Proposed Rules

Federal Register
Vol. 84, No. 214
Tuesday, November 5, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 778

RIN 1235–AA31

Fluctuating Workweek Method of Computing Overtime

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This proposed rulemaking would revise the Department of Labor's (Department) regulation for computing overtime compensation for salaried nonexempt employees who work hours that vary each week (fluctuating workweek) under the Fair Labor Standards Act (FLSA or the Act). The proposal will clarify that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate as appropriate under the Act. The proposal would also add examples and make minor revisions to make the rule easier to understand.

DATES: Submit written comments on or before December 5, 2019.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA31, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the instructions for submitting comments. *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to *http://www.regulations.gov,* including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this rulemaking. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. For additional information on submitting comments and the rulemaking process, see the ''Electronic Access and Filing Comments'' heading below. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop. Director, Division of Regulations, Legislation, and Interpretation, Office of Policy, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this proposed rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or visit WHD's website for a nationwide listing of WHD district and area offices at *https://www.dol.gov/whd/america2.htm. Electronic Access and Filing Comments:* This proposed rule and supporting documents are available through the **Federal Register** and the *https://www.regulations.gov* website. You may also access this document via WHD's website at *https://www.dol.gov/whd/.* To comment electronically on Federal rulemakings, go to the Federal eRulemaking Portal at *https://www.regulations.gov,* which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. You must identify all comments submitted by including ''RIN 1235–AA31'' in your submission. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period (11:59 p.m. on the date identified above in the **DATES** section); comments received after the comment period closes will not be considered. Submit only one copy of your comments by only one method. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to *https://www.regulations.gov,* including any personal information provided.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA guarantees a minimum wage for all hours worked and limits to 40 the number of hours per week a covered nonexempt employee can work without additional compensation. *See* 29 U.S.C. 206, 207. Payment of a fixed salary for fluctuating hours, also called the ''fluctuating workweek method,'' is one way employers may meet their overtime pay obligations to nonexempt employees, if certain conditions are met. Under 29 CFR 778.114, an employer may use the fluctuating workweek method for computing overtime compensation for a nonexempt employee if the employee works fluctuating hours from week to week and receives, pursuant to an understanding with the employer, a fixed salary as straight time ''compensation (apart from overtime premiums)'' for whatever hours the employee is called upon to work in a workweek, whether few or many. 29 CFR 778.114(a). In such cases, because the salary ''compensate[s] the employee at straight time rates for whatever hours are worked in the workweek,'' an employer satisfies the overtime pay requirement of section 7(a) of the FLSA if it compensates the employee, in addition to the salary amount, at a rate of at least one-half of the regular rate of pay for the hours worked each workweek in excess of 40. 29 CFR 778.114(a). Because the employee's hours of work fluctuate from week to week, the regular rate must be

determined separately each week based on the number of hours actually worked each week. *Id.*

The payment of additional bonus and premium payments to employees compensated under the fluctuating workweek method has presented challenges to employers and the courts alike, as set forth in more detail below. The proposed regulation would clarify that bonus payments, premium payments, and other additional pay are consistent with using the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate unless they may be excluded under FLSA sections 7(e)(1)–(8). *See* 29 U.S.C. 207(e)(1)–(8).

The Department proposed a similar clarification through a Notice of Proposed Rulemaking (NPRM) in 2008. *See* 73 FR 43654, 43662, 43669–70 (July 28, 2008). However, the Final Rule issued in 2011 did not adopt this proposal because the Department, at the time, believed that courts had ''not been unduly challenged'' in applying the current regulatory text, that the proposed clarification ''would have been inconsistent'' with the Supreme Court's decision in *Overnight Motor Transportation Co.* v. *Missel,* 316 U.S. 572 (1942), and that the proposed clarifying language ''may create an incentive'' for employers ''to require employees to work long hours.'' 76 FR 18832, 18848–50 (Apr. 5, 2011). However, since 2011, courts have reached inconsistent holdings based on a judicially crafted distinction between certain types of bonuses that the Department has never recognized. As explained below, the Department has reconsidered the need for a clarification, particularly in light of the 2011 Final Rule and its interpretation by courts, now finds these reasons articulated in 2011 to be unpersuasive, and is therefore re-proposing substantially similar revisions to those initially proposed in 2008.

Specifically, the Department proposes to add language to § 778.114(a) clarifying that bonuses, premium payments, and other additional pay of any kind are compatible with the use of the fluctuating workweek method of compensation. The Department also proposes to add examples to § 778.114(b) to illustrate the fluctuating workweek method of calculating overtime where an employee is paid (1) a nightshift differential and (2) a productivity bonus in addition to a fixed salary. The Department further proposes minor revisions to § 778.114(a) and (c) that were not proposed in the 2008 NPRM to improve comprehensibility. Specifically, revised § 778.114(a) would list each of the requirements for using the fluctuating workweek method, and duplicative text would be removed from revised § 778.114(c). Finally, the Department proposes to change the title of the regulation from ''Fixed salary for fluctuating hours'' to ''Fluctuating Workweek Method of Computing Overtime.''

This proposed rule is expected to be an Executive Order (E.O.) 13771 deregulatory action. Details on the estimated reduced burdens and cost savings of this proposed rule can be found in the rule's economic analysis and supplemental illustrative analysis in Appendix A.

II. Background

The Department introduced the fluctuating workweek method of calculating overtime pay in its 1940 Interpretive Bulletin No. 4. *See* Interpretative Bulletin No. 4 ¶ ¶ 10, 12 (Nov. 1940). In 1942, the U.S. Supreme Court upheld the fluctuating workweek method in *Missel,* 316 U.S. at 580. In that case, the Court held that where a nonexempt employee had received only a fixed weekly salary (with no additional overtime pay) for working irregular hours that frequently exceeded 40 per week and fluctuated from week to week, the employer was required to retroactively pay an additional 50 percent of the employee's regular rate of pay multiplied by the overtime hours worked to satisfy the FLSA's time and a half overtime pay requirement. *Id.* at 573–74, 580–81.[1] The quotient of the weekly salary divided by the number of hours actually worked each week, including the overtime hours, determined the ''regular rate at which [the] employee [was] employed'' under the fixed salary arrangement. *Id.* at 580.

In 1968, informed by the Supreme Court's holding in *Missel,* the Department issued 29 CFR 778.114, which explains how to perform the regular rate calculation under the FLSA for salaried employees who work fluctuating hours. *See* 29 CFR 778.1, 778.109, 778.114. The Supreme Court has ''interpreted the [FLSA] statute in a manner that would 'afford the fullest possible scope to agreements' that are designed to address 'the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day . . . .' '' *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)).[2] Indeed, ''[t]he [fluctuating workweek] method was developed to permit FLSA-covered employees who work irregular hours to negotiate a consistent *minimum* salary with their employers.'' *Hunter,* 453 F. Supp. 2d at 61 (emphasis in original).

Consistent with this manner of interpretation and purpose, the Department, until 2011, had never explicitly forbidden in rulemaking the payment of bonuses and premiums beyond the minimum salary to employees compensated under the fluctuating workweek method. As explained more fully below, to the contrary, in both a 2008 NPRM and in a 2009 opinion letter, the Department stated that such bonuses were consistent with using the fluctuating workweek method. However, in the Preamble to the 2011 Final Rule, the Department stated a different position. The Department now seeks to add clarifying language to 29 CFR 778.114 affirming its current position that employers using the fluctuating workweek method to calculate overtime compensation may pay bonuses and premiums in addition to the minimum salary.

Early examples of Department guidance and court decisions exemplify interpretations of the FLSA that ''afford the fullest scope possible'' to fluctuating workweek arrangements. For example, a 1999 Wage and Hour Division (WHD) opinion letter explained that an employer using the fluctuating workweek method may pay bonuses for working holidays or vacations, broadly instructing that ''[w]here all the legal prerequisites for the use of the fluctuating workweek method of overtime payment are present, the

[1] Half-time, rather than time-and-a-half pay, for overtime is appropriate where the employee's weekly earnings constitute compensation for all hours worked that week, including overtime hours. Such a pay system already compensates the employee for overtime hours at the regular rate, and so the employee is entitled under the FLSA to an additional half-time the regular rate for those hours. *See* 29 U.S.C. 207(a).

[2] Note that *Belo* concerned a different type of flexible pay agreement, now codified under Section 7(f) of the FLSA, in which an employee was paid on an hourly basis with a guaranteed weekly sum. The Department only cites *Belo* here for the limited purpose of recognizing the manner in which the Court generally interprets work arrangements under the FLSA when work hours vary from week to week. In *Hunter,* the district court similarly referenced *Belo* in analyzing the regular rate, and found notable that the Court decided *Belo* and *Missel* on the same day and that both cases ultimately informed the promulgation of the fluctuating workweek regulatory scheme. *See Hunter,* 453 F. Supp. 2d at 56, 58 (''With the companion decisions of *Missel* and *Belo* as a backdrop, the Department of Labor promulgated regulations that provide 'examples of the proper method of determining the regular rate of pay in particular instances,' '' including the fluctuating workweek method.) (quoting § 778.109).

FLSA, in requiring that 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, *does not prohibit paying more.*'' [3] As another example, courts have applied and endorsed the fluctuating workweek method when employees received additional bonus payments beyond what was statutorily required. *See, e.g., Cash* v. *Conn Appliances, Inc.,* 2 F. Supp. 2d 884, 908 (E.D. Tex. 1997) (applying fluctuating workweek method where employee received incentive bonuses in addition to fixed salary); *see id.* at 893 n.17 (citing *Parisi* v. *Town of Salem,* No. 95–67–JD, 1997 WL 228509, at *3 (D.N.H. Feb. 20, 1997) (''The rules promulgated by the Secretary do not change when base compensation includes not only a salary but a bonus payment; the bonus payment is simply included in calculating the regular rate.'')).

However, in 2003, the First Circuit held that certain types of additional pay were incompatible with the fluctuating workweek method. *See O'Brien* v. *Town of Agawam,* 350 F.3d 279 (1st Cir. 2003). In *O'Brien,* the First Circuit held that police officers' receipt of ''bonus'' pay for working nights and long hours, was contrary to the fluctuating workweek method. *Id.* at 288. The *O'Brien* court reasoned that an employer using the method must pay a '' 'fixed amount as straight time pay for whatever hours . . . work[ed],' '' and *any* extra compensation would violate this '' 'fixed amount' '' requirement. *Id.* (quoting 29 CFR 778.114(a)).

The Department filed an amicus brief in support of the ultimate overtime-back-pay result in *O'Brien,* reasoning that the ''base salary covered only 1950 hours of work annually'' under the specific officers' agreement at issue, and therefore, this ''base salary was not intended to compensate them for an unlimited number of hours,'' as required by 29 CFR 778.114. Brief for the Sec'y of Labor as Amicus Curiae, *O'Brien,* 350 F.3d 279, 2004 WL 5660200, at *11, 13 (Feb. 20, 2004). In other words, the Department reasoned that the fluctuating workweek method could not be used because the officers' fixed salary was intended to compensate them for a specific—rather than fluctuating—number of hours each week. *Id.*[4]

However, the Department's brief did not address whether bonus pay beyond the ''fixed amount'' required was incompatible with the fluctuating workweek method.[5]

Some courts followed *O'Brien* to hold that certain types of bonuses were incompatible with the fluctuating workweek method,[6] while others continued to hold that bonuses were compatible with that method.[7] These inconsistent decisions appear to have created practical confusion for employers.

The Department's 2008 NPRM, in an effort to ''eliminate confusion over the effect of paying bonus supplements and premium payments to affected employees,'' proposed 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 will not invalidate the ''fluctuating workweek'' method of overtime payment, but such payments must be included in the calculation of the regular rate unless excluded under section 7(e)(1) through (8) of the FLSA. 73 FR at 43670. The Department also proposed to add ''an example to § 778.114(b) to illustrate these principles where an employer pays an employee a nightshift differential in addition to a fixed salary.'' *Id.* at 43662; *see also id.* at 43670. The proposed clarifying language in the 2008 NPRM reflected the Department's position that bonus and premium payments are compatible with the fluctuating workweek method.

On January 16, 2009, WHD reaffirmed this same position when it issued an opinion letter explaining that ''[r]eceipt of additional bonus payments does not negate the fact that an employee receives straight-time compensation through the fixed salary for all hours worked whether few or many, which is all that is required under § 778.114(a).'' WHD Opinion Letter FLSA2009–24 (Jan. 16, 2009) (withdrawn Mar. 2, 2009).

On May 5, 2011, the Department issued a Final Rule, which did not adopt the proposed clarifying language to § 778.114. *See* 76 FR 18832. Instead, in the Preamble, the Department stated it would leave the text of § 778.114 unchanged except for minor revisions. The Department expressly stated that the decision not to implement the proposed changes would avoid ''expand[ing] the use of [the fluctuating workweek] method of computing overtime pay beyond the scope of the current regulation,'' and would ''restore the current rule.'' 76 FR at 18850. The same 2011 Preamble, however, 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.'' 76 FR at 18850.

The 2011 Preamble's reference to the ''current rule'' appears to have generated further confusion among courts, as the ''record indicate[d] that in 2008 and 2009, . . . DOL construed the [fluctuating workweek] regulation to permit bonus payments,'' then ''shifted course'' in 2011 in a manner ''contrary to its publicly-disseminated prior position.'' *Switzer* v. *Wachovia Corp.,* No. CIV.A. H–11–1604, 2012 WL 3685978, at *4 (S.D. Tex. Aug. 24, 2012). For example, one court stated that the 2011 Preamble ''presents an about-face'' that ''alters the DOL's interpretation'' so as to prohibit employers from using the fluctuating workweek method for workers who receive bonuses. *Sisson* v. *RadioShack Corp.,* No. 1:12CV958, 2013 WL 945372, at *6 (N.D. Ohio Mar. 11, 2013). Another court presented with identical facts as *Sisson* reached an

[3] WHD Opinion Letter, 1999 WL 1002399, at *2 (May 10, 1999) (emphasis added).

[4] *Id.* at *16–18 (citing *Valerio* v. *Putnam Assocs. Inc.,* 173 F.3d 35, 39 (1st Cir. 1999) (holding that fluctuating workweek method was inappropriate where an employee was informed that her daily hours were ''8:30 to whenever,'' she understood that her salary would compensate her for fluctuating hours, but she ''routinely worked without complaint more than 40 hours per week without extra pay''); *Martin* v. *Tango's Restaurant, Inc.,* 969 F.2d 1319, 1324 (1st Cir. 1992) (approving use of fluctuating workweek method where employee was paid a certain fixed salary each week, regardless of the number of hours worked)).

[5] In reflecting on *Valerio* and *Tango's Restaurant,* the Department stated that ''[n]othing in either of those decisions suggests that 29 CFR 778.114 extends, contrary to its terms, to a pay system in which an employee, while receiving a fixed salary for a certain minimum number of hours, is paid more for additional straight time worked beyond a regular schedule.'' *O'Brien* Amicus Br. at *18 (citing *Valerio.,* 173 F.3d at 39; *Tango's Restaurant,* 969 F.2d at 1324). While the brief did not address the precise issue of whether bonus pay beyond the ''fixed amount'' required was incompatible with the fluctuating workweek method, to the extent that the brief could be read to suggest that this may have been the Department's position at the time, the Department is making clear that this is not the Department's current position. The Department instead seeks to clarify that bonus pay for extra straight time work is compatible with the fluctuating work week method. *See, e.g., Black* v. *Comdial Corp.,* Civ. A. No. 92–O81–C, 1994 WL 70113, at *2 (W.D. Va. Feb. 15, 1994) (''The provision of [straight time] bonus pay for hours 45–61 changes neither the salary basis of [an employee's] pay, nor the applicability of the fluctuating workweek method of 29 CFR 778.114.'').

[6] *See, e.g., Ayers* v. *SGS Control Servs., Inc.,* No. 03 CIV. 9077 RMB, 2007 WL 646326, at *10 (S.D.N.Y. Feb. 27, 2007) (''Plaintiff who received sea pay or day-off pay did not have 'fixed' weekly straight time pay, in violation of 29 CFR 778.114(a).''); *Dooley* v. *Liberty Mut. Ins. Co.,* 369 F. Supp. 2d 81, 87 (D. Mass. 2005) (bonus pay arrangement for weekend work violated requirement that ''the employee must receive a fixed salary that does not vary with the number of hours worked during the week'') (internal quotation marks and citation omitted).

[7] *See, e.g., Clements* v. *Serco, Inc.,* 530 F.3d 1224, 1230 (10th Cir. 2008) (applying fluctuating workweek method where employee received recruitment bonus in addition to fixed salary); *Perez* v. *RadioShack Corp.,* No. 02 C 7884, 2005 WL 3750320, at *1 (N.D. Ill. Dec. 14, 2005) (applying fluctuating workweek method where employee received tenure pay, commissions, and other bonuses in addition to fixed salary).

opposite conclusion because it interpreted the 2011 Preamble as ''a decision to maintain the status quo'' that ''does not[ ] disturb the law permitting employers to use the [fluctuating workweek] method to calculate the overtime pay of workers who receive performance bonuses.'' *Wills* v. *RadioShack Corp.,* 981 F. Supp. 2d 245, 259 (S.D.N.Y. 2013). As another example, a third court declined to give any weight to the 2011 Preamble because it rested on an ''unconvincing'' interpretation of *Missel. Smith* v. *Frac Tech Servs., LLC,* No. 4:09CV00679 JLH, 2011 WL 11528539, at *2 (E.D. Ark. June 15, 2011).

A growing number of courts, since 2011, have developed a dichotomy between ''productivity-based'' supplemental payments, such as commissions, and ''hours-based'' supplemental payments, such as night-shift premiums. Such courts hold that productivity-based supplemental payments are compatible with the fluctuating workweek method, but not hours-based supplemental payments. *See, e.g., Dacar* v. *Saybolt, L.P.,* 914 F.3d 917, 926 (5th Cir. 2018), *as amended on denial of rehearing* (Feb. 1, 2019) (''Time-based bonuses, unlike performance-based commissions, run afoul of the [fluctuating workweek] regulations''); *Lalli* v. *Gen. Nutrition Ctrs., Inc.,* 814 F.3d 1, 10 (1st Cir. 2016) (''a compensation structure employing a fixed salary still complies with section 778.114 when it includes additional, variable performance-based commissions''). However, the Department 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, such as the 2004 *O'Brien* amicus brief (declining to support application of fluctuating workweek method to payment of additional straight-time hours), the 2008 NPRM and the 2009 opinion letter (permitting bonuses as compatible with the fluctuating workweek), and even the 2011 Final Rule (declining to implement the 2008 NPRM and stating that the current rule prohibits all bonuses as compatible with the fluctuating workweek).

As a result, the Department is increasingly concerned that it may be confusing and administratively burdensome for employers to distinguish between productivity- and hours-based bonuses and premium payments, particularly because the Department itself does not distinguish between such types of payment in determining the regular rate. *See* 29 CFR 778.208–778.215. The Department is further concerned that the ''productivity'' versus ''hours'' based distinction fails to provide adequate guidance to employers because it has not been adopted by all jurisdictions.[8] The Department also believes that this distinction is unhelpful for supplemental pay that does not fall neatly into either category, such as retention bonuses, safety bonuses, and referral bonuses.

The divergent views of the Department and courts—and indeed, even among courts—have created considerable uncertainty for employers regarding the compatibility of various types of supplemental pay with the fluctuating workweek method. As such, the need for the Department to clarify its fluctuating workweek rule is even stronger now than in 2008, when it proposed a substantially similar clarification.

III. Discussion

As an initial matter, the Department is making clear that employers and courts should not rely on the statement in the 2011 Preamble that ''bonus and premium payments . . . are incompatible with the fluctuating workweek method of computing overtime under section 778.114.'' 76 FR at 18850. The Department did not modify the regulatory text in 2011 to align with this statement. Further, the Preamble affirmatively denied it was making a change by insisting that the Department was ''restor[ing] the current rule.'' 76 FR at 18850. As the Supreme Court has explained, ''[w]hen an agency changes its existing position . . . the agency must at least display awareness that it is changing position.'' *Encino Motorcars, LLC* v. *Navarro,* 136 S Ct. 2117, 2125–26 (2016) (internal quotation marks and citations omitted). Because, for example, the *Switzer* court viewed the 2011 Preamble language as ''shifting course'' in a manner ''contrary'' to its prior position,[9] it is worth making clear that the Preamble does not reflect a change from the Department's position that the 2008 NPRM sought to clarify.

The 2011 Preamble reaffirmed that ''the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees.'' 76 FR at 18850. Yet it declined to permit bonus and premium payments under the fluctuating workweek method because, in 2011, the Department believed that the receipt of premium and bonus payments ''would have been inconsistent with the requirement of a fixed salary payment set forth by the Supreme Court in [*Missel*].'' 76 FR at 18850. However, the 2011 Final Rule did not explain any basis for the perceived inconsistency, and at least one court has found that belief to be ''unconvincing'' because ''[n]othing in *Missel* prohibits the use of the fluctuating work week method . . . whenever an employer gives a bonus to an employee.'' *Smith,* 2011 WL 11528539, at *2.

Upon further review, the Department is now similarly unconvinced of its 2011 position. The pre-2011 position was not inconsistent with *Missel; Missel* did not even address the issue of bonus or incentive payments beyond the fixed salary, let alone preclude certain types of payments. The plaintiff in *Missel* had a fixed weekly salary regardless of hours worked, and the Court explained how to compute overtime compensation under those facts. As one court has explained, ''[T]he message from the Supreme Court in *Missel* . . . was that the employment contracts of FLSA-covered workers must guarantee that the regular rate of compensation in any given week will not fall below the statutory minimum wage.'' *Hunter,* 453 F. Supp. 2d at 57.[10]

The 2011 Final Rule also reflected the Department's concern, at the time, that permitting employers that offer bonus and premium payments to use the fluctuating workweek method of overtime payment could ''shift a large portion of employees' compensation into bonus and premium payments, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked.'' 76 FR at 18850. Upon reconsideration, the Department is no longer concerned that employers would shift large portions of pay into bonus and premium payments and is not aware of any evidence of problematic pay shifting. To the contrary, the Bureau of Labor Statistics

[8] Decisions holding that all bonus and supplemental payments, including productivity based commissions, are incompatible with the fluctuating workweek remain good law in some heavily populated jurisdictions, including the Federal judicial districts for the Northern District of Ohio and the Middle District of Florida. *See Sisson,* 2013 WL 945372, at *2–7; *West* v. *Verizon Servs. Corp.,* No. 8:08–CV–1325–T–33MAP, 2011 WL 208314, at *11 (M.D. Fla. Jan. 21, 2011) (fluctuating workweek method invalid where employee ''received various bonus payments and commissions'').

[9] 2012 WL 3685978, at *4.

[10] *See also Smith,* 2011 WL 11528539, at *2 (''Nothing in *Missel* prohibits the use of the fluctuating work week method for calculating damages whenever an employer gives a bonus to an employee. A bonus given wholly at the discretion of the employer cannot be said to affect the mutual understanding between the employer and the employee that the employee's fixed salary comprises his entire compensation.'').

finds that in situations where employers are permitted to pay bonuses and premiums, such supplemental pay constitutes a relatively small portion of employees' overall compensation—no more than 5% for any occupation.[11] Accordingly, the Department finds no reason to believe that permitting employers using the fluctuating workweek method to pay bonuses would result in large-scale pay shifting. In fact, the Department now believes the proposal would encourage employers to pay these bonuses, premiums, and additional pay to salaried nonexempt employees who work fluctuating hours, and the Department does not believe that employers will shift large portions of salaries into such supplemental payments. Moreover, the Department's earlier concern that permitting employers who offer bonus and premium payments to use the fluctuating workweek would permit employers to pay a reduced fixed salary would be addressed by retaining the requirement that the fixed salary amount must be sufficient to provide compensation at a rate not less than the minimum wage.

Finally, the 2011 Final Rule was based on the Department's view that ''the courts have not been unduly challenged in applying the current regulation to additional bonus and premium payments.'' 76 FR at 18850. However, as discussed in the background section, courts applying the language from the 2011 Preamble have reached inconsistent holdings, even in cases concerning the same types of bonus and premium payments. *Compare Wills,* 981 F. Supp. 2d at 256 (holding that RadioShack's payment of quarterly and annual performance based bonuses is compatible with the fluctuating workweek method) *with Sisson,* 2013 WL 945372, at *1 (holding that RadioShack's payment of quarterly and annual performance based bonuses is not compatible with the fluctuating workweek method). Moreover, a growing number of courts, only through the lens of a wholly judicially developed distinction, now interpret the current regulation, as interpreted in the 2011 Preamble, to distinguish between productivity- and hours-based bonus and premium payments, even though the Department has never drawn that distinction. *See Dacar,* 914 F.3d at 926; *Lalli,* 814 F.3d at 10. Inconsistent decisions and the development of case law not reflecting any previous position of the Department convinces the Department that courts have been unduly challenged in applying the current regulation.

Accordingly, the Department is proposing to clarify the current regulation to allow employers who offer both productivity and hours based bonuses and premium payments to use the fluctuating workweek method of compensation; the proposed consistent treatment of all bonuses and premium payments that are included in the regular rate will eliminate any such confusion for employers. To further eliminate confusion, the Department is proposing to clarify that additional pay of any kind on top of the fixed salary is compatible with the fluctuating workweek method. The proposed inclusion of ''additional pay of any kind'' is intended to prevent disagreements over whether a payment is a ''bonus'' or ''premium.'' Examples of ''additional pay of any kind'' may include commissions, compensation falling within the FLSA's section 3(m), supplemental hourly or lump sum payments, and incentive-related sums.

In summary, the Department no longer finds persuasive the 2011 Final Rule's rationale for stating in the Preamble that bonus and premium payments are incompatible with the fluctuating workweek method. Paying employees bonus or premium payments for certain activities, such as working undesirable hours, is common[12] and, as the 2011 Final Rule recognized, ''can be beneficial for employees.'' 76 FR at 18850. The Department therefore proposes to clarify that all bonus and premium payments are compatible with the fluctuating workweek method, thereby eliminating any disincentives for employers to make such payments. Thus, employers that would meet the conditions of § 778.114 would be able to use the fluctuating workweek method when paying nonexempt employees bonuses and premiums as long as they include such payments in the calculation of the regular rate, unless they may be otherwise excluded under FLSA sections 7(e)(1)–(8).

IV. Proposed Regulatory Changes

The Department proposes to revise its existing fluctuating workweek regulation at § 778.114 to address these issues. First, the proposed rulemaking clarifies the regulation to expressly state that any bonuses, premium payments, or other additional pay of any kind are compatible with the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate unless they are excludable under FLSA sections 7(e)(1)–(8). Second, the proposal adds examples to § 778.114(b) to illustrate these principles where an employer pays an employee, in addition to a fixed salary, (1) a nightshift differential and (2) a productivity bonus. Third, the proposed regulation revises the rule in a minor way to make it easier to read and understand. Revised § 778.114(a) would list each of the requirements for using the fluctuating workweek method, and duplicative text would be removed from revised § 778.114(c). Finally, the Department proposes to change the title of the regulation from ''Fixed salary for fluctuating hours'' to ''Fluctuating Workweek Method of Computing Overtime'' to better reflect the purpose of the subsection and to improve the ability of employers to locate the applicable rules.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This NPRM does not require a collection of information subject to approval by the Office of Management and Budget (OMB) under the PRA, or affect any existing collections of information. The Department welcomes comments on this determination.

VI. Executive Order 12866; Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review; and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

A. Introduction

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and therefore, subject to the requirements of the E.O. and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million

[11] Supplemental pay's portion of total compensation for any occupation ranges from 0.3% (teachers) to 4.8% (production). *See* Bureau of Labor Statistics, Employer Costs for Employee Compensation, March 2019, Table 2, *https://www.bls.gov/news.release/pdf/ecec.pdf.*

[12] The Bureau of Labor Statistics estimated in 2009 that 42.35 percent of workers receive bonuses and 19.75 percent receive shift differentials. Bureau of Labor Statistics, A Look at Supplemental Pay: Overtime Pay, Bonuses, and Shift Differentials, Table 2, Mar. 25, 2009, *https://www.bls.gov/opub/mlr/cwc/a-look-at-supplemental-pay-overtime-pay-bonuses-and-shift-differentials.pdf.*

or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. As described below, this proposed rule is not economically significant. The Department has prepared a Preliminary Regulatory Impact Analysis (PRIA) in connection with this NPRM, as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

B. Overview of the Proposed Rule and Potential Affected Employees

This rule, if finalized as proposed, clarifies that bonus, premium, and any other supplemental payments are compatible with the fluctuating workweek method of calculating overtime pay. Current legal uncertainty regarding the compatibility of supplemental pay with the fluctuating workweek method deters employers from making such payments to employees paid under the fluctuating workweek method. The proposed rule would eliminate this deterrent effect, and thereby permit employers who compensate their employees under the fluctuating workweek method to pay employees a wider range of supplemental pay.

If the proposed rule were finalized, it would be clear to employers that employees paid under the fluctuating workweek method are eligible for all supplemental payments. The Department relied on data from the Current Population Survey (CPS) to estimate the total pool of employees who could possibly be affected.[13] In particular, the Department focused on full-time, nonexempt workers who report earning a fixed salary. The Department's regulations recognize only two ways that an FLSA-covered employer may pay a nonexempt employee a fixed salary.[14] First, under 29 CFR 778.113, the employer may pay a salary for a *specific number* of hours each week. For the purpose of this analysis, the Department assumes that a nonexempt worker paid under 29 CFR 778.113 would likely report having a ''usual'' number of hours worked in the CPS. Second, under 29 CFR 778.114, the employer pays a salary for *whatever number* of hours are worked—this is the fluctuating workweek method. For the purpose of this analysis, the Department assumes that a nonexempt worker paid under the fluctuating workweek method generally would not report having a ''usual'' number of hours worked each week, but rather would report working hours that ''vary'' from week to week. The Department estimated the number of such workers who could be compensated using the fluctuating workweek method by counting CPS respondents who: (1) Are employed at a FLSA-covered establishment; (2) are nonexempt from FLSA overtime obligations; (3) work full time at a single job; (4) reside in the District of Columbia or a state that permits the use of the fluctuating workweek method; [15] (5) are paid on a salary basis; and (6) work hours that ''vary'' from week to week. The Department calculated that 721,656 workers satisfy all these criteria based on 2018 CPS data. These workers are generally eligible to be paid under the fluctuating workweek method, but the Department lacks specific data as to how many are actually paid that way.

Using this group of workers to estimate the fluctuating workweek population may overstate the number of employees paid under the fluctuating workweek method because not all nonexempt and full-time CPS respondents who report earning a salary for working hours that ''vary'' from week to week are paid under the fluctuating workweek method. Some such respondents may actually be paid a salary for a specific number of hours under § 778.113, despite working fluctuating hours, and so classifying them as employees paid under the fluctuating workweek method would result in over-counting. Such an estimate may also undercount the number of employees paid under the fluctuating workweek method because the Department's methodology excludes all CPS respondents with ''usual'' hours from counting as an employee paid under the fluctuating workweek method. But an employee who works a ''usual'' number of hours may still be paid under the fluctuating workweek method if there is some weekly variation in the number of hours worked. Indeed, relying on 2018 CPS data, the Department estimates that an additional 675,130 nonexempt, full-time, and salaried workers report having a ''usual'' number of hours but routinely work hours that differ from that ''usual'' number. These additional workers are also eligible to be paid under the fluctuating workweek method, but the Department lacks data as to how many are actually paid that way.

Altogether, the total number of workers the Department estimates who may currently be paid under the fluctuating workweek method is about 1.4 million (721,656 workers who report their hours vary plus 675,130 workers who report having a ''usual'' number of hours but who work hours that differ from that number). For the purpose of this PRIA, the Department lacks data to determine how prevalent this compensation method actually is. Without data on the precise number, and for purposes of this illustrative analysis, the Department assumes that *half* of these workers are currently being paid using the fluctuating workweek method, meaning 698,393 workers could become eligible for a wider range of supplemental payments if the proposed rule were finalized.

The actual number may be higher or lower. The Department invites comment on this illustrative analysis, including any relevant data or information that may further inform the estimated

[13] The CPS is a monthly survey of about 60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey.

[14] Under either method of salary payment the employee is entitled to overtime premium pay of at least one and one-half times the regular rate. However, the method of calculating the overtime due differs because of the difference in what the salary payment is intended to cover.

[15] Currently four states generally prohibit the use of the fluctuating workweek method under state law: Alaska, California, Pennsylvania, and New Mexico. *See* 8 Alaska Admin. Code section 15.100(d)(3); Cal. Labor Code section 515(d); *Chevalier* v. *Gen. Nutrition Ctrs., Inc.,* 2017 PA Super 407, 177 A.3d 280 (Pa. Super. Ct. 2017), *appeal granted,* 189 A.3d 386 (Pa. 2018); *N.M. Dep't of Labor* v. *Echostar Commc'ns Corp.,* 134 P.3d 780, 783 (N.M. Ct. App. 2006).

number of employees paid under the fluctuating workweek method. The Department especially welcomes information from employers, employer organizations, employee organizations, or payroll processors who may have unique insight into the number of employees paid under this method.

The proposed clarification may also encourage some employers to switch their employees who are currently paid on an hourly basis to the fluctuating workweek method. The Department believes legal confusion over the last fifteen years, exacerbated by the 2011 Final Rule, likely caused some employers to stop using the fluctuating workweek method to compensate employees, and instead pay them on an hourly basis.[16] The Department applied the same estimation methodology it used to approximate the current number of employees paid under the fluctuating workweek method to approximate the number of such employees in previous years—going back to 2004—using CPS data from those years.[17]

The estimated percentage of U.S. workers compensated under the fluctuating workweek method has declined from 0.83 percent in 2004 to 0.45 percent in 2018. At least some portion of this decline likely may be attributed to the legal uncertainty discussed in greater detail above, but some may be attributable to unrelated causes.[18] For example, the Department recognizes that the total number of nonexempt FLSA full-time salaried workers decreased both in total number and also as a share of the employee population over this same period.[19] The Department further assumes that some employers who switched their employees away from the fluctuating workweek method due to legal uncertainty would be likely to switch those employees back to the fluctuating workweek. However, the Department lacks sufficient information to estimate the precise number of ''switchers'' due to elimination of legal uncertainty. The Department invites commenters to provide data or information on the number of employees who could have their compensation methods switched, or on the impact of this switch on their hours, roles, or responsibilities. The Department especially welcomes information from employers, employer organizations, employee organizations, or payroll processors who may have unique insight into the number of employees paid under this method.

C. Costs

The Department believes that the only likely costs attributable to this rulemaking are regulatory familiarization costs, which represent direct costs to businesses associated with reviewing changes to regulatory requirements caused by a final rule. Familiarization costs do not include recurring compliance costs that regulated entities would incur with or without a rulemaking. The Department calculated regulatory familiarization costs by multiplying the estimated number of establishments likely to review the proposed rule by the estimated time to review the rule and the average hourly compensation of a Compensation, Benefits, and Job Analysis Specialist.

To calculate costs associated with reviewing the rule, the Department first estimated the number of establishments likely to review the proposed rule, when finalized. The most recent data on private sector establishments at the time this NPRM was drafted are from the 2016 Statistics of U.S. Businesses (SUSB), which reports 7.8 million establishments with paid employees.[20]

The Department believes that each of the 7.8 million establishments will review the rule. All employers will give the proposed rule a cursory review, lasting no more than five minutes, to determine if they need to comply with the rule. Most employers will not spend any more time on the rule, because they do not have any employees compensated under the fluctuating workweek method. Additionally, the Department believes that employers currently using or interested in using the fluctuating workweek method to pay workers will give the proposed rule a more detailed review. The Department estimates that 698,393 workers are paid under the fluctuating workweek method, based on the 2018 CPS data. The Department uses this number to help estimate the number of establishments who will spend more time reviewing the rule. As previously discussed, the Department lacks data to identify the specific employers or employees who may switch to the fluctuating workweek given the new legal clarity, but estimates, for purposes of this cost analysis, that employers will switch additional employees to being paid under the fluctuating workweek method. This entire pool is approximately 0.45 percent of the 155.8 million workers in the United States. By assuming these workers are proportionally distributed among the 7.8 million establishments, the Department estimates approximately 35,100 establishments pay or are interested in paying employees using the fluctuating workweek method, and therefore, would review the proposed rule in greater detail. Because the proposed rule is a clarification that simplifies the interaction between the fluctuating workweek method and supplemental payments, the Department estimates it would take an average of 30 additional minutes (on top of the five minutes spent on an initial review) for each of these employers to review and understand the rule. Some might spend more than 30 additional minutes reviewing the proposed rule, while others might take less time; the Department believes that 30 minutes is a reasonable estimated average for all interested employers in light of the rule's simplicity.

Next, the Department estimated the hourly compensation of the employees who would likely review the proposed rule. The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (Standard Occupation Classification 13–1141), or an employee of similar status and comparable pay, would review the rule at each establishment. The median hourly wage of a Compensation, Benefits, and Job Analysis Specialist is $30.29.[21] The Department adjusted this base wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The Department used a fringe benefits rate of 46 percent of the base rate[22] and an overhead rate of 17 percent of the base rate, resulting in a fully loaded hourly compensation rate for Compensation, Benefits, and Job Analysis Specialists of $49.37 = ($30.29 + ($30.29 × 46%) + ($30.29 × 17%)).

The Department estimates one-time regulatory familiarization costs in Year 1 of $32.8 million (= 35,100 establishments × 0.5 hours of review

[16] The Department believes that few employers would have switched employees from the fluctuating workweek method to a fixed salary for a specific number of hours under § 778.113 because those employees would have, by definition, worked hours that varied from week to week.

[17] The Department lacks the required CPS data from before 2004.

[18] *Compare, e.g., Wills,* 981 F. Supp. 2d at 256, *with Sisson,* 2013 WL 945372, at *1.

[19] From approximately 27.0 million in 2004 to 19.2 million in 2018.

[20] U.S. Census Bureau, 2016 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry, *https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html.*

[21] Bureau of Labor Statistics, May 2018 National Occupational Employment and Wage Estimates, United States, *https://www.bls.gov/oes/current/oes_nat.htm.*

[22] The benefits-earnings ratio is derived from BLS's Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

time × $49.37 per hour + 7.8 million establishments × 0.083 hours of review time × $49.37 per hour), which amounts to a 10-year annualized cost of $3.73 million at a discount rate of 3 percent or $4.36 million at a discount rate of 7 percent. This proposed rule would not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance; therefore, there are no other costs attributable to this proposed rule. The Department acknowledges that employers who do switch to the fluctuating workweek method may encounter adjustment costs as they make changes to their payroll systems. These costs were not captured here; however, because employers are not required to change their payment method (*i.e.,* their choice to switch is voluntary), and the Department assumes employers will make economically rational decisions, then such costs would reasonably be expected to be less than employers' combined cost savings and salary reductions. The Department invites comment on this analysis, including any relevant data or information that may further inform this cost estimate.

D. Cost Savings

The Department believes that this proposed rule could lead to three categories of potential cost savings: (1) The opportunity costs of previously forgone activities; (2) reduced management costs for non-hourly employees; and (3) reduced legal costs for employers. The Department uses the assumptions previously discussed in this PRIA to develop illustrative estimated cost savings. Based on these estimates, the Department believes total cost savings are likely to exceed regulatory familiarization costs.

First, the proposed rule would eliminate some of the opportunity costs in lost productivity resulting from employers' current inability to offer supplemental incentive pay to employees compensated under the fluctuating workweek method.[23] Legal uncertainty regarding the compatibility of such pay with the fluctuating workweek method prevents employers and employees from entering into certain mutually beneficial exchanges. For instance, an employer using the fluctuating workweek method could not offer supplemental incentive pay in exchange for performing undesirable duties. *See Dacar,* 914 F.3d at 926 (extra pay for ''offshore'' inspections invalidates fluctuating workweek method). The prohibition against such beneficial exchanges imposes economic costs, and the proposed rule, if finalized, would eliminate such costs.

The Department evaluates the potential scope of opportunity costs imposed by current legal uncertainty as the economic value of supplemental incentive pay prevented by current legal uncertainty. The Department assumes that employers currently follow the holdings of an increasing number of courts on the compatibility between supplemental payments and the fluctuating workweek method. These courts have held that productivity based payments, such as commissions, are compatible with the fluctuating workweek method. *See Lalli,* 814 F.3d at 8. The Department therefore assumes employers are not currently deterred from paying productivity based bonuses and premiums to employees under the fluctuating workweek method.[24] On the other hand, courts have held, and the 2011 Preamble may have led employers to believe, that shift differentials and hours-based payments—such as payments for holiday hours and hours spent working offshore—are not compatible with the fluctuating workweek method. *See Dacar,* 914 F.3d at 926. The Department believes that employers are currently deterred from making these types of payments to employees paid under the fluctuating workweek method. Finally, the Department believes legal uncertainty further deters employers from making supplemental payments that are neither productivity-based nor hours-based. This includes, for example, retention bonuses, referral bonuses, and safety bonuses that the Bureau of Labor Statistics categorize as ''nonproduction bonuses.'' [25]

The Department lacks sufficient data to predict the precise deadweight loss attributable to the present legal uncertainty including the economic value of work that fluctuating workweek employees do not perform because their employers cannot provide certain supplemental pay. However, after the rule change, if 70,000 workers who presently are compensated under the fluctuating workweek method—*i.e.,* one-tenth of the Department's estimate of 698,393—receive supplemental pay equal to approximately one-third the national average shift differential and nonproduction bonuses for work not presently performed, the full annual opportunity cost of lost productivity that the proposed rule would eliminate could exceed $60 million.[26] Appendix A contains a detailed illustrative analysis regarding possible ranges of potential opportunity cost eliminated and the critical variables upon which these estimates depend.

Ultimately, the Department lacks data to precisely measure the extent of overstating or understating its estimate of opportunity costs eliminated from the proposed rule. The Department welcomes comments providing data or information regarding the magnitude of possible opportunity costs avoided by this proposed rule, which may help the Department further quantify these effects in a Final Rule analysis. The Department especially welcomes information from employers, employer organizations, employee organizations, or payroll processors who may have unique insight into employees paid under the fluctuating workweek method.

Second, the proposed rule would reduce management costs for any employers that switch employees from hourly pay to the fluctuating workweek method. As explained above, the Department believes legal uncertainty caused some employers to stop paying employees using the fluctuating workweek method, and instead to pay them on an hourly basis. Since overtime pay premiums for hourly employees are constant (*i.e.,* their regular rate does not decrease as more overtime hours are worked), these employers may incur increased managerial costs because they may spend more time developing work

[23] ''[C]ost savings should include the full opportunity costs of the previously forgone activities.'' Office of Management and Budget, ''Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs,' '' Apr. 5, 2017, *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.* Some economists refer to this amount as deadweight loss or ''the sum of consumer and producer surplus.'' *Id.*

[24] The Department understands that this assumption may not perfectly reflect reality because many employers using the fluctuating workweek method may presently be deterred from paying production based bonuses and premiums, especially outside of jurisdictions in which such supplemental pay have been expressly held to be compatible with the fluctuating workweek method. By assuming all employers are paying production bonuses despite this concern, the Department's illustrative estimate may be understating the economic cost of current legal uncertainty. The Department welcomes comments providing data or information regarding whether employers using the fluctuating workweek are currently paying production based bonuses and premiums, such as commissions.

[25] Bureau of Labor Statistics, Fact Sheet for the June 2000 Employment Cost Index Release (2000), at 1, *https://www.bls.gov/ncs/ect/sp/ecrp0003.pdf.* As the name implies, nonproduction bonuses do not include productivity based pay, such as commissions, that courts generally find to be compatible with the fluctuating workweek method.

[26] BLS estimates that average hourly shift differential and nonproduction bonuses are 3.4% of hourly pay and the 698,393 workers that the Department estimates are paid under the fluctuating workweek method earn an average annual salary of $49,282.

schedules and closely monitoring an employee's hours to minimize or avoid overtime pay. For example, the manager of an hourly worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime based on the higher hourly rate. But such assessment is less necessary for an employee paid under the fluctuating workweek method because the employee's regular rate decreases with each additional overtime hour, reducing the overtime premium as a share of compensation.

There was little precedent or data to aid in evaluating these managerial costs. With the exception of the 2016 and 2019 overtime rulemaking efforts, the Department has not estimated managerial costs of avoiding overtime pay. *See* 81 FR 32391, 32477 (May 23, 2016); 84 FR 10900, 10932 (Mar. 29, 2019). Nor has the Department found such estimates after reviewing the literature. The Department therefore refers to the methodology used in the 2019 overtime rulemaking to produce a qualitative analysis of potential additional cost savings.

Under the overtime rulemaking methodology, the Department assumed a manager spends ten minutes per week scheduling and monitoring a newly exempt employee to avoid or minimize overtime pay. And employers may be able to avoid at least some of this effort if the employee were instead paid under the fluctuating workweek method because the marginal cost of paying overtime would be lower. While, the Department does not estimate the precise number of hourly workers who would switch from hourly pay to the fluctuating workweek method if the proposed rule were finalized, the Department believes that management costs may be reduced for every worker who is switched because their managers may spend less time managing their schedules. If, hypothetically, 150,000 workers were switched, employers might reduce their annual managerial costs by over $ 66 million.[27]

The Department welcomes data or information regarding the number of employees who could have their compensation method switched, how employers would manage their hours after switching, or other relevant factors that would help the Department further quantify cost savings. The Department especially welcomes information from employers, employer organizations, or payroll processors who may have unique insight into employees paid under the fluctuating workweek method.

Third, the clarifying language and updated examples included in this NPRM may reduce the amount of time employers spend attempting to understand their obligations under the law, after an initial one-time rule familiarization. For example, employers interested in offering supplemental payments to employees compensated under the fluctuating workweek method would know immediately from the language proposed for inclusion in § 778.114 that such payments will be compatible with the fluctuating workweek method, thereby obviating further legal research and analysis on the issue. The Department does not have data to estimate the precise amount of cost savings attributable to reduced need for legal research and analysis, and instead provides an example to illustrate the potential for such savings.

If the additional legal clarity reduces the annual amount of legal review by just one hour for each employer that pays or is interested in paying employees using the fluctuating workweek method, the Department calculates potential cost savings of up to $4.7 million. The Department obtained this illustrative estimate by first calculating the hourly cost of a lawyer (Standard Occupation Classification 23–1011). The median wage of a lawyer is $58.13,[28] and the Department adjusted this to $94.75 per hour to account for fringe benefits and overhead.[29] The fully loaded hourly compensation rate of $94.75 is then multiplied by the 35,100 establishments that the Department estimates pay or may be interested in paying employees using the fluctuating workweek method, resulting in a product of $ 3.3 million per year.[30] As noted above, this figure is an illustrative example of potential annual cost savings due to reducing legal-review burdens, and the Department welcomes comments providing data or information on this topic so that the Department accurately quantify these effects in a Final Rule analysis.

Even though the Department cannot quantify the precise amount of total cost savings, it expects cost savings to outweigh regulatory familiarization costs. Unlike one-time familiarization costs, the potential cost savings described in this section would continue into the future, saving employers valuable time and resources. This proposal also offers increased flexibility to employers in the way that they compensate their employees. However, the Department is unable to precisely quantify cost savings and other potential effects of the proposed rule due to a lack of data. The Department welcomes comments providing data or information regarding possible cost savings attributable to this proposed rule, which may help the Department further quantify these effects in a Final Rule analysis. The Department especially welcomes information from employers, employer organizations, employee organizations, or payroll processors who may have unique insight into employees paid under the fluctuating workweek method.

E. Transfers

Transfer payments occur when income is redistributed from one party to another. The Department believes the proposed rule, if finalized, may cause transfer payments to flow from employers to employees and may also cause transfer payments to flow from employees to employers. The incidence, magnitude, and ultimate beneficiaries of such transfers is unknown.

The Department lacks data to estimate the precise amount and composition of the supplemental incentive pay that employers may now offer, the extent to which employers may restructure compensation packages, the method by which employers who switch employees to a fluctuating workweek may allocate additional compensation, and the allocation of economic gains between employees and employers. The Department welcomes comments providing data or information regarding how employers will structure employment compensation following this rulemaking, as well as how employers may change employees' hours or responsibilities. The Department especially welcomes information from employers, employer organizations, employee organizations, employees, or payroll processors who may have unique insight into employees paid under the fluctuating workweek method and the management practices

[27] This illustrative analysis assumes: Ten minutes per week per worker, fifty-two weeks per year, multiplied by a hypothetical number of new employees paid under the fluctuating workweek method, multiplied by the full-loaded median hourly wage for a manager ($31.18 + $31.18(0.46) + $31.18(0.17) = $50.92). This wage is calculated as the median hourly wage in the pooled 2018/19 CPS MORG data for workers in management occupations (excluding chief executives).

[28] Bureau of Labor Statistics, May 2018 National Occupational Employment and Wage Estimates, United States, *https://www.bls.gov/oes/current/oes_nat.htm.*

[29] The Department used a fringe benefits rate of 46 percent of the base rate and an overhead rate of 17 percent of the base rate, resulting in a fully loaded hourly compensation rate of $94.75 = ($58.13 + ($58.13 × 0.46) + ($58.13 × 0.17)).

[30] This number is discussed in greater detail in the Costs section, above.

employed by companies using the fluctuating workweek method.

F. Benefits

The Department believes the proposed clarification would reduce avoidable disputes and litigation regarding the compatibility between supplemental pay and the fluctuating workweek method. As noted above, there is no uniform consensus among Federal courts as to whether and what types of supplemental pay is permitted. The Department believes this uncertain legal environment generates a substantial amount of avoidable disputes and litigation. The proposed rule would provide a simple standard that permits all supplemental pay under the fluctuating workweek method, and therefore should reduce unnecessary disputes and litigation.[31] The Department lacks data to quantify this benefit, and welcomes data and information on the amount of unnecessary disputes and litigation that would be avoided if the proposed rule were finalized. The Department especially welcomes information from employers, employer organizations, or payroll processors who may have unique insight into employees paid under the fluctuating workweek method.

VII. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603 and 604.

This proposed rule would not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance. Therefore, there are no other costs attributable to this deregulatory proposed rule other than regulatory familiarization costs. As discussed above, the Department calculated the familiarization costs for both the estimated 7.8 million private establishments in the United States and for the estimated 50,064 establishments that pay or are interested in paying employees using the fluctuating workweek method. The Department estimated the one-time familiarization cost for each of the 7.8 million establishments—which would give the proposed rule a cursory review—is $4.11. And the one-time familiarization cost for each of the 35,100 establishments that employ or are interested in employing employees paid under the fluctuating workweek method—which would closely review the proposed rule—is $24.69. Estimated familiarization costs would be trivial for small business entities, and would be well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses.

The Department believes that this proposed rule would achieve long-term cost savings that outweigh initial regulatory familiarization costs. For example, the Department believes that clarifying the confusing fluctuating workweek regulation and adding updated examples should reduce compliance costs and litigation risks that small business entities would otherwise continue to bear. The proposed rule would also reduce administrative costs of small businesses that respond by switching hourly employees to the fluctuating workweek method. The proposed rule further enables a small business to offer employees paid under the fluctuating workweek method supplemental incentive pay in exchange for certain productive behavior, such as working nightshifts or performing undesirable duties. The business would offer such supplemental pay only if the benefits of the incentivized behavior exceed the cost of payments. Because the vast majority of businesses, including small businesses, do not pay workers using the fluctuating workweek method,[32] the Department believes such benefits will be limited to few small businesses. Based on this determination, the Department certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. While this rulemaking would affect employers in the private sector, it is not expected to result in expenditures greater than $100 million in any one year. Please see Section VI for an assessment of anticipated costs and benefits to the private sector.

IX. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Appendix A

This appendix presents the Department's illustrative analysis of the opportunity cost of work that is not performed because employers are not permitted to provide certain types of supplemental incentive pay to fluctuating workweek employees. The proposed rule would reduce such opportunity costs. What follows is discussion of two approaches to estimating these effects.

I. Method One: Using Supplemental Pay Data

The Department's first methodology consists of three steps. First, the Department estimates the amount of additional supplemental pay that the average fluctuating workweek employee could receive if employers believed all supplemental payments were compatible with the fluctuating workweek method. Second, the

[31] The costs of such disputes and litigation are not insignificant, but are not estimated here nor included in the projected regulatory cost savings.

[32] The Department of Labor estimates that only 0.45% of U.S. workers are compensated using fluctuating workweek method.

Department estimates the economic value of the work that such supplemental pay could have incentivized—this represents the opportunity cost per workers resulting from legal uncertainty. Third, the Department multiplies the opportunity cost per worker by the estimated number of workers who are potentially compensated under the fluctuating workweek method.[33]

1. Average Supplemental Pay Being Prevented

As discussed in the Preamble, the Department assumes that employers currently use production-based supplemental pay—such as commissions—to incentivize employees, but they presently are deterred from using other types of supplemental pay. If this NPRM were finalized as proposed, the Department expects some employers may begin to use other types of supplemental pay, including nonproduction bonuses and shift differentials, to incentivize employees to perform economically valuable tasks.

The Bureau of Labor Statistics (BLS) provides estimates on nonproduction bonuses, which include, *e.g.,* safety bonuses, holiday pay, attendance pay, and referral bonuses.[34] BLS also provides separate estimates of shift differentials that employees receive nationwide. Shift differentials and nonproduction bonuses comprise approximately 3.4 percent of the salaries and wages of workers nationwide.[35] The Department believes this 3.4 percent national average may be a useful starting point to estimate the amount of supplemental incentive pay that current legal uncertainty could prevent.

The Department recognizes that 3.4 percent of salary may overstate or understate the average supplemental pay that legal uncertainty prevents fluctuating workweek employees from receiving. For example, the Department assumes employers using the fluctuating workweek method currently are unable to directly incentivize certain productive tasks with supplemental pay. But some employers may be indirectly (and less efficiently) incentivizing such behavior, *e.g.,* encouraging holiday work by increasing the base salary of all employees and requiring employees to work a holiday as needed rather than paying a lower salary to all employees and paying a premium only to employees who work that particular holiday. If so, the amount of incentive pay prevented by current legal uncertainty may be less than the 3.4 percent of salary. Conversely, the amount of lost incentive pay may be higher than 3.4 percent of salary because that percentage does not include production-based incentive pay. The Department assumes employers using the fluctuating workweek method currently pay production-based bonuses, such as commissions, to incentivize productive behavior. But case law permitting this practice extends only to two circuits and some district courts,[36] and some employers outside those jurisdictions may be deterred from paying production based incentive pay due to legal uncertainty.[37] If so, the amount of lost incentive pay for productive behavior due to legal uncertainty may be higher than 3.4 percent of salary.

Ultimately, the Department lacks sufficient data to precisely measure the extent of overstatement or understatement. In the presentation that follows, the Department assumes that the average fluctuating workweek employee would receive less than the national average of 3.4 percent of salary if employers were assured that such payments were compatible with the fluctuating workweek method. This appendix presents two scenarios regarding the average supplemental pay that that current legal uncertainty may prevent fluctuating workweek employees from receiving:

- Scenario 1 assumes supplemental pay being prevented equals 1 percent of salary; and
- Scenario 2 assumes supplemental pay being prevented equals 2 percent of salary.

As discussed in the preamble, the Department uses CPS data to identify approximately 1.4 million workers who may currently be paid under the fluctuating workweek method. CPS data indicate that these 1.4 million workers earn an average annual salary of $49,282. Under Scenario 1, the average amount of supplemental pay per employee that legal uncertainty prevents is $492.82 (= $49,282 × 1%) per year. Under Scenario 2, the average amount per employee is $985.64 (= $49,282 × 2%) per year. On a weekly basis, these scenarios would result in an employee receiving approximately $9.48 or $18.95 in supplemental pay.

2. Average Opportunity Cost

The above estimates for Scenarios 1 and 2 represent potential supplemental incentive payments that employers were deterred from paying an average employee compensated under the fluctuating workweek method. And since the employee did not receive this amount, the Department assumes he or she completed fewer productive tasks that such pay would have incentivized, such as working nights or weekends or performing other undesirable duties.

The estimates under Scenarios 1 and 2 represent the worker's share of the total economic cost of lost productivity. The Department assumes the worker's share of this cost is the same as labor's share of national income, which BLS estimates was 56.4 percent in 2018 (the most recent year of data available at publication).[38] The full, economy-wide annual opportunity cost of lost productivity that the proposed rule would eliminate is therefore equal to the lost supplemented pay under Scenarios 1 and 2 divided by 56.4 percent. Under Scenario 1, this amounts to $873.79 (= 492.82 ÷ 56.4%) per employee compensated under the fluctuating workweek method. Annual opportunity cost eliminated under Scenario 2 is $1,747.59 (= 985.64 ÷ 56.4%) per such employee.

3. Total Opportunity Cost Eliminated

The Department multiplied the opportunity cost per employee by the estimated number of fluctuating

[33] This analysis does not attempt to evaluate whether and to what extent some employees not presently compensated under the fluctuating workweek method might be shifted to the fluctuating workweek method from their present method of compensation.

[34] Bureau of Labor Statistics, Fact Sheet for the June 2000 Employment Cost Index Release (2000), at 1, *https://www.bls.gov/ncs/ect/sp/ecrp0003.pdf*; *see also* BLS, Employee Benefits Survey, March 2017, *https://www.bls.gov/ncs/ebs/benefits/2017/ownership/govt/table43a.htm.* As the name implies, nonproduction bonuses do not include productivity based pay, such as commissions, that some courts have found to be compatible with the fluctuating workweek method. Approximately one-third of U.S. workers have access to nonproduction bonuses in 2017. *Id.*

[35] BLS estimates average wages and salaries of private industry workers to be $24.17. And their average hourly shift differential and nonproduction bonus adds up to $0.81, which represents 3.4% of hourly pay. Bureau of Labor Statistics, Employer Costs for Employee Compensation, March 2019, Table 1, *https://www.bls.gov/news.release/archives/ecec_06182019.pdf.* This figure represents the national average of all workers: Some workers may receive little or no shift differentials and nonproduction bonuses while other may receive substantially higher shift differentials and nonproduction bonuses than the national average.

[36] *See, e.g., Lalli,* 814 F.3d at 8; *Dacar,* 914 F.3d at 926; *Wills,* 981 F. Supp. 2d at 256.

[37] For instance, the 2011 Preamble's statement that ''bonus and premium payments . . . are incompatible with the fluctuating workweek method of computing overtime under section 778.114'' does not, on its face, permit employers to pay commissions and other production-based bonuses under the fluctuating workweek method. *See also Sisson,* 2013 WL 945372, at *6 (commissions not permitted under fluctuating workweek method).

[38] Bureau of Labor Statistics, Labor Productivity and Costs, *https://www.bls.gov/lpc/special_requests/msp_dataset.zip.*

workweek employees to estimate the potential total reduction in opportunity cost from the proposed rule. As discussed in the Preamble, the Department estimated there are up to 1.4 million workers who may currently be paid under the fluctuating workweek method and further assumed that half—698,383 workers—are actually being paid under that method. But, as the Preamble noted, the actual number may be higher or lower. To account for the uncertainty in the actual number of fluctuating workweek employees who would receive supplemental pay under the proposed rule, the Department estimated the total reduction in opportunity cost under three different scenarios:

- Scenario A uses half of the Department's estimate of fluctuating workweek employees, or 349,192 employees;
- Scenario B uses one quarter of the Department's estimate, or 174,596 employees; and
- Scenario C uses one tenth of the Department's estimate, or 69,838 employees.

Scenarios A–C reflect different assumptions regarding the number of fluctuating workweek employees who may receive supplemental pay, while Scenarios 1 and 2 reflect different assumptions regarding the amount of supplemental pay—and by extension productive activity—prevented by current legal uncertainty. These create six different combinations, A1 thorough C2, each presenting a different estimate for the total opportunity cost that the proposed rule would eliminate. The table below summarizes these possibilities:

TABLE 1—OPPORTUNITY COST ELIMINATED

		Scenario 1	Scenario 2
		1% Suppl. Pay	2% Suppl. Pay
Scenario A	349,192 Workers	$305,121,551	$610,243,103
Scenario B	174,596 Workers	152,560,776	305,121,551
Scenario C	69,838 Workers	61,024,310	122,048,621

As Table 1 shows, the estimated opportunity cost that the proposed rule could eliminate depends upon the number of workers being compensated under the fluctuating workweek method and the amount of supplemental pay that current legal uncertainty prevents such workers from receiving. At the low end is Scenario C1—representing the lowest calculated number of fluctuating workweek employees and the lowest calculated amount of supplemental pay—which indicates that opportunity cost that could be eliminated is approximately $61 million.[39] And at the high end is Scenario A2—representing the highest estimate of affected fluctuating workweek employees and the highest amount of supplemental pay—which indicates the opportunity cost that could be eliminated by the proposed rule is approximately $610 million.

The Department lacks sufficient data and information necessary to precisely predict which scenario is most plausible and thus to estimate the potential reduction in opportunity cost. Accordingly, the Department invites comment on this analysis, including any relevant data or information on the Department's assumptions regarding: (1) The estimated number of employees paid under the fluctuating workweek method; and (2) the amount of supplemental pay that current legal uncertainty prevents such employees from receiving. The Department especially welcomes information from employers, employer organizations, employee organizations, or payroll processors who may have unique insight into employees paid under the fluctuating workweek method.

II. Method Two: Comparison With Managerial Costs

In the absence of the fluctuating workweek NPRM, employers whose employees work irregular hours each week have different compensation options. One option is to pay workers an hourly wage with premiums (for hazard duty, graveyard shifts, and so forth), another option is to pay a salary without such premiums (another is to pay using the fluctuating workweek method, but without such premiums). Comparing these two options indicates a tradeoff between employer surplus—associated with the ability to enhance productivity by paying premiums—and reduced managerial costs—associated with paying salaries, per the Preamble's portion of this RIA. Hence, the managerial cost savings can provide a bound on the employer surplus effects that can be achieved by eliminating this tradeoff. Multiplying managerial costs for waged workers of $441.31 per year (=$50.92 × 52 weeks × 1/6 hour per week) by the estimated 698,393 fluctuating workweek employees yields an estimate of $308 million as the upper bound on the proposed rule's employer surplus effects.[40] Worker surplus would likely be of similar magnitude, thus putting the overall upper bound on rule-induced deadweight loss reduction at approximately $0.6 billion. If there were productivity gains from switching employees into the fluctuating workweek method, this bound could rise. As with Method One, the Department invites comment on this analysis.

Signed at Washington, DC, this 28th day of October, 2019.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

List of Subjects in 29 CFR Part 778

Wages.

For the reasons set forth above, the Department proposes to amend title 29, part 778, of the Code of Federal Regulations as follows:

PART 778—OVERTIME COMPENSATION

■ 1. The authority citation for part 778 continues to read as follows:

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 778.200 also issued under Pub. L. 106–202, 114 Stat. 308 (29 U.S.C. 207(e) and (h)).

■ 2. Revise § 778.114 to read as follows:

[39] The $61 million estimate should not be interpreted as a true lower bound. Indeed, a review of public comments on related rulemakings yields only a few muted requests for the fluctuating workweek policy to be revised—potentially indicating that the associated current deadweight loss is of limited magnitude.

[40] The estimate is an upper bound both due to diminishing returns and because it does not account for other potential employer choices (*e.g.,* paying salaries with premiums, while enduring uncertainty as to the arrangement's legality) that they would only pursue if less costly than the two options previously discussed.

§ 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:

(1) The employee works hours that fluctuate from week to week;

(2) The employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many;

(3) The amount of 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;

(4) The employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, or other additional pay of any kind not excludable from the regular rate under section 7(e)(1) through (8) of the Act) for the total hours worked each workweek regardless of the number of hours; and

(5) The employee receives overtime compensation, in addition to such fixed salary and any bonuses, premium payments, and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay for that workweek. Since the salary is fixed, the regular rate of the employee will vary from week to week and is determined by dividing the amount of the salary and any non-excludable additional pay received each workweek by the number of hours worked in the workweek. Payment for overtime hours at not less than one-half such rate satisfies the overtime pay requirement because such hours have already been compensated at the straight time rate by payment of the fixed salary and non-excludable additional pay. Payment of any bonuses, premium payments, and additional pay of any kind is not incompatible with the fluctuating workweek method of overtime payment, and such payments must be included in the calculation of the regular rate unless excludable under section 7(e)(1) through (8) of the Act.

(b) The application of the principles in paragraph (a) of this section may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose work hours never exceed 50 hours in a workweek, and whose salary of $600 a week is paid with the understanding that it constitutes the employee's compensation (apart from overtime premiums and any bonuses, premium payments, or other additional pay of any kind not excludable from the regular rate under section 7(e)(1) through (8)) for all hours worked in the workweek.

(1) *Example.* If during the course of 4 weeks this employee works 37.5, 44, 50, and 48 hours, the regular rate of pay in each of these weeks is $16, $13.64, $12, and $12.50, respectively. Since the employee has already received straight time compensation for all hours worked in these examples, only additional half-time pay is due. For the first week the employee is owed $600 (fixed salary of $600, with no overtime hours); for the second week $627.28 (fixed salary of $600, and 4 hours of overtime pay at half times the regular rate of $13.64 for a total overtime payment of $27.28); for the third week $660 (salary compensation of $600, and 10 hours of overtime pay at half times the regular rate of $12 for a total overtime payment of $60); for the fourth week $650 (fixed salary of $600, and 8 overtime hours at half times the regular rate of $12.50 for a total overtime payment of $50).

(2) *Example.* If during the course of 4 weeks this employee works 37.5, 44, 50, and 48 hours and 4 of the hours the employee worked each week were nightshift hours compensated at a premium rate of an extra $5 per hour, the employee's total straight time earnings would be $620 (fixed salary of $600 plus $20 of non-overtime premium pay for the 4 nightshift hours). In this case, the regular rates of pay in each of these weeks is $16.53, $14.09, $12.40, and $12.92, respectively, and the employee's total compensation would be calculated as follows: For the first week the employee is owed $620 (fixed salary of $600 plus $20 of non-overtime premium pay, with no overtime hours); for the second week $648.20 (fixed salary of $600 plus $20 of non-overtime premium pay, and 4 hours of overtime at half times the regular rate of $14.09 for a total overtime payment of $28.20); for the third week $682 (fixed salary of $600 plus $20 of non-overtime premium pay, and 10 hours of overtime at half times the regular rate of $12.40 for a total overtime payment of $62); for the fourth week $671.68 (fixed salary of $600 plus $20 of non-overtime premium pay, and 8 hours of overtime at half times the regular rate of $12.92 for a total overtime payment of $51.68).

(3) *Example.* If during the course of 4 weeks this employee works 37.5, 44, 50, and 48 hours and the employee received a $100 productivity bonus each week, the employee's total straight time earnings would be $700 (fixed salary of $600 plus $100 productivity bonus). In this case, the regular rate of pay in each of these weeks is $18.67, $15.91, $14, and $14.58, respectively, and the employee's total compensation would be calculated as follows: For the first week the employee is owed $700 (fixed salary of $600 plus $100 productivity bonus, with no overtime hours); for the second week $731.84 (fixed salary of $600 plus $100 productivity bonus, and 4 hours of overtime at half time the regular rate of $15.91 for a total overtime payment of $31.84); for the third week $770 (fixed salary of $600 plus $100 productivity bonus, and 10 hours of overtime at half times the regular rate of $14, for a total overtime payment of $70); for the fourth week $758.32 (fixed salary of $600 plus $100 productivity bonus, and 8 hours of overtime at half times the regular rate of $14.58 for a total overtime payment of $58.32).

(c) Typically, the salaries described in paragraph (a) of this section are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where the conditions for the use of the fluctuating workweek method of overtime payment are present, the Act, in requiring that ''not less than'' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for overtime hours at a rate no greater than that which the employee receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[FR Doc. 2019–23860 Filed 11–4–19; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0830]

RIN 1625–AA87

Security Zone; Super Bowl 2020, Bayfront Park, Miami, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary security zone over certain navigable waters of Biscayne Bay in connection with Super