December 5, 2019

ATTORNEY GENERAL RAOUL URGES DEPARTMENT OF LABOR TO WITHDRAW PROPOSAL THAT WOULD DECREASE EMPLOYEE EARNINGS

Raoul, 17 Attorneys General Argue the Proposal Will Result in Longer Hours, Lower Pay

Chicago — Attorney General Kwame Raoul and Pennsylvania Attorney General Josh Shapiro today led a coalition of 18 attorneys general in opposing a proposal by the U.S. Department of Labor to change the method employers use to calculate overtime, which would force employees to work longer shifts while reducing their weekly earnings.

In a letter issued today, Raoul and the coalition urged the Department of Labor (DOL) to withdraw its proposed rule amending the DOL's regulation on the fluctuating workweek method of computing overtime. The coalition argues that the DOL's proposal to arbitrarily expand the application of the fluctuating workweek method compromises worker safety, reduces the compensation workers receive for overtime work, and makes it more difficult for employers to comply with fair labor laws.

"All employees have a right to receive a fair living wage for the work they perform, which includes receiving fair compensation for any hours they work," Raoul said. "I urge the Department of Labor to withdraw its arbitrary proposal that will allow employers to take advantage of their employees and impede states' ability to protect our workers."

Under the fluctuating workweek rule, employers can agree to pay a limited class of employees whose hours fluctuate from week to week a fixed salary for all hours worked. Those employees' regular rate of pay is calculated by dividing the employee's fixed salary by their total hours worked. Employers must then pay those employees an additional half of their regular rate for each overtime hour worked.

The rule has long been held as being incompatible in instances in which employees receive additional pay like bonuses and shift differentials linked to the hours they work. The fluctuating workweek rule is the only rule under which workers' hourly and overtime rates of pay actually decrease as the amount of hours they work per week increase. For that reason, states such as Illinois and Pennsylvania use a modified fluctuating workweek method or apply it only in the narrow set of circumstances allowed under current law.

The DOL's proposal would expand the application of the fluctuating workweek to employees who receive any kind of additional pay, including pay incentives linked to employees' hours worked, despite decades of legal precedent. In their letter, Raoul and the coalition argue that expanding the use of the fluctuating workweek rule decreases an employee's regular and overtime rate of pay the more the employee works. The coalition also argues that while the DOL claims the proposed rule will boost job creation, it actually creates incentives for employers to overwork employees instead of hiring additional staff. As employers reduce fixed salaries in lieu of paying employees premiums for working specific shifts, employees unable to work shifts offering premium pay will receive greatly reduced wages.

Additionally, Raoul and the attorneys general point out that the DOL's proposed rule undermines the Fair Labor Standards Act (FLSA), which was enacted in 1938 and ensures that employees are fairly compensated for working more than 40 hours per week. Instead of protecting workers from long hours and unfair compensation, the proposed rule threatens to expand the use of the only method for calculating overtime where the more the employee works, the less the employee is paid for each hour of overtime.

The proposed rule also runs counter to past court and department precedent. For decades, courts have held that employers may only use the fluctuating workweek rule when employees earn a fixed salary for all hours of work. In 2011, the DOL rejected a similar proposed rule because it would have the unintended consequence of allowing employers to pay a lower fixed salary and shift employees' compensation into bonuses, resulting in wide pay disparities depending on the hours employees worked. Raoul and the attorneys general argue that, in light of this precedent, the DOL offers no evidence to necessitate its policy change.

Joining Raoul and Shapiro in submitting the letter are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Vermont, and Washington.

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December 5, 2019

Via Electronic Filing (http://www.regulations.gov)

The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Amy DeBisschop
Acting Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
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Washington, DC 20210

Re: Notice of Proposed Rulemaking (RIN: 1235-AA31)
Fluctuating Workweek Method of Computing Overtime

Dear Secretary Scalia and Acting Director DeBisschop:

This comment is submitted by the Attorneys General of Illinois, Pennsylvania, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Vermont, and Washington in opposition to the United States Department of Labor's ("DOL" or "Department") proposed rulemaking amending the Department's Regulation on the Fluctuating Workweek ("FWW") Method of Computing Overtime. *See* 84 Fed. Reg. 59,590 (Nov. 5, 2019) (to be codified at 29 C.F.R. § 778.114 ("Proposed Rule"). As Attorneys General in our respective States, we enforce laws that protect the public interest, in some cases including laws that set fair

labor standards. The requirement that employers compensate nonexempt employees at time and a half their regular rate for all hours worked in excess of forty per week is a critical component of these enforcement schemes. It protects workers' health and safety by imposing a cost on employers who require their employees to work excessive hours, and it promotes economic security by ensuring that when employees do work long hours, they are fairly compensated. The Proposed Rule departs from this well-established framework without justification. Abandoning decades of precedent, the Proposed Rule will not only harm workers in our states by reducing their weekly earnings and forcing them to work longer or more difficult shifts, but will also create unnecessary confusion for employers, potentially leading them to violate state laws and needlessly exposing them to costly enforcement actions. For these reasons, we urge you to reconsider the Proposed Rule.

I. Introduction

The Proposed Rule relates to the federal Fair Labor Standards Act of 1938 ("FLSA"). Because States often provide wage-hour protections that exceed those provided by FLSA for employees covered by both, and extend wage-hour protections to employees who are not covered by FLSA, we have a keen interest in maintaining state and federal overtime enforcement schemes that relate to each other in a manner that can be understood by employees and employers alike. The FLSA requires employers to pay employees a rate of no less than time and a half the employees' regular rate of pay for each hour worked in excess of forty per week.[1] For example, a non-exempt employee whose hourly wage is $12 per hour would earn $18 per hour ($12/hour * 1.5) for every hour worked over forty per week. If that same employee worked 60 hours in a week, the employee would receive $480 in straight-time wages ($12/hour * 40 hours) plus $360 in overtime premiums ($18 * 20 hours), for a total of $840.

The FWW method allows an employer to hire an employee to work fluctuating hours each week but pay a fixed salary for all hours worked. Whether the employee works forty hours or sixty hours, the weekly salary is the same. Under the FWW method, the employee's regular rate of pay is derived by dividing the employee's fixed salary by all hours worked in a week. Pursuant to the FWW method, the employer need only pay an employee an additional half time (0.5) the regular rate of pay for each hour worked in excess of forty per week. The FWW method of calculating overtime wages is therefore the only method whereby the employee's regular rate of pay and the employee's overtime rate of pay actually decrease as the hours worked increase.

As an illustration of the FWW method, an employee who earns $600 per week no matter how many hours he or she works, and works fifty hours in a week, has a regular rate of $12/hour for that week ($600/50 hours). The overtime premium, then, is an additional $6 ($12/hour * .5) for each of the 10 hours of overtime worked, for a total of $660 ($600 [base pay] + $60 [overtime premium]). If that same employee works sixty hours the following week, however, the employee's regular rate of pay would drop to $10/hour for that week ($600/60 hours). Furthermore, the overtime premium would then only be an additional $5 ($10/hour * .5) for each of the 20 hours of overtime worked. The employee working 60 hours at a fixed salary of $600 under the FWW method would only earn a total of $700 for that week ($600 [base pay] + $100 [overtime premium]) in contrast to the non-FWW employee who earned $840 by working 60

[1] 29 U.S.C. § 207(a)(1).

hours at a regular rate of $12/ hour and an overtime rate of time and half ($18/hour) in the example referenced above.

The FWW method "may only be applied to calculate overtime premiums when there is a contractual agreement between the employer and the employee that the employee will be paid a fixed weekly wage for hours that fluctuate from week to week."[2] The amount may not be a "fixed *minimum* sum each week; rather, to comply with the regulation, [the weekly salary must be] a 'fixed amount as straight time pay for whatever hours [the employee] is called upon to work in a workweek, *whether few or many*.'"[3] "This requirement of a 'fixed salary' has existed since [29 C.F.R. § 778.114(a)] was adopted in 1968."[4] Several courts have expressed criticism of the existing FWW rule, opining that the "math adds up to a perverse incentive—'the longer the hours the less the rate of pay per hour.'"[5] The perverse incentives created by the rule have led multiple states, like Pennsylvania, to modify its application.[6] Other states, like Illinois, allow its use only in the narrow set of circumstances to which it has traditionally been limited—that is, when an employee receives a fixed salary and works fluctuating hours.

The Proposed Rule would amend 29 C.F.R. § 778.114 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)."[7] The proposal will also add examples of employer payments in addition to a fixed salary such as "(1) a nightshift differential and (2) a productivity bonus."[8]

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[2] *Black v. SettlePou, P.C.*, 732 F.3d 492, 499 (5th Cir. 2013) (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942)).

[3] *O'Brien v. Town of Agawam*, 350 F.3d 279, 288 (1st Cir. 2003) (finding shift differentials were "additional compensation," which varied weekly compensation "without reference to the number of hours worked.").

[4] *Dacar v. Saybolt, L.P.*, 914 F.3d 917, 931 (5th Cir. 2018).

[5] *Hasan v. GPM Investments, LLC*, 896 F. Supp. 2d 145, 147 (D. Conn. 2012) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942)). *See also Zulewski v. The Hershey Co.*, No. 11-05117, 2013 WL 633402, *5 (N.D. Cal. Feb. 20, 2013) ("Retroactive application of the FWW [in the misclassification cases] . . . goes against the FLSA's intention of encouraging employers to spread employment among more workers, rather than employing fewer workers who must then work longer hours." (citation omitted)).

[6] *See, e.g., Chevalier v. Gen. Nutrition Centers, Inc.*, ___ A.3d ____, No. 22 WAP 2018 (Pa. Nov. 20, 2019) (affirming determination that the "regular rate" should be calculated by using all hours worked as the divisor but, once calculated, the overtime premium must be one and one half time pursuant to Pennsylvania law), http://www.pacourts.us/assets/opinions/Supreme/out/J-26B-2019mo%20-%2010422881487748684.pdf?cb=1; *but see* S.B. 79, 2019 Gen. Assemb. (Pa. 2019) (requiring conformity of Pennsylvania minimum wage and overtime requirements with federal law and regulation unless a higher standard is specified by statute or state regulation), https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=S&billTyp=B&billNbr=0079&pn=1389.

[7] 84 Fed. Reg. at 59,594.

[8] *Id.*

Hours-based bonuses or incentives such as extra payment for working on a scheduled day off, working offshore, or working on a holiday have always been incompatible with the FWW method because when an employee receives these premiums her salary is no longer "fixed."[9] The Proposed Rule would make hours-based bonuses compatible with use of the FWW rule. In so doing, the Department abandons decades of legal precedent to the detriment of both employees and employers across the country. The Department proposes to expand use of the FWW method of calculating overtime, the only one in which an employee's regular rate of pay and overtime premium actually *decreases* the more the employee works. The Proposed Rule will harm employees in states that permit use of the fluctuating workweek method by subjecting them to longer hours for less pay. The Proposed Rule will also harm employers by fomenting confusion regarding their wage and hour obligations and incentivizing them to implement pay schemes that run afoul of laws, both in states that follow the FWW rule as traditionally circumscribed and those that do not follow it at all.

II. The Proposed Rule Is Contrary to the Purpose of the FLSA.

The FLSA was enacted in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[10] An employer may not "employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[11]

The FLSA requires overtime pay to achieve three purposes.[12] First, Congress sought to prevent workers willing to work long hours in detriment to their health from taking jobs from others.[13] Second, Congress intended to decrease unemployment by creating a financial incentive to hire more workers rather than scheduling longer hours.[14] Finally, Congress intended to adequately compensate workers for long hours and the increased risk of injury that accompanies those hours.[15] To avoid violating the Administrative Procedures Act (APA),[16] agencies engaging in rule-making must consider how their proposed rule would carry out the purpose of the Act they enforce.[17] The Proposed Rule stands in opposition to all three purposes.

The Proposed Rule would dramatically expand the use of the fluctuating workweek method in contravention of the purposes of the FLSA. Instead of protecting workers from long hours, fairly compensating workers for overtime work, and creating financial incentives for employers

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[9] *Id.* at 922, 926.
[10] 29 U.S.C. § 202(a).
[11] 29 U.S.C. § 207(a)(1).
[12] *See, e.g., Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1175-76 (7th Cir. 1987); *Parker v. NutriSystem, Inc.*, 620 F.3d 274, 279 (3d Cir. 2010).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 5 U.S.C. § 706(2)(A).
[17] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 29 (1983) (citation omitted).

to hire more workers, the Proposed Rule expands the use of the only method for calculating overtime where "the more the employee works and the more overtime the employee logs, the less he or she is paid for each additional hour of overtime."[18] Although the Proposed Rule purports to promote job creation,[19] in fact it creates incentives for employers to overwork their current employees instead of hiring additional staff. As employers reduce fixed salaries and shift employees' compensation towards premiums for working specific shifts, employees who are unable to work shifts offering premium pay will also find themselves with greatly reduced wages. Such effects are contrary to the original and continuing purposes of the FLSA. The Department's justification for this departure from decades of legal precedent and legislative purpose is very thin and would not survive arbitrary and capricious review. Accordingly, the Proposed Rule should be withdrawn.

III. The Proposed Rule Runs Afoul of Decades of Legal Precedent.

For decades, courts and the Department have been clear that employers may only use the FWW rule where their employees earn a fixed straight-time salary for *all* hours worked. This rule grew out of the Supreme Court's 1942 ruling in *Overnight Motor Transportation Co. v. Missel*. The *Missel* case involved a rate clerk employed by an interstate motor company, whose duties resulted in wide variations in the time he worked each week. The rate clerk earned a fixed salary for all hours worked, allowing him to receive a guaranteed wage on weeks when he worked few hours while serving as a ceiling for the employer on wages paid in weeks when a higher number of hours were worked. The *Missel* court developed the FWW rule to apply in the narrow set of circumstances presented in that case, namely, where an employee's regular rate of pay could be derived by dividing the employee's fixed salary by the number of hours worked each week, and where the regular rate varied only as a factor of the hours worked each week.[20] In 1968, the Department formally adopted the *Missel* court's FWW method by promulgating a federal regulation.

Since *Missel*, courts have been clear in their application of the FWW rule. Under the rule the employer's regular rate of pay can vary only with the number of hours worked per week, not the type of work performed during those hours or any premiums paid for those hours.[21] For example, in *O'Brien v. Town of Agawam*, the United States Court of Appeals for the First Circuit found that a town could not apply the FWW rule to the wages of police officers because the officers' straight-time compensation varied depending on what shift they worked.[22] Similarly,

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[18] *Monahan v. Cty. of Chesterfield*, 95 F.3d 1263, 1280 (4th Cir. 1996).
[19] News Release, U.S. Dep't of Labor, U.S. Department of Labor Announces Proposal to Expand Access to Bonuses for America's Workers (Nov. 4, 2019), https://www.dol.gov/newsroom/releases/whd/whd20191104.
[20] *Missel*, 316 U.S. at 580 ("Where the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week. As that rate is on an hourly basis, it is regular in the statutory sense inasmuch as the rate per hour does not vary for the entire week, though week by week *the regular rate varies with the number of hours worked*.") (emphasis added).
[21] *Id.* at 580 ("the longer the hours the less are the earnings per hour.").
[22] 350 F.3d 279, 288–89 (1st Cir. 2003).

the officers also received a premium for every hour they worked above eight per day.[23] The First Circuit held that the officers' regular rate of pay did not vary based only on the number of hours worked and, therefore, did not fit the fluctuating workweek mold. Specifically, it stated:

> [T]o comply with the regulation, the Town must pay each officer a "fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many.*" The undisputed evidence indicates that the Town does not satisfy this requirement. The officers' compensation varies from week to week even without reference to the number of hours worked.[24]

Federal courts across the country have followed *Missel* and *O'Brien* in ruling that when employees receive premiums based on what hours they work, the type of work they do, or other additional pay tied to hours worked, the FWW is no longer available as a method for calculating overtime pay. Courts have reasoned that, because the employees are receiving premiums for the hours they work, those premiums must be included in their regular rate of pay. As such, the employee's regular rate of pay would no longer vary solely based on the employee's fixed salary and the number of hours worked, as *Missel* and the FWW method have long required.

For example, in *Ayers v. SGS Control Service, Inc.*, the district court found that an employer in the oil and gas industry could not use the FWW method because it provided "day off pay" and "sea pay" for offshore assignments, and it stated that those premiums must be included in an employee's regular rate of pay.[25] In *Brantley v. Inspectorate Am. Corp.*, the district court found that the FWW rule did not apply where employers paid premiums to oil and gas inspectors based on the time they performed work and the type of work they performed.[26] These hours-based premiums were correctly part of the employees' regular wages and caused employees' weekly compensation to vary from week to week in contravention of the FWW rule.[27] The clear precedent since *Missel* has been that hours-based premiums, or premiums paid for specific shifts, or specific kinds of work are tied to the hours worked by employees and are incompatible with the FWW rule.

In addition to clear direction from the courts, the Department's own rulemaking history does not support an expansion of the FWW rule. In 2011, the Department rejected a similar rule, proposed in 2008, because the proposal "could have had 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, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked."[28] The summary of the final rule published by the Department explained that "[i]t is just this type of wide disparity in weekly pay that the fluctuating workweek method was intended to avoid by requiring the payment of a

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[23] *Id*. at 289.
[24] *Id.*
[25] No. 03 Civ. 9078 RMB, 2007 WL 646326, at *12 (S.D.N.Y. Feb. 27, 2007).
[26] 821 F. Supp. 2d 879, 890 (S.D. Tex. 2011).
[27] *See also Dooley v. Liberty Mut. Ins. Co.*, 369 F. Supp. 2d 81 (D. Mass. 1985).
[28] Updating Regulations Issued Under the Fair Labor Standards Act 76 Fed. Reg. 18,832, 18,850 (April 5, 2011) (to be codified at 29 C.F.R. §§ 4, 516, 531, 553, 778, 779, 780, 785, 786, and 790).

fixed amount as straight time pay for all hours in the workweek, whether few or many."[29] The Department's analysis echoed that of members of the United States Congress, who commented that the proposal was "unlawful" and violated the FLSA as interpreted by *Missel*.[30] The fact that the Department ultimately rejected this proposal when it published its final rule in 2011 is further evidence of the clear precedent for the limits of the FWW rule that the Department seeks to disturb by making additional payments "of any kind" compatible with the FWW rule.

IV. The Department Provides No Justification for Its Departure From Long-Standing Precedent.

An agency intending to abandon settled precedent must "provide a reasoned explanation for the change," including showing "that there are good reasons for the new policy."[31] Failure to do so may render a rule arbitrary and capricious and unlawful under the APA.[32] In an effort to justify its departure from decades of precedent, the Department claims that courts' interpretations of the FWW have created confusion for employers. Specifically, the Department claims that the distinction between productivity-based premiums (such as commissions) and hours-based premiums (such as shift differentials) is unclear. However, no such confusion exists.

It is true that several courts have held that employers may provide certain additional payments to employees without running afoul of the FWW rule. However, these courts have been careful not to disturb long-standing precedent that an employee cannot receive premiums tied to hours worked without violating the FWW rule's requirement that an employee receive a fixed salary for *all* hours worked. In contrast to hours-based premiums, productivity-based premiums provide additional compensation to an employee that is not tied to hours worked and does not alter the fixed wage an employee receives for all hours worked. The difference is clear: productivity-based premiums depend on the nature and quality of the work performed as opposed to the timing of the work.

For example, in *Lalli v. Gen. Nutrition Centers, Inc.*, the First Circuit explained that performance-based commissions do not conflict with the FWW regulation because performance-based bonuses, unlike time-based bonuses, do not vary based on the hours worked by employees.[33] Specifically, it stated:

> When an employee is paid a bonus for working a nighttime shift, his pay fluctuates as a direct result of the hour he is called upon to work. His compensation, by definition, varies with respect to the particular hour without regard to whether that hour is spent productively or idly. Thus, any underlying salary could not be called "fixed" with respect to "whatever hours he is called

[29] *Id.*
[30] Letter from U.S. Congress to Richard M. Brennan, Dir., Off. of Interpretations & Reg. Analysis, Dep't of Labor 4 (Sept. 26, 2008), https://www.regulations.gov/document?D=WHD-2008-0003-0037 (noting that many common types of bonuses and premiums would not be credited towards an employee's regular rate of pay under the proposal).
[31] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016) (citations omitted).
[32] *Id.*
[33] 814 F.3d 1, 5 (1st Cir. 2016).

> upon to work," as required under section 778.114. On the other hand, when an employee is paid a bonus for executing a large number of sales, his pay fluctuates as a direct result of those sales.[34]

Prior to *Lalli*, several district courts drew the same distinction between productivity-based premiums and hours-based premiums. For example, in *Soderberg v. Naturescape, Inc.*, the district court held that a lawn care provider's payment of performance-based bonuses to branch managers and lawn specialists was not incompatible with using the FWW to calculate these workers' overtime pay.[35] Such bonuses were not tied to hours worked, and therefore, employees were still receiving the same fixed salary.[36] In *Switzer v. Wachovia Corp.*, the trial court upheld the use of the FWW rule, despite the employer's payments of bonuses based on sales growth and portfolio growth, because the bonuses did not vary with hours worked.[37]

Similarly, fringe benefits and other additional payments made to employees without regard to the hours employees worked are not incompatible with the FWW rule.[38] The *Clements v. Serco, Inc.* case, which the Department cites as an example of a decision creating confusion over the compatibility of bonuses with the FWW method, involved military recruiters who received a fixed salary and a "commission if the Employees reached established quotas for recruits," not hours-based premiums.[39] Legal precedent simply does not offer any justification for the Department's proposed break with its current interpretation of the FWW rule.

Although the Department attempts to justify its abrupt departure from clear precedent by arguing that employers struggle to distinguish productivity bonuses from hours-based bonuses,[40] if employers have had a hard time differentiating between these two types of bonuses, the record certainly does not reflect it. The Department does not cite any cases or other instances where an employer's only alleged violation was failing to distinguish between hours-based and productivity-based premiums. Instead, the Department relies primarily on cases where

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[34] *Id*. at 7.
[35] No. 10-3429, 2011 WL 11528148 (D. Minn. Nov. 3, 2011).
[36] *Id.* at *5.
[37] No. H-11-1604, 2012 WL 3685978, at *3 (S.D. Tex. Aug. 24, 2012). *See also Lance v. Scotts Co.*, No. 04-5270, 2005 WL 1785315, at *6 (N.D. Ill. July 21, 2005) (finding the use of the FWW method permissible where employee received base salary plus commissions).
[38] *Aiken v. Cty. of Hampton*, 977 F. Supp. 390, 397 (D.S.C. 1997), *aff'd*, 172 F.3d 43 (4th Cir. 1998).
[39] 530 F.3d 1224, 1226 (10th Cir. 2008). In *Sisson v. Radioshack Corp.*, the district court held interpreted the 2011 Rule to prohibit the use of productivity bonuses with the FWW method. 1:12CV958, 2013 WL 945372, at *6 (N.D. Ohio Mar. 11, 2013). The court relied in part in the Department's departure from its short-lived position as stated in its 2008 NPRM. A single court's decision in the midst of the temporary confusion created by the Department's attempt to depart from the clear precedent interpreting the FFW method according to *Missel*, however, hardly provides justification for the Department's position now. Application of the FWW rule has always been limited to situations, as in *Missel*, where the employee is paid a fixed salary, there is an understanding that the fixed salary is compensation for all hours worked, and the employee's hourly rate of pay varies only with the hours worked.
[40] 84 Fed. Reg. at 59,592, 594

employers simply failed to follow the FWW rule by combining this compensation method with hours-based premiums. The cases the Department relies on involve application of the FWW rule to determine damages when an employee was misclassified as an independent contractor; they do not apply the FWW method where an employer attempted to follow the rule.

V. The Proposed Rule Will Harm Workers.

"It is undisputed that the FWW method has the effect of reducing workers' overtime pay."[41] Premium and bonus pay is offered by employers in many industries to incentivize hourly workers to pick up more hours, often for undesirable shifts. For example, such premiums may be offered for late shifts, weekends, holidays, or for shifts that involve more burdensome tasks. Many workers depend on the additional income offered as a result of working these shifts. The Department is now proposing to bring the premiums offered for working such shifts within the FWW rule, the only method of payment where the longer the hours worked, the lower the regular rate of pay. The Proposed Rule will dilute the value of those premiums by lumping them into the regular rate of pay calculation, harming workers across many labor sectors including construction, manufacturing, healthcare, insurance, and retail.[42] Compounding the loss of income, those employees will lose the time and one-half overtime premium when their employer takes advantage of the expanded FWW method.

The Proposed Rule will incentivize employers to lower fixed weekly salaries and make payment contingent on employees working difficult shifts. The Department cavalierly dismisses the concerns it expressed in its 2011 Final Rule, in which it agreed with comments on the proposed rule submitted by the AFL-CIO, the National Employment Law Project ("NELP"), members of Congress, and other stakeholders.[43] The Department noted then that "the proposed regulation could have had 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, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked."[44] These concerns remain relevant today.

In its new proposal, the Department notes that the Bureau of Labor Statistics 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."[45] The Department ignores, however, that the rule it is changing has prevented employers from exploiting the FWW method and acted as a deterrent against shifting more pay toward hours-based premiums.

The Department's endorsement of "additional pay of any kind" in the Proposed Rule risks eliminating that protection, for several reasons. First, modern staffing logistics enable businesses to staff mainly or wholly based on fluctuating employee workweeks. Second, the

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[41] *See* Letter from U.S. Congress, *supra* note 29.
[42] *See* News Release, Bureau of Labor Statistics, Employer Costs for Employee Compensation, June 2019, Table 4 (Sept. 17, 2019), https://www.bls.gov/news.release/pdf/ecec.pdf.
[43] *See* 76 Fed. Reg. at 18,850.
[44] *Id.*
[45] 84 Fed. Reg. at 59,594.

same logistical advances enable the calculation of "additional pay" that, while perhaps superficially attractive to the employee, will result in less pay – because of the marginally diminishing regular rate of pay – than she otherwise would have received via FLSA's overtime mandate. The Department's announcement of the Proposed Rule states that it "expand[s] access to bonuses for America's workers."[46] But these bonuses may amount to agreements to receive less overtime pay than required by the FLSA. That not only is a bad deal, but one violating a bedrock FLSA precept: minimum wage and overtime obligations cannot be waived.[47] As Justice Ginsburg has observed in the voting rights context, abandoning such a protection "when it has worked and is continuing to work . . . is like throwing away your umbrella in a rainstorm because you are not getting wet."[48]

VI. The Proposed Rule Will Create Confusion for Employers in States That Either Do Not Follow the FWW or Limit the FWW Method Following Settled Precedent.

For over 70 years, the requirements of a lawful fluctuating workweek have remained virtually unchanged. Within this context, some states have chosen to legislate or regulate the use of the FWW rule within their jurisdictions based on local needs, while others have remained silent and followed the federal standards. Illinois, for example, is part of a group of states that have enacted their own fluctuating workweek regulations that closely track the precedent set by *Missel* and apply the rule narrowly.[49] Other states, including Pennsylvania, Alaska, California, and New Mexico, have expressly prohibited use of the FWW method or modified its use in their jurisdictions.[50]

The signatory states are concerned that the Proposed Rule will create incentives for employers to reduce fixed weekly salaries while increasing weekly work schedules and to shift a large portion of wages into bonus and premium payments to reduce costs.[51] These incentives will likely lead employers to increase their use of the FWW rule and in doing so, will fail to comply with local laws that either do not allow the FWW rule or allow it only within the narrow bounds of the precedent the Department now seeks to overturn. Employers who rush to use the FWW in conjunction with hours-based premiums may suddenly find themselves embroiled in costly litigation or subject to investigation based on alleged violations of local laws that follow *Missel's* precedent or prohibit the FWW method altogether. In this sense it is the Department's effort to expand the FWW rule, rather than the status quo, that would create confusion for employers and courts.

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[46] *See* News Release, U.S. Department of Labor (November 4, 2019), http://www.usdol.gov/newsroom/releases/whd/20191104.
[47] *Brooklyn Savings Bank v. O'Neil*, 325 U.S. 895, 902 (1945)
[48] *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).
[49] 56 Ill. Admin. Code § 210.430(f).
[50] *See, e.g., Chevalier v. Gen. Nutrition Centers, Inc.*, ___ A.3d ____, No. 22 WAP 2018 (Pa. Nov. 20, 2019), http://www.pacourts.us/assets/opinions/Supreme/out/J-26B-2019mo%20-%2010422881487748684.pdf?cb=1.
[51] 76 Fed. Reg. 18,832, 18,848-50 (Apr. 5, 2011).

VII. Conclusion

The Proposed Rule runs counter to the remedial purpose of the FLSA and will result in employees working longer shifts while earning less wages. The Department should withdraw the Proposed Rule as it did in 2011 and avoid the harm and confusion to workers and employers that finalizing the proposed rule would cause.

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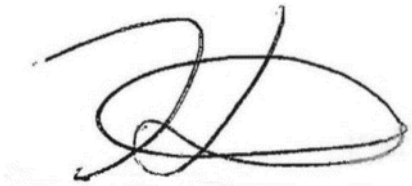

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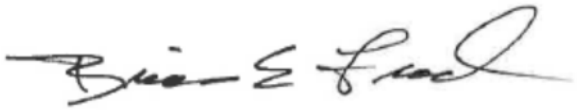

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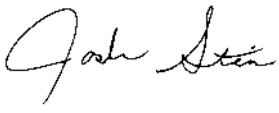

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