

The USDOL Issues a Proposed Rule to Clarify and Amend the Fluctuating Workweek Method of Overtime Compensation

On November 5, the U.S. Department of Labor published a [proposed rule](#) in the Federal Register to provide some clarity for employers that seek to use the fluctuating workweek method of overtime compensation under the Fair Labor Standards Act. The proposed amendment lists each of the five requirements for using the fluctuating workweek method separately, instead of including all of the requirements in paragraph form as the current regulation does. The proposed amendment also includes additional language not currently contained in the regulation, explicitly stating that bonuses, premium payments, and other additional payments of any kind are not incompatible with the use of the fluctuating workweek method of computing 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 new proposed rule, the requirements for using the fluctuating workweek method have not changed, but those requirements are listed separately. 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 employee’s 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.

So, although the fluctuating workweek method of computing overtime can potentially reduce payroll costs, this method is generally not an option in most circumstances. Employers that wish to use the fluctuating workweek method still need to be cautious and must be sure that all of 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 under the FLSA.

Payment of Bonuses and Other Premium Payments

Because the regulation regarding the fluctuating workweek method of overtime compensation requires 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 of computing overtime. In 2011, the U.S. Department of Labor considered, but did not implement, a proposed amendment to the regulation that would have allowed employers to use the fluctuating workweek method even if the employer paid employees non-discretionary bonuses in addition to the required fixed salary.

The U.S. Department of Labor's current proposed rule would amend the regulation to specifically state that bonuses, premium payments, and additional pay of any kind are not incompatible with the fluctuating workweek method of overtime compensation. This potentially gives employers more flexibility to use this method for employees who may be eligible for bonuses, commissions, shift differentials, and other types of additional payments over and above the fixed salary.

Conclusion

Ultimately, the proposed rule is clearly a positive for employers. The proposed rule provides more clarity regarding the conditions that must be met for an employer to use the fluctuating workweek method of overtime compensation and allows employers to use incentive compensation in conjunction with the fixed salary for employees who are otherwise eligible to be paid under this method. However, even if this proposed rule is adopted, employers must remain cautious and seek legal advice before utilizing this method of computing overtime.

Written comments to the proposed rule can be submitted on or before December 5 through the Federal eRulemaking Portal at <https://www.regulations.gov>.

If you have any questions about this Information Memo, please contact [Subhash Viswanathan](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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