

Legislative Update

JULY 2020*

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U.S. DEPARTMENT OF LABOR ISSUES FINAL RULE RELATING TO THE FLSA'S FLUCTUATING WORKWEEK METHOD OF COMPUTING EMPLOYEE OVERTIME

On May 20, 2020, the U.S. Department of Labor announced a final rule that allows employers to pay bonuses or other incentive-based pay to salaried, nonexempt employees whose hours vary from week to week. The final rule clarifies that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method under the Fair Labor Standards Act (FLSA). In its final rule, the U.S. Department of Labor:

1. Adds language to 29 CFR 778.114(a) to expressly state that employers can pay bonuses, premium payments, or other additional pay, such as commissions and hazard pay, to employees compensated using the fluctuating workweek method of compensation. The rule also states that such supplemental payments must be included in the calculation of the regular rate unless they are excludable under FLSA sections 7(e)(1)-(8). The rule grants employers greater flexibility to provide bonuses or other additional compensation to nonexempt employees whose hours vary from week to week, and eliminates any disincentive for employers to pay additional bonus or premium payments to such employees.
2. Addresses the divergent views expressed by the Department of Labor and courts -- and even among courts -- that have created legal uncertainty for employers regarding the compatibility of various types of supplemental pay with the fluctuating workweek method.
3. Adds examples to 29 CFR 778.114(b) to illustrate these principles where an employer pays an employee, in addition to a fixed salary: (a) a nightshift differential, and (b) a productivity bonus.
4. Revises the rule in a non-substantive way to make it easier to read, so employers will be able to better understand the fluctuating workweek method, including the following revisions to its current regulations: (i) revised 29 CFR 778.114(a) lists each of the requirements for using the fluctuating workweek method, and (ii) duplicative text is removed from revised 29 CFR 778.114(c).
5. Changes the title of the regulation from "Fixed salary for fluctuating hours" to "Fluctuating Workweek Method of Computing Overtime."

Source: USDOL

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