

December 5, 2019

Ms. Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S—3502
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1235-AA31; Comments of the Center for Workplace Compliance on the Notice of Proposed Rulemaking Regarding the Fluctuating Workweek Method of Computing Overtime

Dear Ms. DeBisschop:

The Center for Workplace Compliance (CWC) welcomes the opportunity to submit written comments in response to the Department of Labor's (DOL) Notice of Proposed Rulemaking, published in the *Federal Register* on November 5, 2019,¹ regarding the fluctuating workweek method of computing overtime. As discussed in more detail below, CWC strongly supports the proposal.

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)² is the nation's leading nonprofit Association of employers dedicated exclusively to helping its members better understand and manage their workplace compliance requirements and risks. CWC's membership includes over 200 major U.S. corporations, collectively providing employment to millions of workers.

CWC's directors and officers include many of industry's leading experts in the fields of fair employment, workplace compliance, and risk management. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations.

All of CWC's members are employers subject to the FLSA. As such, CWC has a strong interest in ensuring that DOL's interpretations related to the fluctuating workweek method of overtime pay accurately reflects the law as applied to the modern workforce and provides meaningful guidance to employers.

Summary of Comments

CWC is pleased to support the proposed revisions because they would clarify that employers may provide employees with additional compensation over and above their salary without violating the fluctuating

¹ 84 Fed. Reg. 59,590.

² Formerly the Equal Employment Advisory Council (EEAC).

workweek rules. While this had been DOL's longstanding position, it was not articulated in the Department's codified rules and courts developed inconsistent interpretations of the practice, which were exacerbated by statements DOL made in 2011.

By clearly articulating the rules for providing additional compensation in excess of an employee's salary, the proposal would remove a major disincentive to using the fluctuating workweek method. This will help restore the fluctuating workweek as a viable alternative for employers with employees who work irregular hours.

Background

The FLSA, enacted in 1938 and amended numerous times since then, requires employers to pay employees who are not exempt from the law's coverage the federal minimum wage and premium pay for all hours worked over 40 in a workweek. Since the law's earliest days, DOL³ and federal courts⁴ have recognized that one way that the overtime premium requirement may be met is through the "fluctuating workweek method" of pay.

At its core, the fluctuating workweek method acknowledges that employers and employees may enter into employment agreements that pay an employee a salary that represents straight-time earnings for all hours worked in a week. Because the salary already accounts for straight-time pay for any overtime hours worked, the FLSA's overtime premium requirements are satisfied by paying a premium of at least 0.5 times the regular rate of pay for each hour of overtime worked.

Under DOL's current interpretations,⁵ the following conditions must be satisfied in order to use the fluctuating workweek alternative:

- An employee's hours of work must fluctuate from week to week;
- The employee must receive a "fixed amount" as straight-time pay for all hours worked in the week, whether few or many;
- The employee and employer must have a clear mutual understanding that the fixed amount is compensation for all hours are worked during the week (apart from overtime premiums);
- The amount of the fixed salary must be high enough so that the employee's pay never falls below the minimum wage in any week; and
- The employee must receive overtime compensation at a rate of not less than one-half of the employee's regular rate of pay for that workweek.

While DOL's published rules have largely remained the same for decades, application of these principals has become more difficult in recent years due to conflicting court decisions regarding whether

³ Wage and Hour Division Interpretive Bulletin No. 4., Maximum Hours and Overtime Compensation (Nov. 1940).

⁴ See, for example, *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942).

⁵ These interpretations are codified at 29 C.F.R. § 778.114 and further elaborated on in the DOL's Field Operations Handbook § 32b04b.

additional payments can be made without violating the “fixed amount” requirement. DOL proposed addressing this matter in 2008 when it published a Notice of Proposed Rulemaking covering numerous FLSA matters.⁶

DOL ultimately decided not to include substantive revisions to the fluctuating workweek when it finished its rulemaking in 2011. However, it included statements in the preamble to the final rule that contributed to the growing confusion over how additional compensation should be treated. Specifically, DOL stated that additional payments, other than those representing overtime, “are incompatible with the fluctuating workweek method of computing overtime”⁷ Further, DOL stated “The Department does not believe that it would be appropriate to expand the use of this method of computing overtime pay beyond the scope of the current regulation.”⁸ In other words, while DOL did not publish any substantive changes to its codified rules, it articulated an explanation directly contrary to past practice.

The Current Proposal Would Significantly Improve the Clarity of the Fluctuating Workweek Requirements and Provide Additional Flexibility to Design Appropriate Compensation Systems

On November 5, 2019, the Department published proposed revisions to its longstanding fluctuating workweek rules. The principle substantive revision would add language explicitly recognizing that the fixed salary requirement is not violated by providing additional pay such as bonuses and premium payments. The proposal also states that any additional compensation beyond the fixed salary is to be included in the employee’s regular rate of pay subject to the same exceptions that apply to other nonexempt employees. For example, if an employer paid an employee under the fluctuating workweek method and included a bonus for meeting sales targets, a non-discretionary bonus, the bonus would be included in the regular rate on which any overtime premium is based.

The proposal is consistent with DOL’s longstanding interpretation of the fluctuating workweek alternative as it existed prior to DOL’s unexpected departure in 2011. For example, during the Clinton Administration, the Wage and Hour Division (WHD) received an inquiry about whether making additional payments for time not worked, such as for holiday pay, would be consistent with the fluctuating workweek method. In response, WHD stated that the fluctuating workweek method “does not prohibit paying more.”⁹

Similarly, in early 2009 WHD responded to an inquiry as to whether the fluctuating workweek method would permit paying an additional premium to employees, pay at double-time rates for work on a Sunday or holiday. In response, the Acting Wage and Hour Administrator found such a practice consistent with the fluctuating workweek method, noting “Receipt of additional bonus payments does not negate the fact that an employee receives straight-time compensation through the fixed salary for all hours worked, whether few or many, which is all that is required under” the regulations.¹⁰ While this opinion letter was later withdrawn by the Obama Administration “for further consideration,”¹¹ no inconsistent interpretation was issued, apart from the 2011 preamble.

⁶ 73 Fed. Reg. 43,654 (Jul. 28, 2008).

⁷ 76 Fed. Reg. 18,831, 18,850 (May 5, 2011)

⁸ *Id.*

⁹ Letter from Daniel F. Sweeney, Office of Enforcement, Fair Labor Standards Team, 1999 WL 1002399 (May 10, 1999).

¹⁰ Opinion letter 2009-24 (January 16, 2009), available at:

https://www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_24_FLSA.pdf.

¹¹ Letter from John L. McKeon, Deputy Administrator for Enforcement (March 2, 2009), available at:

https://www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_24_FLSA.pdf.

While DOL's pre-2011 interpretations have been consistent, this has not been so for the courts. As detailed in the preamble to this proposal, confusion has only grown since 2011. Some courts have permitted additional payments, others have prohibited them. Still other courts have drawn distinctions between permitted and prohibited additional payments based on the purpose of the payments.¹² This widely divergent case law has created a greater disincentive for employers to consider the fluctuating workweek alternative.

DOL is right to propose an interpretation that would restore clarity. Further, this proposal brings clarity in a form that offers employers ways to provide additional compensation to employees and to offer incentives for meeting important business needs. This will provide modest flexibility for employers that utilize jobs with irregular hours.

The Proposed Non-Substantive Revisions Also Enhance Clarity

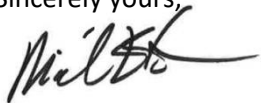
The proposal includes several non-substantive revisions that will also enhance clarity and understanding of the rule. By more clearly outlining the required conditions for using the fluctuating workweek method and by updating and modernizing the language used in the rule, employers will more quickly understand the requirements of the rule. The proposal also adds several examples to the rule that show how calculations of the overtime premium should be made using the fluctuating workweek method where additional payments are provided above a fixed salary. We are pleased to support these provisions as well.

Conclusion

The Department's proposed changes to the fluctuating workweek rules would restore needed clarity and remove unnecessary disincentives toward using this method of pay. CWC strongly supports the proposal.

Please do not hesitate to contact me if the CWC can be of further assistance to you as you consider these important issues.

Sincerely yours,



Michael J. Eastman
Senior Vice President, Policy and Assistant General Counsel

¹² 84 Fed. Reg. at 59,592-93 (citing cases).