

*Congressional Review Act*

This rule is not a major rule as defined by section 804 of the Congressional Review Act (CRA), 5 U.S.C. 804. However, pursuant to the CRA, DEA is submitting a copy of this rule to both Houses of Congress and to the Comptroller General.

**List of Subjects in 21 CFR Part 1308**

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, 21 CFR part 1308 is amended as follows:

**PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES**

- 1. The authority citation for part 1308 continues to read as follows:

**Authority:** 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

- 2. Amend § 1308.11 by adding paragraph (d)(80), to read as follows:

**§ 1308.11 Schedule I.**

\* \* \* \* \*

(d) \* \* \*  
(80) 1-(1,3-benzodioxol-5-yl)-2-(ethylamino)propan-1-one (ethylone)  
7547.

\* \* \* \* \*

**Uttam Dhillon,**

*Acting Administrator.*

[FR Doc. 2020-10295 Filed 6-5-20; 8:45 am]

**BILLING CODE 4410-09-P**

**DEPARTMENT OF LABOR****Wage and Hour Division****29 CFR Part 541**

**RIN 1235-AA20**

**Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Correction**

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule; technical correction and correcting amendments.

**SUMMARY:** On September 27, 2019, the Department of Labor published in the *Federal Register* a final rule updating and revising the regulations issued under the Fair Labor Standards Act implementing the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside

sales, and computer employees. This final rule was effective on January 1, 2020. Through publication of this document, the Department corrects certain regulatory text.

**DATES:** This rule is effective June 8, 2020.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693-0406 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The Department of Labor published a final rule in the *Federal Register* on September 27, 2019 titled, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*. 84 FR 51230. Due to an error in the instructions for amending 29 CFR 541.601 (Highly compensated employees), the final rule erroneously deleted regulatory text of § 541.601(b)(3) and (4) (page 51307), when the Department's intent was only to revise § 541.601(b)(1) and (2), but to leave paragraphs (b)(3) and (4) unchanged. The Department restores these two provisions in this correction. Further, the Department here deletes § 541.607 (Automatic updates to amounts of salary and compensation required), which should have been deleted in the final rule. In the Notice of Proposed Rulemaking, the Department proposed to delete § 541.607, while affirming its intention to propose increasing the earnings thresholds every four years. 84 FR 10900, 10915 (Mar. 22, 2019). In the final rule the Department declined to finalize its proposal to propose updates quadrennially, and instead reaffirmed its commitment to better implement Congress's instruction to define and delimit the EAP exemptions "from time to time" through regulations. 84 FR 51252 (citing 29 U.S.C. 213(a)(1)). However, due to an error, the Department failed to remove and reserve the regulatory text section in the instructions. The Department corrects these errors with this action.

Section 553(b)(3) of the Administrative Procedure Act (APA) provides that an agency is not required to publish a notice of proposed rulemaking and solicit public comments when the agency has good cause to find that doing so would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3). The Department finds that good cause exists to dispense with the notice and public

comment procedures for this correction to its regulations, as it concludes that such procedures are unnecessary because this rule merely corrects inadvertent errors in regulatory instructions. Section 553(d) of the APA also provides that substantive rules should take effect not less than 30 days after the date they are published unless "otherwise provided by the agency for good cause found[.]" 5 U.S.C. 553(d)(3). Since this rule is a correction that does not change the substance of the Department's regulations, the Department finds that it is unnecessary to delay the effective date of the rule. Therefore, the Department is issuing this correction as a final rule effective on the date of publication.

**List of Subjects in 29 CFR Part 541**

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

For the reasons set out in the preamble, the Department of Labor corrects 29 CFR part 541 by making the following correcting amendments:

**PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES**

- 1. The authority citation for part 541 continues to read as follows:

**Authority:** 29 U.S.C. 213; Pub. L. 101-583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945-53 Comp., p. 1004); Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

- 2. In § 541.601, add paragraphs (b)(3) and (4) to read as follows:

**§ 541.601 Highly compensated employees.**

\* \* \* \* \*

(b) \* \* \*

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period

in advance, the calendar year will apply.

\* \* \* \* \*

#### § 541.607 [Removed and Reserved]

#### ■ 3. Remove and reserve § 541.607.

Signed at Washington, DC, this 29th day of May, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

[FR Doc. 2020-11979 Filed 6-5-20; 8:45 am]

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## DEPARTMENT OF LABOR

### Wage and Hour Division

#### 29 CFR Part 778

RIN 1235-AA31

#### Fluctuating Workweek Method of Computing Overtime

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** The Department of Labor (the Department) is revising its regulation for computing overtime compensation of salaried nonexempt employees who work hours that vary each week (fluctuating workweek) under the Fair Labor Standards Act (FLSA or the Act). The final rule clarifies that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate as appropriate under the Act. The Department also adds examples and makes minor revisions to make the rule easier to understand.

**DATES:** This final rule is effective on August 7, 2020.

#### FOR FURTHER INFORMATION CONTACT:

Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at

(866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website for a nationwide listing of WHD district and area offices at <http://www.dol.gov/whd/america2.htm>.

#### SUPPLEMENTARY INFORMATION:

##### I. Executive Summary

Section 7(a) of the FLSA requires employers to pay their nonexempt employees overtime pay of at least "one and one-half times the regular rate at which [the employee] is employed" for all hours worked in excess of 40 in a workweek. 29 U.S.C. 207(a). In other words, for each hour over 40 an employee works in a workweek, the employee is entitled to straight-time compensation at the regular rate and an additional 50 percent of the regular rate for that hour. Where an employee receives a fixed salary for fluctuating hours, an employer may use the "fluctuating workweek method" to compute overtime compensation owed, if certain conditions are met. 29 CFR 778.114.

Under current 29 CFR 778.114, an employer may use the fluctuating workweek method if the employee works fluctuating hours from week to week and receives, pursuant to a clear and mutual understanding with the employer, a fixed salary as straight time compensation for whatever hours the employee is called upon to work in a workweek, whether few or many. 29 CFR 778.114(a). In such cases, because the salary "compensate[s] the employee at straight time rates for whatever hours are worked in the workweek," the regular rate "is determined by dividing the number of hours worked in the workweek into the amount of the salary," and an employer satisfies the overtime pay requirement of section 7(a) of the FLSA if it compensates the employee, in addition to the salary amount, at a rate of at least one-half of the regular rate of pay for the hours worked each overtime hour. 29 CFR 778.114(a). Because the employee's hours of work fluctuate from week to week, the regular rate must be determined separately each week based on the number of hours actually worked each week. *Id.*

The payment of additional bonus and premium payments on top of the fixed salary to employees compensated under the fluctuating workweek method has presented challenges to employers and the courts alike, as set forth in more detail below. In the Notice of Proposed Rulemaking (NPRM), the Department proposed to clarify that bonus payments, premium payments, and other additional pay are consistent with

the use of the fluctuating workweek method of compensation. See 84 FR 59590, 59591 (Nov. 5, 2019). Such supplemental payments and the fixed salary provide straight-time compensation for all hours worked and the regular rate is determined by dividing that amount by the hours worked in the workweek. Additional bonuses or premium payments must be included in the calculation of the regular rate unless they may be excluded under FLSA sections 7(e)(1)–(8). See 29 U.S.C. 207(e)(1)–(8).

The Department proposed a similar clarification through an NPRM in 2008. See 73 FR 43654, 43662, 43669–70 (July 28, 2008). However, the final rule issued in 2011 did not adopt this proposal because the Department, at the time, believed that courts had "not been unduly challenged" in applying the current regulatory text, that the proposed clarification "would have been inconsistent" with the Supreme Court's decision in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), and that the proposed clarifying language "may create an incentive" for employers "to require employees to work long hours." 76 FR 18832, 18848–50 (Apr. 5, 2011). The preamble to the 2011 final rule further stated, for the first time in rulemaking by the Department, that all straight-time bonus and premium payments were incompatible with the fluctuating workweek method, while maintaining that the preamble "restore[d] the current rule." The decision in that rulemaking not to make any substantive changes to the regulatory text, however, caused courts to interpret the 2011 final rule in different ways and to reach inconsistent holdings based on a judicially-crafted distinction between certain types of bonuses that the Department has never recognized.

As explained below, the Department has considered anew the need for a clarification, particularly in light of the 2011 final rule and its interpretation by courts, now finds the reasons articulated in 2011 to be unpersuasive, and is therefore finalizing revisions that are substantially similar to those initially proposed in 2008. Specifically, the Department is adding language to § 778.114(a) clarifying that bonuses, premium payments, and other additional pay of any kind are compatible with the use of the fluctuating workweek method of compensation. The Department is also adding examples to § 778.114(b) to illustrate the fluctuating workweek method of calculating overtime where an employee is paid (1) a nightshift differential, (2) a productivity bonus in