



VIA ELECTRONIC SUBMISSION

December 5, 2019

Ms. Amy DeBisschop
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

Re: RIN 1235-AA31, Notice of Proposed Rulemaking on Fluctuating Workweek Method of Computing Overtime

Dear Ms. DeBisschop:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced notice of proposed rulemaking published in the *Federal Register* on Nov. 5, 2019, at 84 Fed. Reg. 59590.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Background

On July 28, 2008, the U.S. Department of Labor issued a notice of proposed rulemaking to update regulations issued under the Fair Labor Standards Act, which included amendments to the regulations at 29 CFR Part 778.114 addressing the fluctuating workweek method of computing overtime compensation for salaried nonexempt employees.¹ The proposal provided that bonus and premium payments are

¹ 73 Fed. Reg. 43654.

compatible with the fluctuating workweek method of compensation and must be included in the calculation of the regular rate unless excluded by FLSA sections 7(e)(1)-(8).²

On April 5, 2011, DOL issued a final rule, which did not adopt the proposed clarifying language and left the text of 29 CFR Part 778.114 unchanged except for minor revisions.³

On Nov. 5, 2019, DOL published an NPRM that is consistent with the language in the 2008 NPRM and expressly states that any bonuses, premium payments or other additional pay of any kind, in addition to the fixed salary, are compatible with the use of the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate as appropriate under the FLSA. Additionally, the NPRM includes examples to 29 CFR Part 778.114(b).⁴

ABC's Comments in Response to the Department's Proposed Rule

ABC supports the proposed revisions to 29 CFR Part 778.114 to allow employers who offer bonuses and premium payments to use the fluctuating workweek method of compensation and eliminate the confusion brought on by the 2011 final rule. In a survey of ABC's members, more than 78% of survey respondents give their employees discretionary and/or non-discretionary bonuses. In addition to such bonuses, many construction industry employers offer numerous other forms of variable incentive compensation, including night shift differentials, premium pay for specific types or days of work and commissions.

Construction industry employers employ a number of categories of highly paid nonexempt workers, such as certain nonexempt working foremen, who may work fluctuating hours, be paid on a salaried basis and receive variable incentive compensation. ABC's perception is that the existing fluctuating workweek method, though arguably permitted by the department's existing rule in such circumstances, has been underutilized in the construction industry. One reason the methodology has not been fully used, to the detriment of employers and employees, is the confusion over variable incentive payments that are the focus of the NPRM. ABC applauds the department's efforts to clarify that bonus payments, premium payments and other additional pay incentives over and above any fixed salary are consistent with the fluctuating workweek method of compensation. ABC further agrees with the department's rejection of any distinction between "hours-based" or "productivity-based" incentive compensation in applying the fluctuating workweek method of payment.

ABC suggests that the final rule would be further improved by clarifying that section 778.114 authorizes use of the fluctuating workweek method for employees paid on a salary basis by incorporating by reference the definition of that term in section 541.602. ABC further supports language clarifying that such a salary complies with the rule so long as the salary is "reasonably calculated" to provide compensation for all hours worked at or above the minimum wage. Finally, it would also be helpful for the department to clarify that examples given in the final rule are just that: *examples*. The department should make clear that examples given do not impose limitations, restrictions or other conditions on applying the overtime calculation.

² Id. at 43662.

³ 76 Fed. Reg. 18832.

⁴ 84 Fed. Reg. 59590.

Conclusion

ABC is pleased to support the proposed rule with the important modifications listed above.

Respectfully submitted,



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