

Department of Labor Issues Wage and Hour Opinion Letter Regarding Permissible Use of the Fluctuating Workweek Method of Compensation

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The U.S. Department of Labor (DOL), Wage and Hour Division (WHD) issued an opinion letter on August 31, 2020 addressing whether the fluctuating workweek method of compensation may be used when an employee's weekly hours fluctuate only above and not below 40 hours per week. The WHD concluded there is no requirement, under the FLSA or its interpreting regulations and guidance, that an employee's hours worked fluctuate below 40 hours per week when utilizing the fluctuating workweek method for determining overtime compensation.

Background

The fluctuating workweek method is an alternative method for computing overtime pay, which allows an employer to pay a nonexempt employee a fixed salary plus an overtime rate of one-half the employee's regular rate, rather than the standard "time and a half." In order to utilize this alternative method for computing overtime, the following criteria must be met:

- The employee works hours that fluctuate from week to week;
- The employee receives a fixed salary that does not vary with the number of hours worked in the workweek;
- The fixed salary is sufficiently large to satisfy the minimum wage rate requirements for every hour worked;
- The employee and employer have a clear and mutual understanding that the fixed salary is compensation for all hours worked each workweek regardless of the number of hours worked.

Because the fixed salary is intended to compensate an employee at straight time for all hours worked, including hours worked in excess of 40 hours, only one-half the regular rate is required as overtime pay. An employee's regular rate is calculated by dividing the amount of weekly salary by the number of hours

MEET THE AUTHOR



Maria Tavano

Counsel
Berkeley Heights, New Jersey
Office

mtavano@fordharrison.com

P: 973-646-7313

actually worked during that week. Under this method of compensation, an employee's regular and overtime rates may fluctuate weekly.

The WHD's Analysis

The WHD found that a plain reading of the regulation makes clear there is no requirement that an employee's hours worked fluctuate below 40 hours per week and highlights prior guidance reaffirming that point. The WHD notes that courts have generally reached the same conclusion. The Second, Fourth, Sixth and Seventh Circuits have all expressly held that the fluctuating workweek method does not require weekly schedules to fluctuate below 40 hours.

The opinion letter also reaffirms a related point regarding deducting pay for employee absences. Generally, when using the fluctuating workweek method of compensation, an employer may not deduct pay for absences occasioned by the employee. However, there is an exception to this general prohibition for deductions related to an employee's willful absences, tardiness or infractions of major work rules. This exception has been explicitly incorporated into the recently amended fluctuating workweek rule.

Bottom Line

The WHD's opinion letter provides clear guidance that an employer may utilize the fluctuating workweek method of compensation even when an employee's hours fluctuate above but not below 40 hours per week. It also reaffirms the limited circumstances in which an employer may deduct pay for an employee's absences when using this method of compensation.

Though historically rarely used, the fluctuating workweek method of compensation may become more attractive to employers as their workforce returns to work following closures related to the COVID-19 pandemic and the need for staggered or modified work schedules increases. Other benefits, such as potentially being able to reduce fixed salaries in favor of timed incentive payments, may make this alternative method of compensation even more attractive. Employers should assess their compensation models to determine whether they can benefit from utilizing this alternative method of compensation.

If you have any questions regarding this Alert, please contact the author, [Maria Tavano](mailto:mtavano@fordharrison.com), counsel in our Berkeley Heights office at mtavano@fordharrison.com. Of course, you can also contact the FordHarrison attorney with whom you usually work.

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