



**FOULSTON  
SIEFKIN LLP**  
ATTORNEYS AT LAW

WWW.FOULSTON.COM  
WICHITA TOPEKA OVERLAND PARK

EMPLOYMENT AND LABOR  
FOULSTON SIEFKIN ISSUE ALERT

## EMPLOYERS WITH SALARIED NON-EXEMPT EMPLOYEES BEWARE! NEW DOL REGULATIONS CHANGE HOW YOU MAY PAY THESE EMPLOYEES

MAY 16, 2011

by *Forrest T. Rhodes*

*frhodes@foulston.com*

316.291.9555

**EARLIER THIS MONTH** (on May 5, 2011), new regulations issued by the Wage and Hour Division of the Department of Labor ("DOL") went into effect. These regulations impact various aspects of the Fair Labor Standards Act ("FLSA"), the federal law governing minimum wage and overtime. Most of these provisions are technical changes to various aspects of the existing FLSA regulations to make them consistent with the judicial opinions interpreting the FLSA. In a couple of areas, however, the new regulations break new substantive ground.

One of these areas concerns a common mechanism used to calculate overtime for salaried non-exempt employees. This mechanism goes by different names, including "½-time overtime," "salaried overtime," and "fixed-pay-for-fluctuating hours." The DOL refers to it as the "fluctuating workweek" payment method. This mechanism is premised on the employee and employer agreeing that the employee will receive a fixed salary that is intended to cover all straight-time hours worked during the week. If the employee works less than 40 hours, he or she gets the full salary and nothing else. If the employee works more than 40 hours, he or she is entitled to the salary plus overtime, but because the salary already includes the straight-time component, the overtime premium is calculated at only the additional ½-time rate. Stated differently, in addition to the salary, each overtime hour is paid at ½ of the employee's regular rate, rather than at 1 ½ times (i.e. time-and-a-half).

Back in July 2008, the DOL issued proposed regulations to clarify certain aspects of the fluctuating workweek mechanism. In particular, the DOL proposal addressed the question of what happens when an employer provides additional compensation other than premium pay for overtime. This additional compensation could take the form of a bonus or a non-overtime premium, such as a schedule or shift premium. The DOL proposal clarified that such additional payments would not invalidate the fluctuating workweek method. The additional payment would simply be incorporated into the regular rate on which the ½-time overtime was calculated.

Last month the DOL issued its final rules on the 2008 proposals and did an about-face on this issue by expressly rejecting its proposed regulation. In the

---

*This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.*

Preamble to the final rules, the DOL states that “bonus and premium payments ... are incompatible with the fluctuating workweek method of computing overtime . . . .” While it recognized that “bonus and premium payments can be beneficial for employees in many other contexts,” the DOL ultimately determined that the proposal “could have the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of the employee’s compensation into bonus and premium payments . . . .” The DOL feared that this unintended effect could result in a “wide disparity in weekly pay that the fluctuating workweek method was intended to avoid . . . .”

## WHAT DOES THIS MEAN TO ME?

There is certainly room to argue about the merits of the DOL’s position, and it remains to be seen whether that position will be challenged and if so, how the courts might decide those cases. Nonetheless, the fluctuating workweek method is a creature of the DOL’s creation, so it would not be surprising for the courts to defer to the DOL’s interpretation of it. What is certain at this point is how the DOL views the rule. This means we know what to expect if the DOL conducts a wage and hour compliance audit. Similarly, we know the position FLSA plaintiff’s attorneys will take in cases involving this issue.

If you have salaried non-exempt employees who are being paid via the fluctuating workweek method, the DOL will view any additional non-overtime payments, such as bonuses or shift/schedule premiums as inconsistent with the underlying requirement that the employee be paid a “fixed salary.” If the fixed salary requirement isn’t met, the fluctuating workweek method will not be available. In that case, the overtime payment would have to be calculated at 1 ½ times the employee’s regular rate rather than at ½-time rates. This payment would be in addition to the employee’s salary. Such a result would, in effect, triple your overtime costs and create potential exposure to litigation under the FLSA.

Employers in this position should immediately discontinue providing employees paid via the fluctuating workweek system with any additional payments, other than overtime. Depending on the nature and frequency of the payment, there may be potential alternatives, but these should be addressed on a case-by-case basis with your wage and hour counsel.

## FOR FURTHER INFORMATION

If you have questions or want more information regarding these FLSA issues, you should contact your legal counsel. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Forrest Rhodes is available to assist you with FLSA-specific issues, or with any general employment or labor law issues you may have. You may contact him at [frhodes@foulston.com](mailto:frhodes@foulston.com) or by calling 316.291.9555. You may also contact Jay Rector, Foulston Siefkin’s Employment and Labor Practice Group Leader, at 316.291.9722 or [jrector@foulston.com](mailto:jrector@foulston.com). For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

####

*Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Topeka, Overland Park, and Wichita, Foulston Siefkin provides a full range of legal services to clients in the areas of Administrative & Regulatory, Agribusiness, Antitrust & Trade Regulation, Appellate Law, Banking & Financial Services, Commercial & Complex Litigation, Construction, Creditors’ Rights & Bankruptcy, E-Commerce, Education & Public Entity, Elder Law, Emerging Small Business, Employee Benefits & ERISA, Employment & Labor, Energy, Environmental, Estate Planning & Probate, Family Business Enterprise, Franchise, General Business, Government Investigations & White Collar Defense, Health Care, Immigration, Insurance Defense Litigation, Insurance Regulatory, Intellectual Property, Life Services & Biotech, Mediation/Dispute Resolution, Mergers & Acquisitions, OSHA, Public Policy and Government Relations, Product Liability, Professional Malpractice, Real Estate, Securities, Tax Exempt Organizations, Taxation, Water Rights, and Workers Compensation. This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.*