
**Federal Court Report**

**11th Circuit: Additional Compensation for Salaried, Nonexempt Employee Is Permissible**

1/12/2022

By Douglas H. Duerr - Elarbee, Thompson, Sapp & Wilson LLP
*A member of* [*Worklaw® Network*](http://www.worklaw.com)

For employees paid overtime compensation pursuant to the fluctuating workweek method available under the Fair Labor Standards Act (FLSA), the payment of bonuses, shift differentials or other variable pay for the same week does not invalidate the arrangement, according to the 11th U.S. Circuit Court of Appeals.

The plaintiff was employed in Florida as a technician and was classified by Plastipak as a salaried, nonexempt employee. When he was hired, he signed a document stating that he would be paid according to the fluctuating workweek method of calculating his overtime compensation.

Under this method, an employee's overtime compensation is calculated by taking the weekly salary, dividing it by the total number of hours worked in the week to determine the employee's regular rate of pay for the week. That hourly amount is then divided in half and multiplied by the number of overtime hours to determine the overtime compensation due. In the plaintiff's case, Plastipak used a formula that was more generous than the law required by dividing the salary in weeks with overtime by only 40 (thus increasing the regular rate) and then multiplying that rate (rather than using only half) by the number of overtime hours.

In addition to a salary, the plaintiff would also occasionally receive holiday pay and, in weeks when he worked the night shift, up to $30 extra as a form of shift differential. When calculating his overtime compensation in such weeks, Plastipak would add those additional payments to the total before calculating the regular rate for the week.

The plaintiff sued, alleging that these additional, irregular amounts meant he did not receive a fixed salary each week and that, therefore, he was entitled to additional overtime compensation. The federal district court agreed and awarded judgment for the plaintiff. Plastipak appealed.

In reversing the district court's decision, the court of appeals looked at the history, dating back to 1938, of how the U.S. Department of Labor (DOL) had interpreted the requirements for use of the fluctuating workweek method of determining overtime as well as the U.S. Supreme Court's decision in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 575 (1942). Both the DOL's interpretation and the Supreme Court's decision permitted use of this method of calculating overtime compensation, and this was adopted by regulation in 1968 by addressing payment of employees paid a "[f]ixed salary for fluctuating hours." 29 C.F.R. §778.114.

Applying a textual analysis, the appeals court determined there was no requirement that the total, weekly compensation be fixed, rather there had to be an understanding that there would be a weekly salary intended to cover the straight-time component of the hourly pay. This interpretation was supported by other regulations distinguishing between salary and other types of compensation such as bonuses.

The appeals court noted in passing that although not relevant to the decision because the case involved work performed from 2011 to 2016, in 2020, the regulation was amended to clarify that payment of additional compensation did not invalidate the method of calculating overtime.

*Hernandez v. Plastipak Packaging, Inc.*, 11th Cir., No. 19-12655 (Oct. 13, 2021).

**Professional Pointer:** While the fluctuating workweek method of paying a salaried, nonexempt employee cannot be used in every state, it is available under the FLSA as a method of reducing the overall cost of overtime compensation payable to employees whose hours vary. This decision potentially opens the door for employers to provide additional compensation components. However, other courts of appeals, while allowing such additional compensation, draw a distinction between additional compensation tied back to hours worked (e.g., shift differential), and thus inconsistent with a fixed salary, and those that are not tied back to hours worked (e.g., commissions). Thus, when considering additional compensation for salaried, nonexempt employees, the consequences of doing so may vary depending upon where the employee works.

*Douglas H. Duerr is an attorney with* [*Elarbee, Thompson, Sapp & Wilson LLP*](https://worklaw.com/firms/elarbee-thompson-sapp-wilson)*, the Worklaw® Network member firm in Atlanta.*