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DOL proposes changes to FLSA's fluctuating workweek pay rules

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Last month, the DOL proposed revised rules for computing overtime compensation for salaried, nonexempt employees whose hours vary from week to week. The proposal clarifies that bonus, premium and other incentive payments on top of fixed salaries are compatible with the Fair Labor Standards Act's fluctuating workweek method of compensation. If finalized, the proposal will give employers that use this method greater certainty and flexibility in structuring compensation arrangements.

Background

The Fair Labor Standards Act (FLSA) establishes federal minimum pay standards for public- and private-sector employers. Employees covered by the FLSA must be paid at least the federal minimum wage and, in most cases, overtime at time and one-half (or 150% of the employee's regular rate of pay) for all hours worked over 40 in any workweek.

The FLSA provides an alternative method for calculating overtime for salaried, nonexempt employees whose work hours vary from week to week — the so-called "fluctuating workweek" method — but only if the following conditions are met.

- The employee's hours fluctuate from week to week
- The employee is paid a fixed salary each workweek, regardless of the number of hours worked, but is paid at least minimum wage for those hours
- The employer and employee have a "clear mutual understanding" that the fixed salary is compensation for all hours worked each workweek, excluding bonuses, overtime premiums and other incentives

Under the fluctuating workweek method, the employee's "regular rate" of pay is calculated by dividing the employee's weekly salary by the total number of hours worked that week, with overtime hours paid at the "reduced" rate of one-half of the employee's regular rate. Thus, the more hours the employee works, the lower the overtime premium.

Proposed overtime rules

Last month, the DOL proposed revised rules for calculating overtime pay under the FLSA's fluctuating workweek method. The proposal would reverse the Obama DOL's position that bonus, premium and other incentive-based payments were inconsistent with a "fixed salary" and incompatible with that method. It would clarify that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method.

Under the proposed rules, employers would be allowed to offer bonuses and other incentive-based pay to salaried, nonexempt employees who work a fluctuating workweek, regardless of whether that pay is tied to the number of hours worked. It would also clarify that bonuses, premium payments and "other additional pay of any kind" must be included in determining the regular rate of pay for each week under the fluctuating workweek method, unless excludable under other rules. That rate is then cut in half for purposes of computing overtime compensation.

> **Buck comment.** Where the FLSA and state law differs, employees get the benefit of the law that is most advantageous to them. In states that do not permit the use of the fluctuating workweek method to calculate overtime pay — such as California, New Jersey and Pennsylvania — employers would not be able to take advantage of the potential labor cost savings it offers. Instead, they would have to pay all hours worked in excess of 40 at 1.5 times the employee's regular rate.

The DOL also proposed adding two examples that illustrate the fluctuating workweek method of calculating overtime where an employee is paid (1) a nightshift differential, and (2) a productivity bonus in addition to a fixed salary.

In closing

If finalized, the proposed rules would give employers more flexibility to provide additional forms of compensation to salaried, nonexempt employees whose hours fluctuate from week to week.