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F Is For Fluctuate: Overtime Pay And The Fluctuating Workweek (WTH Is FWW?)

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While speaking with a client recently about the vast sea of FLSA regulations, a question arose about the use of half-time pay. FLSA's golden rule for non-exempt employees is one that sounds familiar to many: time-and-a-half pay for hours worked over 40 in a workweek. But what about just half-pay? There is an alternative approach to meeting the FLSA's overtime requirements that allows employers to pay non-exempt employees on a fixed salary basis. The Department of Labor dubs this method the "Fluctuating Workweek" (or FWW, for those legal acronym nerds out there). So in honor of Letter F, this week we are answering the age-old question: WTH is FWW? Under FLSA regulations, employers must pay non-exempt employees overtime premium pay (based on one-and-a-half times the employee's regular rate of pay) for hours worked over 40 in a workweek. The employer can set the workweek as any consecutive seven-day period, but it cannot calculate overtime over a period longer than a week. For example, if an employee works 35 hours one week and 45 the next, the employer cannot call it a 'wash' and refuse to pay overtime in the second week. However, in recognizing those industries where employees truly do not have set schedules and work varying hours from week to week, the FLSA offers the potential to apply the FWW method. The FWW is an approved method for paying non-exempt workers on a salary or fixed basis, but it comes with stringent requirements:

- The employer and employee must have a clear understanding (preferably in writing) that the employee will receive a fixed salary (apart from overtime premiums) that remains the same in both long and short workweeks.
- The employer must pay a fixed amount per week for whatever hours the employee is called up on to work (i.e. no docking the salary for short weeks).
- The amount must provide at least the legally-required minimum wage for each hour worked, including those weeks where the employee works the greatest number of hours.
- The employer must pay overtime premiums at one-half the employee's regular rate of pay for hours worked over 40 in a workweek (based on the regular rate for that week, which will vary).

There are, with anything else, pros and cons to this method. Obviously,

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employers may be paying employees more in those weeks where they work fewer hours. Employers also must continuously and carefully monitor the employee's hours to ensure that they are not receiving less than minimum wage in long weeks. Even more, the method may not comport with state or local minimum wage and overtime laws, so employers must carefully review all applicable rules before implementing the FWW. Nonetheless, some employers prefer the consistency of fixed salaries in terms of more predictable wages and the potential for savings. Additional forms of compensation, such as bonuses or commissions, can further complicate the method, so employers should also seek legal input before adopting the FWW. See you next time for Letter G!