



## "Including" Overtime: Don't Be Misled By USDOL's Example

Insights

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We have previously cautioned that (with one *very* limited exception) federal Fair Labor Standards Act regular-rate principles do not support paying a fixed salary that "includes" FLSA overtime premium for varying numbers of overtime hours worked up to some targeted worktime total. This is so even though an employer plans to pay *more* in FLSA overtime wages for overtime hours the employee works *over* such a threshold.

Poorly-drafted "guidance" offered by the U.S. Labor Department in connection with the coming exemption changes appears to be misguiding employers into thinking otherwise.

### A Careless Muddle

Page 7 of USDOL's guidance says that an employer and employee may agree to a "fixed salary" for a workweek of more than 40 hours worked, and that this "salary" can "include" FLSA overtime compensation "under certain conditions". If the employee's "schedule" "changes in any way" for any workweek, "either by working more or fewer hours", the employer must "adjust" the "salary" for that workweek.

USDOL gives the example of Andre, who is paid a "fixed salary" of \$760 a week for "a 45 hour workweek". This salary is said to consist of two components: \$640 (\$16 regular hourly rate × 40 hours) as straight-time wages, plus \$120 (\$16 × 1.5 × 5 overtime hours) as FLSA overtime compensation "for hours 41-45". If Andre's "schedule" "changes" in a workweek (the example goes), then his "fixed salary" "needs to be adjusted" to reflect the hours worked for that week. No guidance is offered on why or how one must "adjust" the "fixed salary".

Some employers are apparently taking this obscure language to mean that Andre has been paid FLSA-compliant overtime compensation even if he works *fewer* than 45 hours, so long as he receives his \$760 "fixed salary" in such a workweek. This is incorrect, and in the end USDOL is not saying otherwise.

### Speaking Plainly

To begin with, FLSA overtime is not based upon an employee's "schedule". What matters is the employee's actual number of *hours worked* in a workweek, irrespective of the "schedule", and regardless of whether his or her "schedule changes". And in the real world, it is highly likely that an *accurate* record of an employee's hours worked will reveal that his or her worktime regularly varies from the "schedule" from workweek-to-workweek.

Furthermore, the arrangement USDOL is actually trying to describe is not in fact based upon any "fixed salary". What the agency really means in relevant part is that:

- ◇ Andre is in truth paid at an hourly rate of \$16,
- ◇ Andre's \$760 in total wages complies with the FLSA's overtime requirements *only* when he works *exactly 45 hours* in a workweek,
- ◇ *If* Andre worked *exactly 45 hours in each and every workweek*, then his properly-computed FLSA wages for those hours based upon a regular rate of \$16 an hour would of course total \$760 for each such workweek; *but*
- ◇ If Andre works *fewer* than 45 hours in a workweek, then it is necessary to "adjust" his compensation by computing the proper FLSA overtime wages so as to pay a lower amount reflecting the hours he actually worked, based upon his regular hourly rate of \$16.

As an illustration, if USDOL had provided an example involving Andre's having worked 42 hours in a workweek, then the requisite "adjustment" under the FLSA would have called for Andre's wages to be:

$$[(\$16 \times 40 \text{ hours}) + (\$16 \times 1.5 \times 2 \text{ overtime hours})] = \$688.$$

USDOL is not saying that Andre's \$760 "fixed salary" "includes" any FLSA overtime compensation, except in the obvious and unsurprising sense that Andre's FLSA-complying hourly-rate wages total \$760 for a workweek in which he works exactly 45 hours.

### **The Bottom Line**

Employers should resist the temptation to read USDOL's remarks to mean something they do not. Indeed, when it matters, USDOL itself can be expected to disclaim any such interpretation.

Neither should employers believe that a "fixed salary" "including" some FLSA overtime compensation can be predicated upon "exceptions reporting" timekeeping or any other method that does not result in an *accurate* record of hours worked that is then used to compute the FLSA-required pay.

Finally, employers should avoid creating the worst of all worlds by committing to an Andre-like "fixed salary" arrangement that does not "include" any FLSA overtime compensation but represents an enforceable payment right under contract law or in some other way.