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Pay Model for Variable-Schedule Workers Gets 6th Cir. Stamp (1)

By Robert Iafolla

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- Case of first impression for federal appeals court in Cincinnati
 - Court revived dispute, identified unresolved question for jury

A company can pay workers a fixed weekly amount for up to 60 hours of work when the timing and length of their job tasks can't be controlled or predicted, a federal appeals court said.

The Fair Labor Standards Act permits that alternative compensation model when a worker's duties "necessitate" variable hours, but that doesn't mean an employer can create that necessity just by ordering an irregular schedule, the US Court of Appeals for the Sixth Circuit ruled Wednesday in a case of first impression.

Inconsistent hours become necessary "when the inherent nature of the employee's work—i.e., the inalienable qualities of the industry, profession, or specific position—place the employee's hours beyond either his or his employer's power to control or predict," the court said.

The ruling clarifies the Sixth Circuit's view of one of the four requirements for the compensation model allowing fixed pay for variable hours, generally known as a *Belo* plan. That model was named after the US Supreme Court's 1942 decision in *Walling v. A.H. Belo Corp.* and was added to the FLSA.

At least two other federal appeals courts have concluded that the meaning of "necessitate" for the purposes of a *Belo* plan derives from more than just an employer dictating the hours a worker must be on duty, the court said, pointing to rulings by the Fifth and Tenth circuits.

The other elements allowing for a *Be/lo* plan are that the employee works under an individual contract or a collective bargaining agreement, the deal specifies regular and overtime rates of pay, and it also includes a weekly pay guarantee for up to 60 hours.

The Sixth Circuit case arose from fracking company Producers Service Corp.'s appeal of a lower court decision granting summary judgment to workers who sued for unpaid overtime. The company's predetermined schedules—rather than necessity—caused the workers to keep irregular hours, the court below said.

The Sixth Circuit reversed that decision, holding that PSC presented enough evidence to create a jury question over whether the nature of the workers' duties necessitated variable work hours.

Judge Julia Smith Gibbons, a George W. Bush appointee, wrote the panel decision, which was joined by Judges John Bush, a Trump appointee, and Stephanie Davis, a Biden appointee.

PCS is pleased with the ruling, which addresses "groundbreaking" issues that hadn't been tackled by the Sixth Circuit, said the company's attorney, Danielle Crane of Kegler Brown Hill & Ritter.

"The newfound clarity on when irregular hours are deemed 'necessitated by the work' will offer much-needed direction that employers have been lacking," Crane said in a statement.

Josh Sanford of Sanford Law Firm PLLC, didn't immediately respond to a request for comment.

The case is *Jones v. Producers Service Corp.*, 6th Cir., No. 23-3247, 3/6/24.

(Updated with comment from employer's lawyer. Story originally published March 6.)

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