Blog Post

# DOL Changes Rules for Fluctuating Workweek and Retail Establishments

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Employers who use the fluctuating workweek method of compensating employees and those who rely on the retail establishment exemption from overtime are both in for some changes. Recently the Department of Labor (DOL) passed two key regulations altering the application of certain rules under the Fair Labor Standards Act (FLSA) applicable to each. First, the DOL has authorized employers to offer bonuses and hazard pay to workers with fluctuating workweeks, without destroying the validity of that method of pay. Second, it has changed its regulations addressing which businesses qualify as "retail" businesses for certain overtime exemptions. Employers should review these rules and identify whether either policy might provide relief to their businesses as they adjust to flexible schedules and potentially new service or retail offerings.

## Fluctuating Workweek Compensation Changes

With employers facing several new obstacles during the coronavirus pandemic, the DOL has implemented new regulations to provide more flexibility to employers who wish to utilize flexible work schedules. Under the fluctuating workweek method of compensation, governed by 29 CFR § 778.114, an employer may pay an employee a weekly salary for hours of work that fluctuate from week to


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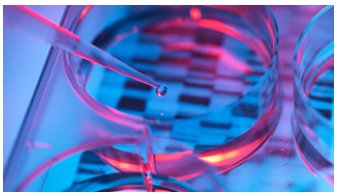


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week pursuant to a "clear mutual understanding" that the employee will receive that salary as straight time pay for whatever hours the employee works that workweek, whether few or many. The employer must ensure that the amount of the weekly salary is sufficient to ensure that the employee's average hourly earnings do not fall below the minimum hourly wage rate for every hour worked in those weeks where the highest number of hours are worked. In such cases, because the salary "compensate[s] the employee at straight time rates for whatever hours are worked in the workweek," the regular rate "is determined by dividing the number of hours worked in the workweek into the amount of the salary," and an employer satisfies the overtime pay requirement of the FLSA if it compensates the employee, in addition to the salary amount, at a rate of at least one-half of the regular rate of pay for the hours worked in excess of 40 in a workweek. As a practical matter, in addition to paying a half-time rate, the fluctuating workweek allows an employer to pay overtime on a graduated scale because the amount of overtime paid per hour diminishes with each additional hour that the employee works.

Previously, it was unclear whether employers could pay "hazard pay" or bonuses in addition to the fixed amount. Under the DOL's new regulations, bonuses and other premiums have been deemed consistent with the fluctuating workweek, so long as they are incorporated into the calculations for the employee's regular rate when calculating the overtime rate. This should provide employers with clearer guidance about how to calculate an employee's regular rate where that employee works a flexible schedule. That said, this new DOL regulation does not supersede state law and may be impermissible in states that have rejected the fluctuating workweek method of compensation, such as California, Pennsylvania, and New Jersey.

## Expansion of the Retail and Service Establishment Concept

Under Section 7(i) of the FLSA, certain retail employers are exempt from paying overtime to commission-based employees, upon meeting certain criteria. Nearly 60 years ago, the DOL issued interpretive guidance, creating two lists, each containing dozens of categories of businesses that the agency believed either may or may not be qualified for the exemption as a retail or service establishment. Among the excluded businesses were dry cleaners, accounting firms, construction contractors, travel agencies, and dentists. As of the end of May 2020, those lists have been withdrawn, opening the possibility that businesses that were previously excluded may now qualify for an exemption under 7(i). There also may be increased uncertainty for companies that previously were expressly included— such as jewelers and hair salons—as those companies will not be able to point to the now-withdrawn lists on which they could rely in the past. Instead, they will need to establish their exemption through the particular facts and circumstances surrounding their businesses.

Without the lists, employers seeking to qualify for the exemption will be required to show that their business is a "retail or service establishment." An employer must show that 75 percent of its annual dollar volume of sales of goods or services (or of both) "is not for resale and is recognized as retail sales or services in the particular industry" and that it has a "retail concept." The regulations provide that an establishment has a retail concept if it:

- sells goods or services to the general public,
- serves the everyday needs of the community,
- is at the very end of the stream of distribution,
- disposes its products and skills "in small quantities," and
- does not take part in the manufacturing process.

In other words, businesses will have to show that they sell goods or services to the general public and

are not a middle-man, so to speak, who sells from the manufacturer or distributor to another retailer.

Once an employer determines it operates a retail or service establishment, it can determine whether any of the employees of that establishment may qualify as exempt from overtime, based upon the manner of their compensation. To be exempt from the overtime requirement, employees must receive more than half of their pay in the form of bona fide commissions on goods or services. The employer may use a representative period of one month, up to as long as one year, to measure compliance with this requirement. The employee's regular rate for each hour worked also must exceed one and one-half times the minimum wage.

With businesses expanding into new sectors and making other creative changes during COVID-19, employers may want to consider whether their business and commissioned employees may fit into the retail or service establishment exemption so as to be exempt from overtime requirements.

For assistance in determining whether your business might qualify, or for other questions under the FLSA or other workplace laws, contact your Akerman attorney.

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