



FLSA2020-14

August 31, 2020

Dear **Name***:

This letter responds to your request for an opinion regarding the fluctuating workweek method of calculating overtime pay under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You ask whether employees' hours must fluctuate above and below 40 hours per week to qualify for the fluctuating workweek method of calculating overtime pay set forth at 29 C.F.R. § 778.114 or if it is sufficient that the employees' hours fluctuate only above 40 hours per week.

GENERAL LEGAL PRINCIPLES

The FLSA requires employers to pay their nonexempt employees at least "one and one-half times the regular rate at which [the employee] is employed" for all hours actually worked in excess of 40 in a workweek. 29 U.S.C. § 207(a). In other words, for each hour over 40 that an employee works in a workweek, the employee is entitled to straight-time compensation at the regular rate and additional overtime compensation at 50 percent of the regular rate.

An employer may use the fluctuating workweek method to compute the amount of overtime pay owed to a nonexempt employee under the FLSA if five criteria are met:

1. The employee's hours of work fluctuate from week to week;
2. The employee receives a fixed salary that does not vary with the number of hours worked;
3. The amount of the fixed salary is sufficient to satisfy the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest;
4. The employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, commissions, or other additional pay that may not be excluded from the

regular rate) for the total hours worked each workweek regardless of the number of hours; and

5. The employee receives, in addition to the fixed salary and any bonuses, premium payments, commissions, and additional pay of any kind, compensation for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay for that workweek.

29 C.F.R. § 778.114(a)(1)-(5).

WHD construes its regulations using traditional tools of statutory interpretation and applies the plain meaning that those tools uncover. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (opinion of the court), 2419 (opinion of Kagan, J.) (2019). WHD's regulations apply in a straightforward and unambiguous manner here. *See id.* at 2414 (opinion of the court) ("The regulation ... just means what it means ...").

OPINION

An employee's work hours do not have to fluctuate above and below 40 per workweek for an employer to be able to use the fluctuating workweek method of calculating overtime pay. The plain language of the regulation makes clear that there is no requirement that an employee's hours vary both above and below 40 per week to come within the rule; it requires only that the employee's hours fluctuate from week to week. *See* 29 C.F.R. § 778.114(a)(1) (requiring that "[t]he employee works hours that fluctuate from week to week"). This conclusion is reinforced by Section 778.114(d), which discusses a fixed salary that "does not vary with the number of hours worked in the workweek, whether few or many." Hours that are "few or many" include an employee's work hours that could be more than or less than the 40-hour workweek—or both. *See Ramos v. Telgian Corp.*, 176 F. Supp. 3d 181, 195 (E.D.N.Y. 2016).

WHD has long held that the fluctuating workweek method does not require that an employee's hours of work fluctuate below 40 hours per week. We reaffirmed this interpretation in the preamble to the fluctuating workweek final rule, published on June 8, 2020, and which became effective on August 7, 2020. *See* 85 Fed. Reg. 34970, 34975. Indeed, WHD has consistently stated that the method is appropriate even when the employee always works more than 40 hours per week. *See* WHD Opinion Letter FLSA (Oct. 27, 1967) ("There is no requirement that the hours of work of an employee compensated on a fluctuating workweek basis fluctuate above and below 40 hours in a workweek..."); WHD Opinion Letter FLSA2009-3, 2009 WL 648995 (Jan. 14, 2009) (fluctuating workweek method can be used to compute back wages for workers whose hours fluctuated but who were generally expected to work at least 50 hours per week). The

courts have generally agreed.¹ Indeed, one district court surveying opinions noted that “[t]here is no appellate law to the contrary.” *Speer v. Cerner Corp.*, No. 14-0204-CV-W-HFS, 2015 WL 3541065, at *2 (W.D. Mo. June 3, 2015).

Although not directly related to your request, we also note that WHD has long held that an employer using the fluctuating workweek method may not deduct from an employee’s salary for absences occasioned by the employee. *See* WHD Opinion Letter FLSA2006-15, 2006 WL 1488849, at *1 (May 12, 2006). Section 778.114’s requirement that an employee be paid a “fixed salary that does not vary with the number of hours worked in the workweek” prohibits such deductions. 29 C.F.R. § 778.114(a)(2). For instance, an employer using the fluctuating workweek method may not deduct from an employee’s salary when the employee has exhausted a sick leave bank or not yet earned sufficient sick leave to cover an absence due to illness. *See* FLSA2006-15 Opinion Letter, 2006 WL 1488849, at *1 (May 12, 2006); *see also* WHD Opinion Letter, 1978 WL 388412, at *1 (Dec. 29, 1978) (deductions for “excused absences, even for personal reasons (such as time off to visit a relative who is ill) would be inconsistent” with the fluctuating workweek method). However, there is an exception to this general prohibition: An employer using the fluctuating workweek method “may take occasional disciplinary deductions from [an] employee’s salary for *willful* absences or tardiness or for infractions of major work rules, provided that the deductions do not cut into the [required] minimum wage or overtime pay....” 29 C.F.R. § 778.114(d) (emphasis added). WHD has long interpreted the “fixed salary” requirement to permit these occasional deductions. *See, e.g.*, WHD Opinion Letter FLSA2006-15, 2006 WL 1488849, at *1 (May 12, 2006); WHD Opinion Letter FLSA, 1983 WL 802650, at *1 (Nov. 30, 1983).² This interpretation is now explicitly incorporated into the fluctuating workweek rule, which became effective on August 7, 2020. *See* 85 Fed. Reg. 34970.

¹ *See, e.g., Thomas v. Bed Bath & Beyond Inc.*, 961 F.3d 598, 609-11 (2d Cir. 2020) (holding that the fluctuating workweek method does not require weekly schedules to fluctuate above and below the FLSA non-overtime limit of 40 hours per week); *Aiken v. County of Hampton*, 172 F.3d 43, 1998 WL 957458, at *3 (4th Cir. 1998) (unpublished) (concluding that use of the fluctuating workweek method was appropriate when employee reliably worked a base number of hours over 40 per week and a fluctuating number of overtime hours); *Condo v. Sysco Corp.*, 1 F.3d 599, 602 (7th Cir. 1993) (stating that the fluctuating workweek method may be used when employee’s hours fluctuated above but not below 40 hours per week); *Mitchell v. Abercrombie & Fitch Co.*, 428 F. Supp. 2d 725, 735 (S.D. Ohio 2006), *aff’d* 225 F. App’x 362 (6th Cir. 2007) (per curiam) (stating that “neither existing authority nor the language” of the regulation supports the argument that hours must fluctuate above and below 40 hours per week); *Ramos*, 176 F. Supp. 3d at 195 (holding that the regulation “does not impose, or even suggest” a requirement that employee’s hours fluctuate above and below 40 per week).

² As we explained in the recent fluctuating workweek final rule, “If such deductions are consistently or frequently made, however, then ‘the practice of making such deductions would raise questions as to the validity of the compensation plan.’” 85 Fed. Reg. 34970, 34976 (quoting WHD Opinion Letter FLSA2006-15, 2006 WL 1488849, at *1 (May 12, 2006)).

CONCLUSION

We conclude that the fluctuating workweek method of calculating overtime pay requires only that an employee's hours worked fluctuate from week to week, not that they fluctuate above and below 40 hours worked per week. Therefore, assuming all of the other conditions for using the fluctuating workweek method are satisfied, an employee may qualify for the fluctuating workweek method if their hours fluctuate only above 40 hours per week. We also reaffirm that employers using the fluctuating workweek method may not make deductions from an employee's pay for absences occasioned by the employee, except for occasional disciplinary deductions for willful tardiness or absences or infractions of major work rules.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

We trust that this letter responds to your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Cheryl M. Stanton" followed by a long horizontal flourish.

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**