Rethinking Overtime: The Fluctuating Workweek Method No Longer Works

Maddie Joyce*

I. INTRODUCTION

The fluctuating workweek method of overtime compensation presents a complex challenge to the protections intended by the Fair Labor Standards Act (FLSA).[1] While the fluctuating workweek method offers employers flexibility in managing labor costs,[2]

* Maddie Joyce (formerly Maddie Meister), J.D. Candidate, The University of Iowa College of Law, 2026; B.A. Psychology, the University of Iowa, 2023. I would like to thank my friends on the *Journal of Corporation Law* for their encouragement and guidance throughout the note-writing and editing process. I would also like to thank my husband John for his unwavering support.

1. *See* Garrett R. Krueger, Comment, *Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1098 (1995) (stating that "[t]he Act's stated purpose is to protect workers from 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency and generally well-being of workers'") (quoting 29 U.S.C. § 202(a) (1988)).

2. Anthony J. Galdieri, *The Fluctuating Workweek: How It Works, How It's Treated, How It's Perceived*, 8 PIERCE L. REV. 157, 158–59 (2010).

particularly in industries with unpredictable schedules,[3] it raises serious concerns about employee well-being.[4] Historically, the most pressing concern has been the disproportionate impact of the fluctuating workweek on low-wage workers.[5]

The fluctuating workweek method allows employers to pay a fixed weekly salary that includes overtime compensation, resulting in employees receiving reduced overtime pay as their hours increase.[6] This structure discourages hiring additional employees and incentivizes overworking a smaller workforce—precisely the kind of practice the FLSA was designed to prevent.[7]

A clear illustration of this issue is presented in *Thomas v. Bed Bath & Beyond, Inc.*[8] In this case, department managers at Bed Bath & Beyond were compensated under the fluctuating workweek method, where they worked fluctuating hours but were paid a fixed weekly salary.[9] The department managers were often scheduled for at least 47 hours per week, with their actual hours fluctuating based on store needs.[10] Despite working extensive overtime, their overtime compensation was calculated at a reduced rate, minimizing the financial pressure on Bed Bath & Beyond to spread work among more staff.[11] This system,

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3. *See* Cat Symonds, *Predictive Scheduling Laws: Employer's Guide*, FACTORIAL (Aug. 19, 2025), https://factorialhr.com/blog/predictive-scheduling-laws-employers-guide/ [https://perma.cc/WP9K-UTM4] (discussing that the FLSA "does not include any provisions for predictive scheduling . . . mean[ing] that, under federal law, employers can generally change employees' work schedules without prior notice or consent, provided they comply with contracted hours and adhere to overtime regulations for non-exempt workers"); *see also* Lisa Nagele-Piazza, *Should Employers Use the Fluctuating Workweek Method?*, SHRM (Mar. 13, 2017), https://www.shrm.org/topics-tools/employment-law-compliance/employers-use-fluctuating-workweek-method [https://perma.cc/HXZ3-WJRC] (stating that "this method works well for transitioning employees who were previously treated as exempt").

4. *See* William C. Ruggiero, *DOL Weighs in on Fluctuating Workweek Method: Employee Hours Do Not Need to Fluctuate Below 40 to Qualify*, OGLETREE DEAKINS (Sept. 1, 2020), https://ogletree.com/insights-resources/blog-posts/dol-weighs-in-on-fluctuating-workweek-method-employee-hours-do-not-need-to-fluctuate-below-40-to-qualify/ [https://perma.cc/83GP-89BY] (discussing that employees possibly do not benefit from the fluctuating workweek method because it "does not require that an employee's hours fluctuate below 40 hours per week").

5. *See, e.g.*, Davis v. Friendly Express, Inc., No. 02-14111, 2003 WL 21488682, at *1 (11th Cir. Feb. 6, 2003) (discussing how the fluctuating workweek applies to the convenience store managers); *In re* Tex. EZPawn Fair Lab. Standards Act Litig., 633 F. Supp. 2d 395, 397 (W.D. Tex. 2008) (discussing how the fluctuating workweek applies to the retail pawn and short-term loan managers); *see also* Perez v. RadioShack Corp., No. 02 C 7884, 2005 WL 3750320, at *1 (N.D. Ill. Dec. 14, 2005) (discussing how the fluctuating workweek applies to the RadioShack store managers); *see also* Griffin v. Wake Cnty., 142 F.3d 712, 714 (4th Cir. 1998) (discussing how the fluctuating workweek applies to EMT drivers).

6. *See* Galdieri, *supra* note 2, at 159–60 ("[T]he more the employee works and the more overtime the employee logs, the less he or she is paid for each additional hour of overtime.") (quoting Monahan v. County of Chesterfield, 95 F.3d 1263, 1280 (4th Cir. 1996)).

7. *See* Krueger, *supra* note 1, at 1099 ("Congress believed that an overtime provision would spread work among a greater number of workers, thereby reducing unemployment.").

8. *See generally* Thomas v. Bed Bath & Beyond Inc., 961 F.3d 598 (2d Cir. 2020) (discussing the application of the fluctuating workweek method).

9. *Id.* at 601.

10. *Id.* at 602.

11. *Id.* at 606–07.

while compliant with the FLSA,[12] resulted in long hours for the department managers without meaningful financial rewards for their additional work.[13]

The *Thomas* case demonstrates how the fluctuating workweek method can lead to the very outcomes that the FLSA sought to remedy: excessive work hours for a few employees and reduced incentives for employers to create new jobs.[14] By exploring cases like this, it becomes clear that the fluctuating workweek method, though permissible,[15] undermines the FLSA's core protections by favoring employer cost-cutting over employee welfare.[16]

This Note proceeds in three parts. Part II reviews the history and development of the fluctuating workweek method under the FLSA. Part III analyzes the fluctuating workweek's practical application and its benefits and challenges. And lastly, Part IV offers recommendations that promote better alignment with the FLSA's protective goals.

II. BACKGROUND

A. The Enactment of the FLSA

During the Great Depression, President Franklin D. Roosevelt signed the FLSA into law.[17] As the cornerstone of Roosevelt's New Deal, the FLSA aimed to eliminate child labor, establish a federal minimum wage, and mandate overtime pay.[18] According to Roosevelt, these goals were sufficient to further the standard of a "self-supporting and self-respecting democracy."[19]

This government intervention, through the FLSA, was necessary to address workers' rights. Before the FLSA, the United States workforce faced "conditions that amounted to economic enslavement."[20] School-aged children risked their lives spending 50 to 70 hours a week in mines, factories, and mills.[21] Women frequently received inadequate wages

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12. 29 C.F.R. § 778.114; *see also Fact Sheet #82: Fluctuating Workweek Method of Computing Overtime Under the Fair Labor Standards Act (FLSA) / 'Bonus Rule' Final Rule*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (July 2020) [hereinafter *'Bonus Rule' Final Rule*], https://www.dol.gov/agencies/whd/fact-sheets/82-bonus-rule [https://perma.cc/G6DA-5C4Q] (explaining that "[t]o use the fluctuating workweek method, employees' hours actually must change on a week-to-week basis, and employees must receive the agreed-upon fixed salary even when they work less than their regularly scheduled hours").

13. The Court held that "the FWW method of calculating overtime compensation does not require employees' schedules to fluctuate above and below . . . 40 hours per week." *Bed Bath & Beyond Inc.*, 961 F.3d at 612. It necessarily follows that employees appear to suffer a detriment if they are never working under 40 hours. *Id.*

14. *See* Krueger, *supra* note 1, at 1099 ("[T]he overtime provisions of [the] FLSA are designed to stimulate the employment market and protect workers' physical and economic well-being.").

15. *See* 29 C.F.R. § 778.114 (codifying the fluctuating workweek method).

16. *See* Nagele-Piazza, *supra* note 3 (stating that "[f]or employers, the fluctuating workweek method . . . help[s] reduce labor costs as compared to an hourly basis of pay").

17. Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORN. L. REV. 557, 558 (2019).

18. *Id.*

19. *Id.* at 559.

20. Laura Huizar, *A Baseline for Economic Freedom: 80 Years of Fair Labor Standards*, NAT'L EMP. L. PROJECT (Oct. 23, 2018), https://www.nelp.org/80-years-of-fair-labor-standards/ [https://perma.cc/TZ7K-PTRG].

21. *Id.*

because employers disallowed bargaining for higher pay.[22] And researchers claimed that bakers' unreasonably long hours exposed them to not only great physical exertion but also great risks to their health.[23] Even when the state and federal government stepped in to pass laws to protect workers, the courts found them unconstitutional as a limit to one's freedom to contract.[24] It took until 1937—nearly one year before the FLSA's passage—before the United States Supreme Court upheld a minimum wage law in the notorious case of *West Coast Hotel*.[25]

Despite the FLSA's historical significance, it faces scrutiny in the modern economy.[26] While it remains fundamental to U.S. employment law—covering over 143 million workers[27]—critics argue that it is outdated and ill-suited for contemporary work arrangements.[28]

B. The FLSA: The Traditional Method of Overtime Compensation

The FLSA established a federal mandate for overtime compensation to guarantee fair labor standards for nonexempt workers.[29] Section 7(a) of the FLSA requires employers to pay employees "at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per workweek."[30] This provision ensures that employees are fairly compensated for additional hours and supports workplace equity.

The regular rate calculation, as defined in 29 U.S.C. § 207(e), plays a crucial role in determining overtime pay.[31] The statute defines the "regular rate" as encompassing "all remuneration for employment," except for eight specific statutory exclusions.[32] To calculate the regular rate, total remuneration is divided by the number of hours worked in the

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22. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 386–88 (1937) (discussing the law that was put into place because women could not receive adequate wages).

23. *See* Lochner v. New York, 198 U.S. 45, 70 (1905) (Harlan, J., dissenting) (discussing Professor Hirt's research on the long hours and grueling conditions that bakers faced at the time).

24. *Id.* at 64 (majority opinion) (finding a statute unconstitutional where it interfered with the freedom to contract).

25. *See West Coast Hotel Co.*, 300 U.S. at 398 (upholding a minimum wage law for women).

26. Griffith, *supra* note 17, at 559 (stating that "[f]ederal minimum wage and overtime complaints are on the rise in recent years").

27. *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (July 2009), https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage [https://perma.cc/7FW9-BMVF].

28. *See* Griffith, *supra* note 17, at 560 (discussing how the FLSA "has been disparaged as an outdated 'geriatric piece of legislation in need of updating and rejuvenation' to keep pace with twenty-first century business realities"); *see also* Leo E. Strine, Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 82 (2015) (discussing how the FLSA came about in an era where the individual worker struggled to obtain even livable wages).

29. *See generally* 29 U.S.C. § 207(a) (discussing how a "non-exempt" employee is entitled to certain protections under the FLSA, such as guaranteed overtime pay).

30. *Regular Rate Under the Fair Labor Standards Act*, FED. REG.: WAGE & HOUR DIV. (Mar. 29, 2019), https://www.federalregister.gov/documents/2019/03/29/2019-05687/regular-rate-under-the-fair-labor-standards-act [https://perma.cc/63WY-6AET].

31. 29 U.S.C. § 207(e).

32. *Id.*

given workweek.[33] Importantly, the regular rate must be recalculated weekly to reflect changes in employee earnings and hours worked.[34]

For hours worked beyond the 40-hour threshold, employees are entitled to two forms of compensation: straight-time pay at the regular rate, plus an overtime premium of 50% of the regular rate for each additional hour worked.[35] The Supreme Court in *Walling v. Youngerman-Reynolds Hardwood Co.*, affirmed the necessity of this method.[36] In fact, in *Walling*, the Court emphasized that dividing non-excludable remuneration by hours worked is the *only* appropriate method to compute the regular rate.[37]

C. The FLSA: Adopting the Fluctuating Workweek

The fluctuating workweek method of calculating overtime pay was introduced by the U.S. Department of Labor in 1940 through *Interpretative Bulletin No. 4*.[38] The Department of Labor clarified that the fluctuating workweek method permitted employers to pay overtime wages at only one-half the employee's regular rate, so long as certain requirements were met.[39] This new overtime calculation method provided a solution for compensating employees whose hours varied from week to week by offering employers a way to maintain salary-based compensation while complying with the FLSA's overtime requirements.[40] The Department of Labor emphasized that this new method for calculating overtime was "an alternative to the traditional method of overtime compensation, not an exception that cheats or oppresses the employee."[41]

Two years later, the United States Supreme Court affirmed the fluctuating workweek method in *Overnight Motor Transportation Company v. Missel*.[42] The Court held that when an employee with a fluctuating schedule is paid a fixed weekly salary, the employer must retroactively add an overtime premium of 50% of the employee's regular rate for hours worked beyond 40 in any given week.[43] Notably, the Court clarified that the regular rate is calculated by dividing the weekly salary by the total number of hours worked, including overtime hours.[44] The *Missel* decision provided the foundation for how employers would apply the fluctuating workweek method under the FLSA.[45]

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33. *Id.*

34. *See* Trusha Palkhiwala, *How to Calculate Overtime Pay*, ADP (Nov. 17, 2025), https://www.adp.com/resources/articles-and-insights/articles/h/how-to-calculate-overtime-pay.aspx [https://perma.cc/88QX-FEHZ] (stating that "each workweek stands alone, which means that averaging hours worked over two or more workweeks is not permitted").

35. *See id.* ("Following FLSA rules, multiply the regular rate of pay by 1.5 and multiply the result by the total number of overtime hours worked.").

36. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 426 (1945).

37. *Id.*

38. John F. Lomax, Jr., *The Attack on the Fluctuating Workweek Method*, 30 ABA J. LAB. & EMP. L. 347, 347 (2015) ("Soon after Congress adopted the FLSA, the DOL issued Interpretative Bulletin No. 4 stating that the fluctuating workweek was an acceptable method for employers to comply with . . . paying overtime.").

39. *Id.*

40. *Id.* at 347–48.

41. Galdieri, *supra* note 2, at 157.

42. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 584 (1942).

43. *Id.* at 577–78.

44. *Id.*

45. *See id.* at 584. This decision is no longer good law; however, it was foundational to how the Court understands today's fluctuating workweek.

After the *Missel* decision, the Department of Labor continued to publish interpretive bulletins and, in 1968, codified the fluctuating workweek method.[46] With time, though, the fluctuating workweek method became the subject of considerable debate in the courts. Some courts repeatedly endorsed the method's flexibility, stressing the need to afford the "fullest possible scope to agreements" between employers and employees in industries where work hours are inconsistent.[47] However, other courts thought the flexibility resulted in employer and employee confusion. More specifically, courts debated whether the fluctuating workweek method's fixed salary included bonuses and premium payments.[48] While historically, courts had deemed bonuses compatible with the fluctuating workweek method, this consensus began to unravel as disagreements over their inclusion emerged.[49]

To resolve this confusion, the Department of Labor's 2008 Notice of Proposed Rulemaking announced the potential "to add a sentence to the end of § 778.114(a) providing that payment of overtime premiums and other bonus and non-overtime premium payments [would] not invalidate the 'fluctuating workweek' method of overtime payment."[50] This proposed language reflected the Department of Labor's support for bonus and premium payments being included in the calculation.[51] In fact, in 2009, the Wage and Hour Division affirmed this position.[52]

Despite this clear direction, the Department of Labor reversed its position in its 2011 final rule, stating that the fluctuating workweek method could not include bonus payments in the calculation.[53] As such, this reversal deepened the divide among courts, with some following the 2011 interpretation, while others rejected it as inconsistent with the FLSA's purpose.[54] For example, "[i]n one particularly vexing instance, federal courts in two different states reached conflicting determinations as to the applicability of the fluctuating workweek with respect to the *same* employer and salaried non-exempt employees subject to the *same* bonus plan."[55]

46. Lomax, *supra* note 38, at 348; *Fluctuating Workweek Method of Computing Overtime*, FED. REG.: WAGE & HOUR DIV. (June 8, 2020), https://www.federalregister.gov/documents/2020/06/08/2020-10872/fluctuating-workweek-method-of-computing-overtime [https://perma.cc/8YHH-TPG4].

47. Hunter v. Sprint Corp., 453 F. Supp. 2d 44, 56–57 (D.D.C. 2006) (quoting Walling v. A.H. Belo Corp., 316 U.S. 624, 635 (1942)).

48. *See* O'Brien v. Town of Agawam, 350 F.3d 279, 288 (1st Cir. 2003) (stating that certain types of additional pay were incompatible with the fluctuating workweek method, such as the police officers' receipt of "bonus" pay for working nights).

49. *Compare* Cash v. Conn Appliances, Inc., 2 F. Supp. 2d 884, 908 (E.D. Tex. 1997) (demonstrating that employees can receive incentive bonuses under the fluctuating workweek method), *with O'Brien*, 350 F.3d at 288 (discussing why bonuses were not recognized under the fluctuating workweek method).

50. *Fluctuating Workweek Method of Computing Overtime*, *supra* note 46.

51. *Id.*

52. *Id.*

53. *See id.* (stating that the 2011 preamble "interpreted the 'current rule' to mean that bonus and premium payments 'are incompatible with the fluctuating workweek method of computing overtime under section 778.114'").

54. *See id.* ("A growing number of courts, since 2011, have developed a dichotomy between 'productivity-based' supplemental payments . . . and 'hours-based' supplemental payments.").

55. Paul DeCamp, *U.S. Department of Labor Allows Employers to Give Bonuses and Other Extra Pay to Fluctuating Workweek Employees*, EPSTEIN BECKER GREEN: WAGE & HOUR DEF. BLOG (May 20, 2020), https://www.wagehourblog.com/u-s-department-of-labor-allows-employers-to-give-bonuses-and-other-extra-pay-to-fluctuating-workweek-employees [https://perma.cc/MG45-4D7E].

Following years of judicial inconsistency and employer uncertainty, the Department of Labor issued its 2020 final rule.[56] Under the final rule, the Department of Labor clarified that bonuses or other incentive-based pay, such as commissions or hazard pay, are indeed compatible with the fluctuating workweek method.[57] The Department of Labor also stated that it believed that "this rule [would] allow employers and employees to better utilize flexible work schedules."[58]

D. Who Is Eligible for the Fluctuating Workweek?

An employer can use the fluctuating workweek method under the FLSA by satisfying five criteria.[59] First, the hours must fluctuate from week to week.[60] Second, the employees' fixed salary cannot vary with the number of hours worked.[61] Third, the fixed salary must satisfy minimum wage laws.[62] Fourth, the employer and employee must "have a clear and mutual understanding that the fixed salary is compensation."[63] And lastly, the employer must still compute overtime pay owed under the fluctuating workweek method.[64]

Courts require strict adherence to the fluctuating workweek method requirements.[65] Therefore, absent any of the listed criteria, the court will invalidate the employer's usage of the fluctuating workweek method.[66]

1. Fluctuating Hours

The first requirement is fluctuating hours. The current regulation and the 2020 final rule confirm "that the fluctuating workweek method is appropriate where, *inter alia*, an employee 'ha[s] hours of work which fluctuate from week to week.'"[67] Despite some concerns raised during the rulemaking process—particularly whether the fluctuation must include weeks with fewer than 40 hours—the Department of Labor clarified that there is no requirement for hours to fluctuate below 40.[68] The Department of Labor has consistently held that the fluctuating workweek method remains valid even if only the overtime hours vary from week to week.[69]

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56. *'Bonus Rule' Final Rule*, *supra* note 12.

57. *Id.*

58. *Fluctuating Workweek Method of Computing Overtime*, *supra* note 46.

59. *See id.* ("Proposed § 778.114(a)(1) through (5) lists five circumstances which, if all are met, enable an employer to use the fluctuating workweek method.").

60. Linda K. Horras, *DOL Clarifies Scope of Fluctuating Workweek Overtime Pay Calculation*, HINSHAW (Sept. 16, 2020), https://www.employmentlawobserver.com/dol-clarifies-scope-of-fluctuating-workweek-overtime [https://perma.cc/5HVD-CPRW].

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* DeCamp, *supra* note 55 (discussing how the employer must comply with the fluctuating workweek method's requirements to avoid the court concluding that it is unavailable).

66. *Id.*

67. *Fluctuating Workweek Method of Computing Overtime*, *supra* note 46 (alteration in original).

68. *See id.* ("[C]ourts have . . . found that the fluctuating workweek method does not actually require that the employee's hours fluctuate below forty hours.").

69. *See id.* ("The Department has consistently stated that the fluctuating workweek method remains appropriate even when it is only the number of overtime hours that fluctuate.").

2. *Fixed Salary*

The second requirement is a fixed salary. To use the fluctuating workweek method, an employee must receive a fixed salary that does not change based on the number of hours worked each week, even if they work fewer than forty hours.[70] Some courts argued that the Department of Labor should adopt a more flexible "salary basis" test to allow for deductions for absences.[71] However, the Department of Labor rejected this suggestion and instead opted to only include deductions based on willful absences or infractions.[72]

3. *Fixed Salary Satisfies Minimum Wage*

The third requirement involves satisfying the minimum wage. For the fluctuating workweek method to apply, an employee's fixed salary must at least equal the minimum wage.[73] Stated another way, the employee's fixed salary must remain above the minimum wage even in weeks with lots of hours worked.[74] If a high-hour workweek causes the regular rate to drop below the minimum wage, the employer must provide additional pay to meet the requirement.[75] However, occasional shortfalls due to unforeseen circumstances do not invalidate the fluctuating workweek method, so long as the fixed salary was reasonably calculated to meet the minimum wage in most weeks.[76] Frequent or predictable shortfalls, though, require a new pay arrangement.[77]

4. *Clear and Mutual Understanding*

The fourth requirement involves having "a clear mutual understanding" between employer and employee that the fixed salary covers all hours worked in a week, regardless of

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70. *Id.*

71. *See id.* (stating that it is "the longstanding position of the Wage and Hour Division that an employer utilizing the fluctuating workweek method of payment may not make deductions from an employee's salary for absences occasioned by the employee"); *see also* Ruggiero, *supra* note 4 ("[A]n employer 'may not deduct from an employee's salary when the employee has exhausted a sick leave bank or not yet earned sufficient sick leave to cover an absence due to illness.'").

72. *See* Samson v. Apollo Res., Inc., 242 F.3d 629, 638 (5th Cir. 2001) (stating that deductions cannot be made for illness, but the employer can make deductions for willful absence or tardiness); *see also* Ruggiero, *supra* note 4 (emphasizing that employers can deduct from employee's salaries "for *willful* absences or tardiness or for infractions of major work rules, provided that the deductions do not cut into the [required] . . . overtime pay") (alteration in original).

73. *See* Galdieri, *supra* note 2, at 163 ("[T]he employee's fixed salary must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage.").

74. *Id.*

75. *See* Cash v. Conn Appliances, Inc., 2 F. Supp. 2d 884, 894 (E.D. Tex. 1997) (stating that when the employee works so many hours that her salary fails to support the minimum wage, the employer must provide "an additional amount sufficient to generate an average hourly rate equal to the applicable minimum wage").

76. *See id.* (discussing how "the employee's salary must be large enough to ensure that her average hourly rate never dips under the applicable minimum wage," and this amount suffices so long as it is "'reasonably calculated to provide' an average hourly rate").

77. *See* Perez v. RadioShack Corp., No. 02 C 7884, 2005 WL 3750320, at *3 (N.D. Ill. Dec. 14, 2005) (stating that the employer must reach a new understanding with the employee if they breach the fluctuating workweek framework too many times).

the number of hours.[78] This means that a conversation with the employee during onboarding about their fixed salary covering all hours is sufficient. The employer is not required to put this information in writing. Some commenters proposed removing or modifying this requirement, stating that the method should be based on objective evidence rather than subjective understanding.[79] However, the Department of Labor maintains that the current understanding is sufficient and does not require employers to disclose more information or explain the specific calculations used to determine overtime pay. [80]

5. *Computing Overtime Under the Fluctuating Workweek Method*

The last requirement involves computing overtime. Section 778.114(a)(5) clarifies that under the fluctuating workweek method, employees must receive overtime pay at a rate of at least half their regular rate for overtime hours, in addition to their fixed salary, bonuses, and other supplemental payments.[81] The definition also includes a catch-all category for additional pay in kind.[82] These additional payments must be included in the regular rate calculation unless exempted by the FLSA.[83]

This method simplifies compliance by treating bonuses and other supplemental pay consistently. Supporters, such as the Society for Human Resource Management, applaud the added clarity that the 2020 final rule brought,[84] while others dislike the broad catch-all category for "additional pay in kind."[85] Regardless, as Cheryl Stanton, the DOL Administrator of the Wage and Hour Division at the time, said, this final rule gave employers better flexibility to deal with the COVID-19 situation.[86]

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78. Tina Tellado & Deisy Castro, *Wages, Hours & Leave, Professional Perspective—Analysis of the Fluctuating Workweek: A Complex Alternative to Overtime Compensation*, BLOOMBERG L. (Jan. 2019), https://www.bloomberglaw.com/external/document/X8C3E5M8000000/wages-hours-leave-professional-perspective-analysis-of-the-fluct [https://perma.cc/Z6JN-Q28Q]; *see also* Hunter v. Sprint Corp., 453 F. Supp. 2d 44, 61 n.19 (D.D.C. 2006) (stating that employers must "negotiate an overtime compensation arrangement with the employee at the outset" to ensure a mutual understanding).

79. *See* Tellado & Castro, *supra* note 78. (explaining that the understanding between the employer and the employee depends on the context of the situation).

80. *See, e.g.*, U.S. Dep't of Lab.: Wage & Hour Div., Opinion Letter on FLSA2009-3, (Jan. 14, 2009) (stating that the language of "clear and mutual understanding" does not extend to the method used to compute overtime pay).

81. *Fluctuating Workweek Method of Computing Overtime*, *supra* note 46.

82. *See id.* ("[P]ayment of bonuses, premiums, and other additional pay under the fluctuating workweek method will not change the half-time overtime calculation, as long as those payments are appropriately included in the regular rate.").

83. *See id.*

84. *See id.* ("According to the Society for Human Resource Management (SHRM), 'employees and employers are best served by a system that promotes maximum flexibility in structuring employee pay and benefits'").

85. *See id.* ("The WFCA requested that the Department restrict 'additional pay of any kind' . . . 'to what is ultimately included in the definition of the regular rate.'").

86. *USDOL Clarifies the Fluctuating Work Week Method of Paying Overtime and Its Relationship to Provision of Bonuses: Keep Those Interpretations Coming!*, FOX ROTHSCHILD LLP (May 29, 2020), https://wagehourlaw.foxrothschild.com/2020/05/articles/general-wage-hour-law-news-updates/usdol-clarifies-the-fluctuating-work-week-method-of-paying-overtime-and-its-relationship-to-provision-of-bonuses-keep-those-interpretations-coming/ [https://perma.cc/98XZ-79NA].

III. ANALYSIS

The fluctuating workweek method's practical application involves nuanced calculations that can affect an employer's compliance.[87] Thus, this section provides a detailed analysis of the application of the fluctuating workweek method. After the practical application, this section demonstrates the method's benefits and challenges.

A. Calculating Overtime Under the Fluctuating Workweek

The fluctuating workweek method hinges on the principle that the employee's fixed salary covers all straight-time hours, while overtime is compensated at half the employee's regular rate, which varies each week.[88] For example, if an employee earns a fixed weekly salary of $800 and works 44 hours one week, the regular rate for that week is $18.18 per hour ($800/44 hours).[89] Because the salary already covers all hours worked, the employer owes half-time pay—$9.09 per hour—for the four overtime hours.[90] Thus, the total weekly compensation amounts to $836.36 ($800 salary + $36.36 overtime).[91] The following week, if the employee works 56 hours, the regular rate drops to $14.29 per hour ($800/56 hours), resulting in half-time overtime pay of $7.14 per hour.[92] For 16 overtime hours, the employee is owed an additional $114.29, bringing the total compensation for that week to $914.29 ($800 salary + $114.29).[93]

The fluctuating workweek calculation illustrates the financial efficiency for employers: as hours increase, the regular hourly rate decreases, which reduces the cost of overtime.[94] While this method benefits employers managing fluctuating demands, employees may feel under-compensated when overtime yields diminishing returns. For example, if an employee with a $600 salary works 50 hours in a week, the amount of money that they take home depends on whether their employer uses the traditional method or the fluctuating workweek method to calculate overtime. Under the traditional method, the employee would receive $750 ($600 salary + 10 hours at $18 per hour).[95] However, under the fluctuating workweek method, the employee would only take home $660 ($600 salary + 10 hours at $6 per hour).[96] As this shows, the difference in overtime compensation can be

87. *See* Tellado & Castro, *supra* note 78 (stating that "a legally compliant fluctuating workweek method of overtime payment requires a complex assessment of a variety of factors" which is why "employers [should] consult with counsel before pursuing implementation of a fluctuating workweek plan").

88. 29 C.F.R. § 778.114(a)–(b).

89. *See e.g.*, Bill Maccarone, *New DOL Rule Makes It Easier to Lower First Responder Pay*, FIREFIGHTER OVERTIME (June 14, 2020), https://www.firefighterovertime.org/2020/06/14/new-dol-fww-rule/ [https://perma.cc/M27T-U7G5] (applying this calculation for a firefighter).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Maccarone, *supra* note 89 ("The FWW's unpopularity—*among workers*—is linked to the fact that an employee's regular rate decreases as his or her overtime hours increase.").

95. *See* Galdieri, *supra* note 2, at 163 (following the example for how employers must calculate the fluctuating workweek method).

96. *Id.* (following the example for how employers must calculate the fluctuating workweek method).

significant, raising concerns about fairness, particularly in industries where long workweeks are common.[97]

Furthermore, incorporating bonuses and premiums into the calculation adds complexity. Under FLSA regulations, the regular rate must include non-excludable payments such as commissions, hazard pay, or shift differentials.[98] Consider the same employee who earns a $100 productivity bonus during a 48-hour work week.[99] The total straight-time compensation becomes $700 ($600 salary + $100 bonus).[100] The new regular rate is $14.58 per hour ($700/48 hours), and the half-time overtime rate is $7.29 per hour.[101] For the eight overtime hours, the employee earns an additional $58.32, resulting in a total weekly compensation of $758.32.[102] This calculation highlights how bonuses increase the regular rate, leading to higher overtime costs—but only modestly—since overtime is still compensated at the reduced half-time rate.

B. Advantages of the Fluctuating Workweek Method

The fluctuating workweek method offers several operational and financial advantages, particularly for employers.[103] Stabilizing labor costs through a fixed salary helps businesses budget more effectively,[104] especially in industries with irregular workloads (e.g., retail, hospitality, and transportation).[105] In contrast to the traditional overtime model, where overtime is compensated at one and a half times the regular rate, the fluctuating workweek method lowers overtime premiums, offering a financial cushion.[106] For example, when an employee works 48 hours, the additional overtime liability under the fluctuating workweek method is $50 ($6.25 per hour for eight overtime hours), compared to $180 under a time-and-a-half calculation at a $15 hourly rate.[107] These significant savings make the fluctuating workweek model particularly appealing for businesses managing unpredictable demand.[108]

97. For example, firefighters and first responders traditionally work long hours per week. *See* Maccarone, *supra* note 89.

98. *Compare* 29 C.F.R. § 778.209, *with* 29 U.S.C. §§ 207(e)(1)–(8).

99. *See* DeCamp, *supra* note 55 (following the example to calculate regular rates, including bonuses).

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* Patrick McHale, *Understanding U.S. DOL's Fluctuating Workweek Overtime Rule*, CBIA (July 6, 2020), https://www.cbia.com/news/hr-safety/fluctuating-workweek-overtime-rule/ [https://perma.cc/9RDW-6TVC] (discussing how the fluctuating workweek method allows employers budget for labor costs).

104. *Id.*

105. For example, lawn maintenance companies and golf courses tend to use the fluctuating workweek overtime pay method. *See Fluctuating Workweek Overtime Pay*, N.C. DEP'T LAB., https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/fluctuating-workweek [https://perma.cc/QZD2-DVYM].

106. 29 C.F.R. § 778.114.

107. *Compare* 29 C.F.R. § 778.114 (listing the circumstances when an employer may use the fluctuating workweek method to properly compensate based on the regular rate for a nonexempt employee), *with* 29 C.F.R. §§ 778.100–788.122 (providing guidance as to the calculations for overtime pay under the FLSA).

108. Symonds, *supra* note 3.

The fluctuating workweek method also provides income stability for employees, as the fixed salary remains consistent even during weeks with fewer hours.[109] For instance, if employees work only 30 hours one week, they still receive their full $600 salary, regardless of the reduced hours.[110]

C. Challenges with the Fluctuating Workweek Method

Despite its advantages, the fluctuating workweek method poses several challenges. The most significant concern is the erosion of overtime compensation.[111] For example, because "almost 60% of American workers are paid an hourly wage," a great deal of these workers rely on overtime work to significantly supplement their take-home pay.[112] Thus, under the fluctuating workweek method, when employees work longer hours to earn less per overtime hour than traditional overtime structures, this seems to go against the very purposes of the FLSA's overtime provisions.[113] The primary purposes of the FLSA's overtime provisions are "to protect workers from long hours of work and to spread employment."[114] As such, the fluctuating workweek method seems to go against these purposes by encouraging employers to reduce workers' earnings, use more overtime, and hire fewer employees.

Additionally, the fluctuating workweek method's requirement for "fluctuating hours" per week encourages employers to frequently fluctuate the employee's hours *over* 40, if not every week.[115] Employers comply with the fluctuating workweek method merely by *fluctuating* the hours.[116] Therefore, there is more of an incentive for the employer to frequently fluctuate over 40 hours while retaining the lesser rate for overtime pay.[117] For example, if an employee works 43 hours the first week and 41 hours the next week, the employer has followed the "fluctuating hours" requirement.[118] However, in this situation, the employee is at a disadvantage because the employer receives the benefit (e.g., additional work by the employee), whereas the employee does not gain an equal benefit in return. Stated another way, if the "fluctuating hours" *never* go under 40, the employee's

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109. *See Fluctuating Workweek Method of Computing Overtime*, *supra* note 46 (clarifying that the hours worked must fluctuate from week-to-week).

110. *See id.* (using the test for "fluctuating" to illustrate that employees working a different number of hours over 40 each week count as "fluctuating").

111. *See* Krueger, *supra* note 1, at 1098 (illustrating that the purpose of the FLSA's overtime laws is to protect worker's well-being). For example, when employees are working longer hours and earning less per hour than under the traditional overtime method. *Id.*

112. J. Sandberg, *You Choose: Time or Money?*, FISHER PHILLIPS (Jan. 6, 2014), https://www.fisherphillips.com/en/news-insights/you-choose-time-or-money.html [https://perma.cc/W96J-J86V].

113. *Id.*; *compare* 29 C.F.R. § 778.114 (listing the circumstances when an employer may use the fluctuating workweek method to properly compensate based on the regular rate for a nonexempt employee), *with* 29 C.F.R. §§ 778.100–788.122 (providing guidance as to the calculations for overtime pay under the FLSA).

114. *Fluctuating Workweek Method of Computing Overtime*, *supra* note 46.

115. *See id.* (illustrating how the fluctuating workweek method remains applicable even when the number only "fluctuates" over 40, which is beneficial to the employer).

116. *Id.*

117. *Id.*

118. *See id.* (applying the framework for the "fluctuating" requirement).

"consistent base salary" is undermined by the substantial loss of income compared to the traditional model.[119]

The fluctuating workweek method's "clear and mutual understanding" requirement further extends protection to employers. The FLSA requires "a clear mutual understanding" between the employer and employee that the fixed salary covers all hours worked in a week, regardless of the number of hours.[120] However, in practice, this requirement favors employers. For example, "clear and mutual understanding" does not require a written contract.[121] Nor does "clear and mutual understanding" require employers to ensure employees understand the complexities of the fluctuating workweek method.[122] As mentioned earlier in this Note, the employer can satisfy this requirement through a brief conversation during onboarding.[123] This does not seem to favor employee protection.

Moreover, some states have moved to supersede the FLSA's fluctuating workweek method through enactments of state law. Currently, seven states generally prohibit the use of the fluctuating workweek method under state law: Alaska, California, Pennsylvania, New Mexico, Connecticut, Montana, and New Jersey.[124] For example, in Pennsylvania, the Supreme Court of Pennsylvania held that the fluctuating workweek method was not permissible under the Pennsylvania Minimum Wage Act (PMWA).[125] In doing so, the Court explained that, interpreting the PMWA, employers can *only* comply with overtime by paying one and a half times the regular rate for each overtime hour.[126] Therefore, at the state level, courts seem to be less accepting of the fluctuating workweek method by holding that it is inconsistent with state law.

IV. RECOMMENDATION

The fluctuating workweek method provides an effective cost-control measure for employers while contravening the FLSA's goal of safeguarding fair compensation and worker welfare. This section offers actionable recommendations for the FLSA to take against the fluctuating workweek method to reconcile employer labor strategies with the FLSA's protective framework. The first recommendation is for the FLSA to eliminate the use of the fluctuating workweek method to compute overtime compensation. This would not be an unreasonable step for the FLSA to take. In fact, as this Note has previously shown, multiple states have already taken such action.[127] The second recommendation is an alternative approach. If the FLSA does not eliminate the use of the fluctuating workweek method to compute overtime compensation, it should at least take measures to improve the current test. By implementing either of these steps, the FLSA can promote a healthier workforce.

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119. *Compare* 29 C.F.R. § 778.114 (listing the circumstances when an employer may use the fluctuating workweek method to properly compensate based on the regular rate for a nonexempt employee), *with* 29 C.F.R. §§ 778.100–788.122 (providing guidance as to the calculations for overtime pay under the FLSA).

120. Tellado & Castro, *supra* note 78.

121. *Id.*

122. *See id.* (explaining that there is no requirement that "employee[s] must understand the manner in which overtime pay is calculated in order to meet the 'clear mutual understanding' requirement").

123. *See* discussion *supra* Part II.D.iv.

124. Tellado & Castro, *supra* note 78.

125. Chevalier v. Gen. Nutrition Ctrs., Inc., 220 A.3d 1038, 1051–59 (Pa. 2019).

126. *Id.*

127. *See* discussion *supra* Part III.C.

A. Supporting the Elimination of the Fluctuating Workweek Method

The FLSA should eliminate the use of the fluctuating workweek method of calculating overtime compensation because it is contrary to the FLSA's remedial purpose. As mentioned earlier in this Note, the primary purposes of the FLSA's overtime provisions are to protect workers from long work hours and to spread employment among more employees.[128] However, the fluctuating workweek method goes against these purposes in a few ways. First, the fluctuating workweek method encourages employers to reduce workers' earnings.[129] The fluctuating workweek method decreases an employee's earnings each week for each overtime hour.[130] As a result, in industries where employees frequently work over 40 hours, the employer is more likely to use this method. If the employer uses this method, the employee earns less than under the traditional overtime calculation.

Second, the fluctuating workweek method encourages employers to use more overtime.[131] In fact, "the marginal cost to the employer of another hour of overtime is *always* lower under the fluctuating workweek method than under the standard method—generally on the order of three times lower."[132] And lastly, the fluctuating workweek method encourages employers to hire fewer employees.[133] If the employer can pay less for overtime, then the employer is incentivized to overwork their existing staff instead of hiring additional workers.

States rejecting the fluctuating workweek method as a viable means to calculate overtime further signal the need to eliminate it. The FLSA does not preempt state law, and therefore, some states have used more restrictive standards that do not account for the fluctuating workweek method.[134] The states' main argument for eliminating the fluctuating workweek method stems from their belief that it cannot adequately compensate employees for all hours worked.[135]

Although the fluctuating workweek method does provide some benefits, these benefits do not outweigh the costs for the employees. For example, the employer being able to use the fluctuating workweek does give them flexibility and predictability with payment to their employees. However, this flexibility and predictability do not outweigh the employees' interest in receiving just compensation for their hours worked, especially overtime hours. Therefore, the FLSA should eliminate the fluctuating workweek method to calculate overtime and should instead rely on the traditional method of time and a half.

B. Supporting Legislative Reforms to Modernize the Fluctuating Workweek

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128. *Id.*

129. Margaret Poydock & Heidi Shierholz, *EPI Comments on the Department of Labor's Proposed Rule Regarding the Fluctuating Workweek Method*, ECON. POL'Y INST. (Dec. 5, 2019), https://www.epi.org/publication/epi-comments-on-the-department-of-labors-proposed-rule-regarding-the-fluctuating-workweek-method/ [https://perma.cc/C9BL-T3BK].

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Robert W. Pritchard, *DOL Issues Final Rule on Fluctuating Workweek Method of Computing Overtime Under Fair Labor Standards Act*, LITTLER (May 26, 2020), https://www.littler.com/news-analysis/asap/dol-issues-final-rule-fluctuating-workweek-method-computing-overtime-under-fair [https://perma.cc/9X8U-U3MG].

135. *See, e.g.*, Chevalier v. Gen. Nutrition Ctrs., Inc., 220 A.3d 1038, 1051–59 (Pa. 2019) (holding that regardless of a fluctuating workweek, overtime needs to be paid at a rate of 1.5x normal pay).

Method's Overtime Regulations

The fluctuating workweek method has evolved, but it is overdue for adjustments that reflect the realities of today's workforce and economic environment. If the FLSA does not eliminate the fluctuating workweek method, the alternative is for the Department of Labor to issue interpretative regulations that improve the current test. The Department of Labor should make two changes through its interpretative regulations: clarify "clear mutual understanding" and remove bonuses and premium payments from the fixed weekly rate.

First, "clear mutual understanding" should include more safeguards to ensure that employees understand the fluctuating workweek arrangement. Under the current interpretation of "clear mutual understanding," the employee has the potential of being tricked into agreeing to this compensation method. For example, the employer might advertise for a higher salary base than employers who use the traditional overtime method. In this situation, the employee is more likely to choose the higher salary option, even though they will receive less pay per overtime hour. Because the employer is only required to state that the salary covers all hours worked, the employee may not fully understand how overtime affects their take-home pay.

To help remedy this potential misunderstanding, the Department of Labor should issue interpretative guidance that instructs employers to explain the difference between the fluctuating workweek method and the traditional method for calculating overtime. After explaining the difference, the employer should confirm the employee's understanding in writing. One way the employer could explain the difference to the employee is through a video demonstration. After watching the video, the employee could answer questions about their understanding of the fluctuating workweek method. Although this adjustment does not fix the employee's potential for earning less money, it likely will help the employee's understanding of how the fluctuating workweek method functions.

Second, the Department of Labor should revert to its original understanding of the fixed weekly rate. When the Department of Labor approved the fluctuating workweek in 1940, the employer could use the fluctuating workweek method only if the employer and employee agreed upon a salary arrangement that includes a *fixed* weekly rate.[136] It necessarily follows that including bonuses and incentives in this weekly rate no longer makes the salary *fixed*. If the weekly rate is not fixed, there is a greater potential for the employer to misuse supplemental pay for their employees. As such, going back to the original understanding of a fixed weekly rate will better protect employees and align with the fluctuating workweek's original purpose.

V. CONCLUSION

The fluctuating workweek method reveals a tension between the employer's incentive to cut costs and the FLSA's protective framework. While the method's purpose is to offer flexibility in industries with varying workloads, its application undermines the FLSA's intent to ensure fair compensation and safeguard employee well-being.[137] As demonstrated

136. *See* discussion *supra* Part II.C (providing background on the fluctuating workweek method).
137. Krueger, *supra* note 1, at 1098.

throughout the analysis section, this method has been used to erode the financial rewards of overtime.[138]

Historical and legal developments surrounding the fluctuating workweek method further illustrate its misalignment with contemporary labor standards. The evolving interpretation of bonuses,[139] the complexity of compliance,[140] and the differences in state-level acceptance[141] reveal an ongoing struggle to align employer practices with the FLSA's overarching goals. Moreover, the method's reliance on fluctuating hours offers employers disproportionate advantages under the pretense of *flexibility*.

To bridge this gap, it is essential to advocate for reforms that align with the modern labor market. As this Note demonstrates, it is in the best interest of employees to eliminate the fluctuating workweek method to calculate overtime. In the alternative, the Department of Labor should at least issue interpretive regulations to improve the fluctuating workweek test. In taking one of these recommendations, this Note supports the FLSA's objectives and creates sustainable employment practices that attract employees and employers alike.

138. *See* discussion *supra* Part III.A.
139. *See* discussion *supra* Part II.B.
140. *See* discussion *supra* Part II.C.
141. *See* discussion *supra* Part III.C.