



Attempting to Fix Fluctuating Workweek

Insights

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USDOL has announced a proposed rule intended to clarify the "fluctuating workweek" under the FLSA. This is yet another example of the Wage and Hour Division (WHD) continuing to clean up the mess left by its predecessors.

Fluctuating Workweek In A Nutshell

The so-called "fluctuating workweek" method of compensation calls for paying a non-exempt employee a salary that represents straight-time compensation for *all of* his or her hours worked in a workweek, including all hours worked over 40. Thus, regular rate is computed by dividing the total straight-time compensation by all of the workweek's hours worked. The salary itself 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.). The FLSA-required overtime premium due for that work is figured at one-half of the regular rate.

What You Need To Know

WHD is proposing regulatory language that is meant to directly address the payment of extra wages in addition to a salary that is intended to compensate the employee for all hours worked in a workweek. Per its news release, WHD's publication:

- Proposes to revise its existing fluctuating workweek regulation at 29 CFR 778.114;
- Clarifies the regulation by expressly stating that any bonuses, premium payments, or other additional pay of any kind are compatible with the fluctuating workweek method of compensation and that such payments must be included in the calculation of regular rate unless excludable under FLSA sections 7(e)(1)-(8);
- Adds examples to better illustrate how the regulation works operationally;
- Revises the regulation to increase readability; and
- Proposes a title change to the regulation to better reflect the purpose of the subsection.

The proposal will be available for review and public comment for just 30 days.

The Bottom Line

First, do not make changes based on the proposed rule.

Second, If you are wondering why this would be necessary given the earlier description of fluctuating workweek, WHD is attempting to set the record straight. Those following the fluctuating workweek developments know that much confusion was caused by a non-rule published in 2011. Those following the developments before 2011 might even recall that the FLSA's first principles already supported the appropriateness of a "half time" calculation when an employee is paid a salary for all hours worked. Additional compensation does not change the "regular rate" formula, merely the input (increased total straight-time compensation).

Third, despite the overall favorable language proposed, employers might contemplate submitting thoughtful, substantive comments in collaboration with legal counsel. In particular, the proposed language is very focused. The concept of "regular rate" in and of itself calls for the "half time" calculation in most scenarios without any supposed pre-requisites, limitations, etc.

We will be assessing the situation and provide necessary updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information, and continue to follow our Wage And Hour Blog, to see our latest commentary.

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