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# Overtime: The Fluctuating Workweek

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Most people are not familiar with the Fluctuating Work Week (FWW) method of overtime compensation, but as overtime lawsuits and investigations become more common, it is imperative to understand it. Non-exempt employees who receive a fixed salary for a varying amount of hours each week under a proper FWW system are only entitled to receive one-half, as opposed to one and one-half, times their regular rate of pay for their overtime hours. But if the FWW is not properly implemented, employers can still be liable for the full one and one-half times the regular rate. Thus, the difference between a proper and improper FWW system can mean a three-fold increase in damages and can turn on a number of points, e.g., if the employee actually receives a fixed salary or the presence or absence of a clear, mutual understanding between employer and employee.

The FWW has its origins in *Overnight Motor Transp. Co. Inc. v. Missel*, 316 U.S. 572, 580 (1942), where the U.S. Supreme Court held:

> Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked.

The Court's line of reasoning is carried forth in the Fair Labor Standards Act regulations.

> An employee employed on a salary basis may have hours of work which fluctuate from week to week…. [Overtime is properly paid] where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number…if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.
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> 29 C.F.R. §778.114(a).

Disputes about the propriety of FWW systems usually involve one of two issues: the extent to which the employee's hours must fluctuate, and the presence or absence of a "clear, mutual understanding" between the employer and the employee regarding use of the FWW. Ancillary to these issues, many of the cases dealing with the FWW concern the application of the FWW to employees who have been misclassified as exempt, and who bears the burden of proof in a challenge to an FWW plan.

If the FWW is not properly implemented, employers can still be liable for the full one and one-half times the regular rate.

As a general rule, the FLSA provides that an employer may not employ an employee for a workweek longer than 40 hours unless it pays its employee one and one-half times the employee's "regular rate" for all hours in excess of 40. For employees who work weeks that vary in hours, the Department of Labor regulations provide an alternative way for employers to calculate the regular rate of pay for certain salaried employees. Employees whose hours fluctuate from week to week can reach a mutual understanding with the employer that he or she will receive a fixed amount of compensation per week, regardless of the number of hours that the employee works in that week, and that he or she additionally will receive a rate of 50 percent of the regular hourly pay for any hours over 40 worked in that week.

### Fluctuation in Overtime

One significant thing about the FWW is that the employee's hours need not fluctuate below and above 40 per week; fluctuation only in the number of overtime hours is sufficient.

In *Flood v. New Hanover County*, 125 F. 3d 249 (4th Cir. 1997), EMTs worked a nine-day recurring cycle of several 24-hour shifts followed by 96 hours of rest; although their schedule remained constant, each workweek included a different number of work hours but they usually included at least 40 hours. The court upheld the FWW even though plaintiffs' hours did not "fluctuate" from week to week. Similarly, in *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993), cert. denied, 510 U.S. 1110 (1994), the court upheld the FWW because although the plaintiff, a chauffeur, always worked overtime and never fewer than 40 hours, the amount of overtime varied.

> There is appeal to the argument that when no employee ever works less than forty hours, the fluctuating work week method should not apply. The argument continues that if an employer pays a salary to employees who never work less than forty hours, then the methodology should not apply because it allows the circumvention of the time and one-half provisions in 29 U.S.C. §207.
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> Neither the language of 29 C.F.R. 778.114(a) supports this point of view, nor does the existing authority.

*Evans v. Lowe's Home Centers*, 2004 U.S. Dist. LEXIS 15716, *12-13 (M.D. Pa. June 17, 2004).

In contrast to the number of hours worked, where additional time required of employees is not included in the base pay or where the base pay varies every week, the FWW would not apply.

Plaintiffs, emergency medical technicians, in *Spires v. Ben Hill County*, 745 F.Supp. 690 (M.D. Ga. 1990), aff'd, 980 F.2d 683 (11th Cir. 1993), received a fixed salary for their base hours and additional pay for call-in and on-call time. The court found that the additional pay showed that the base salary did not compensate the plaintiffs for their call-in and on-call work so the FWW did not apply. In *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003), the controlling collective bargaining agreement provided that under certain circumstances the town had to pay officers additional compensation. The court found that additional compensation for certain work meant the officers did not receive a fixed salary for their straight-time hours and therefore, the FWW did not apply.

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Similarly, in *Dooley v. Liberty Mutual Ins. Co.*, 369 F.Supp.2d 81, 86 (D. Mass. 2005), defendant paid plaintiffs a fixed salary for Monday through Friday, but paid an additional amount for Saturday work. The court found that payment of the premium rate for Saturday work precluded use of the FWW. Accord *Brumley v. Camin Cargo Control Inc.*, 2010 WL 1644066, *6 (D.N.J. April 22, 2010).

In *Feaser v. City of New York*, 1997 U.S. Dist. LEXIS 18269, *15 (S.D.N.Y. Nov. 18, 1997), the court held that the employer could not invoke the FWW because the employer did not guarantee a full salary in the absence of a full week of work.

*McCumber v. Eye Care Centers of America Inc.*, 2011 WL 154267, *12 (M.D. La. April 20, 2011), denied defendant's motion for summary judgment on the FWW issue because defendant had twice reduced the plaintiff's weekly pay.

### Clear, Mutual Understanding

The employer and employee must have a "clear mutual understanding…that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number…." 29 C.F.R. §778.114(a).

In *Mayhew v. Wells*, 125 F.3d 216, 219 (4th Cir. 1997), the court stated that "the existence of such an understanding may be 'based on the implied terms of one's employment agreement if it is clear from the employee's actions that he or she understood the payment plan in spite of after-the-fact verbal contentions otherwise.'"

In *Clements v. Serco Inc.*, 530 F.3d 1224 (10th Cir. 2008), the court held that employees need not have a clear mutual understanding of how overtime premiums would be calculated, only that their salary would not deviate depending on hours worked.

> The Employees contend §778.114 requires that the "clear mutual understanding" must extend to how overtime premiums would be calculated. The parties initially agreed that no overtime would be paid; thus, no agreement as to the payment of overtime ever existed… "The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not." Thus, our inquiry is whether the Employees and Serco had a clear and mutual understanding that they would be paid on a salary basis for all hours worked.

Id. at 1230.

In contrast, the following cases found that no clear mutual understanding existed—or at least a question of material fact existed on the issue.

In *Evans*, "[t]here was evidence from each of the named plaintiffs that no superior, or anyone else, explained the method to them. Indeed, when several plaintiffs asked about it, their respective supervisors did not explain it." 2004 U.S. Dist. LEXIS 15716, at *8.

*Brantley v. Inspectorate America Corp.*, 2011 WL 5190122, *11 (S.D. Tex. Oct. 17, 2011), held that improper salary deductions by the employer rendered a clear, mutual understanding impossible.

In *Oliver v. Mercy Medical Ctr.,* 695 F.2d 379 (9th Cir. 1982), the court noted that plaintiff was previously employed by defendant under an express agreement that his salary covered 40 hours, and that if the employer had intended such a "radical change in conditions…tripling the number of hours expected with no increase in pay, we would expect that it would have conveyed the message to him clearly, and probably in writing." Id. at 381, n.5.

In *Szymula v. Ash Grove Cement Co.,* 941 F.Supp. 1032, 1039 (D. Kan. 1996), the court found a question of fact as to the existence of a clear mutual understanding because one employer representative promised plaintiff compensatory time for working overtime and other employer representatives told her she would receive time and one-half for overtime.

In *Dingwall v. Friedman Fisher Assoc.*, 3 F.Supp.2d 215, 221 (N.D.N.Y. 1998), the court relied on the fact that the employee manual stated, "'staff personnel are normally expected to work a 40-hour week with the exception of pre-established holidays'" to find no clear mutual understanding.

### Misclassified Employees

*Urnikis-Negro v. America Family Prop. Servs.*, 616 F.3d 665 (7th Cir. 2010), noted that although Section 778.114 does not in itself provide authority for using the FWW to calculate damages for misclassified employees, the underlying calculation method is appropriate.

> The fit between Section 778.114 and the misclassified employee is an imperfect one…the interpretive rule plainly envisions the employee's contemporaneous receipt of a premium apart from his fixed rate for any overtime work… Section 778.114 is thus a dubious source of authority for calculating a misclassified employee's damages…. But finding that Section 778.114(a) itself is inapplicable does not compel the conclusion that reliance on the FWW method…was erroneous.

Id. at 678-679. Relying on the district court's finding that plaintiff understood her salary was meant to cover whatever hours she worked, the U.S. Court of Appeals for the Seventh Circuit held that *Missel* dictated the same result as the FWW—dividing the week's total compensation by total hours worked, and then awarding one-half of that amount for each overtime hour. Id. at 681.

*Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011), also held that the FWW could be applied to misclassified employees. "The former employees agreed to receive straight time pay for all hours worked… thus the 'loss suffered' is the 50% premium for their overtime hours." Id. at 1230. See also *Clements*, 530 F.3d at 1231; Dept. of Labor Opinion Letter FLSA 2009-3. Compare *Rainey v. American Forest and Paper Ass'n,* 26 F.Supp.2d 82, 100 (D.D.C. 1998) ("Since contemporaneous payment of overtime compensation is a necessary prerequisite for application of the fluctuating workweek method, as a matter of law defendant has failed to prove that all the legal prerequisites for use of the 'fluctuating workweek' method of overtime payment are present."); *Cowan v. Treetop Enterprises*, 163 F.Supp.2d 930 (M.D. Tenn. 2001).

### Burden of Proof

In *Monahan v. County of Chesterfield*, 95 F. 3d 1263 (4th Cir. 1996), the court noted that an employer seeking to invoke the FWW had a "heightened burden" to demonstrate a "clear mutual understanding," id. at 1275, and described the FWW as an "'exemption' to the strict overtime requirements of the FLSA." Id. at 1281. See also *Local 359 Gary Firefighters v. City of Gary, Indiana*, 1995 U.S. Dist. LEXIS 21729, * 11 (N.D. Ind. Aug. 17, 1995) (FWW is an "exception" to the FLSA on which the employer bears the burden of proof).

In *Bailey v. County of Georgetown*, 94 F. 3d 152 (4th Cir. 1996), in contrast with the court's decision in *Monahan* issued the same year, the court rejected plaintiffs' argument that the FWW was an "exception" to the FLSA. Instead, the court stated that "section 778.114 simply provides one means by which a salaried employee's regular rate of pay may be determined." Id. at 154, n.5.

The court in *Samson v. Apollo Resources Inc.*, 242 F. 3d 629, 636 (5th Cir.), cert. denied, 534 U.S. 825 (2001), described the FWW as a "method[] for calculating" overtime pay, and held that an employee challenging it has the burden of proof.

### Conclusion

As with any method of compensation other than paying employees on an hourly basis with time-and-one-half for all overtime work, employers who wish to use the FWW should take all steps necessary to insure they satisfy all of its requirements.