

WHAT RETAILERS NEED TO KNOW ABOUT LABOR DEPARTMENT'S INTERPRETATION OF THE FLUCTUATING WORKWEEK: REGULAR RATE PRINCIPLES PREVAIL

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The U.S. Department of Labor's final regulations addressing the FLSA's fluctuating workweek (FWW) method reminded us that (1) legal principles control and (2) illustrative examples merely demonstrate application. The agency still managed to promulgate a rule that includes some arguably unnecessary requirements beyond the regular rate principles though, which means employers not wanting to fight an uphill battle should treat these requirements as more than just best practices.

THE GOOD NEWS

The final regulations finally, explicitly confirm that you can pay an employee via the FWW method and still pay a bonus, commission, etc. For those employers in the retail sector, this was an extremely valuable clarification.

The now officially titled "fluctuating workweek" method of compensation contemplates how regular rate principles apply when a *non-exempt* employee is *salaried*. Both the employer and the employee are expected to reach an agreement that the salary represents straight-time compensation for *all of* the hours worked in a workweek, including all hours worked over 40. Thus, the regular rate is computed by dividing the total straight-time compensation by all of the workweek's hours worked.

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But an employer still must pay overtime. The salary covers the “straight time” owed to the employee (regardless of how many hours worked), and the overtime is paid at one-half of the straight time rate. This is because the salary is the “one” of the “one and one-half” for the overtime hours (just like it is for an employee paid 100% piece rate, commission, etc.).

In 2011, the administration controlling the USDOL’s Wage and Hour Division expressed a very literal position based on the existing *example* of the FWW. Without even promulgating new regulatory language, the agency put forth a position that was given much deference. The question, in the eyes of some courts, became whether any additional pay of any sort was permitted. Employers have sought clarification on what the rule means and why additional pay cannot be relied upon.

With the new regulations, the FWW method does not preclude you from paying an employee additional pay in almost all circumstances with potential exceptions related to the salary itself. Such payment methods (in addition to the required salary pay) are now expressly permissible in combination with the FWW pay method, but they still must be included in the calculation of regular rate unless excludable under FLSA sections 7(e)(1)-(8). In other words, the regulation makes clear that the employer must apply the regular rate principles and pay overtime as described above on virtually all forms of pay.

WHAT YOU NEED TO CONSIDER

Later this month, the rule will take effect – although technically there was no true basis for courts to hold otherwise before. When that happens, you will have a more established basis for taking the position that the FWW does not preclude other pay components. You should be more mindful, though, of the stated requirements. Best practices that were set forth to demonstrate the nature of the salary are set forth as regulations now. Each is covered in more detail below.

REQUIRED “CLEAR AND MUTUAL” UNDERSTANDING

The FWW method of payment requires a “clear and mutual” understanding between an employer and an employee. Of course, this has led to litigation over what that phrase

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means. Employer advocacy groups sought to have this phrase removed or updated in the final rule.

The USDOL, however, did not give much on their approach here. The agency stated only that “although the parties must have a clear and mutual understanding that the fixed salary is compensation for all hours worked in the workweek, they need not possess such an understanding as to the specific method used to calculate overtime pay.” Because the “clear and mutual understanding” language remains, we expect to continue to see challenges on the requirements of this prong.

Tip: If you spell out the “how” overtime is calculated, it could help fend off challenges to pay practices that really are based to the employee’s failure to understand.

FLUCTUATING WORK HOURS

An employee may be paid via the FWW if the employee’s work hours fluctuate from week to week. *But how much must the hours fluctuate?* The final rule didn’t expressly answer this question, but it did provide the USDOL’s interpretation that an employee can be paid via FWW even if their hours do not fluctuate below forty. In other words, even if an employee always works overtime, the FWW method of payment may be appropriate if their hours fluctuate.

Tip: An accurate timekeeping system should naturally result in fluctuations in time records, which in turn results in fluctuations in the rate for the workweek.

PERMISSIBLE DEDUCTIONS

Similar to (but different from) the white-collar exemptions’ restrictions, the USDOL does not permit deductions from the FWW salary payment to an employee with very, very few exceptions. Tread carefully in this area and consult your employment attorney regarding any deductions you intend to implement with respect to an FWW-paid employee.

Tip: As a general rule of thumb, if the deduction would destroy the white-collar exemption, it probably will destroy the FWW. If it fits within the permissible deductions for the white-collar exemptions, then further analysis is necessary.

MINIMUM WAGE IMPLICATIONS

The salary used for an employee paid via the FWW is expected to cover minimum wage for the hours the employee is expected to work. It is possible that an employee's fixed salary under the FWW may result in a regular rate that falls below minimum wage on occasion, depending on how many hours that employee works (the higher the hours, the lower the regular rate for that workweek).

The USDOL confirmed that employers may increase the pay in such weeks to satisfy the minimum wage requirement of the rule, and still maintain the FWW. Still, this assumes that these instances are "due to unusual and unforeseeable circumstances," according to commentary accompanying the rule.

Tip: The salary should be set high enough to cover the minimum wage in foreseeable circumstances. For illustrative purposes, if an employee's hours fluctuate up to 70 per week but are rarely over 60 and usually under 50, you might use 60 as the starting point and evaluate the likelihood of the employee working more hours. Obviously, a salary that covers 70 hours is even better and a salary that covers less than 60 hours involves more risk.

CONCLUSION

You can expect to see employee advocates challenge the FWW regulation in court. But to the extent the rule is not clearly supported, it only relates to *additional* requirements and not the *rejection* of requirements having no basis stemming from regular rate principles. Bottom line: cross your "t"s and dot your "i"s – even though it might feel like overkill.