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Clarity for the Fluctuating Workweek

The fluctuating workweek formula applies to nonexempt, salaried employees whose hours vary widely from week to week. The formula allows employers to pay overtime hours at diminishing rates as long as they pay workers a minimum base salary, regardless of how many hours they work. While certain states have disallowed the fluctuating workweek, states who allow the method just received some clarity from the Department of Labor (“DOL”).

In the past, there has been much legal uncertainty surrounding the fluctuating workweek. The Department of Labor and the courts hold divergent views regarding the compatibility of various types of supplemental pay with the fluctuating workweek method. The fluctuating workweek rule has been read by some courts to contain an important restriction: extra employee compensation violates the “fixed amount” requirement and renders the fluctuating workweek method unavailable. Other courts have taken a more nuanced approach, concluding that productivity-based bonuses are allowed, but hours-based bonuses are not. The DOL’s view of the issue has shifted over time.

On May 20, 2020, the DOL announced a final rule that expelled this legal uncertainty. This final rule clarifies that bonuses, premium payments, commissions and hazard pay on top of fixed salaries are compatible with the fluctuating workweek method of compensation as long as employers include these supplemental payments when calculating the regular rate of pay for these non-exempt employees whose hours vary from week to week (with some exceptions).

The regulation has also been revised so that it is much easier for employers to read and understand. Examples have been added to illustrate these principles where an employer pays an employee, in addition to a fixed salary [1] a nightshift differential and [2] a productivity bonus. It is anticipated that this new framework will allow businesses to better utilize flexible work schedules and feel confident that they can provide additional compensation to these salaried, non-exempt employees without jeopardizing the fluctuating workweek. Amidst the COVID-19 pandemic, this new rule is aimed to provide employers with new ways to incentivize employees while managing their costs. The full text of the new rule is available [here](#).

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