



COMPLIANCE BULLETIN

HIGHLIGHTS

- The fluctuating workweek method can be used for employees who are paid a fixed salary and whose hours of work fluctuate from week to week.
- The fluctuating method may be prohibited by state and local laws.
- The proposal would help simplify use of the fluctuating workweek method.

IMPORTANT DATES

November 5, 2019

Fluctuating workweek proposed rule is published.

December 5, 2019

Comment period on proposed rule expires.

DOL Proposes Revisions to the Fluctuating Workweek Overtime Method

OVERVIEW

On Nov. 5, 2019, the U.S. Department of Labor (DOL) published a [proposed rule](#) to update the “fluctuating workweek” method for calculating employee overtime wages under the Fair Labor Standards Act (FLSA). The fluctuating workweek method provides employers a cost-saving option to compensate employees who are not exempt from the Act’s overtime wage payment requirements.

If approved, the proposal would enable employers to pay bonuses, shift differentials and other incentive payments to employees who are paid under the fluctuating week method. The proposed changes were issued to clarify conflicting court rulings regarding this method.

ACTION STEPS

This publication is only a proposed rule, so it does not impose any new requirements on employers. However, the DOL is inviting employers to review this proposal and submit their comments, if any, to the DOL **by Dec. 5, 2019** by mail or through the Federal eRulemaking Portal at <https://www.regulations.gov>.

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The Fluctuating Workweek Method

The FLSA requires employers to compensate their employees at a rate of one and one-half (1.5) times the regular wage rate for every hour they work over 40 during a workweek. However, current [FLSA regulations](#) permit employers to compensate employees with only half (0.5) of their regular wage rate for overtime hours if all of the following conditions are met:

1. The employee's work hours fluctuate from week to week;
2. The employee is paid a fixed salary, regardless of how many hours they work week to week;
3. The employee's weekly regular rate is always higher than the highest applicable minimum wage rate;
4. The employee does not qualify for an overtime exemption;
5. There is an understanding between the employer and the employee on how the employee will be paid for overtime work; and
6. Applicable state law authorizes the employer to use the fluctuating method for overtime pay.

Fluctuating Workweek Method Example

As an illustration consider the following [example](#) taken directly from the federal code of regulations. Imagine Amy is an employee whose hours of work do not customarily follow a regular schedule. Amy's schedule varies from week to week, but she never works more than 50 hours in a workweek. Amy is also paid a fixed salary of \$600 per week, with the understanding that this salary constitutes her entire compensation, except for overtime premiums, for whatever hours are worked in the workweek.

Under the fluctuating workweek method, assuming all requirements are met, Amy would receive her entire weekly salary plus half of her regular wage rate times the number of hours of overtime as compensation for her hours of overtime work. The table below shows Amy's wages for four weeks when she works 40, 37.5, 50 and 48 hours respectively.

	Week 1	Week 2	Week 3	Week 4
Hours of work	40	37.5	50	48
Overtime hours	0	0	10	8
Salary	\$600	\$600	\$600	\$600
Regular rate	\$15	\$16	\$12	\$12.50
Fluctuating overtime rate	0	0	$\$12 / 2 = \6	$\$12.50 / 2 = \6.25
Overtime pay	0	0	$\$6 \times 10 \text{ hours} = \60	$\$6.25 \times 8 = \50
Week's wages	\$600	\$600	\$660	\$650

"This proposed rule will provide much-needed clarity for job creators who are looking for new ways to better compensate their workers."

*Wage and Hour Division Administrator
Cheryl Stanton*

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Proposed Changes

For some time, using the fluctuating workweek method to compensate nonexempt employees has posed challenges to employers and the courts. Among other things, this proposed rule would:

- ✓ Clarify that employers can use incentive payments to individuals subject to the fluctuating workweek method;
- ✓ Establish that incentive payments should be included in an employee's regular wage rate when calculating overtime under the fluctuating workweek method (unless specifically excluded by the FLSA); and
- ✓ Provide examples and revise language to make the rule easier for employers to understand.