

# Labor Department Proposes Changes to Clarify Use of FLSA's 'Fluctuating Workweek' Pay Method

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November 6, 2019

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Persistent confusion over the Department of Labor's (DOL) "fluctuating workweek" (FWW) pay method to satisfy employers' obligation to pay overtime has deterred many from using it. Now, the DOL has proposed changes to clarify the pay method.

Under DOL regulations on the FWW pay method, if certain conditions are met, an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked, and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases. Although DOL regulations expressly permit employers to use it, uncertainty regarding its requirements and the potential for litigation (particularly during the last 10 years) has the FWW pay method gathering a bit of dust. The DOL aims to wipe off some of that dust. In a [Notice of Proposed Rulemaking \(NPRM\)](#) issued on November 5, 2019, the DOL clarifies that employers may provide additional pay, such as bonuses or premiums, to employees subject to the FWW method, even when the additional pay is tied to the number of hours worked, without jeopardizing the use of that pay method.

### General Background

The Fair Labor Standards Act (FLSA) guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. Under certain conditions, an employer may use the FWW method for computing any overtime compensation due. If a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all "straight time" (non-overtime) hours the employee works, the employer satisfies the FLSA's overtime pay requirements if, in addition to the salary amount, it pays at least one-half of the "regular rate" of pay for any hours worked in excess of 40. The salary must remain fixed and be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week.

Before 2011, the DOL had never expressly forbidden employers from paying bonuses, premiums, or other compensation beyond the minimum salary to employees who were compensated under the FWW method. On the contrary, in a 2008 proposal and in a 2009 opinion letter, the DOL stated that such bonuses were consistent with the FWW method. When the Obama-era DOL issued a Final Rule in 2011, however, it concluded in the Rule's preamble that such additional payments were impermissible under the FWW method, because they contradicted the notion of a "fixed" salary and, presumably, were inconsistent with the 1942 U.S. Supreme Court decision from which the FWW method originated. Since 2011, and contrary to the DOL's belief promoted in the 2011 Rule, courts have reached inconsistent conclusions on whether such additional compensation is permitted under the FWW pay method. As a result, some courts have permitted so-called production bonuses, but not hours-based bonuses, under the FWW pay method, a

distinction the DOL asserts in the NPRM it has never made.

### Proposed New Rule

Having “reconsidered the need for a clarification, particularly in light of the 2011 Final Rule and its interpretation by courts,” the NPRM states that the reasons for prohibiting such additional compensation as set forth in that Rule are “unpersuasive,” and DOL now seeks to implement a revised rule substantially similar to that proposed in 2008.

The DOL proposes, in addition to making some minor clarifications, to add language to the regulations “clarifying that bonuses, premium payments, and other additional pay of any kind are compatible with the use of the fluctuating workweek method of compensation.” It also seeks “to add examples to [29 C.F.R.] § 778.114(b) to 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.” As with all other compensation not expressly excluded elsewhere in the regulations, any such bonuses or premiums must be included when computing the regular rate for overtime pay purposes.

### Takeaway

If the proposal is finalized, employers clearly will be able to further reward productive non-exempt, salaried employees eligible to receive such additional compensation. Thus, the rule not only should bring some clarity to the FWW method but revive its use, which had waned in the years following the 2011 Rule.

Public comments are due by December 5, 2019. After reviewing the comments, the DOL will issue a Final Rule and the effective date likely will be early in 2020.

If you have any questions about these proposed amendments or any other wage and hour issues, please consult a Jackson Lewis attorney.

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