Fluctuating-Workweek Plans: Don't Forget State Law!

Insights
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Many employers have responded to the U.S. Department of Labor's ongoing efforts to increase the pay-related requirements for the federal Fair Labor Standards Act's "white collar" exemptions by making tough decisions about employees' compensation going-forward.

Some have chosen to pay workers at an hourly rate for their hours worked in a particular workweek. For employees subject to the FLSA's overtime requirement, this also means that they are due overtime compensation of at least 1.5 times their hourly rates (assuming that they receive no other pay affecting their overtime wages) for their hours worked over 40 in a workweek. A number of other employers feel that considerations of employee morale, cost, and/or payroll administration cut against an hourly basis of pay.

The Basic Approach
The good news is that by-the-hour wages aren't the only option for non-exempt employees. One of the alternatives many employers have considered is a so-called "fluctuating workweek" pay plan.

This arrangement calls for a non-exempt employee to be paid a salary as straight-time compensation for *all* his or her hours worked in a workweek, including all overtime hours. The salary represents the "one" of "one and one-half", so for overtime hours the employee is due only the additional one-half of the average or "regular" hourly rate (of at least the minimum wage) figured by dividing all of the workweek's worktime into the salary. Generally speaking, under this method the employee's regular rate will decrease as the hours worked increase, and vice versa. *See*, *e.g.*, 29 C.F.R. § 778.114.

Our previous posts address important aspects of fluctuating-workweek pay where the FLSA is concerned.

State-Law Implications
However, employers should not focus only upon the FLSA ramifications of these plans. It is important to remember that an applicable state law might also affect whether the arrangement is permitted, at least for workers in that jurisdiction.

States are free to permit, restrict, or prohibit the fluctuating-workweek approach under their own wage-hour provisions. Management should therefore review the relevant laws and regulations (if

any) of each state in which it wishes to implement the arrangement. Multi-state employers might find their intentions to be frustrated by a patchwork of conflicting laws.

For example, many states have no overtime provisions applicable to private employment relationships covered by the FLSA. Some others essentially incorporate the U.S. Department of Labor's fluctuating-workweek interpretation (such as Missouri) or articulate their own version of it (as Illinois does). Consequently, an FLSA-compliant fluctuating-workweek arrangement should be acceptable in those jurisdictions.

On the other hand, four states currently *prohibit* such plans. Alaska's administrative code provides that "flex-time or flexitime plans established under 29 C.F.R. 778.114 providing a fixed salary for fluctuating hours up to a predetermined maximum number of hours in a workweek" are not an acceptable method of complying with Alaska's overtime statute. 8 AAC § 15.100(d)(3). California and New Mexico take a similar view, as do court decisions construing Pennsylvania law.

The question appears to be open in other states.

The Bottom Line

Naturally, management must take into account many other details and considerations to ensure that it can design, implement, and maintain a fully-compliant fluctuating-workweek plan. But high on that list is ascertaining the impact of applicable state laws.

And once again, yet-other potential alternatives are available.

It is doubly important to be thinking about these matters now. There will probably be little if any "grace period" should the FLSA "white collar" exemption changes be revived.