the fluctuating workweek method for computing overtime pay and the ambiguities created by the DOL.

Fluctuating Workweek Method

The FLSA permits employers to pay overtime pay to salaried, nonexempt employees whose work hours vary from week to week under the fluctuating workweek, or "half-time," method. With this fluctuating workweek method, a fixed weekly salary compensates the employees for the straight-time portion of their compensation for all hours worked and the employees receive an additional "half-time" overtime premium payment for all hours worked in excess of 40 during the workweek.

Generally, four conditions must be satisfied before an employer may pay overtime compensation under the fluctuating workweek method:

1. the employee's hours must fluctuate from week to week;
2. the employee must receive a fixed salary that does not vary with the number of hours worked during the week (excluding overtime premiums);
3. the fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage; 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 the employee worked. (29 C.F.R. § 778.114)

The split between the courts concerns the second requirement: a "fixed salary that does not vary with the number of hours worked during the week." The Ohio federal court found that payment of the performance-based bonuses violated the fixed-salary requirement and, thus, invalidated RadioShack's use of the "half-time" method. Under the Ohio court's analysis, RadioShack would owe millions in back overtime pay because it paid half-time, rather than time-and-a-half.

The New York federal court found that the performance-based bonuses did not violate the fixed-salary requirement because the bonuses were not based on the hours worked. Thus, the New York federal court dismissed plaintiff's individual and collective and class action claims on summary judgment.

DOL Creates Confusion

This federal court split has its origin with the DOL. In 2008, the DOL, under the Bush administration, proposed a modification to the fluctuating workweek method regulation. The modification would have expressly permitted employers to pay nonexempt salaried employees bonuses or premium payments based on hours of work, such as premium payments for working holidays, weekends or night shifts. The

proposed modification included an example in which the employer pays an employee a night-shift differential in addition to a fixed salary. The proposed modification was in response to several federal courts finding that bonuses based on work hours violated the fixed-salary requirement.

Before 2008, several federal courts had ruled that any payment on top of the fixed salary that was based on hours worked violated the fixed-salary requirement, but no federal court had ruled that bonuses based on factors other than hours, such as performance, violated the fixed-salary requirement. The point of the 2008 proposal was to make any additional payment on top of a salary consistent with the fluctuating workweek's fixed-salary requirement. Thus, employers would be permitted to use the fluctuating workweek method even if they paid bonuses for working holidays, weekends or night shifts.

On April 5, 2011, the DOL, under the Obama administration, issued a final rule under the fluctuating workweek method regulation that did not include the proposed 2008 modification on hourly bonuses or premiums. Instead, the DOL rejected the modification as violating the fixed-salary requirement of the fluctuating workweek method and made no substantive change to the regulation. Because there was no change in the regulation, one would reasonably conclude that the law as to bonuses under the fluctuating workweek method for overtime payment remained unchanged. The DOL explained its rejection of the modification by making the following ambiguous statement:

While the [DOL] continues to believe that the payment of bonuses and premium payments can be beneficial for employees in many other contexts, we have concluded that unless such payments are overtime premiums, they are incompatible with the [fluctuating workweek] method of computing overtime.

The plaintiffs in both RadioShack cases argued that the DOL's commentary should be read literally, and, therefore, any payment in addition to the fixed salary violated the fixed-salary requirement of the fluctuating workweek method and made its use a violation of the FLSA. The Ohio court agreed.

The New York court concluded the opposite. The New York court determined that the DOL's commentary did not change the law because the DOL did not change the fluctuating workweek regulation. The New York court interpreted the DOL's comment as merely confirming that bonuses and premium payments based on hours of work violated the fixed-salary requirement, but bonuses and premiums based on factors other than hours of work did not violate the fixed-salary requirement.

Both RadioShack cases are on appeal to their respective circuit courts. Since the decisions were rendered, the DOL has had an opportunity to clarify its ambiguous comment that led to the court split. The Second Circuit granted the DOL's motion to file an amicus curiae brief in the Wills case, but incredibly, the DOL let the filing deadline pass without filing anything. The DOL asked the Second Circuit for an extension of time to file its brief and was granted a 30-day extension, but the DOL wanted more time. The Second Circuit had some pointed comments about the DOL's delay:

The court is particularly curious about the assertion in the [DOL's] supplemental papers that it will take one month to consider the decision of another circuit on the same issue. Most lawyers are able

to do that in a considerably shorter period of time. ... [H]aving had almost four months to consider whether [to file] an amicus brief and if so to prepare a brief, it is unthinkable that [the DOL] now needs an additional one and one-half months to consider whether to file an amicus brief.

Apparently, the DOL cannot decide what it intended by its own comment. Did the DOL intend the comment to be taken literally, as the Ohio court concluded? Or, was the DOL unintentionally overly broad with its comment, as the New York court concluded? It seems that the very agency designated by Congress to provide clarity and guidance is lost. Does the DOL really not know what it meant?

The New York court would appear to be correct because the DOL did not change the actual fluctuating workweek regulation. The DOL's comment was just that, a comment to explain why it was not changing the regulation. If the DOL meant that all bonus payments violate the fluctuating workweek fixed-salary requirement, the DOL should have changed the regulation to state that. Instead, the DOL left the fluctuating workweek regulation just as it has been for over 45 years, and then added commentary that has led to litigation across the country.

The Second and Sixth Circuits will likely render their decisions in their respective RadioShack cases within the next nine months.