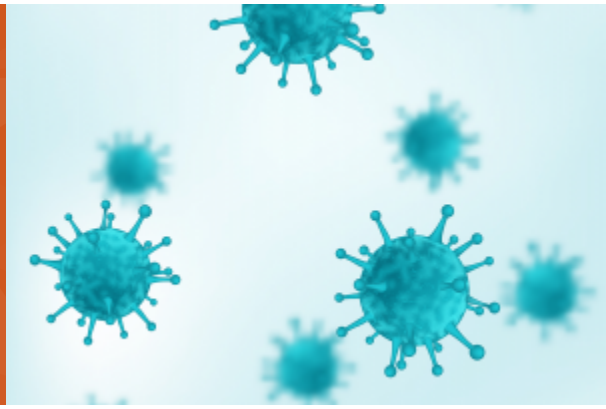
COVID-19 Alert: Fair Labor Standards Act

DOL Issues New Final Rule on Fluctuating Workweek Calculations

May 28, 2020



The U.S. Department of Labor (DOL) issued a final rule under the Fair Labor Standards Act (FLSA) allowing employers to offer bonuses, hazard pay, and other premium pay to employees whose hours, and regular rate of pay, vary from week to week.

The final rule seeks to clarify the calculation of overtime pay for *salaried, non-exempt* employees who work hours that vary each week (known as the "fluctuating workweek"). The new rule clarifies that additional pay, such as bonuses, premium payments, commissions, and hazard pay, on top of fixed salaries are "compatible with the use of the fluctuating workweek method of compensation." The DOL also clarified that such payments must be included in the calculation of the regular rate for overtime purposes. The final rule includes several examples to aid employers in making these calculations.

A fluctuating workweek arrangement is when a *non-exempt* employee receives a set salary for all hours worked in a week, even though those hours may vary from week to week. The fluctuating workweek method allows an employer to pay *salaried, non-exempt* employees overtime at a lesser rate than an *hourly, non-exempt* employee. The complicating factor for employers using this method is that because the employee's weekly work hours vary, the regular rate must be calculated separately each week based on the number of hours *actually* worked that week.

There had previously been much confusion among employers how additional pay, such as bonuses or commissions, would affect the use and calculation of the fluctuating workweek, leaving many employers to utilize the method sparingly. The DOL, recognizing this complexity and confusion, sought to clarify the rules around the fluctuating workweek now as employers bring employees back to work and implement new procedures for social distancing, such as with flexible or variable schedules.

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