Supposed Fluctuating-Workweek "Legal Prerequisites" Come From Where, Exactly?

Insights
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"Fluctuating workweek" pay plans are provoking much litigation under the federal Fair Labor Standards Act. These arrangements call for a non-exempt employee to be paid a salary as straight-time compensation for *all* hours worked in a workweek, including those over 40. The salary represents the "one" of "one and one-half", so for overtime hours the employee is due an additional one-half of the hourly rate figured by dividing all of the workweek's worktime into the salary (that rate can never be less than the minimum wage, of course).

Based upon a U.S. Labor Department interpretation entitled, "Fixed salary for fluctuating hours" found at 29 C.F.R. § 778.114, some courts have ruled that an employer's fluctuating-workweek plan did not satisfy every perceived "condition", "legal prerequisite", "requirement", and so on for such an arrangement. Some such rulings have parsed Section 778.114 word-by-word (a few even scrutinized its punctuation), essentially treating it as if it were an enacted law necessitating scrupulous, detailed adherence. This has led to lengthy pronouncements about whether a "clear mutual understanding" existed that the salary compensated all hours worked (in other versions, whether the employee "clearly understood" this), whether there was a "fixed salary" that "did not vary based upon hours worked", whether an employee's work hours "fluctuated", and a variety of other hyper-technical meanderings and contrived nuances.

But USDOL has no generalized authority to issue binding regulations under the FLSA's overtime requirement. So just what is the status of Section 778.114 in the first place, that is, how did all the purported "requirements", "conditions", and "legal prerequisites" for fluctuating-workweek pay plans come to be? The answer reveals that Section 778.114 is not due the fly-specking veneration that some courts have been giving it.

Section 778.114's Predecessors

The fluctuating-workweek concept was in no respect created by Section 778.114, the original version of which post-dated the FLSA's passage by over 25 years (see below). As early as 1940, there were brief USDOL explanations of overtime calculations for "salaried employees" who worked "irregular or fluctuating numbers of hours". Those illustrations simply observed that employees paid in this fashion were due overtime premium at one-half of the average hourly rate for all hours worked.

These scenarios began by saying "[i]f" the circumstances were those described, but they plainly meant "in this situation". rather than "on the condition that". And nowhere to be found were anv

associated "requirements", "legal prerequisites", or other "conditions".

Not until 1950 did the word "understanding" appear in a published USDOL provision describing these circumstances. Once again, the word was not used as some purported "requirement", "condition", or "legal prerequisite"; it was simply an articulation of hypothetical circumstances. Neither was there any mention of "clear", "mutual", "fixed salary", *etc*. Furthermore, even though the federal Administrative Procedure Act existed by then, USDOL introduced the term "understanding" without advance notice and without seeking any public comment.

A Version of Section 778.114 Appears

Section 778.114 was introduced in 1965. It was very similar to its predecessors, including that it contained the word "understanding" from 1950 (still without "clear" or "mutual").

This version expanded "salaried" and "salary" to "on a salary basis" (still without "fixed"), and it pointed out that the employee had "already received straight time compensation . . . for all hours worked" in these circumstances. It further stated the obvious by cautioning that the average hourly rate for a workweek could not be less than the minimum wage.

But more to the present point, the Wage and Hour Administrator said of the entire 1965 publication of which Section 778.114 was a part that the APA's notice-and-comment requirements were "not applicable because these are interpretative rules." He further stated, "I do not believe such procedures will serve a useful purpose here. Accordingly, this amendment shall become effective immediately."

Section 778.114 Takes Its Current Form

In 1968, Section 778.114 was published to read almost exactly as it stands today. For the first time, the phrases "clear mutual understanding", "clearly understands" "fixed salary", and "legal prerequisites" appeared, along with other grist for the current judicial mill. But once again, this version too was explicitly issued to take effect upon publication, as the Administrator made clear: "The [APA] provisions . . . which require notice of proposed rule making, opportunity for public participation, and delay in effective date are not applicable because these are interpretative rules. I do not believe such procedures will serve a useful purpose here. Accordingly, this amendment shall become effective immediately."

In 1981, Section 778.114's illustrative examples were modified to take into account increases in the minimum wage. These steps too were taken expressly without any notice-and-comment.

In 2008, the Bush Administration's Labor Department gave notice of and sought comment on its proposal to clarify Section 778.114 by saying that making additional payments to fluctuating-workweek employees was consistent with the arrangement. In 2011, the Obama Administration's Labor Department rejected the proposal, expressing its intention to leave the pre-existing interpretation unchanged (except for editorial revisions to delete gender-specific references and to update the computation examples in ministerial ways).

The Bottom Line

The fact is that Section 778.114's so-called "conditions", "legal prerequisites", "requirements", and alleged imperatives by any other description have never been subjected to APA notice-and-comment rulemaking procedures. The provision represents nothing more than a collection of USDOL observations about applying the FLSA's overtime requirements in a particular setting. It does *not* have the force and effect of law, and its contents do *not* merit the persnickety over-analysis that some have brought to it.

Moreover, given that Congress has never delegated plenary regulatory power to USDOL with respect to the FLSA's overtime requirement, it is highly doubtful that Section 778.114 could be made mandatory even if that agency resorted to the APA's procedures.

In any case, notwithstanding that some courts have erroneously treated Section 778.114 as something it is not, the provision cannot become prescriptive via the back door. Employers and employer advocates should clearly, carefully, and consistently resist efforts by opponents or by courts to ascribe a compulsory status to Section 778.114 that it does not possess.