



# "Fixed Salaries" And FLSA Overtime: Another Misguidance Alert

Insights

11.22.16

Employers designing pay plans for employees who are or will be non-exempt should take care not to be misled by murky U.S. Department of Labor "[guidance](#)" published in connection with the coming federal Fair Labor Standards Act exemption [changes](#).

Yet another USDOL example appears to be misguiding the public. This time, it involves paying a "fixed salary" as straight-time pay for hours worked up to a targeted over-40-hours total.

Page 6 of USDOL's publication says that an employer may:

- ◇ Establish a "fixed salary" as straight-time wages for up to some specified number of hours worked over 40 hours in a workweek, and
- ◇ Pay half-time overtime premium for whatever hours are worked between 40 and that specified number, and
- ◇ Pay additional time-and-one-half overtime compensation for hours beyond the specified number.

So far, so good.

## Half-Baked Guidance

USDOL's illustrative pay plan for a hypothetical Jamie rests upon a weekly "fixed salary" of \$850 paid as straight-time wages to compensate "a 50 hour workweek". "Because the salary is for 50 hours per week", USDOL says, "Jamie's regular rate is \$17 (\$850/50)."

Consequently, the example goes, for "a normal 50 hour week", Jamie would be due "additional half-time overtime premium for the 10 hours of overtime (\$8.50/hour)." "If Jamie worked more than 50 hours in a [work]week", then "the employer would also owe overtime compensation at . . . (\$17 × 1.5) for hours beyond 50 . . ."

But what if Jamie worked *fewer* than 50 hours in a workweek, such as 45? Is Jamie's regular rate still \$17? Does an employer comply with the FLSA by paying for those five overtime hours at  $(\$17 \div 2) = \$8.50$  per hour? USDOL's failure to address this, taken in conjunction with its statements that "Jamie's regular rate is \$17" "[b]ecause the salary is for 50 hours per week", is leading some to the

mistaken conclusion that basing Jamie's overtime pay on the \$17 rate even in workweeks with fewer than 50 hours worked satisfies the FLSA's overtime requirement. It does not.

### **Fewer Hours Worked = Higher Regular Rate**

Jamie's salary might be "fixed", but Jamie's regular rate is *not* "fixed". Generally, the regular rate is figured by dividing an employee's workweek wages by the hours the employee actually worked in that workweek for which the compensation was paid. With few exceptions, the regular rate of an employee paid a fixed amount for varying numbers of overtime hours worked must also vary, even if the salary represents straight-time compensation for up to some set number over 40 in a workweek (no matter how that number is selected).

When Jamie works 45 hours in a workweek, that week's salary is paid to compensate 45 hours. This means that Jamie's salary produces a regular rate for that workweek of approximately \$18.89 per hour ( $\$850 \div 45 \text{ hrs.}$ ). The FLSA overtime premium due for that workweek is approximately \$47.22 [ $(\$850 \div 45 \text{ hrs.}) \times \frac{1}{2} \times 5 \text{ OT hrs.}$ ]. See, e.g., 29 C.F.R. § 778.325. If instead management pays only \$42.50 [ $(\$17 \div 2) \times (5 \text{ OT hrs.})$ ], then it has not fully complied with the FLSA's overtime requirement.

### **What About A "Fixed" Hourly Rate?**

Naturally, the analysis is different for an employee supposedly paid a "salary" but who is in truth paid at an hourly rate. Although USDOL's overtime interpretation at Section 778.325 (linked above) is no model of clarity, a careful reading demonstrates that this is so.

USDOL says there that, if the parties understand what it calls a "salary" to compensate a fixed workweek of 50 hours, then the employee's regular rate "in all weeks" equals the "salary" divided by 50 hours. However, in the next sentence USDOL states its assumption that, if the employee works *fewer* than 50 hours in a workweek, "deductions" are made at a that same rate "for the hours not worked."

This reveals that the hypothetical employee is *not* paid a "salary" at all. Instead, the employee is paid at an hourly rate that produces straight-time wages totaling the purported "salary" if he or she works exactly 50 hours in a workweek. Cf. 29 C.F.R. § 778.306 (reducing a "salary" for each unworked hour in short workweeks indicates that the employee is paid at an hourly rate).

In this setting, then, the employee's hourly rate *is* his or her regular rate (unless the employee also receives some other payment that increases the regular rate). But nothing in USDOL's example indicates that Jamie would be paid less for working fewer than 50 hours.

### **The Bottom Line**

Incomplete or over-simplified USDOL examples do not supplant bedrock FLSA principles governing pay for non-exempt employees.

Proposed fixed-salary plans for such employees, whether predicated upon constant weekly wages, "guaranteed hours", a combination, or some other structure, should always be carefully evaluated in

advance. Unless a narrow FLSA exception applies (such as a valid "*Belo*" or "basic rate" arrangement), employers should recognize that the FLSA overtime regular rate will vary as the overtime hours worked in a workweek vary.

As always, employers should also take into account the requirements and limitations of other jurisdictions.