

# Second Circuit Affirms Use of Fluctuating Workweek Pay Method for ‘Big Box’ Store Department Managers

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Concluding that the company properly used the fluctuating workweek (FWW) pay method, the Second Circuit Court of Appeals has affirmed summary judgment in favor of retailer Bed Bath & Beyond in a Fair Labor Standards Act (FLSA) collective action brought by a group of former department managers. *Thomas v. Bed Bath & Beyond*, 2020 U.S. App. LEXIS 18747 (2d Cir. June 15, 2020).

In so holding, the Court of Appeals concurred with several aspects of the U.S. Department of Labor’s (DOL) recently published Final Rule on the fluctuating workweek pay method.

The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

### The FWW Pay Method

Generally, the FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. Under certain conditions, an employer may use the FWW method to compute any overtime compensation due.

When a non-exempt employee works hours that vary from week to week and receives a pre-established, fixed salary intended to compensate all “straight time” (non-overtime) hours the employee works, the employer satisfies the FLSA’s overtime pay requirements if, in addition to the salary amount, it pays at least one-half of the “regular rate” of pay for any hours worked in excess of 40. The salary must remain fixed, it must be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a “clear and mutual understanding” that the salary will remain the same regardless of the hours worked each week.

### The DOL’s Final Rule

In May 2020, the DOL issued a Final Rule regarding the FWW pay method, primarily to formally establish that payments in addition to the fixed salary (such as bonuses, commissions, and shift premiums) are compatible with the use of the FWW method, as long as they are included in the calculation of the applicable regular rate. In addition, the Final Rule clarified several other related issues, most notably that the FWW’s “fluctuation” requirement does *not* require fluctuation both above *and* below 40 hours per week, as some courts have held. On the contrary, fluctuation only above 40 hours per week is sufficient.

The Final Rule further clarified that the use of the FWW pay method is “not invalidated by occasional and unforeseeable workweeks in which the employee’s fixed salary did not provide compensation to the employee at a rate not less than the applicable minimum wage, so long as the fixed salary was reasonably calculated to compensate the employee at or above the applicable minimum wage in the foreseeable circumstances of the employee’s work.” For a more detailed discussion of the Final Rule, see our article, [DOL Issues Final Rule Permitting Use of Non-Salary Compensation Under Fluctuating Workweek Pay Method](#).

## The Second Circuit's Decision

Prior to March 2015, Bed Bath & Beyond paid overtime to its salaried, non-exempt department managers using the FWW method. In *Thomas*, the department managers claimed the company was precluded from using the FWW method. The trial court disagreed and granted summary judgment in favor of the company.

The department managers appealed, asserting three reasons why the employer improperly used the FWW method: (1) the company did not always pay them a fixed salary; (2) their hours did not fluctuate; and (3) when on occasion the company would ask the employees to work on a holiday or previously scheduled day off, the employees would be permitted to shift their paid time off to a later date, a practice disallowed under the FWW pay method. The Second Circuit rejected each contention in turn.

As to the first assertion, the Court of Appeals noted that, out of more than 1,500 combined weeks of pay, the department managers could identify only six occasions where an employee's fixed salary was not paid. Of those, three were payroll errors (two of which were corrected prior to the lawsuit); one was because the employee was discharged in the middle of the week; one was a pre-hire arrangement between the employee and the company for a fixed amount of unpaid vacation during their employment; and the final, and perhaps only questionable, occasion was when an employee took Family and Medical Leave Act (FMLA) leave. Under the totality of the circumstances, the Second Circuit held, this miniscule percentage of exceptions was insufficient to demonstrate that, as a policy or practice, the employees in question were not paid a fixed salary as required under the FWW method.

The department managers next claimed that the FWW method requires hours that regularly fluctuate both above and below 40 hours per week, whereas they almost always worked well in excess of 40 hours every week. The Second Circuit disagreed, concluding that nothing in the FLSA's regulations or binding case law mandated such a requirement. In reaching this conclusion, the Court of Appeals acknowledged that the DOL had reached the same determination in its just-released Final Rule.

Finally, the department managers argued that the company's practice of permitting employees to take additional paid time off on later dates after working on a holiday or previously scheduled day off is inconsistent with the FWW pay method. While some courts have concluded that bonuses and shift differentials are inconsistent with the FWW pay method, observed the Second Circuit, the allegation here was only that the department managers received additional time off, not that they received additional compensation. Nothing under the FLSA, the applicable regulations, or controlling law prohibits such a practice. On the contrary, as long as an employee's pay is not docked, their employer is free to provide additional paid time off without running afoul of the FWW method. Regardless, and as unequivocally set forth in the DOL's new Final Rule, even if the paid time off *was* considered a form of additional compensation, its use is not inconsistent with the FWW pay method.

If you have any questions about this decision, the DOL's new Final Rule on the fluctuating workweek pay method, or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.

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