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When an FLSA Blended Rate Improperly Acts as a Regular Rate: A Case in Point

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Article By Jackson Lewis P.C.
Tony H. McGrathWage and Hour Blog

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The Fair Labor Standards Act (FLSA) generally requires employers to pay non-exempt employees overtime pay at one and one-half times their "regular rate" of pay for all hours worked over 40 in a given workweek. The regular rate is the result of a math equation: The employee's total compensation (with a few defined exceptions) paid by the employer during the workweek in question, divided by the total number of hours worked during that week.

The FLSA was designed specifically so that overtime hours are more costly to the employer than the first 40 hours in a week. The Act was passed in the midst of the Great Depression, when unemployment was high, so by increasing the cost of overtime hours, Congress intended to give employers a financial incentive to hire more employees and spread the work around. Thus, the FLSA is intentionally hostile to non-traditional compensation systems that attempt to blur the lines between straight time and overtime hours.

So, what happens when an employer tries to arrange it so that all hours effectively cost the same? In other words, may an employer satisfy the FLSA's overtime obligation by blending the non-overtime rate with the overtime rate and paying that rate for *all* hours worked during the week? "No," the Fourth Circuit Court of Appeals recently reaffirmed. *U.S. Dep't of Labor v. Fire & Safety Investigation Consulting Servs., LLC*, 915 F.3d 277 (4th Cir. 2019).

In *Fire & Safety*, the employer provides on-site fire investigation consultants to its clients in the oil and gas industry. The consultants were regularly scheduled to work a "hitch" of 12 hours per day for two full calendar weeks, followed by two full calendar weeks off. Thus, over the course of a full hitch, the employee worked 168 hours in two workweeks, or 84 hours per week. Initially, for a given workweek consultants were paid a regular rate for the first 40 hours of the week and one and one-half times that rate for all hours over 40. Then, for about a two year period, the company used a different pay system, based on a blended "hitch rate." Under that system, if a consultant worked a full two-week hitch, he or she was paid a fixed sum, purportedly comprised of a regular rate for the first 40 hours of each week and an overtime rate of one and one-half times the regular rate for the next 44 hours of each week.

So far, so good. However, if a consultant worked *less than* a full 168-hour hitch – even one involving less than 40 hours during one or both weeks – the company reduced their pay based on a "blended rate." The company calculated the "blended rate" by dividing the individual's fixed, full-hitch pay by 168 and then multiplying that rate by the number of hours actually worked during the two-week period. For each hour less than 168 that they worked in a hitch, the consultant's compensation was reduced by the hourly "blended rate." In other words, the employer's blended rate was calculated in the same manner as the FLSA requires the regular rate to be calculated, even if an employee worked no overtime hours. Following an anonymous complaint filed by one of the consultants, the U.S. Department of Labor brought suit alleging failure to properly pay overtime.

More than 70 years ago, the U.S. Supreme Court held that this kind of compensation method likely fails to comply with the overtime requirements of the FLSA, because it blurs the lines between overtime and non-overtime hours. "The payment of 'overtime' compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the 'overtime' compensation is calculated," and is "evidence of an attempt to pay a *pro-rata* share of the weekly wage." *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 205 (1947). Although

such systems may appear to pay *greater* compensation for non-overtime hours worked, in reality they "fail to account for the actual number of regular and overtime hours that an employee works [and] are impermissible replacements for traditional overtime pay rates under the FLSA." *Fire & Safety*, 915 F.3d at 282 (*citing Lopez v. Genter's Detailing, Inc.*, 511 Fed. Appx. 374, 375 (5th Cir. 2013)).

The example posed in the Fourth Circuit's opinion demonstrates the potential flaw in applying such a blended rate. One consultant's regular hourly rate was $23.58. If he worked a full hitch, his compensation could be determined by adding his regular rate of $23.58 per hour times the 80 non-overtime hours of the hitch, to his overtime rate of $35.37 per hour (*i.e.* $23.58 x 1.5) for the 88 overtime hours of the hitch, for a rounded total "hitch rate" of $5,000. His blended rate was then calculated by dividing the $5,000 hitch rate by 168 hours, or $29.76.

When the consultant worked less than a full hitch, he was paid his blended rate times the number of hours actually worked. In the Fourth Circuit's example, during one pay period the consultant worked only six 12-hour days (72 hours total) during the two-week hitch period. If his regular rate legitimately was $23.58 per hour and, as set forth in *Asselta*, his pay was supposed to reflect 40 hours at the regular rate and 32 hours at the overtime rate, he should have been paid ($23.58)(40) + ($35.37)(32) = $2,075.04. But because the blended rate was used, he was paid ($29.76)(72) = $2,142.86. So, if it appears he was paid more than required by the law, why is that a problem?

Because that appearance is illusory. If an employee works a *fixed* number of overtime hours each week, the FLSA regulations do allow paying that employee for all non-overtime hours plus a fixed sum for overtime (calculated by multiplying the overtime rate by the number of overtime hours regularly worked). 29 C.F.R. § 778.309. This regulation is not an exception to the overtime rule, but is instead merely recognition of the mathematical fact that multiplying the same fixed number of overtime hours by the same regular rate will always yield the same result. Not surprisingly, this provision does not apply when an employee works a *varying* number of overtime hours. In the latter case, *Asselta* mandates that the regular rate is based on the number of hours actually worked in a workweek and that the overtime rate is 1.5 times the regular rate.

Thus, because the consultants here did not work a fixed number of overtime hours, the employer was improperly substituting its blended rate for the regular rate. Using the above example, the consultant's actual regular rate was ($2,142.86 ÷ 72) = $29.76 per hour, the same rate the company used as a blended rate. Therefore, his non-overtime pay should have been ($29.76)(40) = $1,190.48, and his overtime pay should have been ($29.76)(1.5)(32) = $1,428.57, for a total of $2,619.05. Instead, he was paid nearly $500 less for that pay period. As a result of the employer's miscalculation of overtime pay due, the Fourth Circuit upheld the trial court's award of more than $1.5 million to the DOL.

The Fourth Circuit's opinion is in line with the holdings of similar cases from the Second and Fifth Circuits applying *Asselta, see Lopez*, 511 Fed. Appx. 374; *Adams v. Department of Juvenile Justice*, 143 F.3d 61 (2d Cir. 1998), and demonstrates the risks employers assume when undertaking "blended" or other non-traditional compensation schemes.