



## CUT AND PASTE POST JUNE, 2020

*SHRM has been really good about sending updates on COVID-related legislation. Since there is nothing earthshattering on that front right now, I thought it might be nice to return to some “mundane” HR news.*

### U.S. DOL Issues Final Rule on Fluctuating Workweeks<sup>(1)</sup>

Under the Fair Labor Standards Act (FLSA), and with “a clear mutual understanding” between an employer and employee, an employer may pay non-exempt employees using a fluctuating work week method. Under this method, the employee receives a fixed salary for all hours worked, regardless of the number of hours worked in any given week. The employee also receives overtime pay, at **one-half the weekly regular rate**, for all hours worked over 40 in that work week. Under this method, the regular rate of pay fluctuates based on the number of hours worked. The U.S. Department of Labor (DOL) estimates that only 0.45% of the workforce is paid under a fluctuating work week schedule.

On November 9, 2019, the DOL published a Notice of Proposed Rulemaking to clarify which payments (in addition to the fixed salary) are compatible with the use of a fluctuating workweek method of compensation, and how those payments would affect the Regular Rate of pay. Public comment was due by December 5, 2019.

The DOL completed the review of public comment and, on June 8, 2020 (today), published a Final Rule addressing this method of payment.

Among the changes, the [Final Rule](#):

1. Clarifies that bonuses, premium payments, and other additional pay of any kind are compatible with the use of the fluctuating workweek method of compensation;
2. Clarifies that ‘all remuneration earned’ (with few exceptions) must be included when calculating the weekly regular rate of pay;
3. Clarifies that a work schedule does not have to go above and below 40 hours to qualify for a fluctuating work week method of compensation; and
4. Adds examples to § 778.114(b) to illustrate the fluctuating workweek method of calculating overtime where an employee is paid:
  - a nightshift differential,
  - a productivity bonus in addition to a fixed salary, and
  - premium pay for weekend work.

In addition, the new Rule makes “non-substantive revisions” to § 778.114(a) and (c). Specifically, it:

- Details the requirements for using the fluctuating workweek method in Section 778.114 ; and
- Removes duplicative language from § 778.114(c).

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(1) For those employers not subject to the FLSA, Montana law has a similar provision, but call Montana’s Wage and Hour Bureau at (40) 444-6543 for assistance.

Finally, the DOL changed the title of the regulation from “Fixed Salary for Fluctuating Hours” to “Fluctuating Workweek Method of Computing Overtime.”

The new Rule becomes effective August 7, 2020. The FLSA regulations will need to be updated accordingly. We’ll keep you updated.

## U.S. DOL Publishes Corrections to White Collar Rule

On June 8, 2020, the DOL announced that it was making corrections to the 9/27/2019 “White Collar” Rule, which updated the Executive, Professional, Administrative, Outside Sales and Computer Employee exemptions to the overtime requirements of the FLSA. The 6/8/20 correction:

1. Restores Sections 541.601(b) (3) and (4) to the FLSA regulations.  
*Reason for correction:* The original intent was to revise § 541.601(b) (1) and (2), but leave paragraphs (b) (3) and (4) unchanged. Paragraphs (b) (3) and (4) were removed from the new legislation in error.
2. Removes from the FLSA regulations §541.607, AUTOMATIC UPDATES TO AMOUNTS OF SALARY AND COMPENSATION REQUIRED.  
*Reason for correction:* Initially, the DOL proposed to review this Rule, including the minimum White Collar salary, every 4 years. In the 9/2019 Final Rule the DOL declined to commit to this update but, when it published the updated regulations, it forgot to remove this review from the “regulatory text”.

## Lessons (Re) Learned from Recent Wage and Hour Decisions

### [Baker vs. Hog and Jog Café:](#)

- If an employer doesn’t have a tracking system to document employee time worked, the employee’s personal records will be used to calculate wage and hour liabilities.
- An owner/member of an LLC is not automatically exempt from wage and hour laws.
- Absent a specific wage agreement between the parties, employees are entitled to be paid the minimum wage in effect at the time the work was performed.

### [Herman v. Blades of Glory, LLC:](#)

- If an employer doesn’t have a tracking system to document employee time worked, the employee’s personal records will be used to calculate wage and hour liabilities. (See a pattern here?)
- The Montana Attorney General has prohibited employers from withholding wages to pay for damages caused by *employee negligence* unless otherwise provided for by a contract between the employee and the employer.
- Under [§39-3-205 \(3\)](#) Montana Code Annotated, when an employee is discharged by reason of an allegation of *theft of property or funds* connected to the employee’s work, the employer may withhold from the employee’s final paycheck an amount sufficient to cover the value of the theft if:
  - a. the employee agrees in writing to the withholding; or
  - b. the employer files a report of the theft with the local law enforcement agency within 7 business days of the separation from employment, subject to the certain conditions.

### [Olson v. Pierce Flooring:](#)

- A well written Employment Agreement can ‘rescue’ an employer facing a Wage and Hour complaint.

As always, please email me ([bergpersonnelsolutions@live.com](mailto:bergpersonnelsolutions@live.com)) with any suggestions for a *Cut N Paste* topic!

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