

WHD Releases Text of Proposed Revisions to the Fluctuating Workweek Regulations

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On [August 26, 2019](#), we wrote of the plan by the U.S. Department of Labor’s Wage and Hour Division (“WHD”) to update the Fair Labor Standard Act (“FLSA”) regulations on calculating overtime pay for salaried non-exempt workers to allow employers to include additional forms of compensation in the so-called “fluctuating workweek” calculations. Under a fluctuating workweek calculation, an employer divides all of an employee’s relevant compensation for a given workweek by the total number of hours the employee worked in the week to derive the regular rate for that week, and then pays one half of that regular rate—in addition to the other pay the employee is receiving for the week—for each hour of overtime. This method of calculating overtime is available under federal law and in most, but not all, states. On November 4, 2019, the WHD released the text of the [proposed rule](#) for public comment.

The WHD proposes to revise the applicable regulations at 29 C.F.R. part 778 to

state expressly that any additional forms of compensation—whether bonuses, premium payments, or otherwise, and whether time- or performance-based—are compatible with the fluctuating workweek method of compensation, and that such payments must factor into the calculation of the regular rate unless they fall within a regular rate exclusion under FLSA sections 7(e)(1)-(8) (e.g., gifts, special occasion bonuses, discretionary bonuses, premium pay for hours in excess of a daily/weekly standard or for work on weekends/holidays/outside the basic workweeks, and payments not for hours worked). In an attempt to provide even greater clarity, the WHD’s proposal includes three illustrative examples, lists each of the requirements for using the fluctuating workweek method, and changes the title of the regulation from “Fixed salary for fluctuating hours” to “Fluctuating Workweek Method of Computing Overtime.” As the WHD acknowledges, this proposal represents a departure from the WHD’s 2011 announcement that bonuses and premium pay are incompatible with the fluctuating workweek method of computing overtime, and newfound recognition that bonuses and premium payments are not only common, but also potentially beneficial for employees.

If adopted, the WHD’s proposed rule may result in more employers using the fluctuating workweek method of compensation, as it eliminates confusion about the availability of bonus pay, and likewise, it may prompt more employers to provide bonuses to salaried non-exempt employees.

Employers are encouraged to review the proposal in full and submit any comments by the December 5, 2019 comment deadline.

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