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Law Moving in Right Direction for "Half-Time" Method of Calculating Damages in FLSA Overtime Cases

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The current prevalence of lawsuits for unpaid overtime compensation under the Fair Labor Standards Act ("FLSA") by employees who claim they were misclassified by their current or former employer as "exempt" from overtime has been well-documented. These lawsuits continue to present challenges to employers, not just in terms of the burdens and costs of defending the cases, but in the uncertainty of the potential financial exposure. As our colleagues have previously reported (here and here), there are two methods in which the employees can be compensated for the allegedly unpaid overtime wages in such a case. Under the FLSA, overtime compensation for non-exempt employees is computed at "a time and half" rate for hours worked in excess of forty in a week. In appropriate situations, however, when the employees have received a fixed salary for all hours worked (which is frequently what has occurred in a misclassification case because the employer has treated the employees as exempt from overtime), the overtime compensation owed to non-exempt salaried employees can and should be calculated based on the "half-time" or "fluctuating workweek" method. This method of calculation can dramatically decrease the potential damages in a misclassification case. Instead of dividing the weekly salary by forty to determine the regular rate of pay and paying 1 ½ times that rate for every hour worked in excess of forty, the weekly salary is instead divided by the actual number of hours the employee worked each week (in other words, the more overtime the employee worked, the lower the regular rate), and then paying an additional ½ of that rate for every hour worked in excess of forty in a week rather than 1 ½ times that rate. Conceptually, the salary pays straight time for all weekly hours, and only additional half-time is due for weekly hours over 40 to pay the time-and-one-half required by law.

Guidance on the requirements for establishing prospectively a lawful fluctuating workweek overtime compensation system for salaried non-exempt employees is provided by U.S. Department of Labor regulations, 29 C.F.R. § 778.114. Employers have frequently argued that this regulatory provision should also apply retroactively if it later turns out that a non-exempt employee was misclassified as exempt. A split in authority has arisen, as some district courts have held that because that regulation requires contemporaneous payment of overtime, and a "clear mutual understanding" of the parties, the fluctuating workweek method cannot be applied retroactively to calculate

damages in a misclassification case. Many other courts have rejected that interpretation and have applied the fluctuating workweek method retroactively. Even the Department of Labor has in the past endorsed the fluctuating workweek method in satisfying unpaid overtime claims in a misclassification case.

The dispute over the correct interpretation of the regulations has become increasingly irrelevant as a growing line of cases eschew the regulations in favor of reliance on the Supreme Court itself. In *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942), the Court held that when an employee and employer have an agreement in which the employee is paid a fixed weekly wage for hours that fluctuate from week to week, the half-time method is the correct way to calculate damages in an unpaid overtime case. Subsequent lower court decisions and the Department of Labor have made clear that the agreement need not be in writing, but rather, can be demonstrated through the course of conduct between the employer and employee. In other words, if the employee was treated as exempt, without deduction from the weekly salary for absences from the office, then the requisite mutual understanding has been established.

A few months ago, the Supreme Court denied certiorari (PDF) in a Seventh Circuit case that would likely have presented the opportunity for a definitive ruling on (or reconfirmation of) the use of the half-time method in a misclassification case. But significantly, five federal circuit courts have now approved the use of the half-time method—the First, Fourth, Fifth, Seventh and Tenth Circuits (All PDFs) —while not a single circuit has rejected this method. And the more recent decisions (Fourth and Seventh Circuits) have broken away from reliance on the regulations and have, more appropriately, grounded their decisions on the Supreme Court's decision in *Overnight Motor Transportation Co.* Thus, the weight of authority is increasingly coming down on the side of the employers on this issue.

EpsteinBeckerGreen will be continuing to monitor developments on this topic and providing updates as appropriate. In the mean time, employers who are sued or threatened with legal action for unpaid overtime under the FLSA should continue to push for the half-time method of calculating damages, in litigation or during settlement discussions, in any case in which the employees were clearly paid a fixed salary regardless of the number of hours actually worked each week, as the case law shows strong signs of developing positively in this direction.