



Proposed New Overtime Rule Would Affect Fluctuating Workweek Employees

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Today, the U.S. Department of Labor (DOL) published yet another new [proposed rule regarding employee compensation](#). The DOL's latest rule deals with the little-used and oft-misunderstood "fluctuating workweek method" of employee compensation. The DOL's [proposed fluctuating workweek rule](#) seeks to clarify the permissibility of employers paying bonuses and other premium compensation to employees who are paid on a fluctuating workweek basis.

Under the Fair Labor Standards Act (FLSA), assuming certain conditions exist, employers may pay a fixed salary to non-exempt employees whose hours fluctuate each workweek. This is provided, of course, that the employee's fixed salary exceeds the minimum wage for workweeks during which the employee works the greatest number of hours. Among other [important conditions](#), the employer and employee must have a clear and mutual understanding that the fixed salary is intended to compensate the employee for all hours worked during any workweek, regardless of the total number of hours actually worked, "whether few or many." Employees compensated under the fluctuating workweek method must also be paid the overtime premium for all hours worked in excess of 40.

The preamble to a 2011 DOL final rule stated that employee bonuses and other premium payments were [incompatible with calculating overtime](#) under the fluctuating workweek method of payment. Today's proposed rule reverses

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this directive from the DOL, and expressly states that bonuses, premium payments, and other additional pay of any kind are compatible with the fluctuating workweek method. The DOL's proposed rule explicitly states that "the Department is making clear that employers and courts should not rely on the statement in the 2011 Preamble that that "bonus and premium payments ... are incompatible with the fluctuating workweek method of computing overtime ...". The DOL further clarified that these additional payments must be included in calculating the employee's regular rate of pay when determining overtime rates, and provides examples illustrating how the proposed rule should be applied.

In its press release [announcing the proposed rule](#), the DOL states that the rule will allow employers to better compensate employees who participate in the fluctuating workweek method. Time will tell if the DOL's goal is achieved, but for employers who use this method of payment, this proposed fluctuating workweek rule is no doubt a welcome clarification.

The DOL's proposed rule was published on November 5, 2019, and will be available for review and comment for 30 days.