

Positive Developments for New York Employers on the Use of the Fluctuating Workweek Method of Computing Overtime Compensation

On June 8, the U.S. Department of Labor issued its final rule to provide some clarity for employers seeking to use the fluctuating workweek method of computing overtime compensation under the Fair Labor Standards Act. The final rule, which is essentially the same as the [proposed rule](#) that was issued on November 5, 2019, lists each of the five requirements for using the fluctuating workweek method separately and explicitly states that bonuses, premium payments, and other additional payments of any kind are compatible with the use of the fluctuating workweek method. The final rule becomes effective on August 7.

About one week after the USDOL's fluctuating workweek rule was issued, the Second Circuit Court of Appeals (the Federal appellate court with jurisdiction over employers in New York) issued a decision in the case of *Thomas et al. v. Bed Bath & Beyond Inc.* In the *Bed Bath & Beyond* case, the Second Circuit affirmed the dismissal of a collective action filed by a group of Department Managers who alleged that Bed Bath & Beyond had improperly used the fluctuating workweek method to pay them overtime.

Requirements for Using the Fluctuating Workweek Method

The fluctuating workweek method of computing overtime has sometimes been referred to as the “half-time” method because when the requirements for using this method have been met, an employer is only obligated to pay overtime at half time instead of time and a half. Under the final rule, the requirements for using the fluctuating workweek method have not changed, but are delineated more clearly. Those requirements are: (1) the employee works hours that fluctuate from week to week; (2) the employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many; (3) the amount of the fixed salary is sufficient to meet the minimum wage in every workweek; (4) the employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, or other additional pay) for the total hours worked each workweek regardless of the number of hours; and (5) the employee receives overtime compensation for all overtime hours worked at a rate of at least one-half the employee's regular rate of pay for that workweek.

Payment of Bonuses and Other Premium Payments

Because the previous version of the rule required a fixed salary for all hours worked in the workweek, many courts have held that payment of additional incentive compensation over and above the fixed salary precludes an employer from using this method. The final rule explicitly states that bonuses, premium payments, and additional pay of any kind are compatible with the fluctuating workweek method.

The *Bed Bath & Beyond* Decision

In the *Bed Bath & Beyond* case, which involved an overtime claim brought under the Fair Labor Standards Act and the New York Labor Law, the Second Circuit confirmed three important principles: (1) payroll errors that result in a failure to pay the fixed weekly salary in some workweeks will not necessarily defeat the application of the fluctuating workweek

method of overtime compensation if the errors occur rarely and are promptly corrected; (2) an employee's schedule need not fluctuate above and below 40 hours per week for the fluctuating workweek method to be used; and (3) the practice of allowing an employee to take paid time off on later dates after working on a holiday or scheduled day off is not inconsistent with the fluctuating workweek method of compensation.

Conclusion

The issuance of the final rule on the fluctuating workweek method and the *Bed Bath & Beyond* decision are both positive developments for employers in New York. However, although the fluctuating workweek method might seem like a tempting way to potentially reduce payroll costs, employers need to be cautious and must be 100% sure that the requirements for using this method are met. If any one of the conditions for using the fluctuating workweek method is not satisfied, an employer may find itself liable not only for the extra overtime owed to its employees, but also for liquidated damages and attorneys' fees.

If you have any questions regarding this decision or its implications for your workplace, please contact [Subhash Viswanathan](#), or the attorney at the firm with whom you are regularly in contact.



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