Department of Labor Permits Payment of Incentive Compensation by Employers Using Fluctuating Workweek

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On May 20, 2020, the United States Department of Labor (DOL) released a Final Rule authorizing employers that use the "fluctuating workweek" method for calculating employees' regular rates of pay to award employees additional incentive-based compensation above their fixed weekly salaries – such as bonuses, premium payments, commissions, or hazard pay – without running afoul of the DOL's fluctuating workweek rules. The new rule is designed to give employers who rely on the fluctuating workweek the ability to use incentive pay to address staffing issues that may arise as businesses attempt to reopen in the face of the COVID-19 pandemic.

The fluctuating workweek provides employers with an alternative method for calculating an employee's "regular rate" of pay, which is the amount an employer must multiply by 1.5 to determine the employee's overtime rate for purposes of the Fair Labor Standards Act's (FLSA) overtime rules. DOL rules permit employers to use a fluctuating workweek to calculate the regular rate where:

1. A non-exempt employee works a variable number of hours from week to week;
2. That employee receives a fixed salary for all non-overtime worked;
3. That fixed salary is sufficient to compensate that employee at a rate greater than the minimum wage for all hours worked; and
4. Both the employer and employee have a "clear and mutual understanding" that the salary is fixed and will not fluctuate with the number of hours worked each week.

Because the fluctuating workweek rule requires that employees receive fixed salaries that compensate them for all hours worked, employers using that method generally were unable to offer non-exempt employees incentive-based compensation in addition to their fixed salaries without losing the ability to use the fluctuating workweek method. Under the new rule, however, employers are permitted to pay their non-exempt employees who otherwise satisfy the fluctuating workweek requirements some additional incentive-based compensation without losing the benefits of the alternative pay method. The DOL's rule is intended to provide employers with greater flexibility to incentivize employees to return to the workplace after the prolonged shutdown triggered by the COVID-19 pandemic.

The Final Rule becomes effective 60 days after it is published in the Federal Register. However, employers should be mindful that many states have fluctuating workweek rules that differ from the federal rules. As such, employers should be aware of the laws in the states in which they operate before making any changes to their current pay practices in light of the new rule.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For guidance on COVID-19 business reopening issues, visit our Resource Portal or contact your Foley Hoag attorney.

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