Published on *The National Law Review* https://natlawreview.com

Fluctuating Workweek Overtime Method May Be Changed with Proposal from U.S. Department of Labor

Article By:

David T. Harmon

A seldom-used alternative method for calculating overtime pay of employees with fluctuating workweeks may soon receive greater attention from employers if the U.S. Department of Labor follows through on a newly proposed rule to loosen the way that such employees' overtime pay is calculated.

On November 5, 2019, the U.S. Department of Labor published a proposed rule which, if adopted by the Department, would include bonuses, "premium" payments, and other additional pay in an employee's regular rate of pay for purposes of calculating any overtime pay for that week.

Although the alternative overtime rule for "fluctuating workweek" employees has long been around, it is not used by employers nearly as often as the better-known "time and a half" overtime rate generally imposed by the federal Fair Labor Standards Act ("FLSA") – and many similar state laws – for more than 40 hours worked in a week by employees who are not exempt from the overtime rules.

What is the "Fluctuating Workweek" Overtime Method?

The fluctuating workweek method provides an alternative method under the FLSA for calculating overtime pay. Under this method, an employer may determine a "fluctuating workweek" employee's "regular rate of pay" (and therefore potential overtime pay due) each week based on the employee's hours worked for that week. Under the normal overtime method, an employee's regular rate of pay (the "time" in "time and a half") is typically a fixed-rate throughout the year based solely on the employee's hourly rate or salary. An employer may apply the fluctuating workweek method to an employee if the following requirements are met:

- The employee is employed on a fixed salary basis
- The employee's hours of work fluctuate from week to week
- There is a "clear mutual understanding" between the employer and the employee that the employee's fixed salary is compensation (apart from overtime pay) for all hours worked each workweek, regardless of their number, rather than for 40 hours (or another period)

- The amount of the employee’s salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour in those workweeks in which the number of hours worked by the employee is greatest

If the above circumstances exist, then, under the fluctuating workweek method, an employer may compensate an employee at a rate of one-half the employee’s “regular rate of pay” for any overtime worked that week. This difference from the conventional overtime rate (½ vs. 1 ½) is due to the fact that the employee’s fixed salary in such a situation is already intended to compensate the employee at straight-time rates for all hours worked in the week, which may be either greater or fewer than 40 in any given week.

The Proposed Rule Change

The newly proposed rule from the DOL would include bonuses, “premium” payments (such as special nightshift compensation) and other additional pay in the calculation of a fluctuating workweek employee’s regular rate of pay for overtime purposes. At first blush, this proposal might appear to primarily benefit employees, by increasing their hourly rate for such weeks and thus their potential overtime pay. However, the change would also permit employers to potentially shift substantial portions of a fluctuating workweek employee’s compensation structure to bonus and other incentive payments, therefore reducing an employee’s fixed weekly salary for other weeks of the year without a corresponding reduction in hours of service to the business.

National Law Review, Volumess X, Number 2