

## Fluctuating Workweeks Can Affect Overtime Pay

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### Employees With Irregular Schedules Protected by Federal Law, Court Rulings

Two recent decisions by Connecticut courts illustrate both the utility and some of the limitations of using the "fluctuating workweek method" to calculate the overtime pay for non-exempt employees who work more than 40 hours in a workweek.

Under the federal Fair Labor Standards Act (FLSA) and Connecticut law, most employees who work more than 40 hours in a given workweek are entitled to compensation for the additional hours "at a rate not less than one and one-half times the regular rate at which [they are] employed." Certain employees paid on a salary basis — generally white-collar professionals and managers — are exempt from the overtime pay requirement, but most workers must receive what is popularly known as "time-and-a-half for overtime."

Some non-exempt employees are paid a salary for an established workweek. In such cases, the regular rate is calculated by dividing the weekly salary by the standard expected number of hours. For example, an employee paid a salary of \$600 per week for a standard workweek of 30 hours earns a regular rate of \$20 per hour. If the employee works 40 hours in a given workweek, he or she is paid an additional \$200; i.e., \$20 for each of the 10 "overtime" hours. But if the employee works 50 hours, he or she is paid an additional \$500 — \$20 for each of the first 10 overtime hours, and \$30 for each of the next 10 overtime hours.

So far, we have assumed that the regular rate is constant. It is set by agreement (or perhaps by employer fiat) and does not change from week to week unless the employer adjusts it. But what about a circumstance where a non-exempt (i.e., overtime-eligible) employee is paid a fixed weekly salary for hours that change from week to week? For example, suppose I am paid \$500 per week whether I work 25 hours or 50 hours? What is my regular rate, and what is my overtime rate?

The U.S. Department of Labor has considered this circumstance and provided for it in a regulation addressing the "fluctuating workweek" method of calculating overtime pay. The regulation is premised on the fact that when an employer pays an employee a fixed salary that is intended to compensate the employee apart from overtime premiums for hours that fluctuate from week to week, the regular rate is no longer constant, but changes each week depending on how many hours the employee works. The employee has already been compensated at the (changing) straight time rate for hours worked in excess of 40. Thus, what he or she is owed is an additional one-half the regular rate for each overtime hour. (That's why this is sometimes called

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the "half-time" method.)

### **Mutual Understanding**

The applicable regulation, 29 CFR § 778.114(a), provides in pertinent part: "(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. 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, . . . such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and 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. . . . [T]he regular rate of the employee will vary from week to week . . . . Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement . . . ."

Thus, if I am paid \$500 per week in salary for fluctuating hours, and I work 25 hours, I earn \$500 and my regular rate for the week is \$20 per hour. If I work 40 hours, I still earn \$500, and my regular rate for the week is \$12.50 per hour. If I work 50 hours, I earn \$500 in straight time pay for the 50 hours, my regular rate is \$10 per hour, and my employer owes me an additional \$50 in overtime pay (i.e., \$5 for each hour I worked in excess of 40 hours in the workweek).

From the employer's point of view, the obvious advantage of this approach is the substantial reduction in the overtime premium it must pay to its employees. In the above example, if the regular rate were based on 40 hours, in the 50-hour week the employee would be owed an overtime premium of \$187.50 rather than \$50.

The approach also has some advantages from the employee's perspective. The employee earns the straight-time salary even in weeks when she or he works fewer than 40 hours. And it's possible that the reduced cost of overtime will induce some employers to make more of it available.

Federal courts have made it clear that an employer may not rely on the fluctuating workweek method unless four requirements are met: (1) work hours fluctuate from week to week; (2) a fixed salary does not vary with hours worked (apart from overtime premiums); (3) the fixed salary satisfies minimum wage requirements; and (4) employer and employee have a "clear mutual understanding" that the fixed salary is compensation, apart from overtime premiums, for the hours worked each workweek. See, e.g., *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942); *O'Brien v. Agawam*, 350 F.3d 279 (1st Cir. 2003). Employers intending to utilize the fluctuating workweek method should put that "clear mutual understanding" in writing and have it acknowledged by the employee.

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### Connecticut Cases

Four years ago, in *Stokes v. Norwich Taxi, LLC*, 289 Conn. 465 (2008), the Connecticut Supreme Court considered whether the fluctuating workweek method was applicable to the unpaid wages claim of a mechanic who brought his claim in state court under both federal and state law. The Supreme Court concluded that the employer had not met its burden of showing that it paid the plaintiff a fixed salary regardless of the number of hours he worked in a given week. Therefore the Court never reached the question of whether the fluctuating workweek method is available to employers under Connecticut law, even though it is not explicitly addressed in state statutes or regulations. (The trial court had held that Connecticut law does not countenance the fluctuating workweek method.)

Another state judge has reached the opposite conclusion. In *Roach v. Moran Foods*, 53 Conn. L. Rptr. 733 (March 16, 2012) (Sup. Ct. at Hartford, No. X04-HHD-CV-11-6023386-S), Superior Court Judge William H. Bright Jr. considered the claim of an assistant sales manager. The defendant had actually paid the plaintiff using the fluctuating workweek method; the plaintiff contended that this was illegal under Connecticut law. The court observed that the FLSA provides a floor, not a ceiling, for employee protection.

But the court also observed that neither the legislature nor the state Department of Labor has acted to bar use of the fluctuating workweek method in the 70 years since the U.S. Supreme Court decided *Missel*, and considered the legislative history of a statutory amendment that explicitly barred use of the fluctuating workweek method for delivery drivers and sales merchandisers paid on a salary plus commission basis, but not for other workers. Judge Bright, disagreeing with the trial court in *Stokes*, concluded that Connecticut law permits employers to use the fluctuating workweek method.

More recently, one of Connecticut's federal judges has addressed the question whether an employer faced with a claim for unpaid overtime may use the fluctuating workweek method on an "after-the-fact" basis to reduce its exposure. The defendant in *Hasan v. GPM Investments, LLC*, 2012 WL 3725693 (D.Conn. Aug. 27, 2012) had classified store managers at its convenience stores and gas stations as overtime-exempt, and paid them a fixed salary with no extra compensation for long hours. The plaintiffs challenged the classification, and via motion in limine sought to preclude the defendant from using the fluctuating workweek method to calculate damages in the event plaintiffs prevailed on their misclassification claim. The defendant argued that it had paid the plaintiffs a fixed salary for fluctuating hours, so if plaintiffs prevailed their "regular rates" used to figure damages should change from week to week.

U.S. District Judge Stefan R. Underhill rejected the defendant's arguments. First and most important, it was clear that there had never been an agreement between the parties that the fixed salary would compensate the employee apart from overtime premiums for all hours worked. There was never an agreement that overtime would be paid at all. Second, the employer had not actually paid any overtime. Finally, the employees' hours did not actually fluctuate; they worked a minimum of 52 hours per week.

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Thus the employees never got the full benefit of the fluctuating workweek bargain — full pay for short weeks. All they got was decreasing marginal pay as their hours increased. The court concluded that it would be inappropriate to use the fluctuating workweek method in calculating plaintiffs' damages.

It remains to be seen whether a higher court may overturn either of these recent decisions on the fluctuating workweek in Connecticut. But in the meantime, while employers may take comfort that Connecticut law appears to permit its use, it is crucial that all of the regulatory criteria are met, and that employees are properly classified as exempt or non-exempt. The fluctuating workweek method will not be effective in reducing exposure to damages where employees have been misclassified in the first instance.

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