

## DOL Floats Fluctuating Workweek, Vet Health Care Rules

By **Braden Campbell**

*Law360 (November 5, 2019, 6:15 PM EST)* -- The U.S. Department of Labor proposed a rule this week that would allow employers using the “fluctuating workweek” overtime formula to pay their workers bonuses, and another that would exclude certain health care providers that serve veterans from the scrutiny of the agency’s discrimination watchdog.

The agency on Monday issued a notice of proposed rulemaking on the “fluctuating workweek method of computing overtime,” which would undo an Obama-era regulation meant to block businesses from shorting workers by shifting the bulk of their base salaries into bonuses.

Then on Tuesday, it issued another proposed rulemaking notice that would put health care providers serving clients through the TRICARE military benefits program outside the purview of the DOL’s Office of Federal Contract Compliance Programs, which brings lawsuits against government contractors that violate federal discrimination laws and regulations.

The notices kick off the process of formally revising the DOL’s regulations in these areas, and give stakeholders 30 days to weigh in on the plans. The fluctuating workweek proposal was published Tuesday and the TRICARE plan is scheduled to be published Wednesday, the DOL said.

DOL Wage and Hour Division head Cheryl Stanton applauded the fluctuating workweek proposal in a statement Monday, saying existing regulations have caused employers “uncertainty regarding their ability to provide bonus pay for workers with fluctuating workweeks.”

“This proposed rule will provide much-needed clarity for job creators who are looking for new ways to better compensate their workers,” Stanton said.

The rule, which would not bind the courts but could inform their decisions, applies to a court-created alternative to the standard time-and-a-half overtime structure for employers whose workers’ hours vary widely from week to week. This method lets employers pay overtime hours at diminishing rates as long as they pay workers a minimum base salary, regardless of how many hours they work. The method makes employers pay out overtime hours at half of a worker’s “regular rate,” which is calculated by dividing the worker’s base salary by the number of hours they work.

For example, a worker who works at a base rate of \$500 per week would earn that sum even if they work 35 hours in a week. If they work 45 hours, they would receive their base rate plus five hours at half their regular rate for that week — \$11.11 — for a total pay of \$527.78.

Courts administering the fluctuating workweek structure have disagreed about whether employers should be allowed to pay workers overtime, the DOL said in its proposed rule. In 2011, the agency finalized a rule blocking businesses that use the method from paying bonuses, reasoning that the alternative would have the “unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees’ compensation into bonus and premium payments.”

But the DOL said Monday it “is no longer concerned” that employers would game the system if they're allowed to pay bonuses, citing findings by its Bureau of Labor Statistics that bonuses make up “a relatively small portion” of workers’ overall pay. As such, the proposal would let employers pay bonuses as long as they factor these payments into the regular rate formula.

Susan Harthill, a former DOL attorney who now advises employers for Morgan Lewis & Bockius LLP, said the proposed rule will dispel “confusion about whether employers could use the fluctuating workweek method if they give a bonus, incentive or other extra payment.”

“This is welcome news for employers,” she said.

The agency’s other proposal would limit OFCCP’s authority over employers connected to TRICARE, a federal program that contracts with a network of health care providers to serve military veterans and their families.

Currently, OFCCP interprets its statutory mandate to give it authority to audit and sue providers that contract with TRICARE, though it declared a moratorium on actions against TRICARE providers in 2014 after Congress decried an agency suit against a Florida hospital.

Tuesday’s proposal essentially extends that moratorium indefinitely, but the agency retains authority over providers that contract with the government outside of TRICARE.

OFCCP Director Craig Leen said the rule will prevent costly guesswork by TRICARE providers about their risk of OFCCP suits.

“Today's proposed rulemaking will allow TRICARE providers to shift resources away from expenses related to legal uncertainties and toward the veterans, active service members and families they serve,” Leen said in a statement.

--Editing by Amy Rowe.