

# DOL Issues Opinion Letter Confirming that the Fluctuating Workweek Method of Calculating Overtime Pay Can Apply to Employees Who Only Work 40 Hours or More Per Week

## Labor & Employment Law Update

on September 3, 2020

On August 31, 2020, the U.S. Department of Labor issued a new opinion letter shedding light on the application of the fluctuating workweek method for paying overtime wages required under the Fair Labor Standards Act (FLSA).

Under the FLSA, employers must pay nonexempt employees at least one and half times their regular rate for all hours in excess of 40 worked in an actual workweek. For employees who work variable hours each week, the employer may use the fluctuating workweek method to compute the amount of overtime pay owed to a nonexempt employee as long as the following criteria are met:

- The employee's hours of work fluctuate from week to week;
- The employee receives a fixed salary that does not vary with the number of hours worked;
- The amount of the fixed salary is sufficient to satisfy the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest;
- The employee and the employer have a clear, mutual understanding that the fixed salary is compensation (not including overtime premiums) for the total hours worked each workweek; and
- The employee receives appropriate compensation in addition to the fixed salary for all overtime hours.

Under the fluctuating workweek method, the employee's regular rate for purposes of overtime calculations is determined by dividing the number of hours worked in a particular workweek by the amount of the weekly salary. The regular rate must be determined separately each week based on the number of hours

that were actually worked that week.

The DOL's recent opinion letter answered the question of whether the fluctuating workweek method can be applied to employees whose weekly hours vary but who never work less than 40 hours per week – for example, an employee who is always expected to work 50 or more hours per week. The DOL's answer is yes. The fluctuating workweek method can be applied to employees whose workweek fluctuates only beyond 40 hours per week, and there is no requirement that the employee's variable schedule include weeks where his or her hours dip below 40 hours.

The opinion letter also reminded employers that the fluctuating workweek method must consistently use the employee's regular weekly salary when computing the employee's regular rate. This is so even if the employee had unpaid absences that particular week. For example, if an employee took an unpaid sick day because he had exhausted his sick bank on Monday, and then worked 48 hours Tuesday through Thursday, the employer must pay the employee overtime and calculate the employee's regular rate for that week by dividing 48 hours by the employee's set weekly rate regardless of the employee's unpaid absence that week. The DOL noted one small exception: employers may take occasional disciplinary deductions from an employee's salary for willful absences or for other infractions of major work rules.

An opinion letter is an official, written opinion by the DOL's Wage and Hour Division analyzing how the FLSA applies in a specific circumstance. Opinion letters are useful in understanding the DOL's position on an application of the FLSA but are not dispositive and do not serve as binding precedent.

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