

## Employers Now Permitted to Pay Bonuses to Employees on Fluctuating Workweeks

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On May 20, 2020, the United States Department of Labor (DOL) announced a final rule allowing employers to pay a bonus or premium pay to non-exempt salaried employees with fluctuating workweeks. Previously, an employer could not pay a bonus or premium pay and comply with the flexible workweek method under DOL rules. However, the DOL has changed its position and now allows employers to pay bonuses and premium payments even when they are using the fluctuating workweek method to allow employers to better utilize flexible work schedules, in light of the need for staggered schedules to accommodate social distancing in the work place due to the COVID-19 crisis.

### **What is the Fluctuating Workweek Method?**

The fluctuating workweek method provides that if a non-exempt employee's work hours fluctuate from week to week, and he or she receives a fixed salary for all non-overtime hours, the overtime requirement of the Fair Labor Standards Act is satisfied if the employer pays the employee at least one-half of the employee's regular rate of pay for all hours worked over forty. The salary itself must remain the same regardless of the number of hours worked and must at least equal the minimum wage for the hours worked. Additionally, the employer and the employee must have a "clear and mutual understanding" regarding the salary.

### **Calculating Bonuses and Premium Payments**

The bonuses and premium payments must be used in calculating the regular rate of pay for overtime purposes. The DOL also clarified that it's not required for an employee's fluctuating work to fluctuate both above and below forty hours a week. As such, employers are permitted to use the fluctuating workweek method for employees even when they always work more than forty hours a week.

The DOL provided the following examples to illustrate the new rule:

- If during the course of 4 weeks this employee receives no additional compensation and works 37.5, 44, 50, and 48 hours, the regular rate of pay in each of these weeks is \$16, \$13.64, \$12, and \$12.50, respectively. Since the employee has already received straight time compensation for all hours worked in these weeks, only additional half-time pay is due for overtime hours. For the first week, the employee is owed \$600 (fixed salary of \$600, with no overtime hours); for the second week \$627.28 (fixed salary of \$600, and 4 hours of overtime pay at one-half times the regular rate of \$13.64 for a total overtime payment of \$27.28); for the third week \$660 (fixed salary of \$600, and 10 hours of overtime pay at one-half times the regular rate of \$12 for a total overtime payment of \$60); for the fourth week \$650 (fixed salary of \$600, and 8 overtime hours at one-half times the regular rate of \$12.50 for a total overtime payment of \$50).
- If during the course of 2 weeks this employee works 37.5 and 48 hours and 4 of the hours the employee worked each week were night shift hours compensated at a premium rate of an extra \$5 per hour, the employee's total straight time earnings would be \$620 (fixed salary of \$600 plus \$20 of premium pay for the 4 night shift hours). In this case, the regular rate of pay in each of these weeks is \$16.53 and \$12.92, respectively, and the employee's total compensation would be calculated as follows: for the 37.5 hour week the employee is owed \$620 (fixed salary of \$600 plus \$20 of non-

overtime premium pay, with no overtime hours); and for the 48 hour week \$671.68 (fixed salary of \$600 plus \$20 of non-overtime premium pay, and 8 hours of overtime at one-half times the regular rate of \$12.92 for a total overtime payment of \$51.68). This principle applies in the same manner regardless of the reason for the hourly premium rate (e.g., weekend hours).

- If during the course of 2 weeks this employee works 37.5 and 48 hours and the employee received a \$100 productivity bonus each week, the employee's total straight time earnings would be \$700 (fixed salary of \$600 plus \$100 productivity bonus). In this case, the regular rate of pay in each of these weeks is \$18.67 and \$14.58, respectively, and the employee's total compensation would be calculated as follows: for the 37.5 hour week the employee is owed \$700 (fixed salary of \$600 plus \$100 productivity bonus, with no overtime hours); and for the 48 hour week \$758.32 (fixed salary of \$600 plus \$100 productivity bonus, and 8 hours of overtime at one-half times the regular rate of \$14.58 for a total overtime payment of \$58.32).

If you are an employer with questions about this legal alert or another employment law issue, contact [Tracy Armstrong](#) or another member of the Wilentz [Employment Law team](#).

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