

DOL Clarifies Scope of Fluctuating Workweek Overtime Pay Calculation

2 min read

Sep 16, 2020

By: Linda K. Horras

By definition, the hallmark of the fluctuating workweek (FWW) is that the hours *fluctuate*. Now, following another [opinion letter](#) from the U.S. Department of Labor (DOL) on the topic, employers know that this does not mean fluctuating below 40 hours per week.

The DOL was asked to weigh-in on whether an employee's time had to dip below 40 hours in order to qualify for the [FWW method of calculating overtime pay](#). In answering the inquiry, the DOL asserted that there is nothing in the language of the regulation that requires weekly hours to vary both above and below the 40-hour threshold.

Notably, the use of the FWW requires careful attention to each part of the regulation. There are five key parts:

1. The employee's hours must actually vary from week to week.
2. The employee receives a fixed salary that does not vary with the number of hours worked.
3. The fixed salary must be enough to meet the minimum hourly wage.
4. The employee and employer must "have a clear and mutual understanding that the fixed salary is compensation" for all hours worked in the workweek regardless of the actual number of hours worked.
5. The employee is paid the half-time rate of pay based on that week's regular rate of pay for all hours over 40 in that workweek. This rate will vary each week based on how many (or how few) additional hours the employee works in that week.



The DOL also reminds employers that an employee's fixed salary cannot be reduced by an employee's absence. For instance, if Jane Doe has exhausted her sick bank, but then takes an additional sick day, her salary cannot be reduced. Interestingly, the DOL now recognizes that the employer *may* deduct *willful absences or tardiness* from the employee's salary, or for other major work rule infractions.

DOL Administrator Cheryl Stanton’s opinion letter also clarifies the application of this method of compensation for employees who are not exempt from the overtime provisions of the Fair Labor Standards Act. It is designed to meet the needs of the employer with respect to employees whose schedules routinely vary and also provide some measure of additional compensation to said non-exempt employee for the additional hours worked. The DOL has now given its blessing to applying the FWW even when there is no expectation the employee will work less than 40 hours per week.

As with so many wage and hour issues, it is critical to record the employee’s understanding in writing—and ensure that the employee has reviewed and signed all documentation—so that there are no surprises come payday or any (un)friendly visits from DOL auditors. The same concept applies to any salary deductions occasioned by “willful” absences, tardiness, and major rule violations. Proceed carefully on such deductions, and always remember: document, document, document. The pain of an error in the application of the FWW is that it will be set aside completely, returning the employee to a non-exempt employee who is entitled to time and a half pay for all time worked beyond 40 hours in the workweek at a regular rate of pay based on those 40 hours, not one that is reduced based on the extra hours worked.

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