

The Fluctuating Workweek Method of Calculating Overtime

by

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Robert B. Fitzpatrick*

The “Fluctuating Workweek” Method of Calculating Overtime

Non-exempt employees who are paid a salary may be paid for overtime on the “fluctuating workweek method” provided certain conditions are met. 29 CFR Section 778.114 provides as follows:

An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the 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 he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement. 29 CFR § 778.114 (a).

This regulation can be summarized as follows:

* This paper was prepared with the assistance of Jonathan Sandstrom Hill, an associate with Robert B. Fitzpatrick, PLLC. Mr. Sandstrom Hill is a May 2008 graduate of Georgetown University Law Center and a member of the Virginia State Bar.

1. The employee must be a salary which is a “fixed amount” regardless of how many hours are worked in a given week (29 C.F.R. §778.114(a) and (c));
2. The employee and employer must have a “clear mutual understanding” that the fixed salary is compensation for all hours worked in a week regardless of how many hours are worked in any given week (29 C.F.R. §778.114(a));
3. The weekly salary must be large enough such that the employee’s hourly rate never falls below minimum wage (29 C.F.R. §778.114(a) and (c)); and
4. The employee’s hours must fluctuate from week to week (29 C.F.R. §778.114(a)).

After several examples of overtime calculations using the fluctuating workweek method, each of these requirements will be dealt with below.

Overtime Calculations Using the Fluctuating Workweek Method

An employee’s base hourly rate is calculated by dividing the employee’s fixed weekly salary by the number of hours worked in that week. 29 C.F.R. §778.114(a). Thus, an employee’s base hourly rate will fluctuate depending on how many hours the employee works in a given week. 29 C.F.R. § 778.114(a); *Adams v. Dep’t of Juvenile Justice*, 143 F.3d 61, 67–8 (2d Cir. 1998) (finding regular rate determined based on actual hours worked); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138–39 (5th Cir. 1988) (finding that when employer and employee have agreed on fixed salary for varying hours, method of computation calls for dividing actual hours worked each workweek into fixed salary). When calculating overtime, the fluctuating workweek method takes into account that the employer has already compensated the employee for all hours worked, even those hours above 40 hours. Thus the only additional compensation an employee is entitled to is one-half times the regular rate of pay for hours over 40. *Id.*

For example, assume an employee makes \$500/week and has a clear mutual understanding with an employer that this amount is compensation for all hours worked. If over two weeks this employee works 44 and 50 hours each week, the employee’s base hourly rate is \$11.36 and \$10.00, respectively. This employee is entitled to 4 and 10 hours of overtime for these weeks. Because this employee has already received compensation for all hours worked, including those over 40, the employee is entitled to overtime pay equal to half his hourly rate for any time worked over 40 hours. Thus, for the 44 hour week, the employee should be paid half his hourly rate of \$11.36 for the 4 hours of overtime or \$22.72 (\$5.68 x 4). For the 50 hour week, the employee should be paid half his hourly rate of \$10.00 for the 10 hours of overtime, or \$50.00 (\$5.00 x 10).[†]

[†] In comparison, under the time-and-a-half method of calculating overtime, this employee would receive time-and-a-half pay for every hour worked over 40 hours. The hourly rate would be \$12.50 (\$500/40 hours). Thus in the first week of our example, the employee would be entitled to 4 hours of overtime time at a rate of \$18.75/hour or \$75.00. In the second week, the employee would be entitled to 10 hours of overtime at \$18.75/hour or \$187.50.

The court in *Condo v. Sysco, Corp.*, 1 F.3d 599 (7th Cir. 1993) upheld a very similar overtime calculation as complying with the FLSA. The method of calculation was described by the court as follows:

Condo’s total salary for weeks during which he worked for fifty hours would be \$440: For fifty-hour workweeks (as for all workweeks) Condo’s base pay would be \$400. Overtime pay would be one-half of the hourly rate (i.e., 1/2 of fifty hours divided into \$400, or \$4.00), multiplied by the ten hours of overtime worked, which results in a sum of \$40.00. This overtime pay added to the base pay results in the total weekly salary of \$440. For sixty-hour weeks, the chart explained that Condo’s total salary would be \$400 + (1/2 (\$400/60 hours)) X 18 hours, or \$466.60.

Id. at 600, n.1. As the following chart shows, this method of overtime calculation results in an employee earning a lower overtime rate as the hours work increase.

Hours Worked (Salary of \$1,000/week)	Conventional Method		Fluctuating Workweek Method	
	Regular Rate	Overtime Rate	Regular Rate	Overtime Rate
40	\$25.00	\$37.50	\$25.00	\$12.50
50	\$25.00	\$37.50	\$20.00	\$10.00
60	\$25.00	\$37.50	\$16.66	\$8.33
70	\$25.00	\$37.50	\$14.28	\$7.14

However, some courts have not found this fact problematic in upholding the use of the fluctuating workweek method. *See Condo v. Sysco Corp.*, 1 F.3d 599, 601–02 (7th Cir. 1993) (holding that the fact that “under the system that is enumerated in §778.114 the greater number of hours an employee works, the lower his regular rate will be and the less he will receive per overtime hour” does not render it unlawful); *Highlander v. K.F.C. Nat’l Mgmt. Co.*, 805 F.2d 644, 647–48 (6th Cir. 1986) (holding that use of the fluctuating workweek method, which resulted in lower earnings per hour as the number of hours per week increased, did not violate FLSA).

In a suit alleging non-compliance with the fluctuating workweek method, the employee bears the burden of proof on all claims. *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir. 2001).

1. The Fixed Salary Requirement

a. When Is a Salary “Fixed”?

- *O'Brien v. Town of Agawam*, 350 F.3d 279, 288-89 (1st Cir. 2003) (holding that variations in the weekly pay of law enforcement officers due to additional compensation for working night shifts prevented the finding of a fixed fluctuating workweek salary).
- *Heder v. City of Two Rivers*, 295 F.3d 777 (7th Cir. 2002) (collective bargaining agreement providing for overtime pay for every hour worked beyond a stated maximum was “incompatible with treating the base wage as covering any number of hours at straight time”).
- *Brumley v. Camin Cargo Control, Inc.*, 2009 U.S. Dist. LEXIS 126785 (D.N.J. Apr. 22, 2010) (paying security officers premiums to work night shifts violates the fixed salary requirement to apply the fluctuating workweek method).
- *Adeva v. Intertek USA, Inc.*, 2010 U.S. Dist. LEXIS 1963, at *2-3 (D.N.J. Jan. 11, 2010) (“The record demonstrates that Plaintiffs’ compensation for non-overtime hours varied, depending upon earned offshore pay, holiday pay or day-off pay. The Court is convinced that due to such payments, Plaintiffs cannot receive the fixed salary required to apply the fluctuating workweek method.”).
- *Ayers v. SGS Control Servs., Inc.*, 2007 U.S. Dist. LEXIS 19634, at *8-10 (S.D.N.Y. Feb. 27, 2007) (finding that inspectors did not receive a fixed salary because they received lump-sum “day-off pay” and “sea pay” for working on their days off and on offshore vessels).
- *Dooley v. Liberty Mut. Ins. Co.*, 369 F. Supp 2d 81, 86 (D. Mass. 2005) (following *O'Brien*).

b. Does Deducting Leave When Employees Miss Work Preclude Application of the Fluctuating Workweek Method?

- “An employer utilizing the fluctuating workweek method of payment may not make deductions from an employee’s salary for absences occasioned by the employee.” 29 C.F.R. §778.114(c). This includes deductions for illness, sick leave, and personal business. WH Admin. Op. FLSA 2006-15 (May 12, 2006); WH Admin. Op. (May 18, 1966).
- The Wage and Hour Division has ruled that occasional deductions for disciplinary reasons do not conflict with the use the fluctuating workweek method. WH Admin. Op. (Dec. 19, 1978); WH Admin. Op. (Dec. 29, 1978). *But see Mitchell v. Abercrombie & Fitch Co.*, 428 F. Supp. 2d 735 (S.D. Ohio 2006) (rejecting argument that pay was not fixed salary because employees were subject to discipline if their work time and benefit (e.g., vacation) time did not add up to 40 hours a week).

- *Conne v. Speedy Cash of Mississippi, Inc.*, 246 Fed. Appx. 849 (5th Cir. 2007) (holding that that deductions for vacation, personal days, sick days or other absences prevent the employer from making use of the fluctuating workweek method).
- *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44 (D.D.C. Sept. 22, 2006) – The court ordered payment at the time and half rate because there was no clear mutual understanding as to whether the employee would receive the fixed salary if that employee worked less than a full-time schedule in a given week. The court found the following arrangement inconsistent with the use of the fluctuating workweek method: “Sprint maintained a policy that, unless an employee utilized earned leave (e.g., vacation or “floating holiday” time), it would deduct a full or partial day’s pay in the event that either (1) the employee was required to attend a court proceeding as a defendant or witness, or (2) the employee was unable to report to work due to inclement weather. . . . The unavoidable implication of this policy is that an employee who had exhausted his leave bank (or not accrued sufficient leave time) would have been docked by Sprint for such missed time.”
- *Advea v. Intertek USA, Inc.*, 2010 U.S. Dist. LEXIS 1963 (D.N.J. Jan. 11, 2001) - The court held that plaintiffs were entitled to payment at the one and half rate because the prerequisites for application of the fluctuating workweek method were not met. Specifically, the court held that the record “demonstrates that Plaintiffs’ compensation for non-overtime hours varied, depending upon earned offshore pay, holiday pay or day-off pay . . . [D]ue to such payments, Plaintiffs cannot receive the fixed salary required to apply the [fluctuating workweek method].”
- *Compare Brumley v. Camin Cargo Control, Inc.*, 2009 U.S. Dist. LEXIS 126785 (D.N.J. Apr. 22, 2010) (defendant’s docking of plaintiff’s pay for unscheduled absences meant that plaintiff was no longer paid a fixed salary as called for by 29 C.F.R. §778.114 and thus the fluctuating workweek method could not apply to plaintiff) *with Cash v. Conn Appliances, Inc.*, 2 F. Supp 2d 884, 906 (E.D. Tx. 1997) (reading the fluctuating workweek regulations to permit an employer to dock pay when an employee failed to show up for scheduled work).
- *Samson v. Apollo Res., Inc.*, 242 F.3d 629 (5th Cir. 2001) (holding that defendant’s “deductions for tardiness” for willful absences did not defeat use of fluctuating workweek method).
- *Yourman v. Dinkins*, 865 F. Supp. 154 (S.D.N.Y. 1994) (refusing to apply fluctuating workweek method of overtime compensation because employer reduced employees’ suffered reductions in pay for working fewer than minimum number of hours).

2. **The Clear Mutual Understanding Requirement**

a. **The Existence of a Clear Mutual Understanding Regarding a Fixed Salary**

The Department of Labor issued an opinion letter stating that employees can indicate their acceptance of the fluctuating workweek method of payment by continuing to work fluctuating workweeks and accepting payment of a fixed salary regardless of how many hours they worked.

DOL Wage & Hour Division Opinion Letter - FLSA2009-3 (Jan. 14, 2009). Similarly, in *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999), the First Circuit noted that:

[T]he deposition testimony demonstrates that Valerio understood that her fixed weekly salary was to be compensation for potentially fluctuating weekly hours. She admits she was told that the hours were indefinite—“8:30 to whenever”—and that she understood that there “possibly” could be work days that would last longer than eight hours. She also understood, and accepted at the time, that Putnam did not intend to provide overtime pay if she worked more than 40 hours in a particular week. Additionally... [d]uring the first eleven months of her employment, Valerio routinely worked without complaint more than 40 hours per week without extra pay.

Id. at 39. Relying on these facts, the court held that there was a clear mutual understanding that “Valerio’s fixed salary would be compensation for however many hours she worked each week” and affirmed the district court’s use of the fluctuating workweek method of calculating overtime. *Id.* at 40.

In *Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997), the Fourth Circuit held, while affirming the district court’s award of damages based on the fluctuating workweek method, that “the existence of [a ‘clear mutual understanding’] may be based on the implied terms of one’s employment agreement if it is clear from the employee’s action that he or she understood the payment plan.” *Id.* at 219. *See also Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283 (N.D. Ill. 1995) (inferring an “implied-in-fact agreement” that employee was to receive the same salary regardless of how many hours worked where he had worked fluctuating hours for 30 months for a consistent salary and never protested).

In *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998), the court held that an employee need not agree to the use of the fluctuating workweek but only need understand its features, stating: “We are unable to find, and the EMTs [plaintiffs] have not identified, any case in which a court has required that employees consent to the fluctuating workweek plan to satisfy section 778.114—employees need only understand it.” *Id.* at 714. The court went on to hold that while the employer’s requirement that employees sign an explanatory memorandum is not necessary to demonstrate a clear mutual understanding: “it [the signed explanatory memorandum] is certainly probative of the employees’ clear understanding of the fluctuating workweek plan.” *Id.* In finding the requisite understanding, the *Griffin* court stated that the FLSA does not require that an “employer hold an employee’s hand and specifically tell him or her precisely how the payroll system works.” *Id.* at 717. *See also Highlander v. K.F.C. Nat’l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986) (finding clear mutual understanding when employee signed form explaining calculation of overtime under the fluctuating workweek method); *Condo v. Sysco Corp.*, 1 F.3d 599, 602 n.4 (7th Cir. 1993) (noting importance of the fact that employment contract contained chart illustrating method of overtime pay).

According to *Samson v. Apollo Res., Inc.*, 242 F.3d 629 (5th Cir. 2001), an employer need not explain any details of the fluctuating workweek method other than that it compensates employees at a fixed salary for all hours worked in a workweek no matter their number. *Id.* at 637. *See also, e.g., Cash v. Conn Appliance*, 2 F. Supp. 2d 884, 907 (E.D. Tex. 1997) (adopting and applying this standard of the clear mutual understanding requirement).

b. Does the Clear Mutual Understanding Requirement Extend to the Method of Overtime Calculation?

The Department of Labor issued an opinion letter stating that there does not need to be a “clear mutual understanding” of the method used to calculate overtime pay, but rather that the “clear mutual understanding” applies only to the understanding that an employee’s salary would remain fixed even if their hours varied. DOL Wage & Hour Division Opinion Letter - FLSA2009-3 (Jan. 14, 2009), available at http://www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_03_FLSA.pdf. Similarly, in *Bailey v. County of Georgetown*, 94 F.3d 152 (4th Cir. 1996), the Fourth Circuit rejected as “contrary to the plain language of the FLSA and [Section 114]” the notion that employers and employees who have adopted a fluctuating pay plan must understand the manner in which overtime pay will be calculated. The court held that the parties must only have reached a “clear mutual understanding” that while the employee’s hours may vary, his or her base salary will not. Even in cases where “the record is replete with evidence that supports Plaintiff’s contention that he did not understand how his [overtime] pay was calculated,” the courts have applied the fluctuating workweek method while holding that there is no requirement that an employee understand how their overtime pay is calculated so long as there is a clear mutual understanding that their base salary remains fixed regardless of how many hours they work in a week. *Lance v. Scotts Co.*, 2005 U.S. Dist. LEXIS 14949, at *20 (N.D. Ill. July 21, 2005).

Other courts have held that the clear mutual understanding requirement includes an understanding that employees will be compensated at an overtime rate of half their regular hourly rate. *Monahan v. Emerald Performance Materials, LLC*, 2010 U.S. Dist. LEXIS 17034 (W.D. Wash. Feb. 25, 2010) (holding that because the employees had been receiving no overtime pay, there could be no clear understanding between the parties regarding the rate of overtime pay and thus the fluctuating workweek method could not be applied).

Additional cases discussing whether the clear mutual understanding must extend to the method of overtime calculation include:

- *Conne v. Speedee Cash of Mississippi, Inc.*, 246 Fed. Appx. 849, 851 (5th Cir. 2007) (holding that contemporaneous payment of an overtime premium is an essential prerequisite to using the fluctuating workweek method).
- *Garcia v. Port Royale Trading Co.*, 198 Fed. Appx. 845 (11th Cir. 2006) (deeming it sufficient that plaintiff understood how much he was paid, that he was paid in the form of a salary, that his hours fluctuated, and that he was paid under the fluctuating workweek method for three years).
- *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999) (requiring clear mutual understanding at the time of hiring that plaintiff’s weekly hours would fluctuate and that the fixed salary provided straight time compensation for all hours worked).
- *Griffin v. Wake County*, 142 F.3d 172 (4th Cir. 1998) (explaining that Section 778.114 does not require an employer to explain precise details of the administration of fluctuating hours plan).
- *Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir. 1997) (holding that contemporaneous payment of an overtime premium is an essential prerequisite to using the fluctuating workweek method).

- *Teblum v. Eckerd Corp. of Florida*, 2006 U.S. Dist. LEXIS 6406 (M.D. Fla. Feb. 7, 2006) (rejecting argument that “mutual understanding” could not exist when employees did not know maximum hours they would be required to work).
- *Tumulty v. FedEx Ground Package Sys., Inc.*, 2005 U.S. Dist. LEXIS 25997 (W.D. Wash. Aug. 16, 2005) (entering summary judgment for defendant, holding that only relevant consideration as to whether a “clear mutual understanding” existed for purposes of fluctuating workweek method is whether parties agreed that salary would be paid for all hours worked, regardless of how many).
- *Stokes v. Norwich Taxi, LLC*, 289 Conn. 465, 482-83 (2008) (holding that contemporaneous payment of an overtime premium is an essential prerequisite to using the fluctuating workweek method).

3. **The Minimum Wage Requirement**

- *Arnold v. Kelly’s Café Am., Inc.*, 2007 U.S. Dist. LEXIS 90623 (W.D. Wash. Aug. 12, 2005) (rejecting fluctuating workweek method in part because employee’s average hourly earnings under fluctuating workweek method were less than the required minimum wage in 19 of the first 20 weeks).
- *Aiken v. County of Hampton*, 172 F.3d 43 (4th Cir. 1998) (finding employer’s limited use of a minimum wage adjustment did not indicate noncompliance with minimum wage requirements for use of fluctuating workweek method).
- *Cash v. Conn Appliances*, 2 F. Supp. 2d 884 (E.D. Tex. 1998) (deeming evidence of isolated instances when regular rate fell below minimum wage for individual employees to be insufficient to preclude use of fluctuating workweek method, provided that shortfall was cured).

4. **The Fluctuating Hours Requirement**

a. **Must an Employee’s Hours Fluctuate Below 40 Hours in Certain Weeks for the Fluctuating Workweek Method to Apply?**

Despite the language of Section 778.114(a), both the DOL and the courts have loosely interpreted the “fluctuation requirement.” The DOL and at least one court have stated that there is no requirement that the employee’s hours of work fluctuate above and below 40 hours in a workweek. 56 WH Admin. Op. (Oct. 27, 1967); *Condo v. Sysco Corp.* 1 F. 3d 599, 602-603 (7th cir. 1993) (applying the fluctuating workweek method and finding employee worked varying amounts of overtime hours, but not fewer than 40 hours per week). Similarly, the Fourth Circuit in *Aiken v. County of Hampton*, 172 F. 3d 43 (4th Cir. 1998) (unpublished), held that fluctuating base hours were not necessary and that Section 778.114 applies in situations where fixed base hours were coupled with fluctuating overtime. The court also held that an employer’s schedule need not fluctuate in an unpredictable manner. A year later the Fourth Circuit clarified the

requirements for a fluctuating hours plan in *Griffin v. Wake County*, 142 F. 3d 172 (4th Cir. 1998). The court held that Section 778.114 does not require a schedule to be unpredictable for it to meet the “fluctuation” requirement.

b. Does Working a Set Schedule Preclude Application of the Fluctuating Workweek Method?

- *Flood v. New Hanover County*, 125 F.3d 249 (4th Cir. 1997); *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998). In both of these cases, the Fourth Circuit held that the fluctuating workweek method can be used when employees’ workweeks fluctuated but on a fixed, repeating schedule. In these cases, EMTs worked 24 hours on, 24 hours off, 24 hours on, and then 96 hours off. The court held that there is no requirement that the fluctuating hours be unpredictable.
- *Aiken v. County of Hampton*, 172 F.3d 43 (4th Cir. 1998) (holding that the fluctuating workweek method will apply in situations where fixed base hours are coupled with fluctuating overtime).
- However, the Seventh Circuit reached a different result in *Heder v. City of Two Rivers*, 295 F.3d 777 (7th Cir. 2002). In that case, the court held that because the firefighters never worked less than their required 216 hours over a 27 day period, the fluctuating workweek model could not be applied because “there is no shortfall of time (and correspondingly higher hourly rate) in one pay period that make up for longer work in another.” The court required the city to pay overtime at the time and a half rate.

Can the Fluctuating Workweek Method be Used to Calculate Damages in Misclassification Cases?

Often, in settling misclassification claims, employers argue that they should be permitted to use the fluctuating workweek method for calculating overtime on the ground that the misclassified worker meets the test for use of the fluctuating workweek method of determining overtime. Several circuits have adopted this approach and held that employees who meet the requirements for being paid overtime under the fluctuating workweek method should have their damages in misclassification cases calculated according to that method. *Clements v. Serco*, 530 F.3d 1224 (10th Cir. 2008) (holding the only clear mutual understanding required by statute is a fixed salary for fluctuating hours, not an understanding regarding payment of overtime, and using the fluctuating workweek method to calculate damages); *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999) (holding that there was a clear mutual understanding that “Valerio’s fixed salary would be compensation for however many hours she worked each week” and affirming the district court’s use of the fluctuating workweek method of calculating overtime); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138–39 (5th Cir. 1988) (finding that when employer and employee have agreed on fixed salary for varying hours, method of computation calls for dividing actual hours worked each workweek into fixed salary). *But see*, *Rainey v. American Forest and Paper Ass’n, Inc.*, 26 F. Supp. 2d 100, 101 (D. D.C. 1998) (holding that *Blackmon* “was not supported by any explanation or effort to analyze the relevant statutory and regulatory language”); *In re Texas EZPawn Fair Labor Standards Act Litigation*, 2008 WL 2513682, at *7 (W.D. Tex. June 18, 2008) (rejecting *Blackmon* as “fundamentally

flawed” because “[i]t was supported by no discussion or analysis of the issues, and assumed—wrongly—that § 778.114 has the force of law”); *Cowan v. Treetop Enters.*, 163 F. Supp. 2d 930 (M.D. Tenn. Aug. 16, 2001) (rejecting *Blackmon*’s retroactive application of the fluctuating workweek).

Plaintiffs argue that such an approach ignores the plain language of the regulation and the need to interpret exceptions to the FLSA’s remedial goals narrowly. Some courts have agreed with plaintiffs making these arguments and held that the fluctuating work week method cannot be used to calculate damages in misclassification cases. For example, in *Brown v. Nipper Auto Parts*, 2009 U.S. Dist. LEXIS 43213 (W.D. Va. May 21, 2009), the court was faced with cross motions for summary judgment pertaining to whether Plaintiff was exempt from the FLSA’s overtime provisions and, if not, whether the employer could use the fluctuating workweek basis for paying unpaid overtime. The court held that since the misclassified worker did not meet the requirements for being paid using the fluctuating workweek, then the employer could not use the fluctuating workweek method to calculate the overtime due. The court ordered overtime pay at one and one-half times plaintiff’s regular rate. Other cases that have addressed the issue of whether in the settlement of a misclassification case the employer can use the fluctuating workweek method of determining overtime include:

- *Monahan v. Emerald Performance Materials, LLC*, 2010 U.S. Dist. LEXIS 17034 (W.D. Wash. Feb. 25, 2010) (holding that overtime must be calculated at the time-and-a-half rate as there was no “clear mutual understanding” that overtime would be calculated with the fluctuating workweek method).
- *Russell v. Wells Fargo and Co.*, 672 F. Supp. 2d 1008 (N.D. Cal. Nov. 17, 2009) (“If Defendants’ position [seeking to apply the fluctuating workweek method in a misclassification case] were adopted, an employer, after being held liable for FLSA violations, would be able unilaterally to choose to pay employees their unpaid overtime premium under the more employer-friendly of the two calculation methods. Given the remedial purpose of the FLSA, it would be incongruous to allow employees, who have been illegally deprived of overtime pay, to be shortchanged further by an employer who opts for the discount accommodation intended for a different situation.”).
- *In re Texas EZPawn Fair Labor Standards Act Litigation*, 633 F. Supp. 2d 395 (W.D. Tex. June 18, 2008) (“Where an employee is misclassified, it is impossible for there to be the requisite mutuality.”).
- *Ayers v. SGS Control Servs., Inc.* U.S. Dist. LEXIS 76539, at *2 (S.D.N.Y. Oct. 9, 2007) (“*Ayers II*”) (holding that as the defendant had violated the fixed salary requirement of the fluctuating workweek method, it could not have damages calculated under the fluctuating workweek method).
- *Scott v. OTS Inc.*, 2006 U.S. Dist. LEXIS 15014 (N.D. Ga. March 31, 2006) (holding that the plain language of Section 778.114 requires contemporaneous payment of overtime).
- *Hunter v. Sprint Corp.*, 453 F. Supp. 2d 44 (D.D.C. 2006) (concluding that the fluctuating workweek method should not “be used as a fall-back whenever employers mistakenly classify employees as FLSA-exempt”).

- *Cowan v. Treetop Enters.*, 163 F. Supp. 2d 930 (M.D. Tenn. Aug. 16, 2001). “The Defendants’ prior assertion of exempt status for these employees and the lack of contemporaneous payment of the 50% overtime to unit managers bar the Defendants’ reliance upon Section 778.114(a) [the regulation allowing for the fluctuating workweek method].” The court also rejected using the fluctuating workweek as the “preponderance of the evidence shows an agreed 10-hour work day schedule.” A fixed weekly schedule is incompatible with the fluctuating workweek method and the proper overtime rate is time and a half.
- *Rainey v. American Forest and Paper Ass’n, Inc.*, 26 F. Supp. 2d 100, 102 (D. D.C. 1998) (“If defendant believed that plaintiff was exempt from § 207(a), such that she was entitled to no overtime compensation, then it was not possible for it to have had a clear mutual understanding with plaintiff that she was subject to a calculation method applicable only to non-exempt employees who are entitled to overtime compensation.”).
- *Cash v. Conn Appliances, Inc.*, 2 F. Supp 2d 884 (E.D. Tex. 1997) (holding that occasional violations of the fluctuating workweek requirements do not result in a broad invalidation of the method when calculating damages).

Between January 14 and 16, 2009, the then-Acting Wage and Hour Administrator issued 35 Opinion Letters. One of these Opinion Letters, FLSA 2009-3 (Jan. 14, 2009), *available at* http://www.dol.gov/whd/opinion/FLSA/2009/2009_01_14_03_FLSA.pdf, specifically allows for the use of fluctuating workweek method in calculating damages in misclassification cases. Plaintiffs argue that Opinion Letter 2009-3 is not persuasive for the following reasons:

1. It fails to analyze the clear mutual understanding and contemporaneous overtime payment requirements of Section 778.114;
2. It fails to consider that the FLSA is a remedial statute and thus exceptions and exemptions to it should be construed narrowly; and
3. It creates incentives for employers to violate the FLSA as it is cheaper to misclassify an employee and the pay damages calculated by the fluctuating workweek method than to pay an employee time-and-a-half overtime.

If a court find that the fluctuating workweek method should not be used to calculate damages, there remains a question regarding how to calculate the regular hourly rate (which will then be multiplied by 1.5 to determine the overtime rate). Plaintiffs argue that courts should use the 40-hour week (not a higher figure) as the denominator for the calculation. *See, e.g., Brumley v. Camin Cargo Control, Inc.*, 2009 U.S. Dist. LEXIS 126785 (D.N.J. Apr. 22, 2010); *Ayers v. SGS Control Servs., Inc.* U.S. Dist. LEXIS 76539 (S.D.N.Y. Oct. 9, 2007).