Two Courts of Appeals to Consider Legality of Paying Incentive Compensation to Fluctuating Workweek Employees

Courtesy of Robert W. Pritchard – March 11, 2014
In a pair of appeals that will have significant implications for employers that utilize the fluctuating workweek (FWW) method of calculating overtime compensation, the U.S. Courts of Appeals for the Second and Sixth Circuits are considering whether the payment of incentive compensation (in addition to fixed weekly salary) is incompatible with the FWW method. Nothing says "no good deed goes unpunished" quite like a claim that the payment of additional compensation invalidates an otherwise lawful compensation plan.

By way of background, the Department of Labor (DOL) historically recognized that the payment of incentive compensation did not undermine the "fixed salary" component of a valid FWW plan under 29 C.F.R. § 778.114. In 2008, the DOL even issued a notice of proposed rulemaking to amend § 778.114 to clarify and confirm its position that bonus or premium payments do not invalidate the FWW method. 73 Fed. Reg. 43654. In 2011, however, the DOL abruptly rescinded the proposed amendment and changed its position, announcing (in a preamble to a Final Rule) that the payment of bonus and premium payments is "incompatible" with the FWW method. 76 Fed. Reg. 18832. As expected, plaintiffs' attorneys seized on the DOL's about-face on the issue to allege that the payment of incentive compensation was incompatible with the FWW method. The results of this litigation have been mixed.

In Sisson v. RadioShack Corp., No. 1:12-cv-958, 2013 U.S. Dist. LEXIS 40135 (N.D. Ohio Mar. 11, 2013), the court granted Chevron deference to the DOL's 2011 announcement even though it did not result in any change to the relevant text of § 778.114. The court concluded that while bonus payments to FWW employees were lawful prior to 2011, the language in the preamble to the 2011 Final Rule changed the law and rendered subsequent bonuses incompatible with the FWW method. Later, acknowledging its "struggles with this issue and with the deference to be afforded the DOL's Final Rule," the court certified its order for interlocutory appeal to the Sixth Circuit.

In November 2013, the Southern District of New York issued a thoughtful and well-reasoned decision rejecting the holding in Sisson. In Wills v. RadioShack Corp., No. 13 Civ. 2733, 2013 U.S. Dist. LEXIS 159727 (S.D.N.Y. Nov. 7, 2013), the court concluded that the 2011

Final Rule left in place a distinction between hours-based bonuses (which it held were incompatible with the "fixed salary" requirement) and performance-based bonuses (which are not). The plaintiff appealed to the Second Circuit.

Recent developments in the Sisson and Wills appeals suggest that the debate over the legitimacy of paying incentive compensation to FWW employees is heating up.

On March 5, 2014, the Sixth Circuit granted RadioShack's petition for permission to appeal. The Court of Appeals noted that the question of whether the payment of performance-based bonuses is inconsistent with the FWW method "is a difficult, novel issue of first impression" and that the "only other case directly on point [Wills] reached a conclusion contrary to that of the district court" in Sisson.

In Wills, the DOL recently indicated that it is considering whether to file an amicus curiae brief in support of the plaintiff/appellant. In a filing with the Second Circuit, the DOL characterized this as a "very important" issue. On March 6, 2014, the DOL asked the Second Circuit for additional time to consider "how the Sisson case will affect the Department's position" in Wills.

Employers who pay incentive compensation to FWW employees should closely monitor developments in these two appeals. The DOL has come under fire in recent years for attempting to reverse course on previously well-established principles without engaging in formal notice-and-comment rulemaking. We may soon find out if the DOL's latest reversal, announced in a preamble to a Final Rule and (perhaps) soon to be backed up with an amicus brief, will withstand the scrutiny of two Courts of Appeals.

Filed Under: Wage & Hour