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## The Fluctuating Workweek: How It Works, How It's Treated, How It's Perceived

Anthony J. Galdieri  
*Franklin Pierce Law Center*

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# The Fluctuating Workweek: How It Works, How It's Treated, How It's Perceived

ANTHONY J. GALDIERI\*

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## I. INTRODUCTION

The fluctuating workweek method of overtime compensation is an alternative to the traditional method of overtime compensation, not an exception that cheats or oppresses the employee.<sup>1</sup> It allows employers to pay employees a fixed, weekly salary, which includes some compensation for overtime, but does not reward employers for

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\* B.A., History & Political Science, Muhlenberg College (2004); J.D., Franklin Pierce Law Center (2008). Currently, the author is the head law clerk of the New Hampshire Superior Court and an adjunct professor at Franklin Pierce Law Center.

1. *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir. 2001); *Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir. 1997); *Bailey v. County of Georgetown*, 94 F.3d 152, 154 n.5 (4th Cir. 1996); *Newsom v. NPC Int'l, Inc.*, No. 03-2068 ML/V, 2003 WL 23849758, at \*2 (W.D. Tenn. Sept. 29, 2003). *But see* *Dingwall v. Friedman Fisher Assocs.*, 3 F. Supp. 2d 215, 221 (N.D.N.Y. 1998); *Burgess v. Catawba County*, 805 F. Supp. 341, 348 (W.D.N.C. 1992).

working a small number of employees for long hours.<sup>2</sup> However, its frequent use in low-wage occupations is indicative of one thing: it is more expensive today to hire new employees than it is to pay a small number of employees to work overtime.<sup>3</sup>

The Fair Labor Standards Act of 1939 (“FLSA”) was enacted to protect workers from substandard wages and oppressive working hours and to create jobs.<sup>4</sup> It established the forty-hour workweek and penalized employers for overworking employees by requiring them to pay overtime.<sup>5</sup> In this way, Congress hoped that the FLSA would better employee health, efficiency, and well-being and encourage employers to spread work among a greater number of employees.<sup>6</sup>

Today, however, the costs associated with taking on new employees, such as administrative overhead, benefits packages (including health care, paid vacation, and sick leave), screening, training, workers’ compensation, and unemployment insurance, have risen dramatically.<sup>7</sup> Thus, paying a small number of employees to work

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2. See 29 C.F.R. § 778.114 (2009).

3. Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 64 (2005); Paul V. Martorana & Paul M. Hirsch, *The Social Construction of “Overtime,”* in THE TRANSFORMATION OF WORK 165, 173 (Steven Vallas ed., Research in the Sociology of Work, vol. 10, 2001).

4. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942), *superse- ded by statute on other grounds*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); Garrett Reid Krueger, Comment, *Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1098–99 (1995); see 29 U.S.C. § 202(a) (2006).

5. 29 U.S.C. § 207(a)(1).

6. *Id.* § 202(a) (stating that oppressive working conditions negatively affect commerce); see *Overnight Motor*, 316 U.S. at 577–78 (“[T]he purpose of the [FLSA] was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. . . . By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the [FLSA].”); Christopher L. Martin, Robert J. Aalberts & Lawrence S. Clark, *The Fair Labor Standards Act and the Fluctuating Workweek Scheme: Competitive Compensation Strategy or Worker Exploitation?*, 44 LAB. L.J. 92, 92–93 (1993).

7. See Lung, *supra* note 3, at 64; Martorana & Hirsch, *supra* note 3, at 173.

overtime helps ensure that sales outpace labor costs, rewarding the employer and undermining the purposes of the FLSA.

The result is that “[a]lmost one in five [American] workers is required to work paid or unpaid overtime once or more a week with little or no notice.”<sup>8</sup> “Nearly one in three [American] workers regularly works more than forty hours a week while one in five workers clocks over fifty hours a week.”<sup>9</sup> Moreover, the number of “American workers who work fifty hours or more per week is among the highest in the industrialized world.”<sup>10</sup>

Because employers know upfront that they will be paying their employees overtime, they have sought alternative methods for doing so that lessen the financial impact on them. One such alternative is the fluctuating workweek method of overtime compensation.<sup>11</sup> Approved by the United States Supreme Court in *Overnight Motor Transportation Co. v. Missel*, and subsequently reduced to regulation, this alternative to the traditional method of overtime compensation allows an employer to pay an employee a fixed, weekly salary, regardless of the number of hours worked.<sup>12</sup> Each week, the employee’s fixed salary is divided by the number of hours worked during the week to determine the employee’s regular rate of pay.<sup>13</sup> Because the fixed salary is designed to compensate the employee upfront for some overtime, an employee is paid one-half her regular rate for every hour she works over forty, instead of one and one-half times her regular rate.<sup>14</sup> Thus, “the more the employee works and

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8. Lung, *supra* note 3, at 52 (citing JAMES T. BOND ET AL., FAMILIES & WORK INST., THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE: EXECUTIVE SUMMARY 9 (1998), available at <http://www.familiesandwork.org/summary/nscw.pdf>).

9. *Id.* (citing LONNIE GOLDEN & HELENE JORGENSEN, ECON. POLICY INST., TIME AFTER TIME: MANDATORY OVERTIME IN THE U.S. ECONOMY (2002), [http://www.epinet.org/content.cfm/briefingpapers\\_bp120](http://www.epinet.org/content.cfm/briefingpapers_bp120)).

10. *Id.* (citing Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, 56 REV. SOC. ECON. 442, 449–50 (1998)).

11. See 29 C.F.R. § 778.114(a) (2009).

12. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); 29 C.F.R. § 778.114(a).

13. 29 C.F.R. § 778.114(a).

14. *Id.*

the more overtime the employee logs, the less he or she is paid for each additional hour of overtime.”<sup>15</sup> This result is permissible because the employee’s salary compensates the employee for some overtime upfront, allowing the employer to drop her hourly rate with every additional hour worked and to pay the employee at one-half her regular rate for the week for every hour worked over forty.<sup>16</sup>

Employers use the fluctuating workweek primarily to ease the burden of having to pay one and one-half times a fixed regular rate of pay in a week where the employee’s hours typically exceed forty hours and vary unpredictably from week to week.<sup>17</sup> Also, employees who fully understand the fluctuating workweek may agree to be compensated by that method because it gives employees “the benefit of a guaranteed salary even in weeks where their hours [are] low.”<sup>18</sup>

This article argues that the fluctuating workweek method of overtime compensation is a viable alternative to the traditional method of overtime compensation. First, it will explain how the fluctuating workweek works and how state courts have treated it. Second, it will debunk several misconceptions about the fluctuating workweek. Finally, it will show that employers are working small numbers of employees for long hours because paying overtime is cheaper today than hiring new employees.

## II. THE FLUCTUATING WORKWEEK: HOW IT WORKS

In order to compensate an employee under the fluctuating workweek, an employer must meet the following five criteria:

1. The employee’s hours must fluctuate from week to week;

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15. *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1280 (4th Cir. 1996).

16. *See* 29 C.F.R. § 778.114(a) (“Payment for overtime hours at one-half [the regular] 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.”).

17. *See* Letter from Catherine K. Ruckelshaus, Nat’l Employment Law Project, to Richard M. Brennan, Dir., Office of Interpretations & Regulatory Analyses, U.S. Dep’t of Labor (Sept. 25, 2008), *available at* [http://nelp.3cdn.net/9147564b4709d124c0\\_x7m6b56su.pdf](http://nelp.3cdn.net/9147564b4709d124c0_x7m6b56su.pdf).

18. *Id.*

2. The employee must receive a fixed salary that does not vary with the number of hours worked during the week (excluding overtime premiums);
3. The fixed amount must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage;
4. The employee must receive at least 50% of his regular hourly pay for all overtime worked; and
5. The employer and employee must share a clear mutual understanding that the employer will pay that fixed salary regardless of the number of hours worked.<sup>19</sup>

A. *The Employee's Hours Must Fluctuate from Week to Week*

Under the first criterion, the employee's hours must fluctuate from week to week.<sup>20</sup> For example, an employee who works eighty hours the first week, seventy-nine hours the second week, eighty hours the third week, and seventy-nine hours the fourth week meets this criterion. Neither the statute nor regulations require the employee's hours to fluctuate above and below forty hours per week.<sup>21</sup> In fact, the example provided in the regulations assumes that the employer will work the employee no fewer than forty hours per week.<sup>22</sup> Also, the fact that the employee works the same shifts or that her hours fluctuate in a predictable manner from week to week is inconsequential.<sup>23</sup>

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19. 29 C.F.R. § 778.114.

20. *Id.* § 778.114(a).

21. *See, e.g.,* Aiken v. County of Hampton, No. 97-2328, 1998 WL 957458, at \*3 (4th Cir. Sept. 22, 1998); Condo v. Sysco Corp., 1 F.3d 599, 602-03 (7th Cir. 1993); Mitchell v. Abercrombie & Fitch, Co., 428 F. Supp. 2d 725, 734-35 (S.D. Ohio 2006); Evans v. Lowe's Home Ctrs., Inc., No. 3:CV-03-0438, 2004 U.S. Dist. LEXIS 15716, at \*13-14 (M.D. Pa. June 17, 2004).

22. 29 C.F.R. § 778.114(b).

23. Griffin v. Wake County, 142 F.3d 712, 715 (4th Cir. 1998); Flood v. New Hanover County, 125 F.3d 249, 253 (4th Cir. 1997); Mitchell, 428 F. Supp. 2d at 735 n.14.

### B. *The Employee Must Receive a Fixed, Weekly Salary*

Under the second criterion, the employee must receive a fixed, weekly salary that does not vary with the number of hours worked during the week (excluding overtime premiums).<sup>24</sup> For example, if an employee's salary is \$400.00 per week, the employee must receive that salary whether she works ten or fifty hours during the week.

An employee's salary is not fixed if it is subject to docking whenever the employee works fewer than forty hours.<sup>25</sup> To show that a fixed salary is subject to docking, an employee must point to "an actual practice of making such deductions or an employment policy that creates a significant likelihood of such deductions."<sup>26</sup> An employment policy that creates a significant likelihood of such deductions must be "clear and particularized" and "must 'effectively communicate[]' that deductions will be made in specified circumstances."<sup>27</sup>

However, an employee's salary is not considered to be subject to docking where an employer requires salaried employees who work fewer than forty hours in a week to use their benefit time to meet a forty-hour workweek:

Where an employer has bona fide benefit plans for vacation, personal or sick leave, it is permissible to substitute or reduce the accrued leave in the plans for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his or her guaranteed salary.<sup>28</sup>

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24. 29 C.F.R. § 778.114(a).

25. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

26. *Id.* (internal quotation marks omitted); see 29 C.F.R. § 541.603(a) (listing factors to consider when determining whether an employer has an actual practice of making improper deductions).

27. *Auer*, 519 U.S. at 461.

28. U.S. Dep't of Labor, Opinion Letter Fair Labor Standards Act, 1997 WL 970567 (July 23, 1997); see also *Mitchell*, 428 F. Supp. 2d at 736 n.16.

C. *The Employee's Regular Rate Must Be at Least Equal to the Minimum Wage, and Overtime Compensation Must Be at Least 50% of the Regular Rate*

Under the third criterion, the employee's fixed salary must be sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage.<sup>29</sup> Under this criterion, the employee's regular rate will vary from week to week and is calculated as follows:

$$\text{(Employee's Weekly Salary)} / \text{(Total Hours Worked for the Week)} = \text{(Regular Rate of Pay)}^{30}$$

Under the fourth criterion, overtime is calculated by multiplying half the regular rate of pay for the week by the hours worked in excess of forty:

$$\text{((Regular Rate of Pay)/2)} \times \text{(Hours Worked in Excess of Forty)} = \text{(Overtime Pay)}^{31}$$

The employee's total compensation at the end of the week is calculated by adding the employee's overtime pay to the employee's weekly salary:

$$\text{(Employee's Weekly Salary)} + \text{(Overtime Pay)} = \text{(Total Compensation)}^{32}$$

For example, under the fluctuating workweek, assuming a minimum wage of \$5.00 per hour, an employee making a fixed, weekly salary of \$400.00 who works eighty hours in one week will have a regular rate of pay of \$5.00 per hour (\$400.00/80) and an overtime rate of \$2.50 per hour (\$5.00/2). Because the employee worked forty hours of overtime, her overtime pay will be \$100.00 (\$2.50 x 40). Thus, at the end of the week, the employee will take home a total of \$500.00 (\$400.00 + \$100.00).

At first glance the result seems unfair. However, a non-salaried, hourly employee working the same number of hours at minimum

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29. 29 C.F.R. § 778.114(c).

30. *Id.* § 778.114(a)–(b).

31. *Id.*

32. *Id.* § 778.114(b).



wage will take home the same amount of compensation at the end of the week.

Under the traditional method of overtime compensation, assuming a minimum wage of \$5.00 per hour, an hourly employee who works eighty hours in one week will make \$200.00 in the first forty hours ( $\$5.00 \times 40$ ) and \$300.00 in the last forty hours ( $\$7.50 \times 40$ ). Thus, at the end of the week, the hourly employee will also take home a total of \$500.00. This example demonstrates when the fluctuating workweek and traditional method of overtime compensation yield the same payday for non-exempt salaried employees<sup>33</sup> and hourly employees.

However, the result changes if the non-salaried employee works less than eighty hours. For example, under the fluctuating workweek, assuming a minimum wage of \$5.00 per hour, an employee making a fixed, weekly salary of \$400.00 who works seventy-eight hours in one week will have a regular rate of pay of approximately \$5.13 per hour ( $\$400.00/78$ ) and an overtime rate of approximately \$2.57 per hour ( $\$5.13/2$ ). Because the employee worked thirty-eight hours of overtime, her overtime pay will be approximately \$97.66 ( $\$2.57 \times 38$ ). Thus, at the end of the week, the employee will take home approximately \$497.66 ( $\$400.00 + \$97.66$ ).

Under the traditional method of overtime compensation, assuming a minimum wage of \$5.00 per hour, an hourly employee who works seventy-eight hours in one week will make \$200.00 in the first forty hours ( $\$5.00 \times 40$ ) and \$285.00 in the last thirty-eight ( $\$7.50 \times 38$ ). Thus, at the end of the week, the hourly employee will take home a total of \$485.00, approximately \$12.66 less than the salaried employee.

The only way the hourly employee will take home more money than the salaried employee in the above examples is if the hourly employee is compensated at a regular rate of pay above the minimum wage. For example, if the hourly employee's regular rate of pay were \$6.00 per hour, she would make \$240.00 in the first forty hours ( $\$6.00 \times 40$ ) and \$342.00 in the last thirty-eight hours ( $\$9.00 \times$

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33. This discourse is concerned solely with non-exempt salaried workers; however, the distinction between exempt and non-exempt workers can be found in 29 U.S.C. § 203(e) (2006).

38). Thus, at the end of the week, the hourly employee would take home \$582.00, \$84.34 more than the salaried employee. This result makes sense because the hourly employee's regular rate of pay for the week is \$0.87 higher than the salaried employee's regular rate.

1. *A Trap for the Unwary*

Because the employee's regular rate changes from week to week under the fluctuating workweek depending on the number of hours the employee works, the danger always exists that the employer may negligently or purposefully work the employee so many hours that her regular rate drops below the minimum wage.<sup>34</sup> For example, under the fluctuating workweek, assuming a minimum wage of \$5.00 per hour, an employee making a fixed, weekly salary of \$400.00 who works eighty-one hours in one week will have a regular rate of pay of approximately \$4.94 per hour (\$400.00/81). This regular rate is below the \$5.00 per hour minimum wage. Thus, the employer who works this employee eighty-one hours in a week will violate the FLSA.

Employers have tried to avoid violating the FLSA in this way by using minimum wage adjustments.<sup>35</sup> Thus, when an employee's regular rate falls below the minimum wage, the employer adjusts the employee's hourly rate so it is at least equal to the minimum wage.<sup>36</sup> But this remedy has its limits. Under the third criterion, an employer must provide a fixed, weekly salary that is sufficient to provide compensation every week at a regular rate that is at least equal to the minimum wage.<sup>37</sup> The use of frequent minimum wage adjustments may, in some instances, demonstrate that the employee's fixed salary is insufficient to provide compensation every week at a regular rate

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34. *See* N.M. Dep't of Labor v. Echostar Commc'ns Corp., 134 P.3d 780, 784 (N.M. Ct. App. 2006) ("Along these lines, we are more concerned that Echostar's formula, permitting calculation of overtime based on a fluctuating workweek, would in extreme cases cause hourly wages to fall below the minimum wage threshold.").

35. *See, e.g.,* Davis v. Friendly Express, Inc., No. 02-14111, 2003 WL 21488682, at \*2 (11th Cir. Feb. 6, 2003); Aiken v. County of Hampton, No. 97-2328, 1998 WL 957458, at \*4-5 (4th Cir. Sept 22, 1998).

36. *See* Davis, 2003 WL 21488682, at \*2; Aiken, 1998 WL 957458, at \*4-5.

37. 29 C.F.R. § 778.114(c).

that is at least equal to the minimum wage, thereby subjecting the employer to liability.<sup>38</sup>

#### D. *Clear Mutual Understanding*

Finally, under the fifth criterion, the employer and employee must share a clear mutual understanding that the employer will pay the employee a fixed, weekly salary regardless of the number of hours worked.<sup>39</sup> This clear mutual understanding does not mean that an employee must understand how to calculate her pay.<sup>40</sup> Rather, the employee need only understand that the employer will pay her a fixed, weekly salary regardless of the number of hours she works.<sup>41</sup>

A clear mutual understanding “may be ‘based on the implied terms of one’s employment agreement if it is clear from the employee’s actions that he or she understood the payment plan in spite of after-the-fact verbal contentions otherwise.’”<sup>42</sup> An employer may also demonstrate a clear mutual understanding from its employment policies, practices, and procedures.<sup>43</sup> Additionally, paychecks and paystubs are considered “regular lesson[s] . . . about how the fluctuating workweek plan operates.”<sup>44</sup>

An employee compensated under the fluctuating workweek is essentially an hourly employee compensated under the traditional method of overtime compensation. The only differences between the two types of employees are that an employee compensated under the fluctuating workweek: (1) is compensated upfront for the time she will work during the week, including some pay for overtime; and (2) has her regular rate of pay expressed as a ratio rather than a fixed dollar amount. These differences create the perception that the long-

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38. *See Davis*, 2003 WL 21488682, at \*2.

39. 29 C.F.R. § 778.114(a).

40. *Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996). *But see Duck v. Wallace Assocs., Inc.*, 438 S.E.2d 269, 270 (S.C. Ct. App. 1993).

41. *Bailey*, 94 F.3d at 156.

42. *Mayhew v. Wells*, 125 F.3d 216, 219 (4th Cir. 1997) (quoting *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1281 n.21 (4th Cir. 1996)).

43. *Griffin v. Wake County*, 142 F.3d 712, 716–17 (4th Cir. 1998) (citing *Monahan*, 95 F.3d at 1275 n.12); *see also Highlander v. K.F.C. Nat’l Mgmt. Co.*, 805 F.2d 644, 645–46, 648 (6th Cir. 1986).

44. *Griffin*, 142 F.3d at 716–17.

longer the employee works, the more money she loses, as opposed to the traditional method of overtime compensation, where the employee starts with nothing and is increasingly rewarded for every hour worked.<sup>45</sup> This perception has caused state courts to treat the fluctuating workweek differently.

### III. STATE COURT TREATMENT

At the federal level, the fluctuating workweek is recognized as a legitimate alternative to the traditional method of overtime compensation.<sup>46</sup> At the state level, however, some courts have been less accepting of the fluctuating workweek and similar methods of overtime compensation, finding that they are inconsistent with state law.<sup>47</sup> Other state courts have held that the fluctuating workweek and similar variations are consistent with state law.<sup>48</sup>

#### A. *Adopting the Fluctuating Workweek*

The Washington Supreme Court has held that the fluctuating workweek method of overtime compensation was consistent with the Washington Minimum Wage Act (WMTWA).<sup>49</sup> In *Inniss v. Tandy Corp.*, the petitioners, store managers at different Radio Shacks owned by Tandy Corporation (Tandy), sued Tandy, claiming that they were not compensated at one and one-half times their regular

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45. See, e.g., *Monahan*, 95 F.3d at 1280.

46. See, e.g., *O'Brien v. Town of Agawam*, 350 F.3d 279, 286–87 (1st Cir. 2003); *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 633 (5th Cir. 2001); *Griffin*, 142 F.3d at 715; *Condo v. Sysco Corp.*, 1 F.3d 599, 601–02 (7th Cir. 1993).

47. See, e.g., *Dresser Indus., Inc. v. Alaska Dep't of Labor*, 633 P.2d 998, 1006 (Alaska 1981); *Skyline Homes, Inc. v. Dep't of Indus. Relations*, 211 Cal. Rptr. 792, 797 (Cal. Ct. App. 1985), *overruled on other grounds by* *Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296 (Cal. 1996); *N.M. Dep't of Labor v. Echostar Commc'ns Corp.*, 134 P.3d 780, 781 (N.M. Ct. App. 2006).

48. See, e.g., *Haynes v. Tru-Green Corp.*, 507 N.E.2d 945, 951 (Ill. App. Ct. 1987); *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289, 298 (Mass. 2000); *Inniss v. Tandy Corp.*, 7 P.3d 807, 808 (Wash. 2000).

49. *Inniss*, 7 P.3d at 816; see also WASH. REV. CODE ANN. § 49.46.130(1) (West 2008).

rate of pay for overtime work as required by the WMWA.<sup>50</sup> The petitioners moved for partial summary judgment, arguing that Tandy's use of the fluctuating workweek violated the WMWA.<sup>51</sup> Tandy cross-moved for summary judgment, arguing that the fluctuating workweek was consistent with the WMWA.<sup>52</sup> The Washington trial court denied the petitioners' motion and granted Tandy's motion for summary judgment, holding as a matter of law that calculating an employee's overtime under the fluctuating workweek did not violate the WMWA.<sup>53</sup> The Washington Court of Appeals affirmed.<sup>54</sup> The petitioners appealed, and the Washington Supreme Court granted review.<sup>55</sup>

Sitting en banc, the Washington Supreme Court (5-4) affirmed the court of appeals, finding that the fluctuating workweek was consistent with the WMWA.<sup>56</sup> The supreme court's analysis focused on interpreting the following provision of the WMWA:

[N]o employer shall employ any of his employees for a work week [sic] 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.<sup>57</sup>

The supreme court noted that neither the WMWA nor the FLSA defined the term "regular rate," but Tandy defined the term in its compensation plan for the petitioners as the weekly base salary divided by the number of hours worked in the workweek.<sup>58</sup> Turning to the U.S. Supreme Court's opinion in *Overnight Transportation Co. v. Missel*, the Washington Supreme Court concluded that the term "regular rate" was flexible enough to permit overtime to be calcu-

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50. *Inniss*, 7 P.3d at 808–09.

51. *Id.* at 809.

52. *Id.* at 809–10.

53. *Id.*

54. *Id.* at 810.

55. *Id.*

56. *Inniss*, 7 P.3d at 816.

57. *Id.* at 810 (alteration in original) (quoting WASH. REV. CODE ANN. § 49.46.130(1) (West 2008)).

58. *Id.* at 810–11.

lated under a fluctuating workweek so long as the purposes of the WMWA were met.<sup>59</sup>

Justice Talmadge wrote a dissenting opinion, in which Justices Alexander, Johnson, and Ireland joined, sharply criticizing the majority's reliance on how federal courts have interpreted the FLSA.<sup>60</sup> Justice Talmadge argued that the purpose of overtime wage laws was to encourage employers to spread employment by hiring more employees rather than paying overtime.<sup>61</sup> Because each hour worked beyond forty resulted in a lower rate of pay, Justice Talmadge would have held that Tandy's use of the fluctuating workweek violated the public policy inherent in the WMWA by encouraging employers to employ a small number of employees for long hours.<sup>62</sup>

#### B. *Rejecting the Fluctuating Workweek*

In *New Mexico Department of Labor v. Echostar Communications Corp.*, the New Mexico Court of Appeals dismissed the majority opinion in *Inniss* as unpersuasive and held that the fluctuating workweek was inconsistent with New Mexico minimum wage law.<sup>63</sup> In *Echostar*, the employee and Echostar executed an employment contract under which the employee would be paid \$509.62 per week regardless of the number of hours worked.<sup>64</sup> The employee's overtime would be calculated by dividing the number of hours worked into the employee's salary and multiplying one-half of that result by the number of hours worked in excess of forty.<sup>65</sup> The employee filed a wage claim with the New Mexico Department of Labor

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59. *Id.* at 815; see *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579–580 (1942), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The court in *Inniss* also held that the purposes of the WMWA were met because the actual wages the employer paid were above the minimum wage. 7 P.3d at 816.

60. *Inniss*, 7 P.3d at 817–18 (Talmudge, J., dissenting).

61. *Id.* at 818.

62. *Id.*

63. *N.M. Dep't of Labor v. Echostar Commc'ns Corp.*, 134 P.3d 780, 783–84 (N.M. Ct. App. 2006).

64. *Id.* at 781.

65. *Id.*

(NMDOL), arguing that Echostar's overtime payment method violated the New Mexico Minimum Wage Act (NMMWA).<sup>66</sup> The NMDOL agreed, finding that the petitioner should have been paid at one and one-half times her regular rate, calculated by using forty hours in the denominator regardless of the hours worked.<sup>67</sup> The NMDOL filed a complaint in the metropolitan court, which affirmed, and Echostar appealed to the district court, which also affirmed.<sup>68</sup> Echostar appealed to the New Mexico Court of Appeals.<sup>69</sup>

The court of appeals unanimously affirmed the decision of the district court, holding that Echostar's use of the fluctuating workweek violated the NMMWA.<sup>70</sup> The court's analysis focused on interpreting the NMMWA in line with its declared policy: "to establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency, and general well-being' and to protect workers 'against the unfair competition of wage and hour standards which do not provide adequate standards of living.'"<sup>71</sup>

As persuasive authority, the court considered how Alaska and California had construed their minimum wage acts when deciding whether overtime compensation methods similar to the fluctuating workweek were inconsistent with state law.<sup>72</sup> In *Janes v. Otis Engineering Corp.*, the issue before the Alaska Supreme Court was whether the plain language of the Alaska Wage and Hour Act required an employee's regular rate to be calculated by considering a normal workweek of forty hours, or eight hours per day.<sup>73</sup> In that case, the employer paid the plaintiff under a compensation scheme similar to the fluctuating workweek.<sup>74</sup> The plaintiff sued, arguing that the employer's method of overtime compensation violated the plain language of the Alaska Wage and Hour Act.<sup>75</sup> The Supreme

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66. *Id.*; see also N.M. STAT. ANN. §§ 50-4-19 to -30 (LexisNexis 2007).

67. *Echostar*, 134 P.3d at 781.

68. *Id.*

69. *Id.*

70. *Id.* at 784–85.

71. *Id.* at 782 (quoting N.M. STAT. ANN. § 50-4-19).

72. *Id.*

73. *Janes v. Otis Eng'g Corp.*, 757 P.2d 50, 53 (Alaska 1988).

74. *Id.* at 51.

75. *Id.* at 51, 53.

Court of Alaska agreed, holding that the regular rate should be calculated by considering a normal workweek of forty hours, or eight hours per day, rather than the total number of hours actually worked.<sup>76</sup> To hold otherwise would allow the employer to deliberately deflate the overtime rate, lessening the premium the employer must pay to work his employees more than forty hours per week.<sup>77</sup>

Similarly, in *Skyline Homes, Inc. v. Department of Industrial Relations*, where the employer paid the plaintiffs under the fluctuating workweek, the California Court of Appeals held that the fluctuating workweek was inconsistent with a California Industrial Welfare Commission order in part because requiring “[p]remium pay for overtime is the primary device for enforcing limitations on the maximum hours of work.”<sup>78</sup>

Relying on the policy arguments in *Janes* and *Skyline*, the New Mexico Court of Appeals in *Echostar* concluded that the fluctuating workweek was inconsistent with the NMMWA because it lessened the financial impact on employers as the number of hours the employee worked increased.<sup>79</sup>

#### IV. POLICY MISCONCEPTIONS

The fluctuating workweek is not as sinister as cases like *Echostar* suggest. It does not contravene the public policies of requiring increased overtime compensation and promoting the spread of unemployment, nor does it encourage employers to work employees ten or twelve hours per day.<sup>80</sup> The fluctuating workweek is an alternative to the traditional method of overtime compensation, not an exception that cheats or oppresses the employee.<sup>81</sup> Under the

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76. *Id.* at 53.

77. *Id.* at 53–54.

78. *Skyline Homes, Inc. v. Dep’t of Indus. Relations*, 211 Cal. Rptr. 792, 798 (Cal. Ct. App. 1985), *overruled on other grounds by* *Tidewater Marine W., Inc. v. Bradshaw*, 927 P.2d 296 (Cal. 1996).

79. *N.M. Dep’t of Labor v. Echostar Commc’ns Corp.*, 134 P.3d 780, 784–85 (N.M. Ct. App. 2006).

80. *See Echostar*, 134 P.3d at 783. *Contra Skyline*, 211 Cal. Rptr. at 801.

81. *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636 (5th Cir. 2001); *Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir. 1997); *Bailey v. County of*



right circumstances, an employer can achieve the same result under the fluctuating workweek as it can under the traditional method of overtime compensation.

More employers are using the fluctuating workweek because it is more cost-effective to pay overtime than to hire new employees. The real problem employees face today is the overtime rate, which at one and one-half times the minimum wage is too low to act as a meaningful economic disincentive for employers.<sup>82</sup> Thus, in order to make overtime a meaningful disincentive, federal or state government must either increase the overtime rate or the minimum wage or decrease the costs associated with hiring new employees until it becomes less expensive to take on new employees and more expensive to work current employees long hours.

## V. EMPLOYEE MISCONCEPTIONS

Employees perceive the fluctuating workweek as unfair primarily because: (1) it is unintuitive and difficult to apply; (2) their regular hourly rate drops as their work hours increase; and (3) their overtime compensation for hours worked over forty is one-half the regular rate of pay instead of one and one-half that rate.<sup>83</sup> For these reasons, employees commonly refer to the fluctuating workweek as

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Georgetown, 94 F.3d 152, 154 n.5 (4th Cir. 1996); *Newsom v. NPC Int'l, Inc.*, No. 03-2068 ML/V, 2003 WL 23849758, at \*2 (W.D. Tenn. Sept. 29, 2003). *But see* *Dingwall v. Friedman Fisher Assocs.*, 3 F. Supp. 2d 215, 221 (N.D.N.Y. 1998); *Burgess v. Catawba County*, 805 F. Supp. 341, 348 (W.D.N.C. 1992).

82. *See* *Lung*, *supra* note 3, at 76–77; *cf.* *Martorana & Hirsch*, *supra* note 3, at 175 (discussing overtime pay as a “premium” to induce employers to hire more workers).

83. *See, e.g.*, Posting of Jim Matthews For Kershaw County Sheriff to <http://www.facebook.com/topic.php?uid=80452507330&topic=9186> (July 17, 2009, 15:11); Posting of jmowreader to [http://www.democraticunderground.com/discuss/duboard.php?az=show\\_mesg&forum=104&topic\\_id=1615541&mesg\\_id=1623581](http://www.democraticunderground.com/discuss/duboard.php?az=show_mesg&forum=104&topic_id=1615541&mesg_id=1623581) (May 18, 2004, 20:05); Posting of Reindeeriv to <http://www.laborlawtalk.com/archive/index.php/t-2018.html> (Oct. 25, 2009, 10:20); Posting of TonetteP to <http://www.workforce.com/phpBB/viewtopic.php?topic=17479&forum=54&5> (Aug. 3, 1999, 08:05).

“Chinese Overtime,”<sup>84</sup> and believe that the fluctuating workweek saves the employer money by cheating the employee out of overtime at one and one-half the regular rate of pay or by forcing the employee to work long hours.<sup>85</sup>

Moreover, misleading examples of how the fluctuating workweek can save the employer money often validate these employee misconceptions. The following example misleads the reader in this way:

Take the case of an Emergency Medical Technician (EMT) employee who worked alternating weeks of 48 hours and 72 hours and is paid a salary of \$500 per week. For this individual the calculation of the biweekly pay would be as follows:

First Week: Regular rate of pay ( $\$500/48 \text{ hr} = \$10.42/\text{hr}$ ).  
Overtime premium ( $0.5 \times 8 \times \$10.42 = \$41.68$ ).  
Total pay ( $\$500 + \$41.68 = \$541.68$ )

Second Week: Regular rate of pay ( $\$500/72 \text{ hr} = \$6.94/\text{hr}$ ). Overtime premium ( $0.5 \times 32 \times \$6.94 = \$111.04$ ).  
Total pay ( $\$500 + \$111.04 = \$611.04$ ).  
Thus, the employee’s gross pay for the biweekly payroll period would be  $\$1,152.72$  ( $\$541.68 + \$611.04$ ).

The cost savings to the employer in this scenario is substantial. Suppose the above employee is paid at \$10.42/hr

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84. See *Ayers v. SGS Control Servs., Inc.*, No. 03 Civ. 9077 RMB, 2007 WL 646326, at \*2 (S.D.N.Y. Feb. 27, 2007); Jane Mundy, *Lowe’s Owes Big Time in Overtime*, LAWYERSANDSETTLEMENTS.COM, Jan. 3, 2007, <http://www.lawyersandsettlements.com/articles/00523/lowes-overtime.html>; Posting of Jim Matthews For Kershaw County Sheriff, *supra* note 83; Posting of STREACKER to <http://www.lawyersandsettlements.com/forum/viewtopic.php?t=192> (Jan. 1, 2005, 10:29); Wiktionary.org, Chinese Overtime, [http://en.wiktionary.org/wiki/Chinese\\_overtime](http://en.wiktionary.org/wiki/Chinese_overtime) (last visited Jan. 18, 2010).

85. See, e.g., *Mitchell v. Abercrombie & Fitch, Co.*, 428 F. Supp. 2d 725, 728 (S.D. Ohio 2006); *Inniss v. Tandy Corp.*, 7 P.3d 807, 808–09 (Wash. 2000); Posting of Jim Matthews For Kershaw County Sheriff, *supra* note 83.

(the worker's regular rate of pay in the above example) on an hourly basis. Then the calculation would be as follows:

First Week: Total regular wages ( $\$10.42/\text{hr} \times 40 \text{ hr} = \$416.80$ ). Overtime premium ( $1.5 \times 8 \times \$10.42 = \$125.04$ ).  
Total pay ( $\$416.80 + \$125.04 = \$541.84$ ).

Second Week: Total regular wages ( $\$10.42/\text{hr} \times 40 \text{ hr} = \$416.80$ ). Overtime premium ( $1.5 \times 32 \times \$10.42 = \$500.16$ ).  
Total pay ( $\$416.80 + \$500.16 = \$916.96$ ).

Thus, the total gross pay for the biweekly payroll period would be \$1,458.80 ( $\$541.84 + \$916.96$ ). An employer that uses the [fluctuating workweek] method for this employee saves \$306.08 ( $\$1458.80 - \$1,152.72$ ) every two weeks, or a total of \$7,958.08 per year—a considerable savings to the employer!<sup>86</sup>

This example leaves the reader with the impression that the fluctuating workweek saves the employer money by cheating the employee out of a regular rate of pay of \$10.42 per hour and an overtime rate of one and one-half times that regular rate. However, an employer who wants to pay an employee \$1,152.72 for 120 hours of work every two weeks would never hire that employee at a regular rate of \$10.42 per hour. Instead, the employer would hire the employee at a lower hourly rate of \$8.23 per hour and arrive near the same figure under the traditional method of overtime compensation.

The fluctuating workweek saves the employer money only when an employee's hours fluctuate unpredictably from week to week.<sup>87</sup> Why? Because the employer does not have to dedicate itself to pay-

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86. C.W. Von Bergen & J.K.S. Chong, *Using the Fluctuating Workweek Compensation Method to Reduce Overtime Expenses*, PROCEEDINGS OF ASBBS, Feb. 2006, at 2207, 2212–13, available at <http://carmine.se.edu/cvonbergen/FWW%20ASBBS%20Proceedings.pdf>.

87. See 29 C.F.R. § 778.114(b) (2009).

ing a fixed, hourly rate upfront.<sup>88</sup> For example, employees like EMTs or police officers may work forty hours one week and, if an emergency arises, seventy-eight hours the following week. They are the type of employees that have erratic, hard-to-predict schedules. Thus, an employer who dedicates itself to an hourly rate of \$10.42 per hour may end up paying its employees more than it can afford should an emergency arise. While the fluctuating workweek could benefit workers whose salaries fluctuate regularly above and below forty hours a week, it is more frequently used in low-wage occupations, such as retail, fast food, customer service, nursing, firefighting, and law enforcement, where workers rarely work less than forty hours a week.<sup>89</sup>

Under the fluctuating workweek, however, the employer can set the salary upfront and make the employee's regular rate dependent on the number of hours worked, thereby keeping the employee's compensation at a predictable level.<sup>90</sup> While an employer could use the fluctuating workweek when an employee's hours fluctuate predictably from week to week,<sup>91</sup> an employer could also use the traditional method of overtime compensation to achieve the same result while avoiding the complexities and stigma associated with the fluctuating workweek.

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88. *See* *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 (1942), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); 29 C.F.R. § 778.114.

89. *See, e.g., Ayers*, 2007 WL 646326, at \*10 (describing inspectors' long hours of work, sometimes 100 hours per week, often resulting in wages below the minimum wage under the fluctuating workweek); *Garcia v. Allsup's Convenience Stores, Inc.*, 167 F. Supp. 2d 1308, 1310–11 (D.N.M. 2001) (finding that out of approximately five years, the fluctuating workweek employee's maintenance work fell below forty hours in only five weeks and was above forty hours in sixty-two weeks); *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289, 298 (Mass. 2000) (noting that the fluctuating workweek "falls heavily on those at the lower rungs of the economic ladder").

90. *See* 29 C.F.R. § 778.114(a).

91. *Mitchell v. Abercrombie & Fitch, Co.*, 428 F. Supp. 2d 725, 735 n.14 (S.D. Ohio 2006).

## VI. CONCLUSION

While unintuitive, difficult to apply, and stigmatized by employees, the fluctuating workweek remains a viable alternative to the traditional method of overtime compensation in most states. Only a few states have found the fluctuating workweek and variations of it inconsistent with their minimum wage laws<sup>92</sup> and their criticisms of the fluctuating workweek are misplaced. The reality is that paying overtime is less expensive today than hiring new employees.<sup>93</sup> Thus, until the overtime rate becomes a meaningful economic disincentive, employers will continue to employ a small number of workers for long hours, regardless of the method of overtime compensation used.<sup>94</sup>

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92. *See, e.g.*, N.M. Dep't of Labor v. Echostar Commc'ns Corp., 134 P.3d 780, 784–85 (N.M. Ct. App. 2006).

93. Lung, *supra* note 3, at 64; Martorana & Hirsch, *supra* note 3, at 173.

94. *See* Lung, *supra* note 3, at 51 (“There is no clearly established public policy which requires employers to refrain from demanding that their adult employees work long hours.”).