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OF THE
UNITED STATES OF AMERICA

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The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue NW, Room S-3502
Washington, DC 20210

VIA ELECTRONIC FILING: www.regulations.gov

Re: RIN 1235–AA31, Notice of Proposed Rulemaking, 29 C.F.R. Part 778, Fluctuating Workweek Method of Computing Overtime, 84 FR 59590 (November 5, 2019)

Dear Administrator Stanton:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the proposal of the U.S. Department of Labor (the "Department"), as published in the Federal Register on November 5, 2019, to revise the regulation at 29 C.F.R. § 778.114, on the calculation of overtime compensation under the Fair Labor Standards Act ("FLSA") for nonexempt employees who are paid a fixed weekly salary as compensation for all hours worked.[1]

The Chamber supports the Department's proposed changes to section 778.114. The Proposed Rule will clarify that the payment of variable incentive compensation to a salaried nonexempt employee—on top of the fixed weekly salary—is compatible with the use of the so-called "fluctuating workweek" method of calculating overtime. The Proposed Rule will eliminate confusion that has persisted since 2011, when the Department departed from its longstanding position and suggested for the first time that an employer who uses the fluctuating workweek method could not also pay variable incentive compensation to its employees. The Proposed Rule will encourage employers to pay bonuses, commissions, and other forms of incentive compensation to salaried nonexempt employees who work fluctuating hours. The Proposed Rule is therefore a win-win for employers and employees.

In these comments, we make three specific and modest recommendations for the Department to provide additional clarity and support for employers seeking to provide salaried nonexempt employees with incentive pay:

[1] Fluctuating Workweek Method of Computing Overtime, 84 Fed. Reg. 59590 (Nov. 5, 2019) [hereinafter the "Proposed Rule"].

First, we recommend that the Department make clear that section 778.114 (like the other examples in the interpretive bulletin of which it is a part) merely provides an *example* of how to calculate overtime in the particular circumstances described in the example. It does not impose restrictions, conditions, or limitations on applying the standard overtime calculation (in which "wages divided by hours" equals the regular rate).

Second, we recommend that the Department modify section 778.114 to clarify that the fluctuating workweek method described in the example may be used so long as the salary is reasonably calculated to provide compensation for all hours worked at an amount no less than the minimum wage.

Third, we recommend that the Department modify section 778.114 to clarify that the fluctuating workweek method described in the example may be used so long as the employee is paid on a salary basis.

These suggestions should in no way overshadow the Chamber's support for the Department's Proposed Rule. Indeed, we believe the Proposed Rule will provide significant benefits for the regulated community. The Rule should be adopted.

I. The Chamber Supports the Proposed Rule, Which Will Encourage Employers to Pay Variable Incentive Compensation to Nonexempt Salaried Employees.

The FLSA requires that nonexempt employees receive one and one-half times their regular rate of compensation for hours worked beyond 40 in one workweek[2], but it grants employers the flexibility to determine the compensation arrangements on which the regular rate is determined. Employers throughout the United States depend on that flexibility to design compensation plans incentivizing and rewarding employees consistently with the employers' business needs.

The Department threatened that flexibility in 2011, when it expressed the view (in a Preamble to a Final Rule) that incentive compensation was "incompatible" with the fluctuating workweek method of computing overtime compensation.[3] Before 2011, the Department had never forbidden the payment of incentive compensation to employees compensated under the fluctuating workweek method. Indeed, in a 2008 NPRM and in a 2009 opinion letter, the Department stated that incentive compensation was compatible with the fluctuating workweek method.[4]

The 2011 Preamble suggested, however, that if an employer pays a nonexempt employee a fixed salary for all hours worked, then the FLSA prohibits the employer from also paying variable incentive compensation to the employee. Of course, the FLSA does not impose any such arbitrary limitation on an employer's right to design a compensation plan that encourages and rewards its employees. The payment of a fixed salary for variable hours is lawful, as is the

[2] 29 U.S.C. 207(a).
[3] 76 Fed. Reg. 18832, 18850 (Apr. 5, 2011), a final rule updating various regulations to conform to changes in the FLSA.
[4] *See* 73 Fed. Reg. 43654, 43662, 43669–70 (July 28, 2008); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter FLSA2009–24 (Jan. 16, 2009) (withdrawn March 2, 2009).

payment of incentive compensation, and the FLSA does not prohibit employers from combining the two. As the United States Court of Appeals for the First Circuit recognized, when an employer pays a nonexempt employee a fixed salary (and properly calculates overtime on that salary) as well as variable incentive compensation (and properly calculates overtime on that incentive), any argument that such a dual arrangement is unlawful is like arguing that "two rights make a wrong."[5]

Not surprisingly, the 2011 Preamble generated substantial confusion and uncertainty for courts and employers alike.[6] Employers saw this as an attack on their ability to reward their salaried nonexempt employees with variable incentive compensation. The Proposed Rule addresses this concern by recognizing (correctly) that an employer who pays its nonexempt employees a fixed salary for variable hours may also pay those employees variable incentive compensation.

The Proposed Rule also resolves recent confusion among courts that distinguished "hours-based" incentive compensation from "productivity-based" incentive compensation when evaluating the validity of the fluctuating workweek compensation plan.[7] The Proposed Rule correctly restores the Department's longstanding view that all forms of incentive compensation (whether characterized as "hours-based" or "productivity-based") are compatible with the fluctuating workweek method. Indeed, the Department has long recognized that "[p]aying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees."[8]

Quite simply, the FLSA does not impose *any* restrictions on the payment of "hours-based" *or* "productivity-based" bonuses to employees who also receive a salary as compensation for variable hours worked. Such payments should be encouraged—not prohibited. For example, an employer who pays an employee a fixed salary for variable hours might also want to pay the employee a bonus to show appreciation for the employee's working late or on a scheduled day off to complete a project. That additional payment does not change the fact that the employee still received the fixed salary as compensation for all hours worked. The Proposed Rule would provide much-needed clarity on this issue.

So long as there is an agreement or understanding between the employer and employee that the employee's salary is compensation for all hours worked, the salary should be divided by all hours worked to establish the "regular rate" attributable to the salary.[9] If the employee also receives variable incentive compensation that must be included in the regular rate, then the

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[5] *Lalli v. Gen. Nutrition Ctrs., Inc.*, 814 F.3d 1, 4 (1st Cir. 2016) (affirming GNC's right to pay commissions to salaried nonexempt employees).

[6] *See* 84 Fed. Reg. at 59592-93 (collecting cases).

[7] *See* 84 Fed. Reg. 59593 (collecting cases).These courts were evidently trying to reconcile the 2011 Preamble with the Department's prior statements that incentive compensation was compatible with the fluctuating workweek method. That this reconciliation was even necessary shows the folly of the 2011 approach.

[8] 73 Fed. Reg. 43654, 43662 (July 28, 2008).

[9] Certainly, if an employer agrees to pay a fixed salary as compensation for a *specific* number of hours each week (*e.g.*, 35, 40, 50 or any other number), the regular rate attributed to that salary "is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113(a). In each case, the regular rate attributed to the salary is always calculated by dividing the salary by the number of hours the salary is intended to compensate, whether fixed or variable.

incentive compensation would be included in the regular rate calculation in the same manner (*i.e.*, incentive compensation divided by all hours worked during the incentive period).

The Chamber supports the Proposed Rule, which rejects the 2011 Preamble's "no good deed goes unpunished" interpretation. The Proposed Rule will remove the 2011 Preamble's obstacle to employers wishing to pay variable incentive compensation to their salaried nonexempt employees. The Chamber welcomes the Department's proposal to amend section 778.114 to confirm its longstanding position that employers using the fluctuating workweek method to calculate overtime compensation for their salaried nonexempt employees may also pay variable incentive compensation to those employees, on top of the salary.

II. Recommendation #1: Clarify that the Interpretive Bulletin Provides Examples of the Standard Overtime Calculation—Not Restrictions, Conditions, or Limitations.

The confusion triggered by the 2011 Preamble reflected a fundamental misunderstanding about the purpose of section 778.114 within the broader context of the interpretive bulletin set forth in 29 C.F.R. Part 778. While section 778.114 provides an *example* of how the regular rate is calculated when employees are paid a salary as compensation for variable hours worked, it does not (and could not) prohibit employers from paying incentive compensation to such employees while adhering to the standard overtime calculation. The Supreme Court established that calculation decades ago: (a) total weekly wages divided by the number of hours compensated by those wages equals the regular rate; and (b) an additional one-half of the regular rate must be paid as the statutorily required overtime premium for all hours worked beyond 40 in a workweek.[10] The Department should make clear that section 778.114 does not (and could not) impose any restrictions, conditions, or limitations on this standard rule.

A. The FLSA Provides Employers with Flexibility to Design Compensation Arrangements that Meet Their Needs.

More than 70 years ago, the Supreme Court recognized that as long as employers comply with the minimum-wage provision of the FLSA, they "may agree to pay compensation according to any time or work measurement they desire."[11] For example, employers may pay their non-exempt employees an hourly rate of pay; a fixed salary (for specified hours or for variable hours); piece rates, day rates, or job rates; commissions, bonuses, and other incentive arrangements; shift differentials; different rates of pay for different types of work; and so on. Employers may combine compensation options in a wide array of arrangements designed to encourage and reward employees, consistent with the needs and realities of their businesses. "It was not the purpose of Congress in enacting the [FLSA] to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement."[12]

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[10] *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 580 (1942).

[11] *Walling v. Youngerman Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945); *see also Adams v. Dep't of Juvenile Justice of the City of N.Y.*, 143 F.3d 61, 66–67 (2nd Cir. 1998) (holding that as long as regular rate equals or exceeds minimum wage, employer is free to establish compensation arrangement).

[12] *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203–04 (1947); *accord Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460–61 (1948) ("Contracts for pay take many forms. The rate of pay may be by the hour, by piecework, by the week, month or year, and with or without a guarantee that earnings for a period of time shall be at least a

B. The Regular Rate Always Equals Weekly Wages Divided by the Number of Hours Those Wages Are Intended to Compensate.[13]

Although employers are free to establish compensation arrangements in any way they choose, that choice will affect the "regular rate" used in the overtime calculation. The formula for determining the "regular rate" is not set forth in the FLSA. Rather, the regular rate is an "actual fact" derived from whatever compensation arrangement the parties establish:

> The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is . . . an actual fact. Once the parties have decided upon the amount of wages . . . the determination of the regular rate becomes a matter of mathematical computation.[14]

In *Overnight Motor Transportation Co. v. Missel*, the Supreme Court explained the straightforward "mathematical computation" that must be used to determine an employee's regular rate: "Wages divided by hours equals regular rate."[15] When "the employment contract is for a weekly wage with variable or fluctuating hours," the formula "wages divided by hours equals regular rate" simply means that "the regular rate varies with the number of hours worked."[16] The Supreme Court concluded:

> It is this quotient [wages divided by the hours the wages were intended to compensate] which is the "regular rate at which an employee is employed" under contracts . . . for fixed weekly compensation for hours, certain or variable.[17]

The Supreme Court recognized that a contract of employment may provide for any number of wage arrangements, but the "same method of computation produces the regular rate for each week."[18] Specifically, the regular rate equals total wages (whether fixed or variable) divided by the number of hours compensated by those wages (whether fixed or variable).[19]

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stated sum. The regular rate may vary from week to week . . . . The employee's hours may be regular or irregular. From all such wages the regular hourly rate must be extracted.").

[13] In general, the "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e) (identifying eight exceptions to this general rule). The Department is separately considering a Proposed Rule to clarify and update the regular rate requirements under section 7(e). *See* 84 Fed. Reg. 11888 (March 29, 2019). In these comments, our reference to "wages" refers to remuneration included in the regular-rate calculation.

[14] *Walling*, 325 U.S. at 424–25.

[15] 316 U.S. 572, 579–80 & n.16 (1942).

[16] *Id.* at 580.

[17] *Id.* at 580; *see also Urnikis-Negro v. Am. Family Property Servs.*, 616 F.3d 665, 674 (7th Cir. 2010) (explaining that when employee is paid fixed weekly wage for hours that fluctuate from week to week, the "proper way to calculate the employee's regular rate of pay is to divide the weekly wage by the number of hours actually worked in a particular week").

[18] *Overnight Motor*, 316 U.S. at 579–80.

[19] *Bay Ridge Operating Co.*, 334 U.S. at 461; *Adams*, 143 F.3d at 66–67 (holding that regular rate is total agreed pay for workweek divided by total hours worked during workweek); *Chavez v. City of Albuquerque*, 630 F.3d 1300,

In short, the so-called fluctuating workweek method is not (and never was) an ***exception*** to the standard overtime rule. When an employee is paid a weekly salary as compensation for variable hours worked, it ***is*** the rule.

C. The Overtime Premium Is an Additional One-Half of the Regular Rate.

If an employee's contractual pay covers at least the minimum wage for every hour worked, the employer's only remaining obligation under the FLSA is to pay an additional one-half of that regular hourly rate for each overtime hour worked, thereby providing the required "one and one-half times the regular rate" for all overtime hours.[20] In other words, the regular rate is the "time" component of the "time and one-half" overtime obligation, while the statutorily mandated overtime premium that must be paid on top of the contractual pay is the "and one-half" component. *See Walling*, 325 U.S. at 426 (regular rate is for all hours worked, so compliance with "time and one-half" obligation requires only another 50% premium for hours worked above forty). As the United States Court of Appeals for the Seventh Circuit explained:

> Notably, the approach taken by the Court in *Missel* [*v. Overnight Motor*] treats the fixed weekly wage paid to the employee as compensation at the regular rate for *all* hours that the employee works in a week, including overtime hours. The employer will separately owe the employee a premium for the overtime hours, but because he has already been compensated at the regular rate for the overtime hours by means of the fixed wage, the employer will owe him only one-half of the regular rate for those hours rather than time *plus* one-half.[21]

In short, when an employee is paid a fixed salary for variable hours, the FLSA's overtime rule is simple: (a) wages divided by hours equals regular rate; and (b) since the regular rate is, by agreement, compensation for all hours worked, the payment of another one-half of the regular rate for all overtime hours worked satisfies the "time and one-half" requirement.

D. The Department Recognized that "Wages Divided by Hours" Equals the Regular Rate and Provided *Examples* of This Rule, Not *Restrictions* on Its Application.

1311-13 (10th Cir. 2011) (stating that the "regular rate is calculated by dividing the relevant weekly compensation by the actual hours worked").

[20] *Chavez*, 630 F.3d at 1313.

[21] *Urnikis-Negro*, 616 F.3d at 675. *See also Mayhew v. Wells*, 125 F.3d 216, 218 (4th Cir. 1997) (employees paid fixed salary for variable hours have "already been 'paid,' in part, for their overtime hours by their fixed salary and ... by receiving an additional one-half their regular pay ... they would effectively receive 'time and a half' for overtime hours"); *Saxton v. Young*, 479 F. Supp. 2d 1243, 1256 (N.D. Ala. 2007) ("[S]ince the salary itself is the straight time component of even the overtime hours, all that remains to be paid for the overtime hours is the additional half time."); *Knight v. Morris*, 693 F. Supp. 439, 445 (W.D. Va. 1988) (stating that employee "on a straight salary who works overtime hours and receives one-half times his regular salary for those overtime hours has received effective 'time and a half' for his overtime hours").

The Department described the so-called fluctuating workweek method as just one part of a broader interpretive bulletin issued in 1968.[22] In the bulletin, the Department confirmed its adherence to the standard "wages divided by hours" approach that the Supreme Court adopted in the 1940s:

> [T]he regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.[23]

The Department's adoption of the Supreme Court's longstanding view that the regular rate is determined by dividing total wages by total hours worked "is consistent with the statutory language."[24]

In the sections following section 778.109, the bulletin provides *examples* of "different employment arrangements and the proper method for complying with the FLSA for each type of arrangement."[25] The examples include the so-called fluctuating workweek salary arrangement (29 C.F.R. § 778.114), as well as examples involving hourly, piecework, day rate, job rate, salary for fixed hours, and commission arrangements.[26] The Department made clear that the list was neither exhaustive nor limiting: "The following sections give *some examples* of the proper method of determining the regular rate of pay in particular instances . . . ."[27]

In *Allen*, the Court of Appeals for the Eleventh Circuit recognized that employers need not conform their compensation plans to the precise terms of one of the examples in the interpretive bulletin to use the "wages divided by hours" approach. *Allen* involved section 778.115, which describes a circumstance in which an employee "works at two or more different types of work" for different rates of pay.[28] The employees argued that their employer did not comply with section 778.115 because it paid different rates of pay for the *same* (not different) types of work.[29] Even though section 778.115—by its own terms—applies only when "different types of work" are performed, the court rejected the employee's argument. It recognized that section 778.115 was merely *an example* of a type of pay plan, showing how the regular rate would be calculated for that type of plan.[30] "[R]eading section 778.115 in the context of section 778.109, it becomes apparent that the former is one of the examples mentioned in the latter as a way that the regular rate may be calculated in certain cases. While it exemplifies one way that a regular rate may be determined, it does not mandate that differing rates of pay are only permitted

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[22] 29 C.F.R. Part 778, 33 Fed. Reg. 986 (Jan. 23, 1968).
[23] 29 C.F.R. § 778.109; *see also id.* § 778.108 (citing Supreme Court's decisions in *Bay Ridge* and *Walling* as foundation of "wages divided by hours" approach); *id.* § 778.308 ("Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived . . . by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made.").
[24] *Chavez*, 630 F.3d at 1313.
[25] *Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1313 (11th Cir. 2007).
[26] 29 C.F.R. §§ 778.110–778.122.
[27] 29 C.F.R. § 778.109 (emphasis added).
[28] 29 C.F.R. § 778.115.
[29] *Allen*, 495 F.3d at 1312.
[30] *Id.* at 1313.

when different types of work are performed."[31] Hence, even though the employer used different rates of pay for the same types of work, the employer complied with the FLSA because it adhered to the "wages divided by hours" approach.[32]

E. Employers Cannot "Violate" Section 778.114 Because It Is Merely an Example of the Standard Overtime Calculation.

As the Department recognized in the Proposed Rule, a few courts have mistakenly held that the payment of hours-based bonuses "violated" section 778.114 because such bonuses allegedly "offended § 778.114's requirement of a 'fixed weekly salary.'"[33] This erroneous view appears to have originated from a misunderstanding about the holding in *O'Brien v. Town of Agawam*.[34] In that case, the parties *assumed* that there was such a requirement, so the court did not consider the issue further.[35] The court never held that hours-based bonuses "violated" the regulation.[36]

Subsequent cases perpetuated the error by mistakenly citing *O'Brien* for the proposition that section 778.114 included a "fixed salary requirement" that must be satisfied before an employer could use the "wages divided by hours" approach.[37] Rather than confront those decisions directly, other courts tried to distinguish them, inventing a distinction between "hours-based" incentive pay and "productivity-based" incentive pay.[38] As the Department explained, such attempts merely exacerbated the confusion, noting that it "has never drawn this distinction, and this distinction is in tension with all of the Department's prior written guidance and statements on the issue."[39] Moreover, it is "confusing and administratively burdensome for employers to distinguish between productivity- and hours-based bonuses and premium payments."[40]

In *Lalli*, the court held that GNC's salary-plus-commission compensation plan complied with the FLSA because: (a) GNC properly calculated overtime on the salary under section 778.114; and (b) GNC properly calculated overtime on the commission earnings under section

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[31] *Id.*
[32] *Id.*
[33] *Wills v. RadioShack Corp.*, 13 Civ. 2733, 2013 U.S. Dist. LEXIS 159727, at *25–26 (S.D.N.Y. Nov. 7, 2013) (citing cases holding that extra pay for holiday, weekend, or night work, or for sea-duty or off-shore work, or for working on days off, "violates the FWW method's fixed salary requirement").
[34] 350 F.3d 279, 287–90 (1st Cir. 2003).
[35] *Id.* at 287 n.15.
[36] *See id.* ("[T]he parties limit their arguments to whether the compensation scheme . . . comports with [section 778.114], and we confine ourselves to the same question.").
[37] *See Dooley v. Liberty Mut. Ins. Co.*, 369 F. Supp. 2d 81, 85–86 (D. Mass. 2005) (relying on *O'Brien* for holding that premium pay for Saturday work "precludes application of the fluctuating workweek method"); *Adeva v. Intertek USA, Inc.*, 09 Civ. 1096, 2010 U.S. Dist. LEXIS 1963, at *9 (D.N.J. Jan. 11, 2010) (relying on *O'Brien* for holding that offshore pay, holiday pay, and day-off pay "run afoul of the 'fixed salary' requirement of 29 C.F.R. § 778.114(a)"); *Ayers v. SGS Control Servs., Inc.*, 03 Civ. 9078, 2007 U.S. Dist. LEXIS 19634, at *33 (S.D.N.Y. Feb. 27, 2007) (relying on *O'Brien* for holding that sea pay and day-off pay resulted in "violation of 29 C.F.R. § 778.114(a)").
[38] 84 Fed. Reg. 59593 (citing cases).
[39] *Id.*
[40] *Id.*

778.118.[41] Notably, the court then recognized that a compensation plan might comply with the FLSA even though it does not fit neatly within one of the examples set forth in the interpretive bulletin:

> Because we hold that the pay scheme complies with the DOL's regulatory *examples*, we need not separately analyze the arrangement under the FLSA directly. . . . *We do not mean to imply, however, that a pay scheme must fall within a regulatory example in order to comply with the statute*.[42]

As suggested by the court in *Lalli*, but contrary to the view of those courts that misinterpreted *O'Brien*, it is impossible for an employer to "violate" section 778.114. Like the other examples in sections 778.110–778.122, section 778.114 merely provides an *example* of how to calculate the regular rate under the precise circumstances described. It does not foreclose other compensation arrangements, and it does not exclude other compensation arrangements from the standard "wages divided by hours" approach to determining the regular rate.[43]

The Department should make clear in the Final Rule that even if it is determined that section 778.114 does not apply to a particular compensation arrangement, then the rule of *Overnight Motor*, *Walling*, *Allen*, and section 778.109 will still apply. That is: (a) total wages divided by the number of hours worked that were compensated by those wages equals the regular rate; and (b) one-half of that regular rate must be paid as an additional overtime premium for all hours worked more than 40 in the workweek. In other words, section 778.114 does not provide the exclusive authority for determining the regular rate when an employer pays its employees some form of "salary" as part of their compensation arrangement, and section 778.114 does not impose any restrictions, conditions, or limitations on the "wages divided by hours" approach to calculating the regular rate and the resulting overtime premium.

F. The "Wages Divided by Hours Compensated" Rule Applies to All Compensation Plans Subject to 29 U.S.C. § 207(a)(1).

The confusion that necessitated the Proposed Rule extends beyond nonexempt employees who are paid fixed salary for variable hours. The Department should use this opportunity to clarify that the examples set forth in the interpretive bulletin do not impose restrictions, conditions, or limitations on an employer's flexibility to design compensation plans that meet its needs, so long as the employer adheres to the "wages divided by hours" rule announced in *Overnight Motor* (and otherwise refrains from designing the plan to evade the overtime obligation). For example:

- Section 778.115 includes the phrase "[w]here an employee . . . works at two or more different types of work" in the example for employees working at two or more hourly rates. As *Allen* recognized, this language merely describes an

[41] *Lalli*, 814 F.3d at 10 (holding that "the mere combination of these two permissible methods does not render the former inapplicable").
[42] *Id.* at 10 n.11 (emphasis added).
[43] *Cf. Allen*, 495 F.3d at 1313.

example in which two different hourly rates were paid for different types of work.[44] The language is not a limitation and does not preclude the use of two different rates for the same type of work.

- Section 778.112, which addresses day-rate and job-rate payments, includes the phrase "if he receives no other form of compensation for services" in the example. This language is neither a limitation nor a prohibition on the payment of bonuses or commissions to employees who are paid a day rate or job rate. Rather, if such incentive compensation is also paid, it is simply included in the regular rate calculation.

- Section 778.118 includes the phrase "[w]hen the commission is paid on a weekly basis" in the example for calculating overtime on commissions. This language does not limit the "wages divided by hours" approach to employers who use a weekly payroll system. When commissions are paid on a bi-weekly basis, for example, the "wages divided by hours" rule still applies (albeit separately to commissions earned during each workweek).

In short, all the examples in the interpretive bulletin merely show how to apply the rule of "wages divided by hours" in the particular circumstances described in the example. The examples do not impose restrictions, conditions, or limitations on an employer's ability to design a compensation plan that best meets its needs.

The Department erred in 2011 when it interpreted section 778.114 as precluding an employer from paying bonuses to employees who are also paid a fixed salary for variable hours, merely because the example set forth in section 778.114 did not happen to include a bonus. While the Proposed Rule will prevent such an erroneous interpretation in the future related to salaried nonexempt employees, the Department must make clear that all the examples in the interpretive bulletin are just that—examples.

For these reasons, the Chamber recommends that the Department modify section 778.114 by adding a new section (d) as follows:

§ 778.114 Fluctuating workweek method of computing overtime.

* * *

(d) As set forth in §§ 778.108–778.109, the regular hourly rate of pay of an employee is always determined by the standard calculation of dividing total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid. The fluctuating workweek method described in this section is just one example of how to perform the standard calculation in the particular circumstances described herein.

[44] *Allen*, 495 F.3d at 1313.

III. Recommendation #2: Clarify that the Fluctuating Workweek Method Described in the Example May Be Used so Long as the Salary Is Reasonably Calculated to Provide Compensation for All Hours Worked at an Amount No Less than the Minimum Wage.

As currently written, section 778.114 provides that the fluctuating workweek method "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."[45] The Proposed Rule similarly provides that one of the conditions for using the fluctuating workweek method is that the "amount of [the] employee's fixed 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 the employee works is greatest."[46]

The Chamber respectfully submits that the fluctuating workweek method described in the example should not be invalidated merely because there may be unexpected occasions when the employee's hours worked are so high that the salary fails to provide compensation at the minimum wage. In such cases, the employer's obligation should be to make a supplemental payment to the employee to ensure minimum-wage compliance—not to retroactively invalidate the fluctuating workweek method altogether.

The Chamber recommends that the Department modify the Proposed Rule to clarify (consistent with existing precedent) that the fluctuating workweek method is permitted when the salary is "reasonably calculated" to provide an hourly rate of at least the applicable minimum wage.[47]

To be sure, if an employee's hours worked in a particular week are so high that the salary does not provide compensation at the minimum wage for all hours that week, then section 6 of the FLSA would require the employer to make a supplemental payment to make up the minimum wage shortfall.[48] In addition, section 7 of the FLSA would require the employer to make an additional overtime premium payment equal to one-half the regular rate (which for that week would be the minimum wage) for all overtime hours worked.[49] The Department should revise the Proposed Rule to clarify that the occasional need to make such supplemental payments does

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[45] 29 C.F.R. § 778.114(c).
[46] 84 Fed. Reg. 59602.
[47] *See Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884, 894 (E.D. Tex. 1997) (stating that salary is sufficient if it "actually proves adequate to sustain an average hourly rate at least equal to the applicable minimum wage" *or* if it "is reasonably calculated to provide" an average hourly rate at least equal to the applicable minimum wage); *id.* at 907 & n.53 (holding that fluctuating workweek method not rendered unavailable merely because of three occasions when salary did not provide minimum wage because of excessive hours worked); U.S. Dep't of Labor, Op. Letter No. 945 (CCH-WH) ¶ 30,957 (Feb. 6, 1969) (stating that if salary is reasonably calculated to provide minimum wage, pay plan does not fail merely because salary did not provide minimum wage five times in one year because of unforeseen circumstances).
[48] 29 U.S.C. § 206(a)(1); *see also* Op. Letter No. 945 (stating, in connection with fluctuating workweek method, that employer retains statutory obligation to pay for all hours worked at rate not less than minimum wage).
[49] 29 U.S.C. § 207(a)(1).

not result in the draconian sanction of retroactively invalidating the fluctuating workweek altogether.[50]

For these reasons, the Chamber recommends that the Department modify section 778.114(a)(3) as follows:

§ 778.114 Fluctuating workweek method of computing overtime.

(a) The fluctuating workweek may be used to calculate overtime compensation for a nonexempt employee if the following conditions are met:

* * *

(3) The amount of the employee's salary is reasonably calculated to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked;

* * *

IV. Recommendation #3: Clarify that the Fluctuating Workweek Method Described in the Example May Be Used so Long as the Employee Is Paid on a Salary Basis.

As currently written, section 778.114 applies to "an employee employed on a salary basis" when the "fixed salary" is compensation for all hours worked each workweek, whether few or many.[51] The Proposed Rule similarly provides that one of the conditions for using the fluctuating workweek method is that the employee receives a "fixed salary that does not vary with the number of hours worked in the workweek, whether few or many."[52]

The "fixed salary" contemplated by section 778.114 has long been recognized as not absolute. For example, the Department stated decades ago that an employer may make "disciplinary deductions for willful absence or tardiness."[53] Similarly, an employee may be paid a "pro rata share of his/her salary in the initial or terminal week of his/her employment."[54] Finally, as noted above, the Department has long recognized that the payment of variable incentive compensation (on top of the salary) is compatible with the "fixed salary" envisioned in section 778.114.

Unfortunately, the provisions of the Field Operations Handbook related to the "fixed salary" contemplated by section 778.114 have not been substantively revised in more than 50

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[50] *See Aiken v. Cty. of Hampton, S.C.*, 977 F. Supp. 390, 398–99 (D.S.C. 1997) (stating that use of "minimum wage adjustment" on an "infrequent basis" because of unexpectedly high hours worked was compatible with fluctuating workweek method where salary was "reasonably calculated to provide at least the statutory minimum wage"); *Davis v. Friendly Express, Inc.*, No. 02-14111, 2003 WL 21488682, at *2 (11th Cir. 2003) (stating that fluctuating workweek method remains valid even where salary sometimes fails to provide minimum wage and employer pays a minimum-wage supplement to make up the shortfall).

[51] 29 C.F.R. § 778.114(a).

[52] 84 Fed. Reg. 59602.

[53] *See* U.S. Dep't of Labor Field Operations Handbook § 32b04b(b) (March 24, 1967).

[54] *Id.* § 32b04b(c).

years. In the meantime, the Department separately developed a robust understanding of what it means to be paid on a "salary basis" in a comparable context: defining and delimiting the exemptions for executive, administrative, and professional employees.[55] Having defined what it means to be paid on a "salary basis" in the context of salaried exempt employees, the Department should adopt the same definition in the context of salaried nonexempt employees.

Section 541.602 defines what it means to pay an employee on a "salary basis"—that is, to pay "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[56] In section 541.602(b), the Department identifies seven discrete and common-sense exceptions to the general prohibition against reductions to the salary. As with the deductions permitted for salaried nonexempt employees paid using the fluctuating workweek method, deductions for salaried exempt employees are permitted when the employee is absent for one or more full days for personal reasons and in the initial and terminal weeks of employment.[57] The updated regulations defining "salary basis" in the context of salaried exempt employees include a few additional exceptions, however, including some (such as for unpaid leave under the Family and Medical Leave Act) that were not even contemplated when the Department last issued substantive revisions to the relevant provisions of the Field Operation Handbook in 1967. There is no principled reason to incorporate some (but not all) of the exceptions from section 541.602(b) into the "salary basis" contemplated by the fluctuating workweek method.

To update, clarify, and simplify the circumstances in which a deduction may be made to the salary of an employee paid using the fluctuating workweek method, and to avoid confusion about the circumstances in which a deduction to an employee's salary might be permitted for a fluctuating workweek arrangement, the Chamber recommends that the Department modify the Proposed Rule to incorporate by reference the "salary basis" provision of 29 C.F.R. § 541.602. The Chamber respectfully submits that section 541.602 provides a clear, workable, and familiar rule for determining when an adjustment may be made consistent with the principle of paying an employee on a salary basis. That same rule should apply when determining whether an employee is paid a fixed salary as compensation for all hours worked in accordance with a valid fluctuating workweek compensation plan.

For these reasons, the Chamber recommends that the Department modify section 778.114(a)(2) as follows:

[55] *See* 29 C.F.R. Part 541, Subpart G ("Salary Requirements").
[56] 29 C.F.R. § 541.602.
[57] 29 C.F.R. § 541.602(b)(1) & (6).

§ 778.114 Fluctuating workweek method of computing overtime.

(a) The fluctuating workweek may be used to calculate overtime compensation for a nonexempt employee if the following conditions are met:

* * *

(2) The employee is paid on a salary basis as compensation for all hours worked in the workweek, whether few or many (the term "salary basis" shall have the same meaning, and be subject to the same exceptions, as set forth in 29 C.F.R. § 541.602);

* * *

V. Conclusion

The U.S. Chamber of Commerce supports the Proposed Rule, but also recommends that the Department modify the Proposed Rule to clarify that:

(1) the interpretive bulletin provides examples of the standard overtime calculation—not restrictions, conditions, or limitations on that standard calculation;

(2) the fluctuating workweek method described in the example may be used so long as the salary is reasonably calculated to provide compensation for all hours worked at an amount no less than the minimum wage; and

(3) the fluctuating workweek method described in the example may be used so long as the employee is paid on a salary basis as defined in 29 C.F.R. § 541.602.

Sincerely,

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