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ACHIEVING OVERTIME LABOR-COST SAVINGS THROUGH THE FLUCTUATING WORKWEEK SCHEME

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ABSTRACT: New modifications to the Fair Labor Standards Act recently promulgated by the Department of Labor as the FairPay Overtime Initiative will produce increasing numbers of workers subject to overtime payments and a concomitant increase in labor costs for public sector organizations. To adapt to this changing environment and to control employee overtime expenditures, organizations may wish to examine the applicability of a relatively obscure provision of the Fair Labor Standards Act labeled the Fluctuating Workweek Scheme. Employers may find this approach attractive because the overtime rate due employees decreases as the number of overtime hours worked increases.

INTRODUCTION

The Fair Labor Standards Act (1938), (hereinafter referred to as the FLSA or Act) requires that most employees in the U.S. be paid at least the federal minimum wage for all hours worked and receive overtime pay at one and one-half times the regular rate for all hours worked over 40 hours in a workweek. The FLSA became law for the private sector in 1938 and in 1985 it was applied to local and state governments in the now-famous case of Garcia v. San Antonio Metropolitan Transit Authority.

Defined within the Act are certain types of employees who are exempt from both minimum wage and overtime pay. To qualify for such exemptions the job description must meet certain salary and job duties tests. The last major revision to the FLSA occurred some fifty years ago and during this time these duties tests became outdated resulting in uncertainty and vagueness in their application. Such ambiguity was exploited by some organizations because exempt employees did not have to be paid overtime and could work unlimited hours. Consequently, organizations began to classify employees as exempt from overtime pay under the FLSA when, in fact and by law, the employees should have been classified as non-exempt (Von Bergen, Mawer, & Pool, 2005). In response to such action, increasing numbers of managerial, administrative, and professional employees along with significant numbers of previously classified
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non-exempt workers began filing high-visibility class-action lawsuits against employers for unpaid overtime claiming misclassification under the FLSA.

As a result of this increase in lawsuits and these decades-old exemption descriptions, the DOL developed new regulations relating to white collar exemptions of the Act called the FairPay Overtime Initiative (hereinafter referred to as FPOI). The purpose of the new FLSA regulations, which went into effect on August 23, 2004, was to modernize, update, and clarify the criteria for these exemptions and to eliminate legal problems that the prior regulations caused. This paper discusses the impact of the FPOI on overtime for public sector organizations and suggests the fluctuating workweek (FWW) scheme as an approach public service employers may wish to consider in order to reduce increased overtime costs resulting from the FPOI.

NEW OVERTIME REGULATIONS’ IMPACT ON PUBLIC SECTOR

These new regulations pose hardships for state and local governments with respect to labor costs (International Public Management Association for Human Resources, 2004). Wages of personnel represent a substantial proportion of costs in most public employers and cost containment in this human resources area continues to be a key challenge in the current environment of tight budgets (Bohlander & Snell, 2004).

Organizations have tried a number of approaches to lower labor costs including downsizing, outsourcing and employee leasing, and more recently better control of overtime (Von Bergen & Mawer, 2005). Overtime pay for current employees is often the least costly option for employers to exercise in scheduling work assignments and has been viewed as a key “survival strategy” by many organizations (Hetrick, 2000). This is because it is often less expensive to schedule longer hours and pay overtime premiums rather than hire, train, and provide benefits for additional employees (Milkovich & Newman, 1999).

A number of items in the FPOI impact public sector organizations with respect to overtime considerations. First, the changes made to the executive exemption are likely to have a serious negative impact on public employers because many supervisors and managers are classified as exempt and earn less than $100,000 per year requiring organizations to reclassify them as non-exempt and subject to overtime provisions of the FLSA. Second, the change made to the provision concerning first responders is causing organizational concerns. For example, the new rules indicated that police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and similar employees are protected by the minimum wage and overtime provisions of the FLSA (29 CFR § 541.3(b)).

Third, in the preamble to the newly instituted regulations, the DOL said “Police sergeants, for example, are entitled to overtime pay even if they direct the
work of other police officers because their primary duty is not management or directly related to management or general business operations” (Federal Register, 2004, p.22129). The DOL’s position on the issue is basically that sergeants can never be exempt. However, this position is greatly at odds with how courts have previously treated the subject (National Public Employer Labor Relations Association, n.d.). The courts have traditionally been more willing to find police sergeants to be exempt from overtime under the FLSA. The leading case, *Auer v. Robbins* (1997), found that several classes of police sergeants were exempt executive employees. Consequently, the new regulations may cost public employers considerably more money. Indeed, the Albany Democrat-Herald (2004) reported that “...Albany police sergeants to be paid for overtime at a potential additional cost of up to $100,000 this budget year.” And this budget increase reflects just one position in a city’s budget!

In summary, there appear to be a number of reasons why employers should experience increased labor costs from the FPOI. This is due primarily to a greater number of positions that will be considered eligible for overtime. Thus, faced with increasing overtime costs, organizations may want to consider alternative approaches to reducing these expenditures. One such approach which may demand further scrutiny by public service employers involves what is called a FWW scheme. This “out of the ordinary wage plan” (Immel, 2003) becomes increasingly attractive to employers as worker overtime increases because a key feature of this approach is that the overtime rate due employees under this plan decreases as the number of hours worked increases. This paper discusses the FWW method and compares it to the traditional method of calculating overtime rates and premiums. The article concludes with a discussion of limitations regarding this approach and a set of recommendations for employers wishing to explore this relatively obscure overtime determination format.

**TRADITIONAL OVERTIME PAYMENT**

Unless specifically exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half (1.5) their regular hourly rates of pay (most states have laws expanding the basic coverage of the FLSA. Courts look at the state standard if it is most favorable to the employee). For example, if an employee is paid $600 a week as compensation and works a work schedule of 40 hours a week, the employee’s overtime rate of pay is computed by dividing $600 by 40 (= $15.00). Thus, for each hour of overtime over 40 hours a week, the employee is entitled to receive 1.5 times $15.00, which equals $22.50 an hour (U.S. DOL, n.d. a).

There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. Additionally, the Act does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest (U.S. DOL, n.d. a). The Act applies on a purely workweek basis. An employee’s workweek is a fixed and regularly recurring period of 168 hours—seven
consecutive 24-hour periods. It need not coincide with the calendar week, and may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks, however, is not permitted—each workweek stands on its own and not by pay period or by month or by any other period of time. Therefore, an employer cannot base the overtime hours on the total hours worked in a bi-weekly or a semi-monthly pay period.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act. Payments which are not part of the regular rate include pay for expenses incurred on the employer’s behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness (U.S. DOL, n.d. a).

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment in any workweek by the total number of hours actually worked (U.S. Department of Labor, n.d. a).

**FLUCTUATING WORKWEEK (FWW) APPROACH**

The FLSA regulations allow employers to pay non-exempt employees a fixed salary for: (1) personnel scheduled to work a standard or preset number of hours each week, or (2) individuals whose work week fluctuates in the number of hours required. More specifically, with respect to fluctuating hours, the DOL’s regulations provide that a worker “employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid to him pursuant to an understanding with his employer that he will receive such fixed amount at a straight time pay for whatever hours he is called upon to work in a workweek, whether few or many” (29 C.F.R. § 778.114).

Employees scheduled to work a predetermined set of hours each week receive an overtime premium of time-and-one-half (1.5) of their regular rate of pay for all hours worked in excess of 40 hours. On the other hand, employees whose work week hours vary or fluctuate can be paid in weeks in which they work more than 40 hours at a rate of half-time (.5) the employee’s regular rate of pay for the extra hours “since the employee has already received straight-time compensation on a salary basis for all hours worked” (29 C.F.R. § 778.114(b)).

This method of calculating overtime has been upheld as a valid interpretation of the Act (Condo v. Sysco Corp, 1998). The regulations permitting this method of calculation were promulgated by DOL’s interpretive bulletins. Although these bulletins are not legally binding their legal importance was established by the Supreme Court in 1942. In the case *Overnight Motor Transport Company v. Missel* (1942), the Supreme Court stated: “While the
interpretive bulletins are not issued as regulations under statutory authority, they
do carry persuasiveness as an expression of the view of those experienced in the
administration of the Act [FLSA] and acting with the advice of a staff
specializing in its interpretation and application” (p. 82). Additionally, at least
one court case has upheld this use of the FWW method. In the case of Kelli K.
Goodrow v. Lane Bryant, Inc. (2000), the court ruled in favor of the employer. In
this case, the employer (Lane Bryant, Inc.) had relied on the DOL’s Field
Operations Handbook in implementing its FWW plan in 1992. Specifically,
Section 32b04b(a) of that Handbook states: “If the employer to avoid weekly
computations chooses to pay extra half-time based on the salary divided by 40
hours, such a method is permissible” (Field Operations Handbook, 1967).

GUIDELINES IN IMPLEMENTING FWW SCHEMES

To ensure that actions relating to FWW are legally defensible a number
of rules or conditions must be met (29 CFR § 778.114(c)) and presented below.

Non-exempt employees must be paid a salary: It is perhaps a little known fact
that the FLSA does not require that employers pay non-exempt employees by the
hour. It only mandates that non-exempt employees receive overtime, after forty
hours of actual work. Employers may pay non-exempt employees by a salary, or
per diem, or by piece rate. Employees who are paid an hourly wage cannot be
paid using the FWW method. An hourly employee is paid at a fixed regular rate
of pay (or multiple rates of pay) so his or her hourly rate of pay is never less than
a stated minimum. But an employee who is paid using the FWW method has a
regular rate of pay that varies. Thus, the first requirement for implementing a
FWW pay system is that employees be paid a salary.

The employee must be paid a fixed salary regardless of the number of hours
worked each week: A second provision for adopting a legally valid FWW
system is that the employee must be paid a fixed salary regardless of the number
of hours worked each week. The employee has to understand that the salary is for
all hours worked, whether few or many: “[T]he employee clearly understands
that the salary covers whatever hours the job may demand in a particular
workweek and the employer pays the salary even though the workweek is one in
which a full schedule of hours is not worked” (29 CFR § 778.114(c)). Since an
employee who works fluctuating hours for a fixed rate of pay is supposed to get
the same pay whether he works short or long weekly hours, the government does
not permit deductions for absences of less than a week, whether for illness,
personal business or other reasons. Indeed, the disadvantage to such a system is
that employees must be paid their full salary even if they work but a single hour
during the week. Since a fixed salary for a FWW covers short, as well as long,
weekly working hours, advantage cannot be taken of the statutory regular-rate
exclusions allowed for occasional paid absences due to vacation, holiday, illness,
failure to provide sufficient work, or other similar cause. For instance, if an
organization decides to close on a holiday, and on the day after the holiday it also decides to close, the organization must pay employees if they are paid on a FWW basis (American Payroll Association, 2004).

The importance of a fixed salary was reinforced in O'Brien v. Town of Agawam (2003), in which the First Circuit Court of Appeals ruled that the FWW method may not be used when employers compensate workers amounts in addition to their normal pay. In this case, employees were paid night shift differentials, additional pay for every hour worked beyond eight hours a day, and additional pay for every hour worked during off-duty time. The Court held that because supplementary compensation was paid, the employees' salaries were not truly "fixed" as required by the regulations. Therefore, the employer was not entitled to use the FWW method.

Employees must be paid overtime premiums for hours worked over 40 in the workweek at the rate of 50% of the regular rate of pay: A third stipulation in effecting a FWW pay method addresses compensation for work in excess of 40 hours in a workweek. Naturally, in a week in which an employee works forty hours, they simply receive the agreed-upon fixed salary. In addition to this salary, the employee must be paid overtime premiums for any hours worked over 40 in the workweek. The overtime premium rate is 50% of the regular rate of pay for the workweek. The rationale behind this regulation is that the employee has already been paid a straight hourly rate for each hour in excess of 40, and is only due the additional 1/2 pay.

Consider for example an employee who receives a fixed wage of $450.00 per week and who works 45 hours in one week and 50 hours in the next. In the first week the individual's regular rate is $10.00 ($450 / 45). The employee is entitled to receive $5.00 per hour (.5 x $10.00) for the five hours worked in excess of 40 since the worker has already received straight time of $10.00 per hour for those hours. In the next week the employee's regular rate is $9.00 ($450 / 50). In that week the employee is entitled to receive $4.50 for each of the 10 hours worked in excess of 40. Note that for working 45 hours per week the employee received an overtime rate of $5.00 per hour and a $4.50 per hour overtime premium for working 50 hours. Paradoxically, then, the more overtime hours worked per week the lower the actual overtime pay rate.

A more sophisticated FWW example is now appropriate. Take the case of an Emergency Medical Technician (EMT) who worked alternating weeks of 48 hours and 72 hours and is paid a salary of $500 per week. For this individual the calculation of the biweekly pay is:

FWW Pay Calculation

First Week:  
Regular rate of pay ($500 / 48 hr) = $10.42/hr.  
Overtime premium (0.5 x 8 x $10.42) = $41.68.  
Total pay ($500 + $41.68) = $541.68.
Second Week: Regular rate of pay ($500 / 72 hr) = $6.94/hr.
Overtime premium (0.5 x 32 x $6.94) = $111.04.
Total pay ($500 + $111.04) = $611.04.

Thus, the employee’s gross pay for the biweekly payroll period would be $1,152.72 ($541.68 + $611.04).

The cost savings to the employer in this scenario are substantial. Suppose the above employee is paid $500 per week or $12.50 on an hourly basis ($500/40). Then the calculation would be as follows:

**Regular Pay Calculation**

First Week: Total regular wages ($12.50/hr x 40 hr) = $500.
Overtime premium (1.5 x 8 x $12.50) = $150.
Total pay ($500 + $150) = $650.

Second Week: Total regular wages ($12.50/hr x 40 hr) = $500.
Overtime premium (1.5 x 32 x $12.50) = $600.
Total pay ($500 + $600) = $1100.

Thus, the total gross pay for the biweekly payroll period would be $1,750 ($650 + $1100).

An employer that uses the FWW method for this employee saves $597.28 ($1750 - $1152.72) every two weeks, or a total of $15,529.28 per year ($597.28 x 26 weeks)—a considerable savings!

The employee’s workweek must be a fluctuating: A fourth demand for adopting a legally defensible FWW program is that the workweek fluctuates. The federal regulations do not establish a requirement as to the degree of fluctuation. Under this method, the salary is intended to compensate the employee at a straight time rate for whatever hours are worked during the workweek.

There are, however, several incorrect assumptions with respect to a FWW (Ditmer, n.d.) The first assumption often made regarding FWWs is that the employee has to work both long and short workweeks. In fact, the method is most often used in situations where that occurs. For example, EMT employees frequently work short weeks as well as long ones. The method has also been used to pay country club workers who are employed year-round and work long hours during the summer and shorter hours during the winter. In those cases, the employer pays overtime premiums during the summer when activity is higher and avoids paying any overtime at all during the winter when play is slower (North Carolina Department of Labor, 2003).

This assumption, however, is incorrect. In the case of *Flood v. New Hanover County* (1997), the court cited a May 16, 1966 opinion letter of the
DOL's Wage and Hour Division that had determined that where employees worked fixed, alternating workweeks of 43 and 41-hour schedules, the workweek was a fluctuating one. Therefore, the FWW method can be used in cases where employees always work overtime but the workweek fluctuates.

A second incorrect assumption is that the workweeks have to be irregular (Ditmer, n.d.). In Flood v. New Hanover County (1997) the workers were actually on a fixed schedule. They worked alternating days, 24 hours on and 24 hours off, with 4 days off at the end of the cycle. This meant that an employee worked 48 hours during one workweek and 72 hours in the next workweek. The court ruled that although the schedule was fixed, the workweek still fluctuated.

Similarly, the District Court for South Carolina found in Roy v. County of Lexington, S.C. (1998) that it "is not necessary for regular hours to be sporadic for the regulation to be applied; it is sufficient that the regular hours vary from one workweek to another." In this case EMT employees' schedule of 24.5 hours on-duty followed by 47.5 hours off-duty was deemed a fluctuating number of hours. Additionally, Griffin v. Wake County (1998) established that work hours must fluctuate but does not require an unpredictable schedule.

A third erroneous assumption asserts that if employees' workweeks are always in excess of forty hours the FWW does not apply (Ditmer, n.d.). The argument is 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. However, two court cases, Evans et al. v. Lowe's Home Centers, Inc. (2004) and Condo v. Sysco Corp. (1993), disagreed with such an argument.

The salary must be sufficiently large enough so that the regular rate of pay will never drop below the minimum wage: A fifth prerequisite for a FWW compensation procedure is stated in the regulations as follows: "The 'fluctuating workweek' method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act" (29 CFR 778.114(c)). For instance, in the case of Flood v. New Hanover County (1997) the workers were actually scheduled to work 72 hours in one workweek. Based on the current federal minimum wage of $5.15 an hour, the minimum salary would have to be $370.80. It should be noted that the Code refers to the employee's earnings from the "salary", not his or her total pay. Consequently, the overtime premium cannot be included in determining whether or not the salary is sufficient.

With the exception of California, the FWW method can be used in all other states (see Skyline Homes, Inc., etc. et al. v. Department of Industrial Relations, et al., 1985). Employers, therefore, must be sure that the salary is sufficiently large that the employee's regular rate of pay is never less than the state minimum wage.
There must be an understanding between the employer and the employee that the employee will be paid using the FWW: A final condition for a FWW pay design is the mutual understanding between the employer and worker regarding the FWW procedure that will be used for paying the employee. It has to be made clear to the employee that the salary is meant to pay for all hours worked. If the employee is paid a salary of $350 per week and works only 35 hours, then the regular rate of pay for that week is $10 per hour. If, however, the employee works 48 hours in the next week, then the regular rate of pay for that week would be $7.29 per hour. Since the regular rate of pay changes each week, the employee is, in effect, paid straight time for all hours worked.

Although the Act does not require that the understanding between the employer and employee be in writing, a written statement to employees is preferable because it provides the employer with a basis for defending the use of the method. For instance, in the case of Kelli K. Goodrow v. Lane Bryant, Inc. (2000), the plaintiff argued that she had not been properly informed of how the method of payment worked. The defendant, however, was able to show that they had provided each new employee a memorandum explaining the method of pay.

It should also be noted that the word “understanding” is used rather than “agreement.” In one case, Griffin v. Wake County (1998), the plaintiffs argued that they had not agreed with the use of the FWW method of payment. The court, though, agreed with the defendant that mere employee notification, not agreement, was all that was required to implement a FWW plan. The county had held mandatory meetings with all of their workers to explain the plan, and all employees had to sign statements that they understood the plan.

ADDITIONAL ISSUES

The need for a signed agreement: Under the DOL regulations, a written acknowledgement between the employee(s) and an organization is not required. The most crucial element is that there be a “clear and mutual understanding.” Distribution of a FWW policy coupled with the signing of an acknowledgement form that indicates the employee has received the policy will constitute a sufficient “understanding.” The signed acknowledgement form in and of itself should be evidence of the requirement of “understanding.” Similarly, employees who continue to work after a FWW arrangement has begun implies his or her acceptance by continuing to work (General Electric v. Porter, 1954).

It is crucial that employers who wish to utilize this mechanism examine any offer letters that may have been given to affected employees and/or review the agreement between the organization and the employee(s) at the time of hire. If, for example, an offer letter specifies that the employee is being hired at a certain salary “for a forty-hour week,” then that agreement, made at the time of hire, has “converted” that employee into an hourly worker and the employer may not avail itself of the FWW method. To the contrary, if the offer letter contains language stating that the employee is hired at a certain salary for all hours worked during the week, then the employer is able to use the FWW method.
Deductions: As stated above, the *quid pro quo* that enables employers to pay overtime at half-time (0.5) instead of time and one-half (1.5) is that the employee receives his or her full salary in any week in which he or she does some work. Clearly, non-exempt hourly paid employees who take a day off for sickness or personal business (or who come in late or leave early) may be docked. There is a key difference on this issue for employees paid under the FWW method. The DOL’s Wage and Hour division has issued several opinion letters addressing the issue of absence from work and deductions in a situation where an employer is using the FWW method of payment. The agency has consistently stated that an employer may charge partial or full day absences against paid time-off allotments without invalidating its fixed pay/FWW arrangement, but cannot make actual deductions from the guaranteed salary (U.S. DOL, 1996). The FLSA provides that a worker’s regular rate of pay is determined based upon “all remuneration” paid to the employee for work performed during a given week (U.S.C. § 207(e)). Payments for shift differentials, hazardous duty pay, bilingual pay, special assignment pay, educational incentive pay, sick pay buy back, and meal allowances are examples of specialty pay types that must be included in the regular rate of pay (*Acton v. City of Columbia, MO, 2004*).

Furthermore, under the Family and Medical Leave Act of 1993 (FMLA) employers that pay according to the FWW rule, “… during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate employees on an hourly basis and pay only for the hours worked, including time and one-half the employee’s regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee’s weekly salary by the employee’s normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the FWW method of payment, the employer must do so uniformly, with respect to all employees paid on a FWW basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee’s compensation to hourly pay, no deduction may be taken for FMLA leave absences” (29 CFR § 825.206).

After the FMLA leave period ends, the employer is free to restore the employee’s original FWW pay practice.

Recently, however, the DOL has modified its position on the deductions issue. Now, an employer may deduct hours from an employee’s bank of vacation or sick hours and charge an FWW employee for absences from work for such hours. Significantly, should an employee exhaust his or her banks of vacation or sick hours, the employer may not make a cash deduction from a FWW employee for a partial or full-day work absence (U.S. Department of Labor, 1997).

State law concerns: Nearly every state has its own wage-hour and overtime statutes and employers must always comply with both the federal and state law
and are bound by whichever is stricter (i.e. more favorable to workers). For example, New Jersey, by opinion letter, recognizes the validity of the FWW method (Tabakman, 2005). In contrast, a California appeals court ruled in Skyline Homes, Inc., etc. et al. v. Department of Industrial Relations, et al. (1985) that the FWW was invalid. Thus, employers must research the law of the particular state(s) in which it is located, to determine the legality of FWW.

**Bonus and on-call considerations:** The FLSA provides that a worker’s regular rate of pay is determined based upon “all remuneration” paid to the employee for work performed during a given week (U.S.C. § 207(e)). Payments for shift differentials, hazardous duty pay, bilingual pay, special assignment pay, and educational incentive pay are examples of specialty pay that must be included in the regular rate of pay. However, certain types of bonus payments are excluded from this calculation including “sums paid in recognition of services performed during a given period if either, (a) both the fact that the payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit sharing plan…” (U.S.C. § 207(e)).

Standby or on-call pay is common in public agencies, particularly among police officers who get called to testify in court and public works employees who need to be available for repairs at any hour of the day. Payments made to employees for being on unrestricted standby or on call time must be included in the employees’ regular rate of pay (29 C.F.R. § 778.223). Correct computation of the regular rate of pay requires that the on-call amount be included with the compensation for normally scheduled hours for that workweek to determine the regular rate of pay. Whether an employer must pay for on-call time depends on the facts. Factors that are considered in determining whether on-call time must be treated as compensable work hours include the following: the average number of emergency calls the employee responds to during the on-call period; the time in which the employee has to be at the work site after being called in; whether an employee is subject to discipline for missing or being late to a call-back; the extent to which an employee is able to engage in other activities while on-call; and geographical restrictions on employee movements. Employees do not have to be paid if they simply are asked to provide information on where they can be reached if the employer needs them.

**Non-exempt salaried employees paid once or twice a month:** While there is no federal provision that requires workers be paid on a certain frequency, state laws may order a prescribed occurrence. For example, under the Texas Payday Law (1993), non-exempt employees must be paid at least twice per month, i.e., biweekly or semimonthly. Thus, the discussion about monthly salaries will not apply to non-exempt employees in Texas or other states with a similar provision. Notwithstanding such prohibitive state regulations for non-exempt salaried
employees who are paid either twice per month or monthly, the payments must be reduced to their workweek equivalents in order to arrive at the regular rate of pay. There are two main ways for an employer to compute overtime pay for salaried employees paid once or twice per month (29 C.F.R. 778.113(b)). The first method involves computing the workweek equivalents: 1) Semimonthly salary—multiply the salary times 24 to get the annual equivalent, then divide that figure by 52 to get the workweek equivalent. Then apply the general rule of 29 C.F.R. § 778.113(a) to arrive at the regular rate. Or, 2) Monthly salary—multiply the salary by 12 for the annual equivalent, then divide that figure by 52 to get the workweek equivalent. Then apply the general rule of 29 C.F.R. § 778.113(a) to arrive at the regular rate.

The other main way to pay overtime based on semimonthly or monthly salaries is to calculate it on the basis of an established basic rate (U.S.C. § 207(g)(3); 29 C.F.R. § 548). 29 C.F.R. 548.3(a) provides that the employer and employee may agree that the regular rate shall be determined by dividing the monthly salary (or semimonthly salary times 2) by the number of regular working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a situation may not be below the statutory minimum wage.

SUMMARY AND CONCLUSIONS

The thrust of this paper is that a FWW scheme can be a significant labor cost-saving tool. Notwithstanding the potential benefits of this method, FWW has not been utilized as often as might be expected. There are several reasons. In order to implement this system, the federal regulations require that the employee be informed that his or her base salary is meant to cover all hours worked and that he or she will be compensated at a half-time rate for overtime. In addition, this system penalizes employers who have employees that work less than 40 hours in a week because the employee is due a fixed base salary each week regardless of hours worked. If work is slow, and the employee is only working 25 or 30 hours per week, the fixed salary must still be paid. Thus, the FWW scheme is only a cost-saving method for those organizations that regularly have employees work more than 40 hours in a week. Additionally, because employees have to be informed of the payment method, many employers are reluctant to use the FWW system due to concerns about possible problems of employee morale and retention (Feldman, 2002). Perhaps the derisive term, "Chinese Overtime," as the FWW method is commonly called (Evans et al. v. Lowe's Home Centers, Inc., 2004) connotes this less than enthusiastic response from employees. Furthermore, the calculation of the "regular rate" upon which all overtime is based will change every week. Therefore, the employer must either assign these computational tasks to an employee or buy/devise a software program to perform the necessary calculations. These administrative challenges sometimes cause employers to shy away from implementing this method.
Balanced against these problematic concerns is the distinct advantage of 
being able to pay half-time, instead of time and one-half, overtime. Additionally, 
by classifying employees as non-exempt salaried workers public service 
employers may lower their exposure to high-visibility class-action lawsuits for 
unpaid overtime that increasingly result in significant amounts of bad publicity, 
jury awards, and multimillion-dollar settlements. Such suits are particularly 
expensive because there is a strong presumption in favor of doubling damages 
and in many cases Courts apply provisions allowing for double damages 
("Overnight Motor Transportation Co. v. Missel, 1942"). Finally, positive 
employee relations can be gained through employee perception of their job as a 
Nevertheless, because of the complex and "out of the ordinary" nature of the 
FWW rules, organizations should obtain professional legal and human resources 
guidance if they are considering this method of determining employee pay.

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