



# DOL's Fluctuating Workweek Opinion Letter Leaves Us With Unanswered Questions

Insights

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The U.S. Department of Labor (USDOL) just released a Wage and Hour Opinion Letter today addressing the fluctuating workweek, reiterating its position that an employee's work hours do not need to fluctuate above and below 40 hours for an employer to rely upon the fluctuating workweek method of calculating overtime. However, there remain some unanswered questions that should cause employers to tread cautiously when implementing this system.

## What Is The "Fluctuating Workweek" Method?

By way of background, the "fluctuating workweek" method of calculating overtime is one method to calculate the pay that is owed under the FLSA to non-exempt employees who receive a salary that is intended to cover all hours worked. Under this method, the salary represents straight-time compensation for *all of* the hours worked in a workweek. However, the employer still owes the employee additional compensation to cover the overtime hours worked.

The regular rate is computed by dividing the total straight-time compensation (including the salary and any other additional compensation) by all of the hours worked in that workweek. The employer then owes the employee an additional amount that one-half of that employee's regular rate for that workweek for each overtime hour worked.

## Today's Opinion Letter

Today's Opinion Letter (FLSA2020-14) articulates five prerequisites that must be met for an employer to rely upon this pay method: (1) the employee's hours fluctuate from week to week; (2) the employee must receive a fixed salary that does not vary with the number of hours worked; (3) the fixed salary must satisfy minimum wage requirements; (4) the employer and the employee must reach a clear and mutual understanding that the fluctuating workweek pay method will be used to calculate overtime; and (5) the employee must receive overtime at a rate of one-half of their regular rate of pay for all hours worked over 40 in each workweek.

## Unanswered Questions

Today's opinion letter clearly states that "an employee's work hours do not have to fluctuate above and below 40 hours per workweek for an employer to be able to use the fluctuating workweek method." However, the letter also states that the rule does require that "the employee's hours fluctuate from week to week."

We are left to continue to wonder how much the hours must fluctuate in order to take advantage of this method. Much like [the final regulations published in June](#), the Opinion Letter did not answer this question. Perhaps the USDOL will answer that question in another Opinion Letter another day. Until then, employers should ensure they consult with their employment attorneys before proceeding in this area in order to best understand the risks and options they face.

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