



The Fluctuating Workweek Approach to Compensation – It Could Save You Money!

Prepared by:
Daniel A. Kaplan
Foley & Lardner LLP



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With the **new, increased salary requirements** set to take effect later this year for exempt employees, many employers are asking how they might reduce their overtime obligations. One possible approach is the fluctuating workweek method of compensation. However, prior to implementing such an approach, employers would be wise to seek guidance from counsel because the fluctuating workweek method comes with its own potential challenges, and it may not be permissible under some state overtime laws, such as the California Labor Code.

Any employee – including non-exempt employees – can be paid a salary; receiving a salary does not automatically exempt the employee from overtime. A groundskeeper, a receptionist, and a file clerk can all be paid a salary; none are exempt under the general white collar exemptions (**executive, administrative, professional**). If such a nonexempt employee is paid a salary **for all hours worked in any work week**, their salary can be considered the straight time compensation for each hour worked. This is called the “fluctuating workweek” method of compensation (FWW). The employer then has to pay an additional amount not less than one-half times their regular rate for the hours worked over 40 in that week, as opposed to one and one-half.

The FWW method of compensation is expressly recognized by the Department of Labor (DOL) under a specific Fair Labor Standards Act **regulation**. Under this approach, an employee is paid a fixed salary for all hours worked in the week, which should fluctuate week to week. When the employee works in excess of 40 hours in the week, then the salary is divided by the total hours worked, which yields the "regular rate." The regular rate is divided by two, and that is the "overtime" rate, which must then be multiplied by the number of hours worked over 40 to determine the overtime compensation owed for the week (which gets added to the fixed salary).

As an example, a data entry operator is employed at a salary of \$500 a week for all hours worked. If he were to work 50 hours, the overtime pay owed under the FWW method is computed as follows:

Salary divided by hours worked ($\$500 \div 50$) = \$10.00/hr. (regular rate); one-half the regular rate = \$5.00/hr.; overtime hours x one-half the regular rate ($10 \times \$5.00$) = \$50.00. Therefore, pay due: Salary (\$500.00), plus overtime owed (\$50) = Total Pay Owed for the week: **\$550.00**

Compare this to the same employee who is paid on an hourly basis at \$12.50/hr. ($\$500 \div 40$), and is therefore, owed overtime at the rate of 1½ times the hourly rate for hours worked over 40:

Overtime rate (one and one-half x the hourly rate) = \$18.75 ($1.5 \times \12.50); Total Pay Owed for the week: ($\$12.50 \times 40$ (\$500)) + ($\18.75×10 (\$187.50)) = **\$687.50**

The FWW method of compensation can only be applied when the following conditions are met:

1. The salary is fixed and provided each week irrespective of number of hours worked (no deductions for absences due to illness, or for working less than 40 hours in the week)
2. The hours the employee works each week fluctuates
3. The salary is sufficiently large enough so that in any given week, the employee is never paid less than minimum wage when the salary is divided by the total hours worked
4. There is an understanding between the employer and employee that his salary is compensation for all hours worked, which is most often accomplished through the provision of an offer letter or a memorandum that clearly explains that the employee's salary is provided for all hours worked in the week

The FWW method of compensation is legal and perfectly acceptable – except where state law does not recognize and approve its use. However, it can be challenging to apply because the “regular rate” will fluctuate from week to week, as the employee's hours fluctuate. In addition, the DOL has stated that employees paid on the FWW method of compensation should not be subject to receipt of bonus compensation – if they are, this too may invalidate this approach to compensation. Should you require assistance or more information on the FWW method of compensation, you should seek guidance from knowledgeable counsel.

