

Daily Labor Report®

First Responder Overtime Virus Pay at Risk Under DOL Rule: Union

By Ian Kullgren

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- Firefighters' union fears pay cuts, excessive overtime
 - Some lawyers say new rule likely to face litigation
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A Labor Department rule on fluctuating schedules set to take effect in July could cut overtime pay for first responders in the middle of the Covid-19 pandemic, according to a national union that represents firefighters and emergency medical technicians.

The rule makes it easier for employers to use the fluctuating workweek method of calculating pay under the Fair Labor Standards Act. Those who support the change say it shields employers from lawsuits when they give bonuses to workers. The union and public-sector worker advocates say it could lead to pay cuts and excessive overtime shifts for firefighters and EMTs because those who work the most overtime could end up earning significantly less.

"Employers know that they can push to have employees work longer hours," said Gregory McGillivray, a senior partner at McGillivray Steele Elkin who represents the International Association of Fire Fighters. "Firefighters working those extended overtime hours is never a great idea because of fatigue."

IAFF represents 320,000 firefighters and paramedics. As many as 1.4 million workers are eligible to be paid under the fluctuating workweek method, DOL estimates, though the actual number is likely much lower.

The fluctuating workweek is an optional method to pay employees who work irregular hours week to week. Employers pay workers half their hourly rate for each hour worked beyond 40 hours, rather than one-and-a-half times their regular rate.

The DOL rule finalized last week states that forms of compensation, such as commissions and hazard pay, may be included in the employee's regular-rate calculation, rescinding an Obama-era restriction intended to stop employers from shifting pay to other forms of compensation.

"First responders would fit that—they have some sort of schedule but then they end up having to stay because of some extended emergency," said Heidi Shierholz, a senior economist and policy director at the left-leaning Economic Policy Institute.

Other Extra Compensation

Management attorneys say the rule would protect employers from wage lawsuits for giving bonuses to workers. Previously, businesses that used the fluctuating workweek method were advised not to include bonuses in the regular rate calculation, forcing some to choose between using the fluctuating workweek option and giving employees incentive pay to boost wages.

Under the new rule, businesses may include other forms of compensation in the regular rate equation before cutting that rate in half to calculate overtime.

“There’s no reason to believe that employee pay is going to decline as a result of this rule in the aggregate,” said Paul DeCamp, the DOL Wage and Hour administrator during the George W. Bush administration who’s now an attorney at Epstein Becker Green. “Instead, this rule if anything makes it easier for companies to provide fluctuating workweek employees with extra compensation in the form of bonuses, shift premiums, and other additional money.”

The rule also gives workers a guaranteed base pay that could be preferable to an hourly worker eligible for regular time-and-a-half overtime, said Jeffrey Brecher, head of the national wage-hour practice group at Jackson Lewis in Long Island, N.Y.

Hourly employees earn less if they don’t work a full 40 hours, “but with fluctuating workweek, they would get a fixed salary regardless of the number of hours they worked,” Brecher said.

The change won’t affect most unionized workers, whose pay is codified in collective bargaining agreements. A spokeswoman for National Nurses United said in an email that the rule “largely does not seem to affect our unionized nurses,” or acute-care bedside nurses because they typically aren’t paid under the fluctuating workweek method.

But those who typically get the most overtime pay could lose out, especially first responders and other public-sector workers who aren’t guaranteed collective bargaining under federal law. Twenty-four states severely limit or prohibit collective bargaining for public-sector workers, according to the American Federation of State, County and Municipal Employees.

In comments on the rule, the IAFF asked the Labor Department to consider an exemption for first responders. DOL didn’t include an exemption in the final rule, and said in a statement it wouldn’t consider adding one.

“Firefighters and other first responders who work a fluctuating schedule are not necessarily paid under the Fluctuating Workweek method,” a DOL spokeswoman said. “Some may be, but many individuals who work flexible hours will still be paid under the traditional hourly + overtime compensation method.”

One requirement of the rule is that all employees must agree with their employer to be paid that way, the spokeswoman added. “As such, an employer cannot unilaterally convert employees to the FWW method.”

The rule is classified as “interpretive” rather than legislative, meaning it lacks the force of law and can be overturned by a judge more easily. McGillivray, the attorney representing the firefighters union, said he would consider filing a lawsuit if there’s evidence of worker harm.

“Further litigation on this issue is inevitable,” said Justin Swartz, a partner at the plaintiff firm Outten & Golden in New York. “Even judges who have ruled in favor of employers on fluctuating workweek issues have done so reluctantly, because even management advocates have to admit that the whole thing stinks.”

—*With assistance from Ben Penn.*

To contact the reporter on this story: Ian Kullgren in Washington at ikullgren@bloombergindustry.com

To contact the editors responsible for this story: Martha Mueller Neff at mmuellerneff@bloomberglaw.com; John Lauinger at jlauinger@bloomberglaw.com

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