Half-Time or Time and One-Half? Recent Developments Deprive Employees of their Rightful Overtime under the FLSA

Christina Harris Schwinn
Half-Time or Time and One-Half?
Recent Developments Deprive Employees of their Rightful Overtime Compensation under the FLSA

By:
Christina Harris Schwinn
B.A. December 20, 1985, University of Nevada, Reno
J.D. September 15, 1990, Thomas M. Cooley Law School
LL.M. December 18, 1991, University of Miami’s Graduate Law School

A Thesis submitted to:
The Faculty of
Atlanta’s John Marshall Law School
in partial satisfaction of the requirements
For the Masters of Employment Law
May 19, 2012

Thesis directed by:
Joelle Sharman
Adjunct Faculty, Atlanta’s John Marshall Law School
Partner: Lewis, Brisbois, Bisgaard & Smith LLP
Acknowledgements:

The author\(^1\) wishes to give special thanks to my thesis advisor Joelle Sharman for her inspiration and contribution to my thesis, to cohort thesis advisor Professor Laura McNeal for her assistance and input regarding presentation and style, to Mary Wilson, Head of Public Services for her expert assistance in helping me to research the legislative history aspects associated with my thesis, to Lisa Kaplan, Director of the Employment Law LL.M. Program for assistance throughout the program, and to the leaders at Atlanta’s John Marshall Law School for being the first to offer an on-line master of laws program in Employment Law.

\(^1\) A note about the author: I have spent most of my 20 plus year career representing management which may surprise the reader as the position that I take in this article is contrary to the position that many management attorneys take or want to hear publicly. However, as jurists I believe that it is important to be intellectually honest and pause to examine the legislative intent of the Fair Labor Standards Act of 1938, as amended (“FLSA”) and the ills that it is intended to address. While many believe that the FLSA is outdated and needs to be overhauled, others believe that the underlying intent should be preserved. Regardless of where one sits in this debate, the reality is that as a society we are governed by the laws of this land and the intent of the FLSA should be observed regardless of its inconvenience or cost to employers until amended. Whether the FLSA should be overhauled is another question entirely, but until such event happens it is incumbent upon courts to apply the FLSA and its implementing regulations as intended and properly apply Supreme Court precedent.
Disclaimer:
The author is a Partner with the Pavese Law Firm in Fort Myers, Florida. This thesis was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Employment Law at Atlanta’s John Marshall Law School. The views expressed in this paper are solely those of the author and do not purport to reflect the official views of her partners or of the firm.
Abstract

This thesis discusses the United States Court of Appeals for the Seventh Circuit’s decision in Urnikis-Negro v. American Family Property Services, et al., 616 F.3d 665 (7th Cir. 2010); cert. denied, 131 S.Ct. 1484 (February 22, 2011) in which it authorized the payment of overtime to the plaintiff in an exemption misclassification case under the Fair Labor Standards Act of 1938, 29 U.S.C. retroactively based upon the methodology under the fluctuating workweek method of paying overtime even though such method for paying overtime in misclassifications cases is not authorized under the FLSA, its regulations, interpretive bulletins or under the United States Supreme Court’s holding in Overnight Motor Transp. Co., Inc. v. Missel, 316 U.S. 572, 62 S.Ct. 1216 (1942).

In this thesis, the author takes the position that the holding in Urnikis-Negro was wrong and that the court arrived at its position because it misconstrued the Supreme Court’s holding in Missel when it relied upon the Supreme Court’s dicta in Missel which recognized and discussed that an employer and employee could enter into an agreement that contemplated that the required overtime premium could be based upon one-half of an employee’s regular hourly rate versus one and one-half times the employee’s regular hourly rate.
SECTION FOUR – CONCLUSION
Table of Authorities

Cases


Blackmon v. Brookshire Grocery Company, 835 F.2d.1135 (5th Cir. 1988) .............. 4


Clements v. Serco, Inc., 530 F.3d. 1224, 1230 (10th Cir.2008)................................. 24, 25

Condo v. United States Court of Appeals for the Seventh Circuit, 1 F.3d 599 (1993) .......................................................................................... 15, 17, 18, 21


Desmond v. PNGI Charles Town Gaming, L.L.C., 630 F.3d 351 (4th Cir. 2011) ............................................................................................................. 4, 8


Griffin v. Wake County, 142 F.3d 712 (1998) ............................................................... 19, 20, 21, 26

Hammer v. Dagenhart, 247 U.S. 251 (1918) ................................................................. 7


Kaiser v. At The Beach, Inc., 2010 WL 5114729 (10th Cir. 2010) .............................. 19, 24, 25


Morehead v. Tipaldo, 298 U.S. 587 (1936) ......................................................... 7


Saizan v. Delta Concrete Products Company, Inc., 209 F. Supp. 2d 1008 (9th Cir. 2009) .................................................. 4

Schecther Corp. v. United States, 295 U.S. 495 (1935). .................................................. 7

Scott v. OTS, Inc., et al., 2006 WL 870369 (11th Cir. 2006) .................................................. 19, 27

St. John v. Brown, D.C., 38 F. Supp. 385, 390 (N.D. Texas, Fort Worth Division 1941) .................................................. 8

Urnikis-Negro v. American Family Property Services, et al., 616 F. 3d 665 (7th Cir. 2010); cert. denied, 131 S.Ct. 1484 (February 22, 2011) ............... passim

Valerio v. Putnam, 173 F. 3d 35 (1st Cir. 1999) .................................................. 20


Statutes

29 C.F.R. § 778.107 .................................................. 10

29 C.F.R. § 778.108 .................................................. 10

29 C.F.R. § 778.113(a) .................................................. 4, 11, 14

29 C.F.R. § 778.114(a) .................................................. passim

29 U.S.C. § 202 .................................................. 1, 8

29 U.S.C. § 203(5) s. (1) .................................................. 1

29 U.S.C. § 204 .................................................. 4
<table>
<thead>
<tr>
<th>Citation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 U.S.C. § 206</td>
<td>8</td>
</tr>
<tr>
<td>29 U.S.C. § 207(a)</td>
<td>4</td>
</tr>
<tr>
<td>29 U.S.C. § 207(a)(1)</td>
<td>1, 9</td>
</tr>
<tr>
<td>29 U.S.C. § 207(e)</td>
<td>2, 4, 9</td>
</tr>
</tbody>
</table>

**Other Authorities**

- Roosevelt, *Public Papers*, VI (May 24, 1937), pp. 214-16 | 8 |
INTRODUCTION

Congress enacted the Fair Labor Standards Act of 1938, 29 U.S.C. ("FLSA") to set minimum standards regarding the payment of wages to employees. In particular, the FLSA requires covered employers\(^2\) to pay nonexempt employees both a minimum wage and an overtime premium when they work more than the statutorily set number hours in a given workweek.\(^3\) Congress enacted the overtime provision for two reasons: 1) to encourage employers to hire new employees rather than work existing employees very long hours for little pay; and 2) to ensure that employees who were required to work long hours in excess of the statutory maximum regular workweek were compensated for their extra hours of work.\(^4\)

In addition to payment of the minimum wage to nonexempt employees, the FLSA generally requires a covered employer to pay its nonexempt employees an overtime

---

\(^2\) A covered employer is one that meets one of the following:

29 U.S.C. § 203(5) s. (1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that:

(A) (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $ 500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

\(^3\) 29 U.S.C. § 207(a)(1). Today, the statutorily set number of hours is 40 hours per workweek for nonexempt employees.

\(^4\) 29 U.S.C. § 202 “that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalties of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.”
premium of one and one-half times the employee’s regular hourly rate\(^5\) for each hour worked in excess of the statutory maximum hours (hereinafter referred to as 40 hours) in a given workweek.\(^6\) However, there is an alternative method authorized under 29 C.F.R. § 778.114(a) that allows an employer to pay a nonexempt employee the required overtime premium based upon one-half of an employee’s regular hourly rate instead of payment based upon one and one-half times the employee’s regular hourly rate for each overtime hour worked during the week.\(^7\) Payment of the required overtime premium based upon the half-time method of paying the overtime premium is commonly referred to as the “fluctuating workweek method” hereafter referred to as FWW.\(^8\)

The FWW method is intended to apply to specific, limited employment situations on a prospective, not retroactive, basis. In particular, the FWW was designed to address situations in which an employee works an irregular number of hours from week to week\(^9\) which are not determinable in advance by the employer.\(^10\) The FWW method requires

---

\(^5\) An employee’s regular hourly rate is calculated by determining the employee’s entire compensation excluding gifts and nondiscretionary bonuses by dividing the total wage paid for the week by the number of hours worked. For example, if a nonexempt employee works 45 hours during the week and is paid $600 for the week, the employee’s regular hourly rate is determined by dividing 45 into $600 which equals $15 per hour for the week. The regular hourly rate is often referred to as the straight time rate or straight time pay. 29 U.S.C. § 207(e).

\(^6\) For example, if a nonexempt employee makes $15 per hour and works 45 hours in a week, the employer is required to pay the employee $15 per hour x 40 which equals $600 plus 5 hours x $22.50 per hour (one and one-half times the employee’s regular hourly rate of $15 per hour) which equals $112.50. Total gross pay for the week would be $712.50.

\(^7\) See 29 C.F.R. § 778.114(a): “An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.”

\(^8\) Id.

\(^9\) The FWW method of paying the required overtime premium at half-time was intended to address those limited situations where from week-to-week, neither the employer nor the employee knew whether the employee would work less or more than 40 hours each week.

both that an employee be paid a set salary for all hours worked,\textsuperscript{11} regardless of whether the employee works more or less than 40 hours in a given workweek,\textsuperscript{12} and that the required overtime premium be paid contemporaneously. If an employee works less than 40 hours in the workweek, the employee still receives the same set salary as the employer is not entitled to deduct pay when the employee works less than 40 hours during the workweek.

When the FWW method of pay is implemented in accordance with § 778.114(a) both the employee and the employer benefit equally because the FWW method of pay: 1) stabilizes an employee’s base wage from week to week as the employee receives the same base salary regardless of the number of hours worked, i.e. above or below 40, plus the required contemporaneous overtime premium when due; and 2) it allows the employer to better budget its payroll expense. But when the FWW methodology of paying overtime is applied retroactively, it harms the employee to the benefit of the employer because the employer’s financial obligation for unpaid overtime is reduced by approximately three-fourths or more of what the employer should be required to pay to misclassified employee in a misclassification case.\textsuperscript{13}

Moreover, application of the FWW methodology retroactively in a misclassification case like \textit{Urnikis-Negro v. American Family Property Services, et al.},\textsuperscript{14}

\begin{itemize}
\item \textsuperscript{11} Under the FWW method, there are two rates of pay that apply. The first rate of pay is determined by calculating the employee’s regular hourly rate. For example, if an employee works 45 hours in a week and is paid $600 the employee’s regular hourly rate for that week would be $15 per hour. Pay at $15 per hour is often referred to as straight time pay or pay for straight time hours.
\item \textsuperscript{12} 29 C.F.R. § 778.114(a).
\item \textsuperscript{13} \textit{Urnikis-Negro v. American Family Property Services, et al.}, 616 F.3d 665, 670 (7th Cir. 2010); cert. denied, 131 S.Ct. 1484 (February 22, 2011). The Seventh Circuit states: “use of the FWW method reduced her total compensation by more than 75 percent.”
\item \textsuperscript{14} 616 F.3d 665 (7th Cir. 2010); cert. denied,131 S.Ct. 1484 (February 22, 2011). \textit{Id.}
\end{itemize}
progeny, and prior decisions only serve to: 1) reward—and potentially encourage—an employer to misclassify a nonexempt employee as exempt at the inception of the employment relationship; 2) deny an employee the employee’s rightful overtime compensation when due; and 3) forces an employee to complain to the U.S. Department of Labor or file suit to collect unpaid overtime.

Under the FWW method, an employee’s regular hourly rate is determined by taking the salary paid to an employee for the week and dividing it by the total number of hours worked for that week. As such, if an employee’s hours fluctuate from week to week so does the employee’s regular hourly rate. Absent application of the FWW method, an employee’s regular hourly rate is determined by taking the total compensation earned for the week and dividing it by 40 hours.

An employee who is paid based upon the FWW method earns more per hour when the employee works less than 40 hours per week and less per hour when the employee works more than 40 hours per week. For example, if an employee only works 35 hours and is paid a salary of $600 for the week, the employee’s regular hourly rate for the week is $17.14 per hour. But if the same employee works 50 hours, the employee’s

---

16 Blackmon v. Brookshire Grocery Company, 835 F.2d.1135 (5th Cir. 1988) (recognized application of FWW method of paying overtime in misclassification case, but provided no analysis); See also Saizan v. Delta Concrete Products Company, Inc., 209 F.Supp.2d 1008 (9th Cir. 2009) applied Blackmon, supra (without analysis of the underlying issue).
19 The United States Department of Labor is the entity responsible for enforcing the Fair Labor Standards FLSA with power being vested in the Secretary of Labor (29 U.S.C. § 204).
20 If an employee’s total compensation includes extra pay during the week then an employee’s regular rate may fluctuate from week to week, but the fluctuation is not a result of the number of hours the employee worked as the divisor is always 40 or the regular number of hours the employee is scheduled to work per week. 29 C.F.R. § 778.113(a). There are some exceptions to the general rule of including all compensation earned in a workweek when determining an employee’s regular hourly rate, e.g. truly discretionary bonuses may be excluded. 29 U.S.C. § 207(e).
regular hourly rate is reduced to $12 per hour. In addition to an employee’s regular hourly rate fluctuating under the FWW method, so does the overtime premium.

The following example illustrates the difference between paying overtime based upon one and one-half times an employee’s regular hourly rate versus one-half and the effect that the FWW method has on an employee’s regularly hourly rate:

<table>
<thead>
<tr>
<th>Time and One-Half</th>
<th>Half-Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>based upon a 45 hour workweek</td>
<td>based upon a 45 hour workweek</td>
</tr>
<tr>
<td>Weekly Salary $600/40 = $15</td>
<td>Weekly Salary $600/45 = $13.33</td>
</tr>
<tr>
<td>$15 per hour x 1 1/2 = $22.50</td>
<td>$13.33 per hour x 1/2 = $6.66</td>
</tr>
</tbody>
</table>

Based upon the above example, if an employee worked 45 hours in a workweek and was paid time and one-half, she would be paid a total of $712.50 ($600/40 = $15 (regular hourly rate) plus overtime in the amount of $112.50 ($15 x 1.5 = $22.50)) for the week. On the other hand if she worked 45 hours and was paid based upon the FWW method, she would be paid a total of $633.30 ($600/45 = $13.33 (regular hourly rate) plus overtime of $33.30 ($13.33 x .5 = $6.66 (half-time rate)) for the week. In this one-week example, an employee who is paid based upon the FWW method would receive $91.85 less in pay for the week. When this hypothetical example is annualized, a misclassified employee who worked 45 hours per week and was paid retroactively based upon the FWW method would be paid $7,592 less than she would have been paid but for being paid based upon the FWW method.21

---

21 Based upon the example cited above, an employee who worked 45 hours each week for 52 weeks would be paid $31,200 for straight time and $5,850 for overtime absent the FWW method for a total of $37,050.
In addition to the overtime premium being less under the FWW method, as shown above, so is the employee’s regular hourly rate of pay because the regular hourly rate is determined by dividing total compensation earned for the week by the total number of hours worked\(^{22}\) which effectively reduces an employee’s regular hourly rate. The fluctuation in an employee’s regular hourly rate under the FWW method coupled with the overtime premium being paid at one-half versus one and one-half times an employee’s regular hourly rate is the reason why employers argue that the FWW methodology for determining how much overtime pay is owed in a misclassification case is the proper method.

This thesis discusses why the United States Circuit Court of Appeals for the Seventh Circuit in *Urnikis-Negro* and other courts erred when they sanctioned application of the FWW methodology of paying the required overtime premium that is due to an employee in misclassification cases.\(^{23}\) Section One will discuss the legislative history and the applicable statutory provisions and regulations. Section Two will analyze why the Seventh Circuit’s holding in *Urnikis-Negro* decision was wrong. Section Three will discuss some appellate court decisions that have properly applied the FWW method. Section Four concludes by stating that the Supreme Court needs to again weigh in on this issue, reaffirm its true holding in *Overnight Motor Transp. Co., Inc. v. Missel*,\(^ {24}\) clarify that application of the FWW methodology of paying the required overtime retroactively in a misclassification case is improper, and state that all five requirements under §

\(^{22}\) 29 U.S.C. §207(e).

\(^{23}\) This paper does not discuss the liquidated damages aspect of the Seventh Circuit’s holding in *Urnikis-Negro*.

\(^{24}\) 316 U.S. 572, 62 S.Ct. 1216 (1942).
778.114(a) must be satisfied before an employer may even pay an employee overtime based upon the FWW method.

SECTION ONE - LEGISLATIVE INTENT

1.1 Legislative History

Prior to the passage of the FLSA, but during the “New Deal” era, numerous initiatives aimed at raising living standards for workers were fought. Some were won initially, but later lost like the passage of the National Industrial Recovery Act, 15 U.S.C. § 703 (NIRA)\(^25\) which was ultimately found to be unconstitutional by the United States Supreme Court.\(^26\) Like the NIRA, the FLSA was one of several “New Deal” initiatives championed by President Roosevelt following the depression. After a hard-fought bitter battle which included fierce opposition to passage of the FLSA by industry trade groups\(^27\) representing employers, including the Chamber of Commerce and the National Manufacturers Association,\(^28\) Congress passed the FLSA and President Franklin D. Roosevelt signed it into law on June 25, 1938 to be effective beginning October 24, 1938.\(^29\)

Understanding why the FLSA requires the payment of a minimum wage, an overtime premium when an employee works more than 40 hours in a week, and the criteria that must be satisfied under § 778.114(a) before an employee may be paid

\(^{26}\) *Schecther Corp. v. United States*, 295 U.S 495 (1935).
\(^{28}\) *Forsythe*, supra. Also note that prior to the passage of the FLSA, the Supreme Court was an obstacle to the passage of wage-hour type legislation that predated the FLSA. “Among notable cases is the 1918 case of *Hammer v. Dagenhart*, [247 U.S. 251 (1918)] in which the court by one vote held unconstitutional a Federal child-labor law.” *Grossman*, supra, Roosevelt, *Public Papers*, VI (May 24, 1937), pp. 214-16; another notable example is the Supreme Court’s decision in *Morehead v. Tipaldo*, 298 U.S. 587 (1936) in which the court held that the State of New York’s minimum wage law as unconstitutional.
\(^{29}\) *Grossman*, supra.
overtime based upon the FWW method are key to understanding why the court in *Urnikis-Negro* and progeny\(^{30}\) erred when sanctioning retroactive application of the FWW methodology for the payment of the overtime premium in misclassification cases.

Congress’ stated objectives when it passed the FLSA were, in part, “that the existence ... of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of [employees]” is adverse to the interests of interstate commerce. Both the minimum wage and overtime premium requirements were—and still are—intended to raise the minimum standard of living and to encourage employers to hire new workers rather than work an existing employee beyond the statutory minimum without additional overtime compensation.”\(^{31}\)

### 1.2 Applicable Statutory Provisions

When analyzing a statute and the regulations implementing the statute, it is important to first review the pertinent statutory provisions relevant to the issues being discussed.

29 U.S.C. § 206 Minimum Wage provides in pertinent part as follows:

(a) Employees engaged in commerce ... . Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $7.25\(^{32}\) ... an hour during the period ...

---


\(^{31}\) 29 U.S.C. § 202; see also *St. John v. Brown, D.C.*, 38 F.Supp. 385, 390 (N.D. Texas, Fort Worth Division 1941). (The one and one-half times provision is akin to a penalty, to discourage overtime employment and to encourage a greater spread of employment.).

\(^{32}\) When originally enacted, the FLSA set the initial minimum wage at $.25 per hour.
29 U.S.C. § 207(a)(1): Overtime -- Maximum Hours provides in pertinent part as follows:

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(e): Regular Rate is defined in pertinent part as follows:

(e) "Regular rate" ... shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee ... but shall not be deemed to include –

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

---

33 When originally enacted, the FLSA established the maximum workweek at 44 hours which was phased down over a two year period to the present day maximum workweek of 40 hours before the overtime obligation triggers for nonexempt employees.
1.3 Right to Overtime is Not Waivable

Under the FLSA, an employee cannot waive her right to overtime\(^\text{34}\) nor can an employer and employee enter into an agreement whereby the employee agrees to give up her right to receive overtime pay because such an agreement would violate the FLSA. “[T]he parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours worked in excess of 40.”\(^\text{35}\) Further, the Supreme Court has held “FLSA rights cannot be abridged by contract or otherwise waived because this would “nullify the purposes” of the statute and thwart legislative policies it was designed to effectuate.”\(^\text{36}\)

1.4 Applicable Regulations

The following regulations are pertinent when analyzing whether a half-time or time and one-half overtime premium based upon an employee’s regular hourly rate is the proper overtime premium that must be paid to a nonexempt employee when the employee works more than 40 hours in the workweek:


The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum.

29 C.F.R. § 778.108: The "regular rate" (in pertinent part).

The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular

---


rate for an employee; it must be drawn from what happens under the employment contract.

29 C.F.R. § 778.113: Salaried Employee, generally (in pertinent part):

(a) Weekly salary. If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate.

29 C.F.R. § 778.114(a): Fluctuating Workweek (in pertinent part). 37

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.

SECTION TWO - URNIKIS-NEGRO

2.1 The Seventh Circuit’s Holding in Urnikis-Negro

One of the more recent appellate courts to sanction retroactive application of the FWW methodology for the payment of overtime in a misclassification case is the Seventh Circuit in *Urnikis-Negro*.

Prior to analyzing the court’s decision in *Urnikis-Negro* it is important to understand the criteria that must be met under § 778.114(a) before an employer may compensate an employee based the FWW method. Specifically, the FWW method is acceptable when:

1) there is a prospective mutual understanding between the employee and the employer;

2) the number of hours that an employee works each week fluctuates as result of the nature of the work being performed;

---

37 Adopted in 1968 by the Department of Labor to address the payment of overtime to salaried employees “who do not customarily work a regular schedule of hours.”
3) the employee’s salary is the same from week to week regardless of the number of hours worked (less or more than 40) during the week;

4) the numbers of hours worked each week are not determinable in advance; and

5) provided that the employer **contemporaneously** (emphasis added) pays the employee the additional half-time overtime premium for each hour worked over 40 in a given workweek.\(^{38}\)

The facts in *Urnikis-Negro* are as follows: 1) Urnikis-Negro was misclassified as an administrative exempt employee by her employer when she was hired; 2) she was paid a set salary per week; 3) she regularly worked more than 40 hours a week, but not less than 40; 4) she was not paid any overtime premium while she was employed; and 5) following her termination of employment she filed suit seeking overtime compensation at one and one-half times her regular hourly rate for all overtime hours worked.

On the issue of whether Urnikis-Negro was entitled to overtime compensation, the district court ruled in Urnikis-Negro’s favor and awarded her overtime compensation, but not based upon one and one-half times her regular hourly rate. Rather, the district court awarded overtime compensation based upon the methodology under the FWW method.\(^{39}\) As a result of the district court’s decision which was upheld on appeal on other grounds,\(^{40}\) Urnikis-Negro’s overtime compensation award was significantly reduced. Excluding liquidated damages and attorney’s fees she was paid $12,333\(^{41}\) in overtime which is less than one-quarter of what she should have been paid had she been paid overtime at one and one-half times her regular hourly rate.\(^{42}\) Had the Seventh Circuit properly construed

---

\(^{38}\) 29 C.F.R. § 778.114(a).

\(^{39}\) *Urnikis-Negro* at 666.

\(^{40}\) *Id.* at 670.

\(^{41}\) *Id.* at 670.

\(^{42}\) *Id.* at 670.
the holding in *Missel*, excluding liquidated damages and attorney fees, she would have been paid $55,983.75 in overtime compensation.\(^{43}\)

While the Seventh Circuit disagreed with the district court’s reasoning, it nonetheless found that paying overtime in a misclassification case retroactively based upon the methodology under FWW method was the appropriate method of compensating her for her overtime even though it acknowledged that:

1) [§] 778.114(a) itself does not provide the authority for applying the FWW method in a misclassification case”, nor is § 778.114(a) “[intended to act as] a remedial measure that specifies how damages are to be calculated when a court finds that an employer has breached its statutory obligations.\(^{44}\)

2) [T]hat other courts have rejected the FWW method of paying of the required overtime premium in misclassification cases retroactively based upon a half-time overtime premium.\(^{45}\)

3) [C]ases ... where the employee has routinely worked more than a 40-hour week, do not truly fit the FWW paradigm, in that the employee’s hours rarely if ever drop below 40. ... The fit between section 778.114(a) and the misclassified employee is an imperfect one ... . Besides looking forward rather than backward, the interpretive rule plainly envisions the employee’s contemporaneous receipt of a premium apart from his fixed wage for any overtime work he has performed ... . \(^{46}\)

Even though the Seventh Circuit acknowledged that the FWW method’s methodology for paying overtime in a misclassification case is imperfect and purports to reject its application in *Urnikis-Negro*, it still found that Urnikis-Negro was only entitled to an overtime premium based upon half-time because it misconstrued the United States Supreme Court’s holding in *Missel*.\(^{47}\)

\(^{43}\) *Id.* at 670, 673.
\(^{44}\) *Id.* at 666.
\(^{45}\) *Id.* at 674.
\(^{46}\) *Id.* at 679.
In *Urnikis-Negro*, the Seventh Circuit correctly observed that § 778.114(a) “sets forth one way in which an employer may lawfully compensate a nonexempt employee for fluctuating work hours,” but its analysis fell short when it stopped at this broad statement and glossed over the fact that the FWW method of compensating an employee is acceptable only when all five criteria under § 778.114(a) are met. In particular, the court ignored these pertinent facts when it approved applying the methodology of paying the overtime premium under the FWW method even though it purported to reject it: 1) that Urnikis-Negro was never contemporaneously paid any overtime premium; 2) her work hours did not fluctuate above and below 40 which means that her hours were determinable in advance, and 3) whether a true mutual understanding existed regarding her salary being intended to compensate her for all straight time hours worked.

Was there a mutual understanding between Urnikis-Negro and her employer that the salary she was paid was intended to compensate her for all straight time hours worked? On this issue, rather than analyzing the facts, the Seventh Circuit accepted the district court’s determination that a mutual understanding existed even though “Urnikis-Negro when hired believed she would be working a 40 hour week, as she had for the bank . . . . [But nonetheless found that] her salary was intended to compensate her for whatever hours she happened to work.” Based upon Urnikis-Negro’s testimony, the court should have determined that no mutual understanding existed and applied § 778.113(a) which provides that the regular hourly rate for someone who is paid on a salary basis based upon a regular workweek, e.g. 40 hours per week, is determined by dividing the salary paid by 40, not by dividing the total number of hours worked by her salary.

---

48 *Id.* at 673.
49 *Urnikis-Negro* at 671.
As legal support for its ruling in Urnikis-Negro that she was only entitled to an overtime premium at half-time, the Seventh Circuit relied upon the United States Supreme Court’s holding in Missel\(^{50}\) which is interesting in light of the fact that Missel’s true holding addressed the proper method of calculating an employee’s regular hourly rate when there was no agreement between the parties as to the number of hours the employee would be called upon to work and, more notably, § 778.114(a) had not yet been adopted by the United States Department of Labor. The Seventh Circuit misinterpreted the Supreme Court’s holding in Missel when it concluded that Missel supported its ruling that Urnikis-Negro was only entitled to overtime based upon half-time,\(^{51}\) instead of time and one-half. In addition to relying on Missel, the Seventh Circuit also cited to its decision in Condo v. United States Court of Appeals for the Seventh Circuit.\(^{52}\) Each of these cases will be examined below

### 2.2 The Supreme Court’s Holding in Missel

Like Urnikis-Negro, Missel was required to work long hours and was not paid any overtime. The facts in Missel are as follows: 1) Missel was a rate clerk who on average worked 65 hours a week; 2) there was no actual agreement regarding how many hours per week he would work; 3) he was initially hired prior to the enactment of the FLSA at a set salary of $25.50 per week; 4) following passage of the FLSA his set salary was $27.50 per week; 5) he was never paid any additional compensation for overtime hours; 6) he filed suit seeking to recover his overtime compensation at one and one-half times his regularly hourly rate plus liquidated damages;\(^{53}\) 7) his employer argued that the salary

\(^{50}\) Id. at 666.


\(^{52}\) 1 F.3d 599 (1993).

\(^{53}\) The FLSA provides for an award of liquidated damages equal to the unpaid wages.
that he was paid was sufficient to cover both the minimum wage and any overtime premium required under the FLSA; 8) the trial court ruled in favor of Missel’s employer; 9) the Fourth Circuit Court of Appeals reversed the trial court; and 9) the Supreme Court affirmed judgment in favor of Missel and awarded him time and one-half his regular hourly rate, not half-time.

The Supreme Court’s holding in Missel addressed the proper method for calculating an employee’s regular hourly rate when an employee was paid a set salary, not whether application of the payment of the overtime premium based upon half-time was permissible. In Missel, the petitioner argued that Missel’s set salary was sufficient to pay him the required statutory minimum wage for all straight time hours plus a half-time overtime premium for each hour worked in excess of 40 hours per week which the Supreme Court acknowledged, but rejected:

> It is true that the wage paid [in Missel] was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum .... But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law (emphasis added).55

Further, the court rejected the employer’s contention that so long as the salary paid equates to more than minimum wage and the required overtime premium required under the FLSA, that employer has complied with the law. In the end, the Supreme Court found that Missel was due overtime at one and one-half times his regular hourly rate

54 Missel at 1223.
55 Id. at 1223.
56 Id. at 1223.
because there was no agreement regarding the maximum number of hours that Missel was required to work and he was not paid an overtime premium.\textsuperscript{57}

Each of the pertinent facts in Missel are consistent with those present in Urnikis-Negro, yet the Seventh Circuit glossed over or ignored them when it instead focused on Missel’s dicta, i.e. that the “wage paid was sufficiently large to cover both base pay and the 50% additional for the hours actually worked over the statutory minimum.”\textsuperscript{58} The Seventh Circuit’s interpretation of the Supreme Court’s holding in Missel—which is not correct—presumes that any time an employee is paid a fixed weekly salary that the proper method of determining the employee’s regular hourly rate is to divide total compensation earned by the employee during the week by the total number of hours worked to determine the regular hourly rate. Had the Seventh Circuit correctly construed Missel it would have awarded Urnikis-Negro overtime based upon one and one-half times her regularly hourly rate of pay.

\textbf{2.3 The Seventh Circuit’s Ruling in Condo}

In addition to relying on the Supreme Court’s holding in Missel, the Seventh Circuit relied upon its holding in Condo for the proposition that an employer can pay an employee based upon the FWW method even though the employee’s hours from week-to-week do not fluctuate below 40, but it ignored other pertinent facts of the case. Specifically, in Condo the requirement for the contemporaneous payment of the half-time overtime premium was satisfied whereas in Urnikis-Negro it was not. Secondly, the facts supported the finding that a true mutual understanding existed between the parties because there was a written contract between the parties that described how Condo would

\begin{flushright}
\textsuperscript{57} Id. at 1221.
\textsuperscript{58} Missel, supra.
\end{flushright}
be compensated.\textsuperscript{59} Whereas, in \textit{Urnikis-Negro} there was no written contract to support the existence of a mutual understanding and she was not paid overtime.\textsuperscript{60} Additionally, the agreement between the parties in \textit{Condo} was applied prospectively, not retroactively.

In \textit{Condo}, unlike \textit{Urnikis-Negro}, the Seventh Circuit correctly determined the parties had a true mutual understanding that Condo’s salary was intended to compensate him for all straight time hours. Further, Condo was actually paid the required overtime premium. As a result, payment of overtime based upon the FWW method was appropriate in \textit{Condo}.

\section*{SECTION THREE - DECISIONS PROPERLY APPLYING THE FWW METHOD}

\subsection{3.1 29 C.F.R. § 778.114(a)}

Prior to discussing specific cases that rejected application of the FWW methodology of paying the required overtime premium in misclassification cases both pre and post \textit{Urnikis-Negro}, it is important to note that while this section discusses cases that rejected application of the FWW methodology because an employer failed to satisfy all five criteria under 29 C.F.R. § 778.114(a), more commonly courts tend to focus on two of the five criteria: 1) whether a “mutual understanding” exists between the parties and 2) the contemporaneous payment of the half-time overtime premium requirement.

Even though there were a number of federal district and appellate courts that rejected application of the FWW methodology of paying an overtime premium at halftime in misclassification cases prior to \textit{Urnikis-Negro},\textsuperscript{61} the Seventh Circuit rejected such

\textsuperscript{59} Id. at 601.
\textsuperscript{60} \textit{Urnikis-Negro} at 667.
holdings presumably based upon its misinterpretation of the Supreme Court’s holding in
Missel.

Respectively, Sections 3.2 and 3.3 will examine three cases decided both pre and
post Urnikis-Negro in which the respective courts refused to apply the FWW
methodology of paying the overtime premium retroactively in exemption
misclassification cases.

3.2 Cases Decided Prior to Urnikis-Negro

3.2.1 Griffin v. Wake County

Rather than fully analyzing whether a mutual understanding existed in Urnikis-
Negro, the Seventh Circuit accepted the district court’s finding that a mutual
understanding existed even though there was little factual evidence to support such
conclusion, and other appellate court decisions had fully analyzed what the concept
mutual understanding means. In 1998, the Fourth Circuit fully analyzed the mutual
understanding issue in its decision in Griffin v. Wake County. In Griffin, the dispute
between Wake County and its firefighters arose after Wake County prospectively
implemented the FWW method of compensating its firefighters. Prior to adopting the
FWW method, Wake County held meetings with its firefighters and it issued a
memorandum explaining how the FWW method actually worked. Following the
county’s adoption of the FWW method, the affected firefighters filed suit against the
county alleging that there must be a “clear and mutual understanding” between the parties
and that both parties must: 1) understand that the fixed salary is intended to compensate

672 F.Supp.2d 1008 (N.D. Cal. 2009); Scott v. OTS, Inc., et al., 2006 WL 870369 (11th Cir. 2006) and West
v. Verizon Services Corp., et. al., 2011 WL 208314 (11th Cir. 2011).
the employee for all hours worked at straight time and 2) that an employee must also understand how the employee is being compensated for overtime purposes.

The Griffin court found that a mutual understanding existed between Wake County and its firefighters that their salary was intended to compensate them for all straight time hours. The court based its conclusion on the fact that Wake County ensured that its firefighters were provided plenty of information about how the FWW method worked when it held meetings with the firefighters and issued a memorandum of explanation prior to converting to the FWW method. Regarding the firefighters’ assertion that the mutual understanding had to also include an understanding regarding how the overtime premium would be calculated, the court, relying on the holding in Valerio v. Putnam, found that it was sufficient to establish that a mutual understanding existed regarding the firefighter’s salary being intended to compensate the firefighters for all straight time hours worked, regardless of whether the firefighters fully understood how the overtime premium was calculated. In addition, the Griffin court found that not only did “the County ... explain prospectively the FWW method to employees [it] also contemporaneously paid the firefighters their half-time overtime premium.”

While the Fourth Circuit’s holding in Griffin is consistent with the Seventh Circuit’s holding in Condo, infra, the only reference by the Seventh Circuit to the decision in Griffin is in footnote number 8 wherein Griffin is cited for the proposition that a mutual understanding between the parties that a fixed salary is intended to compensate an employee for all straight time hours worked does not have to be in writing. It is

---

63 173 F.3d 35 (1st Cir. 1999).
64 Id.
65 Id. at 716.
66 Urnikis-Negro at 675.
unfortunate that the Seventh Circuit focused on such a narrow aspect of the holding in 
Griffin. Had the Seventh Circuit given more thought to the pertinent holding in Griffin coupled with its own holding in Condo, the result in Urnikis-Negro might have been different.

3.2.2 Cowan, et al. v. Treetop Enterprises, Inc.

In addition to the Fourth Circuit’s decision in Griffin, in 2001 the Sixth Circuit had addressed whether the payment of the overtime based upon the FWW methodology in a misclassification case was appropriate. In Cowan, et al. v. Treetop Enterprises, Inc., et al., 67 like the Fourth Circuit in Griffin, the court properly analyzed the requirements that have to be met under the FWW method and when its methodology is appropriate. The Cowan court rejected application of the FWW methodology for paying the overtime premium in the misclassification case before it primarily because the employer had failed to pay the contemporaneous half-time overtime premium when it was due. 68 Additionally, the Cowan court found that no mutual understanding existed between the parties “that their compensation was intended to cover whatever hours they worked rather than some other fixed weekly period.” 69 Because the employer failed to establish that a mutual understanding existed between the parties on the compensation issue and it failed to pay the required contemporaneous overtime premium, the Cowan court ruled that the misclassified employees were entitled to time and one-half their regular hourly rate, 70 not half-time.

---

67 163 F.Supp.2d 930, 938 (6th Cir. 2001)
68 Id. at 938.
69 Id. at 983. See also, Monahan, et al. v. Emerald Performance Materials, LLC, 705 F.Supp.2d 1206 (9th Cir. 2010).
70 Id. at 987.
Like its cursory reference to Griffin in Urnikis-Negro, the Seventh Circuit did cite Cowan in its decision. Interestingly, the Seventh Circuit cited Cowan for the proposition that § 778.114(a) “plainly envisions the employee’s contemporaneous receipt of a premium apart from his fixed wage for any overtime work he has performed,” yet it still held that Urnikis-Negro was only entitled an overtime premium based upon half-time even though Urnikis-Negro was never paid a contemporaneous overtime premium.

3.2.3 In re Texas Ezpawn Fair Labor Standards Act Litigation

Another court rejecting application of the FWW method retroactively in a misclassification case prior to the Seventh Circuit’s decision in Urnikis-Negro is In re Texas Ezpawn Fair Labor Standards Act Litigation. In Ezpawn, the plaintiffs, like Urnikis-Negro, had been misclassified when they were hired initially by their employer. Following the filing of a lawsuit by the plaintiffs to recover overtime based upon one and one-half times their regular hourly rate, the employer argued that the employees were exempt under the FLSA, or alternatively, if the plaintiffs were not exempt, then calculating overtime based upon the FWW method was the proper method of calculating any overtime due to the plaintiffs. The court disagreed and acknowledged that “cases which apply the fluctuating workweek method to calculate damages struggle in their analysis with several elements of the bulletin ... . These analytical struggles are the result of the old “square peg in a round hole” problem—here, attempting to apply § 778.114 to a situation that it was not intended to address.” In Ezpawn, the court recognized that § 778.114(a) is intended to apply prospectively, not retroactively and refused to apply

---

71 Urnikis-Negro at 674.
72 Id. at 670.
74 Id. at 399.
FWW method for paying overtime retroactively in a misclassification case finding that “[t]he plain language of the statute … requires that an employer violating § 207(a) is liable to an employee for the compensation required by § 207(a)—one and one-half times the employee’s regular rate.” In comparison, the Seventh Circuit in Urnikis-Negro acknowledged that application of the FWW method was not a perfect fit, but nonetheless sanctioned its methodology.

3.2.4 Post Script; Cases Preceding Urnikis-Negro

The Seventh Circuit’s holding in Urnikis-Negro is even more perplexing in light of the fact that it had available to it a number of well-reasoned decisions on the issue of whether the methodology of paying the overtime premium retroactively in a misclassification case under the FWW method was appropriate. The only logical conclusion, in this author’s opinion, to account for the Seventh Circuit’s failure to follow the decisions that came before Urnikis-Negro is that the Seventh Circuit was convinced that the holding in Missel required it to find that Urnikis-Negro was only entitled to be paid overtime based upon one-half of her regular hourly rate.

3.3 Cases Decided Post Urnikis-Negro

While the number of federal district and appellate courts rejecting the Seventh Circuit’s holding in Urnikis-Negro represent the minority, the minority has correctly interpreted when the FWW method of paying the overtime premium under § 778.114(a) is appropriate and the Supreme Court’s true holding in Missel.

3.3.1 Kaiser v. At The Beach, Inc.

75 Id. at 400.
76 Urnikis-Negro at 679.
Four months after the Seventh Circuit’s ruling in *Urnikis-Negro*, the Tenth Circuit in *Kaiser v. At The Beach, Inc.*\(^{77}\) declined to approve the FWW methodology of paying the required overtime premium in a misclassification case despite the defendant’s argument urging the court to do so.\(^{78}\) To begin with, the *Kaiser* court rejected the defendant’s argument that there was a mutual understanding between the parties\(^{79}\) because it determined that no agreement existed between the employee and employer regarding a fixed weekly salary.\(^{80}\) In *Kaiser*, the court, citing *Clements v. Serco, Inc.*\(^{81}\), stated that “the proper inquiry is whether the employee and employer ‘had a clear and mutual understanding that they would be paid on a salary basis for all hours worked, even those worked in excess of forty hours per week.’”\(^{82}\) In *Clements*, the court found that employees had actually affirmatively agreed to accept a salary for all hours worked which was supported by their testimony and written statements provided to the Department of Labor by employees.\(^{83}\) Using the holding in *Clements* as its guide, the *Kaiser* court analyzed the evidence presented in the case before it and found that the only evidence offered to support the defendant’s contention that a mutual understanding existed between the company and the employees that the salary paid to the employees was intended to compensate them for all straight time hours worked was that

\(^{77}\) 2010 WL 5114729 (10th Cir. 2010).
\(^{78}\) Id. at *22, 23.
\(^{79}\) Id. at *22.
\(^{80}\) Id. at *22.
\(^{82}\) *Kaiser*, supra.
\(^{83}\) *Clements* at 1228 (The only aspect of s. 778.114(a) that was discussed by the court was the mutual understanding prong. There was no discussion relating to *Missel*, nor any mention of the requirement under s. 778.114(a) regarding the requirement for the contemporaneous payment of overtime.).
management expected employees to work more than 40 hours a week. Based upon the lack of evidence to support the existence of a mutual understanding regarding the employee’s salary being intended to compensate employees for straight time hours, the Tenth Circuit rejected the holding in *Urnikis-Negro* and ruled that the FWW method was improper.

3.3.2 West v. Verizon Services Corp, et al.

Another court rejecting the Seventh Circuit’s analysis in *Urnikis-Negro* is the Eleventh Circuit Court Appeals. In its January 2011 decision in *West v. Verizon Services Corp, et al.*, the Eleventh Circuit rejected the FWW methodology of paying overtime in the misclassification case before it even though the Eleventh Circuit appeared to interpret the Supreme Court’s holding in *Missel* like the Seventh Circuit did in *Urnikis-Negro* without directly citing the holding in *Urnikis-Negro*. The Eleventh Circuit declined to apply the methodology of the FWW method for paying the required overtime premium retroactively because Verizon failed to satisfy all five criteria of § 778.114(a). As a result of Verizon’s inability to show that it had complied with the requirements set forth under § 778.114(a), the Eleventh Circuit ruled that the employees in *West* were entitled to overtime at one and one-half times their regular rate, not half-time.

3.3.3 Ransom v. M. Patel Enters, Inc.

In November of 2011, another federal district court—unconstrained by the precedent in the Seventh Circuit—further analyzed the mutual understanding aspect of

---

84 *Kaiser, supra.*
87 Id. at *9.
89 Id. at *10.
the FWW method and rejected the holding in *Urnikis-Negro*. In *Ransom v. M. Patel Enters, Inc.*\(^9\) the court acknowledged that a mutual understanding could be inferred from the facts, but unlike the court in *Urnikis-Negro*, it chose to further analyze the term “mutual understanding.” In *Ransom*, like the court in *Griffin, infra*, the court fully analyzed what it means to have a mutual understanding. As a result, the *Ransom* court rejected the idea that an inference alone was sufficient to establish the existence of a mutual understanding when a misclassified employee accepts a salary because when a plaintiff is “found to be nonexempt, … the parties have based their actions on a mutual mistake: [i.e.] the plaintiffs went without demanding overtime payments, and the employer employed them believing that they [the employees] were not entitled to overtime pay.”\(^9\) Further, the court stated “by definition, in a misclassification case the employee will have been ‘paid a fixed weekly sum for any and all hours worked,’ will have ‘routinely worked substantial amounts of overtime,’ and will have never received any overtime premium for hours she worked. If this is all it takes to require the FWW be used to calculate the regular hourly rate, the facts really don’t matter.”\(^9\)

The holding in *Ransom* is consistent with the Supreme Court’s holding in *Missel*. Why? Because in *Missel*, the Supreme Court found that there was no agreement between the parties regarding the maximum number of hours Missel would be required to work and his employer. *Ransom* reminds us that facts do matter and if the facts do not support the existence of a mutual understanding, then a court should not infer the existence of a mutual understanding in exemption misclassification cases.

\(^9\) --F.Supp.2d-- (2011), 161 Lab.Cas. P35,961. (This district court in located in the Fourth Circuit which is where *Missel* originated from).

\(^9\) Id.

\(^9\) Id.; see also *Scott v. OTS, Inc., et al.*, 2006 WL 870369 (11th Cir. 2006).
3.3.4 Post Script; Cases Decided Post Urnikis-Negro

The cases decided pre and post Urnikis-Negro rejecting the FWW methodology for paying the overtime premium in misclassification cases all share striking similarities which include each court: 1) actually analyzing the facts to determine whether a mutual understanding existed; 2) determining whether the required contemporaneous payment of overtime was met; 3) understanding the intent of the FLSA and the objectives that it is intended to achieve, and 4) refusing to allow an employer to avoid its financial obligations to employees under the FLSA.

SECTION FOUR – CONCLUSION

While much about business and employment has changed in the movement from the industrial age that existed in the 1930’s to the technological age that exists today, the underlying purposes of the FLSA have not changed. Congress passed the FLSA to ensure that covered employees were paid the minimum wage, compensated for overtime work and to encourage the hiring of new employees rather than working existing employees long hours. Today, like then, employers are requiring employees to work long hours in excess of the statutory minimum and they are reticent to hire new employees due to economic conditions.

The FLSA requires employers to pay nonexempt employees overtime when they work more than 40 hours per week at a rate of one and one-half times the employee’s regular hourly rate unless the employee is being paid under the alternative method under § 778.114(a). Even though § 778.114(a) is not intended to be a remedial measure, it operates as one when courts, like the Seventh Circuit in Urnikis-Negro, apply its methodology retroactively in a misclassification case because the court first concludes

93 See also Section One; Legislative Intent.
that the parties had a mutual understanding regarding the employee’s salary being intended to compensate the employee for all straight time hours worked and therefore the employee is only entitled to an overtime premium based upon half-time. Further, courts like the Seventh Circuit in *Urnikis-Negro* that sanction payment of the overtime premium at half-time in misclassification cases fail to further the purposes of the FLSA which is to eliminate “labor conditions detrimental to the maintenance of a minimum standard of living necessary for health, efficiency, and general well being of workers.”

The FWW method under § 778.114(a) is permissible when it is applied prospectively, there is a clear and mutual understanding between the parties that the salary is intended to compensate the employee for all straight time hours worked (whether less or more than 40 hours) per week, and the employee is contemporaneously paid the half-time overtime premium. When applied prospectively the purposes of the FLSA are accomplished, but when the FWW methodology for calculating the required overtime premium is applied retroactively in an exemption misclassification case, the purposes of the FLSA are nullified at the expense of the employee.

The FLSA guarantees that a nonexempt employee working for a covered employer will be paid at least the minimum wage and compensated for overtime work in accordance with the law. Decisions like *Urnikis-Negro* and progeny jeopardize these rights because they: 1) encourage employers to misclassify nonexempt employees as being exempt; 2) ignore the fact that the FWW method is not a remedial measure and its application is intended to be prospective; and 3) reward employers for violating the law.

---

94 Id. at 401; 29 U.S.C. § 202.
96 *Barrentine, supra*.
97 *Texas Ezpawn, supra*. 
Employers are rewarded when the FWW method of paying overtime is applied retroactively in a misclassification case because the employer only has to pay approximately 25% or less of what it would have been required to pay had the law been properly applied and it does not have to pay any money to the misclassified employee until such time as a court enters an order ordering the employer to pay overtime compensation.\textsuperscript{98}

The time has come for the United States Supreme Court to affirm its true holding in \textit{Missel} and to declare that the required overtime premium that is due an employee in an exemption misclassification case under the FLSA is time and one-half the employee’s regular hourly rate,\textsuperscript{99} and to further declare that the alternative method of paying overtime under § 778.114(a) only applies when an employer fully complies with all of its requirements.

\textsuperscript{98} \textit{Urnikis-Negro}, supra.
\textsuperscript{99} 29 U.S.C. § 207(a) and (e).