

EPI comments on the Department of Labor's proposed rule regarding the fluctuating workweek method

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Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division (WHD)
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: **Fluctuating Workweek Method of Computing Overtime** (RIN 1235-AA31)

Dear Ms. DeBisschop,

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI strongly opposes the Department of Labor’s (DOL) proposed rulemaking regarding the compatibility of bonus, premium payments, or other additional pay with the fluctuating workweek method (FWW).¹ The proposed rule would make it easier for employers to use the fluctuating workweek method, paying overtime premium pay at half-time, instead of time-and-a-half. This will likely expand the number of workers paid under the fluctuating workweek method and increase the overtime hours of workers who are switched to the fluctuating workweek method. This will undermine the purposes—preventing the overwork of America’s workers and spreading employment to other workers who need additional hours—of the overtime provisions in the Fair Labor Standards Act (FLSA). The proposed rule is also inconsistent with the payment of a fixed salary. For these reasons, we urge the Department to withdraw the proposed rule.

The fluctuating workweek method is a means for calculating overtime pay for employees whose hours vary week to week and exceed 40 hours per week under the Fair Labor Standards Act. To calculate overtime pay, the employer and employee agree upon a salary arrangement that includes a fixed weekly rate. The employee’s regular rate is then determined by the fixed weekly rate divided by the number of hours worked that week—meaning that the more hours a worker puts in, the lower their regular rate. Payment of overtime hours (those that exceed 40 hours per workweek) is one-half times the regular rate, instead of the usual 1.5 times the regular rate. Employers may only use the fluctuating workweek method if their employee’s salary is large enough so that the employee’s average hourly earnings does not fall below the federal minimum wage.²

The proposed rule would reduce workers’ earnings

In the proposed rule, the Department “clarifies” that the use of bonuses, premium

payments, and other additional pay is compatible with the fluctuating workweek method. If the rule is finalized, this expansion of pay that is compatible with the method will increase the use of the method by employers who find it beneficial. Which employers will find it beneficial? For a given salary, any time a worker's actual hours are higher than their usual hours, that worker will get less pay under the fluctuating workweek method than under the usual method. Employers will therefore be unlikely to switch to the fluctuating workweek method *unless their employees tend to work more hours above their usual hours than below their usual hours*. That means workers whose employers choose to switch to the fluctuating workweek method are likely to receive lower earnings than they receive under the usual method. In other words, this rule, if finalized, will reduce workers' earnings. These pay losses would come at the expense of workers in industries such as retail, fast food, building maintenance, customer service, nursing, firefighting, law enforcement, and anywhere else where a bonus or premium for undesirable and extra hours, instead of fixed weekly compensation, is common. Further, the proposal will dilute the value of those premiums for employees who currently receive them, because employees will lose the time-and-a-half overtime premium when their employer takes advantage of the expanded fluctuating workweek method.

The proposed rule contradicts the fixed salary rate

In order to apply the fluctuating workweek method, the employer and employee must agree upon a salary arrangement that includes a *fixed* weekly rate. This requirement of a fixed salary has existed since the DOL first approved of the FWW in 1940.³ The requirement was affirmed by the Supreme Court in 1942 and has been in DOL's interpretative regulations since first enacted in 1968. Bonuses and incentives such as premium payments for undesirable hours are incompatible with the fluctuating workweek method because the salary is no longer fixed.

Further, the proposal would permit employers to reduce the fixed rate and shift much of employees' pay to bonuses or premium payments. As a result, workers who do not work those hours shifts due to illness or any other reason in any given week will not have these wages included in their base pay, and their earnings will be lower. This is contrary to the fluctuating workweek principle that workers should earn the same amount each week regardless of the number of hours worked.

The proposed rule encourages the use of overtime

The proposed rule would also encourage the use of overtime. For a given salary and for any plausible combination of usual hours worked and actual hours worked, the marginal cost to the employer of another hour of overtime is *always* lower under the fluctuating workweek method than under the standard method—generally on the order of three times lower. Thus, when using the fluctuating workweek method, employers will have much less

“skin in the game” when they ask workers to work extra overtime hours. This will lead to more overtime hours that are compensated at half-time instead of time-and-a-half, undermining the purposes of the overtime provisions in the Fair Labor Standards Act. Furthermore, the proposed rule puts downward pressure on job growth by creating incentives for employers to overwork their existing employees instead of hiring more employees to perform needed overtime work.

Concerns with the cost-benefit analysis in the proposed rule

It is worth noting that the Department’s finding that the estimated percentage of U.S. workers compensated under the fluctuating workweek method has declined from 0.83 percent in 2004 to 0.45 percent in 2018— which the Department claims may be due in part to the legal uncertainty regarding the compatibility of supplemental pay with the fluctuating workweek method—is based on an unjustified assumption. In particular, it is based on the assumption that the share of workers who are paid under the fluctuating workweek method out of all the workers who *might* be paid under the fluctuating workweek remains constant at 50% over this period (where workers who *might* be paid under the fluctuating workweek are those workers who report their hours vary or who report having a “usual” number of hours but who work hours that differ from that number).

Conclusion

The Economic Policy Institute urges the Department to withdraw this proposed rulemaking. Making it easier for employers to use the fluctuating workweek method would result in lower pay for workers. The use of additional payments would contradict the principle of a *fixed* salary rate, and create unpredictable pay for workers. Finally, the proposed rule would encourage the use of overtime, which would impede workers’ work-life balance and put downward pressure on job growth. We urge the Department to withdraw the proposed rule.

Sincerely,

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1. “Fluctuating Workweek Method of Computing Overtime” 84 Fed. Reg. 59590–59602 (November 5, 2019).

2. 29 CFR § 778.114

3. Interpretative Bulletin No. 4 (Nov. 1940).