



Two Fluctuating-Workweek Variations

Insights

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We have said for a while now that a "fluctuating workweek" pay plan might suit some employers' needs as to workers whom they will no longer treat as overtime-exempt in light of the U.S. Labor Department's coming federal Fair Labor Standards Act exemption changes.

This approach calls for paying a non-exempt employee a salary representing his or her straight-time compensation for *all* hours worked in a workweek, including those exceeding 40. Under the FLSA, this means that the salary itself represents the "one" of "one and one-half" for overtime purposes. So, for hours worked over 40 in the workweek, the employee is due an additional one-half of the hourly rate figured by dividing the salary by all of the workweek's worktime. The regular hourly rate declines as the number of hours worked increases (although obviously the regular rate can never be less than the minimum wage).

Leaving aside USDOL efforts to discourage the use of such plans, employers are sometimes concerned about the employee-relations effects arising from the fluctuating regular rate and from the half-time overtime premium. These characteristics of a proper fluctuating-workweek plan are entirely lawful under the FLSA, but variations on the plan might help strike a better balance between labor costs and employees' reactions.

Variation 1: Adopting A Higher Rate "Floor"

As an illustration, assume that an employee is paid a weekly salary of \$750 as her straight-time pay for *all* of her hours worked in a workweek. For her FLSA overtime hours worked, she will receive overtime premium pay at not less than one-half times the rate determined by dividing her hours worked into that salary.

However, the employer's pay plan also provides that this regular hourly rate will never be less than \$15 per hour. Once her rate drops to this level, her half-time premium rate for her overtime hours worked will be a constant $(\$15 \div 2) = \7.50 per hour, even if her FLSA regular rate is lower.

If she works 60 hours in a workweek, for instance, her actual FLSA half-time premium rate would be $[(\$750 \div 60 \text{ Hrs.}) \times 0.5] = \6.25 per hour, leading to overtime premium pay of $(\$6.25 \times 20 \text{ OT Hrs.}) = \125 . But instead, her *pay plan* calls for her to receive overtime premium of $(\$7.50 \times 20 \text{ OT Hrs.}) = \150 .

Variation 2: Increasing The Multiplier

For a different approach, assume that an employee is paid a weekly salary of \$750 as his straight-time pay for *all* of his hours worked in a workweek. For his FLSA overtime hours worked up to 50 in a workweek, he will receive overtime premium at one-half times the regular rate determined by dividing his hours worked into that salary.

However, if he works more than 50 hours in a workweek, his *pay plan* calls for him to be paid for the hours worked over 50 at a multiple of 1.5 times (rather than only 0.5 times) the regular rate determined by dividing his hours worked into that salary. If he works 60 hours in a workweek, for example, his overtime premium would be:

$$[(\$750 \div 60 \text{ Hrs.}) \times 0.5 \times 10 \text{ OT Hrs.}] = \$62.50$$

$$[(\$750 \div 60 \text{ Hrs.}) \times 1.5 \times 10 \text{ OT Hrs.}] = \$187.50$$

$$(\$62.50 + \$187.50) = \$250,$$

rather than just $[(\$750 \div 60 \text{ Hrs.}) \times 0.5 \times 20 \text{ OT Hrs.}] = \125 .

His FLSA regular rate continues to decline as his overtime hours worked increase, but, for hours worked over 50 in a workweek, he is being paid at a higher multiple than the FLSA requires.

The Bottom Line

Each of these approaches is consistent with USDOL's interpretations that:

- The payment of "overtime premiums" is not incompatible with the "fixed salary" contemplated under the fluctuating-workweek method, and
- Requiring that "not less than" the prescribed half-time premium be paid for overtime hours worked "does not prohibit paying more."

See, e.g., 29 C.F.R. §§ 778.114(a), 778.114(c).

Note that neither of these pay plans "includes" or "builds in" any overtime premium pay for hours worked over 40 in a workweek.

These alternatives are not mutually-exclusive. Moreover, there are others that an employer might consider.

The details of how such pay plans are established and administered will of course be important. And, as always, the applicable laws of other jurisdictions (some of which might not permit

fluctuating-workweek plans) must also be taken into account.