



"Bonus Material" – A Deeper Dive Into The U.S. Department of Labor's Final Regulations on the Fluctuating Workweek

Insights

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The U.S. Department of Labor's final regulations addressing the Fluctuating Workweek (FWW) method of payment finally, explicitly confirm that you can pay an employee via the FWW method and still pay a bonus, commission, etc. Some of the stated requirements though, carried over from prior administrations and courts, leave areas open for continued discussion.

Fluctuating Workweek In A Nutshell

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. 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 on the FWW. It retained without revision language that has been interpreted to mean that employers cannot pay bonuses, commissions, or other compensation in addition to the salary payment and rely upon the FWW method of compensation. Without even promulgating new regulatory language, the agency put forth a position that was given much deference. The question, in the eyes of the 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.

What You Need To Know

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.

The regulations are set to take effect 60 days after its official publication in the Federal Register (TBD, awaiting official publication). When that happens:

- Employers have a more established basis for taking the position that the FWW does not preclude other pay components.
- Employers should be more mindful though of the stated requirements. Best practices for demonstrating the nature of the salary are set forth as regulations now.

These requirements were tackled by the final rule. 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 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, stating only that “[t]he Department has decided...to add clarifying text in § 778.114(a) to emphasize 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.

Fluctuating Workhours

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.

Permissible Deductions?

Keeping this simple, in short, the USDOL does not permit deductions from the FWW salary payment to an employee (short of a few very minor exceptions for occasional unexcused absences or tardies and violations of safety rules). Employers must remember that, under the FWW, they cannot rely upon all of the deductions permitted based upon the definition of the “salary basis” applicable to employees exempt under the white-collar exemptions. Tread carefully in this area, and consult your employment attorney regarding any deductions you intend to implement with respect to an FWW-paid employee.

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. Because overtime is paid at a rate of one-half of the regular rate calculation for each workweek, 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). The USDOL confirmed that employers may increase the fixed salary in such weeks to satisfy the minimum wage requirement of the rule, and still maintain the FWW. As the commentary to the final rule recognizes, "where an employer has reasonably calculated the fixed salary to cover at least the minimum wage for all hours worked, an occasional workweek where the fixed salary does not at least equal the applicable minimum wage, due to unusual and unforeseeable circumstances, does not invalidate the use of the fluctuating workweek method in other workweeks in which the salary equals or exceeds the applicable minimum wage as anticipated."

The Bottom Line

There is a lot more to the final rule than simply implementing a regulation that permits the payment of additional compensation (bonuses, commission, etc.) for employees paid via the FWW method. And while this rule is helpful for understanding the required components to use FWW, there are still several areas that need clarification unfortunately.

You can expect to see employee advocates challenge this regulation in court, just as they are doing with changes USDOL made regarding the [tip credit's 20% rule](#) and, as we expect to be the case, regarding the recent [7\(i\) overtime exemption clarifications](#).

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