



ON THE FRONT LINES  
OF WORKPLACE LAW<sup>SM</sup>



## FLUCTUATING-WORKWEEK PAY PLANS

Some employers pay non-exempt employees a salary that represents straight-time wages for all of the employees' work performed in a workweek, regardless of the number of hours they worked in that workweek. Generally speaking, these "fluctuating workweek" plans (described by the U.S. Department of Labor at 29 C.F.R. § 778.114) are permitted under the federal Fair Labor Standards Act. However, non-exempt employees who are paid on this basis remain subject to the FLSA's minimum-wage and overtime requirements and must receive the proper overtime compensation for their hours worked over 40 in a workweek. Calculating overtime compensation for these employees depends in part upon the proper determination of the "regular rate" that serves as the foundation for FLSA overtime premium pay.

The regular rate is usually determined by dividing the compensation paid for a workweek by the total hours worked in that workweek for which this compensation was paid. If the employee's weekly or weekly-equivalent salary is intended to provide straight-time pay for *only 40 hours*, then his or her regular rate is the result of dividing that salary by 40 hours. In this scenario, the employee's salary provides no pay for hours worked over 40 in the workweek, so he or she is due an additional 1.5 times that regular rate for all overtime hours worked.

By contrast, an employee's weekly or weekly-equivalent fluctuating-workweek salary represents straight-time pay for *all* worktime, including all overtime hours. That is, the salary is *itself* the "one" of the "one and one-half" rate required for FLSA overtime hours. Therefore, only an additional one-half of the regular rate is due under the FLSA for those overtime hours. Generally speaking, the employee's regular rate will decrease as the hours worked increase, and vice versa.

### How The Plan Works

An employee's weekly or weekly-equivalent fluctuating-workweek salary must constitute straight-time compensation for whatever hours are worked in a workweek, rather than only for a predetermined, limited, or fixed number of hours in a workweek. For instance, the compensation should not be described as being paid "for", or "based on", or "to cover" 40 workweek hours, the "scheduled hours", or any other particular or specific number of hours worked. Instead, the employee should clearly understand that the salary is straight-time pay for *all* hours worked in a workweek. The employee therefore receives the salary for every workweek in which he or she performs *any* work (subject only to very limited exceptions).

Because the employee has already received his or her straight-time pay in the form of the salary, overtime premium is computed at one-half of the regular rate. For instance, if an employee paid a weekly salary of \$600 works 48 hours in a workweek, the overtime premium due is  $(\$600 \div 48 \text{ hrs.}) \times (\frac{1}{2}) \times (8 \text{ OT hrs.}) = \$50.00$ . The person's total pay is  $(\$600 + \$50.00) = \$650.00$ .

Contrary to what people sometimes think, a fluctuating-workweek plan compensates employees at a multiple of 150% for their overtime hours, as the FLSA requires. Assume that an employee's fluctuating-workweek weekly salary is \$600, and that he works 50 hours in a particular workweek. His regular rate is  $(\$600 \div 50 \text{ hrs.}) = \$12.00$  per hour.

Figuring his pay in what some think of as the "traditional" way produces total pay of  $(\$12.00 \times 40 \text{ ST hrs.}) + (\$12.00 \times 1.5 \times 10 \text{ OT hrs.}) = \$660$ . Under the fluctuating-workweek plan, his overtime premium is  $(\$600 \div 50 \text{ hrs.}) \times (\frac{1}{2}) \times (10 \text{ OT hrs.}) = \$60$ , and his total pay still comes to  $(\$600 + \$60) = \$660$ .

### Setting The Salary Level

In establishing a fluctuating-workweek salary, the amount chosen must be large enough to assure that an employee's regular rate will not be less than the legally-required minimum hourly rate in any workweek. While as a practical matter the plan *might* not be invalidated should there be a rare minimum-wage intrusion, employers must pay the employee at least the minimum wage and any overtime due on that occasion and should take steps to be certain that this does not happen in the future.

In moving a salaried employee to a fluctuating-workweek plan, management can reduce the employee's existing salary so that, when any overtime premium is taken into account for the employee's typical workweek, the total compensation approximates the amount received before the plan was implemented. However, an employer *may not* adjust the salary in this way from workweek-to-workweek or in each pay period in order to produce the projected amount without regard to the employee's actual hours worked. Neither may the employer simply assume that the employee has worked the same number of hours each workweek. Instead, once the new salary is set, the employer must properly compute overtime in addition to that salary on the basis of how much overtime the employee really works in each workweek. The employee's actual salary-plus-overtime total will therefore vary as his or her overtime hours worked vary each workweek, and the base salary stays the same until another permanent or lasting change is made.

### Dealing With Absences And Leave Time

Fluctuating-workweek plans call for paying employees their entire fluctuating-workweek salaries for every workweek in which they perform any work, with only a few, narrow exceptions. This is true even when an employee works fewer than his or her expected or scheduled hours. *The salary-reduction rules pertaining to exempt "white collar" employees under the FLSA do not apply under a fluctuating-workweek plan.* These two sets of principles are distinct and significantly different, and in some ways those relating to fluctuating-workweek plans are even more limited.

However, USDOL has said that fluctuating-workweek employees need not be paid their salaries for a *workweek* in which they perform *no* work. It also says that employers may pay a prorated amount of the salary for the initial and terminal weeks of employment.

*Occasional* disciplinary deductions may be made for willful absences or tardiness or for infractions of major work rules ("willful" and "major" are not well-defined). However, employers may do this only after the employee's FLSA wages due have been properly computed; cannot allow the penalties to cut into the minimum wage or overtime due; and must still record, count, and properly pay for all hours that the employee *does* work.

**CAUTION:** Frequent or routine deductions of even these kinds could cause USDOL or a court to scrutinize matters closely to determine whether a fluctuating-workweek plan has

been validly maintained. Therefore, this plan might not be a wise choice for employees whose commitment to good attendance is questionable, or if the employer envisions making regular or routine deductions even for the permitted disciplinary reasons.

USDOL has said that deductions for absences during part of a workweek can be made from the employees' paid-time-off allotments, such as vacation accounts or sick-leave banks. But employees must still receive their full salaries even after they have no more paid leave to cover those absences (subject only to the narrow exceptions above).

Employers must also decide how to handle the salaries of employees who take intermittent or reduced-schedule leave under the federal Family and Medical Leave Act. One option, of course, is simply to forgo making any salary deductions for the employee's FMLA-related absences arising from intermittent or reduced-schedule leave.

USDOL regulations (29 C.F.R. § 825.206) provide another approach: *During the period in which the employee is scheduled to take the intermittent or reduced-scheduled FMLA leave*, the employer pays the worker on an hourly basis and only for the hours he or she actually works, including by paying at a rate of at least *1.5 times the employee's regular rate of pay* for overtime hours. USDOL says that (i) an employer using this option must apply it uniformly to *all* fluctuating-workweek employees who take this kind of FMLA leave; and (ii) the employee must be paid this way for the entire period during which he or she is taking intermittent or reduced-schedule leave – even for workweeks in which the employee takes no leave. The employee may once again be paid under the fluctuating-workweek method after the need for intermittent or reduced-schedule FMLA leave ends.

### **Areas Of Present Uncertainty**

In April 2011, USDOL published remarks that were apparently intended to transform and significantly restrict the use of fluctuating-workweek pay plans in two ways.

First, USDOL said that employers who rely upon fluctuating-workweek plans for non-exempt employees may not also pay these workers bonuses, incentive payments, premium sums, or other additional amounts (except for overtime pay). USDOL alleged that doing so is supposedly "incompatible" with paying on a fluctuating-workweek basis.

Its comments also claimed that the fluctuating-workweek method cannot be used unless the employee's hours of work actually fluctuate. USDOL offered no elaboration upon what this means. It said nothing, for example, about how often or by what magnitude this fluctuation supposedly must occur.

It remains to be seen whether and how far USDOL will push these viewpoints.

Of course, the ultimate decisionmakers in such matters are the courts. Judges need not follow the propositions espoused in USDOL's comments, and there are good reasons for declining to do so. However, so far the outcomes are mixed.

For example, some courts have embraced the notion that indeed an employer undercuts the fluctuating-workweek method by paying the employee commissions or incentive amounts. On the other hand, some judges have said that such payments do *not* have this effect. Still others have ruled that additional payments relating to or based upon an employee's *hours worked* (aside from overtime compensation required by the FLSA, of course) are inconsistent with the fluctuating-workweek method.

Insofar as "fluctuation" in an employee's hours is concerned, some decisions have said that such fluctuation is required as a condition of using the fluctuating-workweek method. Of course, total hours based upon an *accurate* record of an employee's worktime almost certainly *will* "fluctuate" to at least some degree. Experience instructs that time records reflecting the same total hours workweek-after-workweek are likely to be inaccurate. Thus, accuracy in timekeeping probably will improve the prospects that a court will find "fluctuation" to have existed in any event.

A limited number of decisions have even held that there must be "fluctuation" both above and below 40 hours over a period of time. This contradicts the view expressed by USDOL long ago in *Opinion Letter of Wage-Hour Administrator No. 693*, 66-69 CCH-WH ¶30,687 (October 27, 1967)("There is no requirement that the hours of work of an employee compensated on a fluctuating-workweek basis fluctuate above and below 40 hours in a workweek . . ."). Furthermore, other courts have rejected the idea that any such fluctuation above and below 40 hours is necessary.

In the end, until a future USDOL withdraws or repudiates these recent statements, and/or until a court consensus rejecting or refining them emerges, employers who are either using or considering a fluctuating-workweek plan must nevertheless take these matters into account. For now, there are essentially three alternative approaches.

One is not to use these plans at all. There is reason to surmise that this is USDOL's preference. An employer taking this course might be able serve its interests by designing alternative compensation methods calling for similar overtime computations, such as those based upon a commissions-only approach, piece-rate wages, or job-rate plans.

Another is to rely upon the fluctuating-workweek method only within USDOL's parameters. This would involve limiting these plans to employees:

- Whose hours "fluctuate" (and a more-cautious approach would be to restrict them to employees whose hours fluctuate both above and below 40), and
- Who are paid the salary plus any overtime premium due but are not paid any other compensation.

Finally, an employer might elect to adopt a fluctuating-workweek pay plan (or to continue an existing plan) without regard to these areas of uncertainty. Obviously, the employer must be ready to defend this decision someday in a USDOL investigation or in a lawsuit.

### **Frequently Asked Questions**

#### ■ *Does A Fluctuating-Workweek Plan Have To Be In Writing?*

There is no requirement under the FLSA that these plans be in writing. Even so, we recommend that an employer adopt a written description of the plan. Otherwise, one or more employees might later claim not to have been paid on this basis, or that their understanding did not support fluctuating-workweek-based overtime calculations. The accompanying sample memorandum illustrates how one might describe a basic fluctuating-workweek plan.

- *Does An Employer Keep Time Records Under A Fluctuating-Workweek Plan?*

Yes. Employers must comply with the FLSA's timekeeping requirements even under a fluctuating-workweek plan. Each employee should *accurately* report his or her hours worked each workday and each workweek. The employer must maintain *accurate* records of those hours worked and must use the time so recorded in properly computing the employee's pay under the FLSA.

- *Can The Salary Be Set To Include Some Overtime Premium Pay?*

No. A fluctuating-workweek salary does not and cannot "include" any FLSA overtime premium pay. Instead, the salary represents only straight-time pay, and the employer must properly compute and pay the half-time overtime premium *in addition* to the salary on the basis of how much overtime the employee actually works in a particular workweek.

- *How Are Wage Deductions Or Employee Payments Handled?*

Pay deductions (or payments by the employee) for things like required uniforms; broken, lost, or damaged equipment; cash or inventory shortages; expenses incurred for the employer's convenience; and so on are subject to the same limitations that normally apply to employees subject to federal wage requirements. Generally, such deductions (or payments by the employee) cannot reduce an employee's pay to below the minimum wage, nor may they cut into the overtime due for the workweek in which the deduction or payment is made.

- *How Does An Employer Handle Salaries Paid Less Often Than Weekly?*

Overtime for employees paid bi-weekly, semi-monthly, or monthly salaries is computed based upon the weekly equivalent of the salary for each workweek ending in the pay period. The weekly equivalent can be determined by multiplying the pay-period salary times the number of pay periods and then dividing this figure by 52. As an illustration, the weekly equivalent of a \$2,000 semi-monthly salary is  $[(\$2,000 \times 24) \div 52] = \$923.08$ .

- *What About The Laws Of Other Jurisdictions?*

Employers should ensure that any plan they adopt complies with the overtime laws of every state and other jurisdiction in which it will be used. For instance, the laws, court decisions, or regulations of some others will not permit this approach.

Keep in mind also that some jurisdictions require a higher minimum wage than that imposed by federal law, and the higher rate must be observed in those places. Furthermore, the laws of one jurisdiction or another might require overtime compensation for hours worked over some specified number in a single workday. In addition, some jurisdictions do not permit employers to make deductions which would be allowed under the FLSA.

*Numerous regulations, interpretations, rulings, and other authorities must be specifically evaluated in applying the provisions of the Fair Labor Standards Act. These materials are for general-information uses only. They are not and may not be construed to be legal advice or to be a legal opinion on any specific facts or circumstances, or to be a comprehensive or all-inclusive compilation of facts or questions that are potentially relevant to these FLSA principles or requirements. You are urged to consult legal counsel competent in labor-standards matters concerning both your own, particular situation and any specific legal questions you might have.*

**Sample Memorandum**

TO: [AFFECTED EMPLOYEE(S)]  
FROM: [APPROPRIATE PERSON]  
SUBJECT: YOUR PAY PLAN  
DATE:

Your weekly salary represents compensation for all your hours worked in a workweek (not just 40 hours, or your scheduled or normal hours, or any other particular number of hours) whether you work more or less than your full schedule of hours.

For all your hours worked over 40 in a workweek, in addition to your salary covering those hours you will also be paid an overtime premium of 50% times your regular rate of pay for that workweek. Because your salary is compensation for all the hours worked in the workweek, your salary represents 100% of your straight-time pay. This means that, in an overtime workweek, you are receiving pay at a multiple of (100% + 50%) = 150%, that is, at a rate of time-and-one-half, for your hours worked over 40.

The premium amount added to your salary for a workweek will be figured by dividing your salary for the workweek by your total number of hours worked in the workweek; multiplying that figure (the "regular hourly rate") times one-half; and multiplying this result times the number of your hours worked over 40 in that workweek.

You must at all times maintain an accurate and truthful record of your hours worked each day and each workweek.

ACKNOWLEDGED:

\_\_\_\_\_  
DATE

\_\_\_\_\_  
EMPLOYEE'S SIGNATURE

***NOTE: ANY SUCH MEMORANDUM SHOULD BE TAILORED TO DESCRIBE THE PARTICULAR PAY PLAN THE EMPLOYER ADOPTS AND TO TAKE INTO ACCOUNT ALL OF THE RELEVANT CIRCUMSTANCES AND CONSIDERATIONS. FOR EXAMPLE, A MODIFIED MEMORANDUM WOULD BE CALLED FOR IF THE EMPLOYER INTENDS TO DEDUCT FROM THE SALARY UNDER PERMISSIBLE CIRCUMSTANCES. IT MIGHT ALSO BE WISE TO INCLUDE AT LEAST A FEW EXAMPLES OF HOW OVERTIME WILL BE CALCULATED.***