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Just In Time For Holiday Bonuses: Proposed New Guidance On “Fixed Salary”

December 3, 2019

Employers who compensate non-exempt employees based on the “fluctuating work week” method, take note. Last month, the Department of Labor (DOL) issued a proposed rule that would permit employers to supplement the salaries of such employees with additional non-overtime payments, such as bonuses and other incentive pay. This is great news for employers and employees, and here is why.

Assuming all of the below factors are met, the “fluctuating work week” method of payment permits employers to pay a fixed salary to non-exempt employees for all straight-time worked. Workers still receive overtime compensation, but at 1/2 of their regular rate, instead of 1.5 times their regular rate.

The DOL says that employers can pay non-exempt employees through the “fluctuating work week” method if the following requirements are met:

- The worker’s hours fluctuate from week to week, meaning:
  - The hours must actually fluctuate, both above and below 40 hours per week, and
  - Workers who work a fixed schedule are not eligible to be paid in this manner.

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- The worker receives a guaranteed salary for each work week, regardless of the number of hours worked:
    - This amount must actually be fixed.
    - An employer using this method could not, for example, reduce workers' salaries if they are absent from work after exhausting sick leave, vacation leave, or paid time off.
- Such salary sufficiently compensates the worker at a rate not less than the applicable minimum wage for the hours worked;
- There is a clear, mutual understanding between the employer and the worker that the fixed salary covers all straight-time wages for all hours worked; and
- In addition to fixed salary, the worker also receives overtime compensation for all overtime hours worked at a rate of at least half of the worker's regular rate of pay (calculated by dividing the non-overtime compensation for each work week by the actual hours worked in each work week).

For example, suppose a non-exempt employee receives a fixed weekly salary of $1,000, regardless of the number of hours worked. If the employee works 15 hours per week, he is paid $1,000. If the employee works 50 hours per week, he is paid $1,000. Because the number of hours worked per week fluctuates, the regular rate of pay per week also fluctuates. For this worker's 15-hour week, his "regular" rate is $66.67 per hour ($1000 divided by 15). For a 50-hour week, his "regular" rate is $20.00 ($1000 divided by 50). Obviously, under this method, the higher the number of hours worked per week, the lower the regular rate of pay is for that week. For any overtime worked, the rate is calculated as half of the regular rate for that week. Therefore, for the 50-hour week for the employee earning a fixed salary of $1,000 per week, the overtime rate is $10.00 per hour, instead of $30.00 per hour. Under this 50-hour week hypothetical, the employee would earn, in total, $1100 for that week.

The new proposed rule impacts the second factor listed above – the guaranteed or fixed salary – and represents a shift from Obama-era guidelines. Under those guidelines, employers could not supplement workers' salaries with incentive pay or bonuses, because, according to the Department of Labor, doing so would be inconsistent with the requirement of a fixed salary and might permit employers to abuse the payment methodology and avoid overtime liability. Now, the Department Labor has done an about-face and the new proposed rule explicitly allows employers using the "fluctuating work week" method to pay bonuses and incentive pay as long as that pay is factored into the worker's regular rate of pay when calculating overtime.

If adopted, the rule would provide clarity to employers who use the "fluctuating work week" method of payment but it is not yet apparent whether states and municipalities will follow suit. For example, the Pennsylvania Supreme Court ruled last month that state law prohibits using the fluctuating workweek method in Pennsylvania. And in Illinois, regulations implementing the Illinois Minimum Wage Law recognize the "fluctuating work week" method of payment but fail to address whether bonuses or incentive compensation can be considered part of the fixed salary.

The Department of Labor is accepting comments on the proposed rule through December 5. Parties can submit comments online through the Federal eRulemaking Portal at https://www.regulations.gov/.
