

# DOL Proposes Changes to the Fluctuating Work Week Overtime Method

## Labor & Employment Law Update

By Sara Zorich on November 19, 2019

The US Department of Labor (DOL) has issued a proposed amendment to the regulation governing the fluctuating workweek (29 CFR 778.114). The fluctuating workweek can be used to calculate overtime for an employee whose hours fluctuate from week to week based on the nature of the job. The DOL's proposed amendment is to clarify that there is no issue with paying a bonus, shift premium, or additional pay to someone who is being paid via the fluctuating workweek method, but such extra payment will increase the regular rate of pay for calculating overtime unless the additional pay meets an exclusion from the Fair Labor Standards Act. This is a change in position since in 2011, during the Obama administration, the preamble to 29 CFR 778.114 added language that any additional pay other than the salary was inconsistent with the fluctuating workweek.

The fluctuating workweek method allows an employer to pay a non-exempt employee a salary and then pay overtime at a 0.5 multiplier. This method is only applicable if the following conditions are met: (1) the employee works hours that fluctuate from week to week; (2) the employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many; (3) the amount of employee's fixed salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest; (4) the employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums) for the total hours worked each workweek regardless of the number of hours; and (5) the employee receives overtime compensation at a rate of not less than one-half the employee's regular rate of pay for that workweek.

The fluctuating workweek method is permissible under the FLSA and under some state laws (including IL, IN, WI and MO). However, employers should review state law for compliance since not all states (including CA) have adopted this method of overtime payment.

The proposed rule will be available for comment for 30 days from November 5, 2019. After the comment period is over, the DOL will review the comments and determine if any changes to the rule will be made. Thereafter, the DOL will issue a final rule. We have seen the DOL acting more swiftly in rulemaking this year but based on the timing of the comment period, we do not anticipate this rule going into effect until sometime in 2020.

## DOL Proposes Changes to the Fluctuating Work Week Overtime M- ethod