

Practical Guidance on Wage Payment Compliance

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

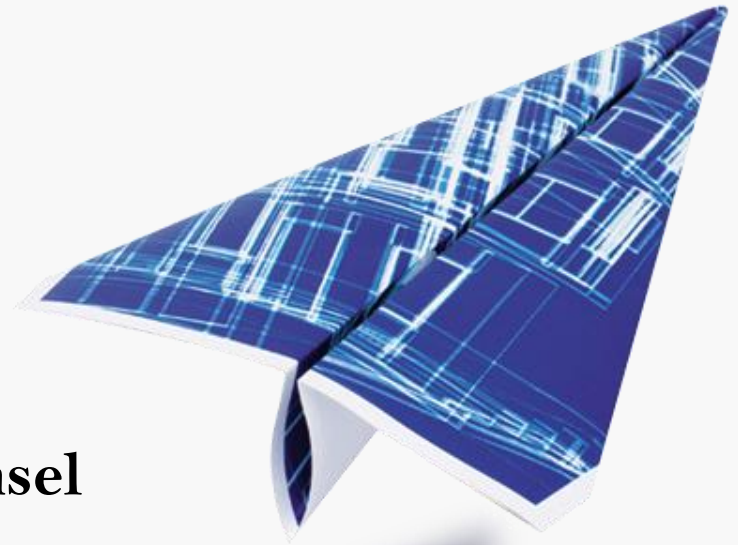
S.C. Association of Corporate Counsel

Annual Meeting

September 23, 2019

Nikole Mergo and Jimmy Byars

Members, Nexsen Pruet



OVERVIEW

- ▶ Should I be worried about the EEO-1 Component 2 deadline?
- ▶ Is there anything we can do to minimize the risk of FLSA collective actions?
- ▶ Do our bonus, commission, and PTO policies have the language we need to protect us?
- ▶ Can we recoup tuition, relocation, licensure, etc. reimbursements paid to employees if they leave too quickly?
- ▶ Can we do anything to keep a lid on overtime expenses?
- ▶ Can we still ask applicants about salary history?



EEO-1 COMPONENT 2

WHO MUST REPORT AND WHEN

- ▶ **Private Employers**
 - ▶ 100 or more employees and are subject to Title VII
- ▶ **Federal Contractors**
 - ▶ With 50-99 employees are not required to report.
 - ▶ The deadline for data submissions is **September 30, 2019.**
 - ▶ Likely will hold it open given the upload issues that have been occurring.



EEO-1 COMPONENT 2

COMPLIANCE

1. Choose the Snapshot Period

- ▶ Any employer-selected pay period between October 1 and December 31.

2. Identify the Total Number of Employees Who Must be Reported

3. Determine the Total W-2 Wages Worked for Each Employee in the Snapshot Period

4. Assign Pay Band

5. Determine total hours worked



EEO-1 COMPONENT 2

2018	Job Category	Salary Compensation Band	Number of Employees (Report employees in only one category)														Total Col A-N
			Race / Ethnicity														
			Hispanic or Latino		Non-Hispanic or Latino												
					Male						Female						
			Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More Races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More Races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O			
1 Executive/Senior Level Officials and Managers	1. \$19,239 and under	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	2. \$19,240 - \$24,439	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	3. \$24,440 - \$30,679	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	4. \$30,680 - \$38,999	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	5. \$39,000 - \$49,919	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	6. \$49,920 - \$62,919	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	7. \$62,920 - \$80,079	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	8. \$80,080 - \$101,919	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
	9. \$101,920 - \$128,959	0	0	8	0	0	0	0	0	0	0	0	0	0	0	0	8
	10. \$128,960 - \$163,799	0	0	7	0	0	0	0	0	0	0	0	0	0	0	0	7
	11. \$163,800 - \$207,999	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	2
	12. \$208,000 and over	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	2

EEO-1 COMPONENT 2

POTENTIAL ISSUES

- ▶ Inefficiencies
 - ▶ Manual Entry Method v. Data Upload?
 - ▶ Frequent error messages; Helpdesk available and has been responsive
- ▶ Hours worked data does not allow for accurate analysis of data
- ▶ EEOC not allowed to give data to any private individuals
 - ▶ But if they give to OFCCP, it is not under same restriction.
- ▶ No authority to fine or punish employers, but failure to file may result in seeking injunction



EEO-1 COMPONENT 2

EEOC ABANDONS COMPONENT 2 MOVING FORWARD

- ▶ On September 11, 2019 the EEOC announced it will not seek approval from OMB to collect pay data going forward.
 - ▶ EEOC will not collect Component 2 pay data beyond September 30
 - ▶ EEOC notes, “At this time, the unproven utility to its enforcement program of the pay data as defined in the 2016 Component 2 is far outweighed by the burden imposed on employers that must comply with the reporting obligation.”
 - ▶ Does not affect the obligation of EEO-1 filers to submit Component 2 data for 2017 and 2018
 - ▶ Red flags?
 - ▶ Conduct review under attorney client privilege

WAGE PAYMENT COLLECTIVE/CLASS ACTIONS

IS THERE ANYTHING WE CAN DO TO LIMIT OUR EXPOSURE?



Michael Scott comes to the Dunder Mifflin GC's office and says, "we're hiring a ton of new people for the warehouse. Can we make them sign something saying they can't sue us if we mess up their paychecks?"

QUESTION: Can we legally implement arbitration agreements covering wage payment issues under the FLSA and SC Payment of Wages Act?

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QUESTION: Can we legally implement arbitration agreements covering wage payment issues under the FLSA and SC Payment of Wages Act?

ANSWER: YES– but draft carefully

WAGE PAYMENT COLLECTIVE/CLASS ACTIONS

ARBITRATION OF WAGE PAYMENT DISPUTES IS PERMISSIBLE

- ▶ *AT&T v. Concepcion* (2011): the FAA requires that arbitration agreements be honored on their terms, except for (state law) grounds that exist for the revocation of any contract
- ▶ State/federal laws that could arguably be construed to prohibit arbitration of certain types of disputes are preempted by FAA (when it applies)
- ▶ This means **wage-related claims** can be arbitrated, unless the arbitration *agreement* is invalid on contractual avoidance grounds, i.e. fraud, duress, unconscionability
- ▶ Don't forget a carve-out for **administrative** filings
- ▶ Arbitration can help to contain costs, speed resolution, maintain privacy, etc. (but there are downsides too)



UNCONSCIONABILITY

BIGGEST THREAT TO ENFORCEMENT OF ARBITRATION PROVISION

- ▶ Court has a “gatekeeper” function involving threshold issues of contract formation
- ▶ Unconscionability= “both an absence of meaningful choice and oppressive, one-sided terms.”
- ▶ Requires both procedural (adhesion) and substantive (one-sided terms) unconscionability.
- ▶ Fact-specific, sliding scale, so choose your priorities.
- ▶ **BIG ISSUE**: does arbitration provision operate to deny a remedy?



WAGE PAYMENT COLLECTIVE/CLASS ACTIONS

CAN WE IMPLEMENT CLASS/COLLECTIVE WAIVERS?



David Wallace gets wind of the arbitration idea, and comes to you and says, “I love it, but I have an even BETTER idea... what if we include a provision in the arbitration agreement saying that the employee waives the right to pursue wage claims in a class or collection action? That ought to keep these things to a minimum.”

QUESTION: Can Dunder Mifflin lawfully enforce a class/collection action waiver for wage (and other employment) claims, requiring that all claims be *individually* arbitrated?

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QUESTION: Can Dunder Mifflin lawfully enforce a class/collection action waiver for wage (and other employment) claims, requiring that all claims be *individually* arbitrated? **YES**

CLASS/COLLECTIVE ACTION WAIVERS

EPIC SYSTEMS V. LEWIS

- ▶ For many years, the NLRB and some circuits held that class/collective waivers were invalid and unenforceable because they violated the NLRA
- ▶ In *Epic Systems* (2018), SCOTUS held that class/collective action waiver provisions are just as valid and enforceable as any other arbitration-related provision
- ▶ Waivers can not only be enforced, but employers do not violate the NLRA by requiring they be signed as a condition of employment
- ▶ Make sure the waiver is “clear and unmistakable,” include a carve-out for administrative charges, and keep in mind this doesn’t preclude DOL investigations or litigation on behalf of employee groups



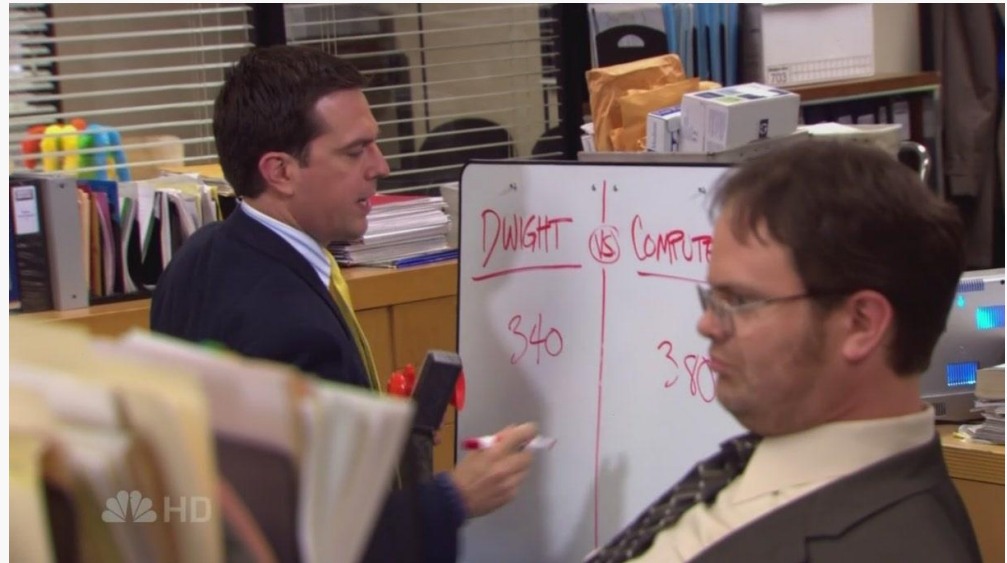
BONUS, COMMISSION, AND PTO POLICIES

WHAT COULD POSSIBLY GO WRONG?

Dunder Mifflin is launching a new website to facilitate online sales, but still wants to incentive salespeople.

Management decides to initiate a new bonus program in which any salesperson will get a \$1,000 bonus at the end of the quarter if he/she personally exceeds \$50k in sales.

Dwight hits the \$50k in one day, but quits before the end of quarter to sell printers at Office Max.



QUESTION: Does DM still have to pay Dwight the bonus even though he's no longer employed when they are paid?

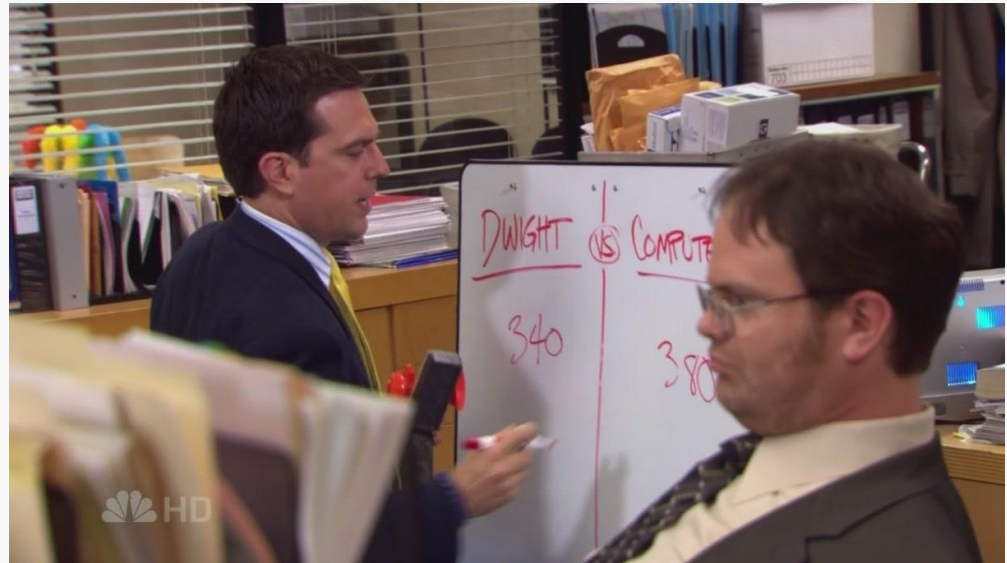
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QUESTION: Does DM still have to pay Dwight the bonus even though he's no longer employed when they are paid?

ANSWER: Probably so, if they didn't issue a written policy specifying the terms of forfeiture.

S.C. PAYMENT OF WAGES ACT

KEY IS CLEAR NOTIFICATION IN WRITING

- ▶ Notify at time of hire **in writing**
 - ▶ Wages and hours
 - ▶ Time and place of payment
 - ▶ Deductions from paychecks
- ▶ Notify of changes in writing at least **seven days in advance**
- ▶ “Wages” includes any comp promised by policy or agreement; includes bonuses, commission, PTO, etc.
- ▶ No deductions/withholding of wages unless:
 - ▶ Required or permitted by law; and
 - ▶ Employee has been notified in advance of the terms.



BONUS, COMMISSION, AND PTO POLICIES

COMMON PROBLEMS LEADING TO UNEXPECTED LIABILITY

- ▶ Failure to include “must be present to win” language in written bonus policies:

Employee must be actively employed on the payroll at the time the bonus is paid in order to be entitled to payment.

- ▶ Failure to specify how commissions will be calculated upon termination:

Salespeople will only be paid commissions on orders that have been booked, shipped, and paid in full as of the effective date of termination.

- ▶ Failure to specify whether accrued/unused PTO will be paid at termination or otherwise forfeited:

*Employees are not entitled to payment of any accrued but unused PTO existing at the time of termination. **OR** Employees are permitted to roll over a maximum of 40 hours of PTO into the next calendar year; all PTO in excess of 40 hours will be forfeited on Jan. 1 each year.*



BONUS, COMMISSION, AND PTO POLICIES

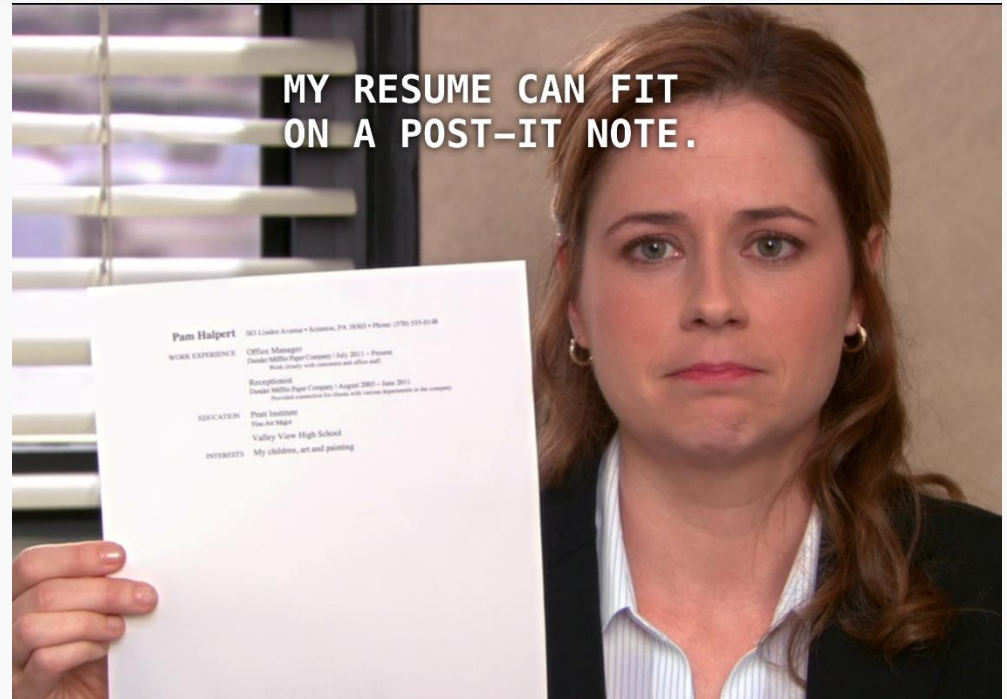
BEWARE OFFER LETTERS AND OTHER “SUMMARIES”

Dunder Mifflin rehires Pam as a salesperson after Michael Scott Paper Co. goes under.

The GC sends her an offer letter specifying the pay terms, including a reference to the bonus program for \$50k in quarterly sales.

Although a separate written bonus policy including the “must be present to win” language was circulated among the sales team when the program began, Pam never received the written policy, and the offer letter didn’t mention it.

Pam hits the \$50k, then quits for art school before the quarter ends.



QUESTION: Does DM have to pay Pam the bonus since the offer letter didn’t include the forfeiture/”must be present to win” language?

BONUS, COMMISSION, AND PTO POLICIES

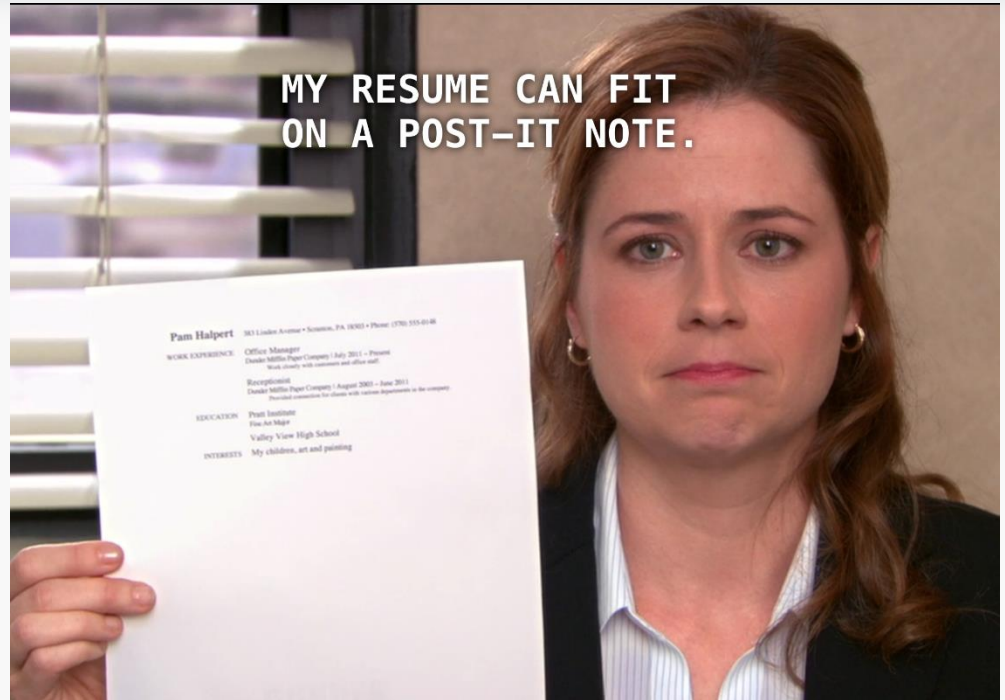
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QUESTION: Does DM have to pay Pam the bonus since the offer letter didn’t include the forfeiture/”must be present to win” language?

ANSWER: Probably so, if the offer letter is the only notification she received.

BONUS, COMMISSION, AND PTO POLICIES

BEWARE OFFER LETTERS AND OTHER “SUMMARIES”

- ▶ The SCPWA defines “wages” as any amounts “due to an employee under any employer policy or employment contract,” and requires that employees be notified of all wage terms at the time of hire and any “changes” thereafter.
- ▶ If you reference bonus, commission, or other programs in an offer letter (or similar announcement) and don’t include the whole policy, be sure to state that complete eligibility terms are set forth in the applicable policies (and make sure they’re provided):

You will be eligibility to earn a \$1,000 bonus each quarter based on quarterly sales exceeding \$50,000. The complete eligibility terms of the Quarterly Bonus Policy are enclosed with this letter and available on the DM intranet.

- ▶ **Offer letters and similar policy statements regarding wages may be treated as a “contract.”** Always consider including the contract disclaimer language on the first page of the document (i.e. THIS IS NOT A CONTRACT).



TUITION, RELOCATION, AND OTHER REIMBURSEMENTS

CAN WE LEGALLY GET OUR MONEY BACK IF EMPLOYEES LEAVE?

DM asks Holly Flax to relocate from Nashua to Scranton to take over as HR Manager after Toby leaves for Costa Rica. To sweeten the deal, DM offers her \$5,000 to help cover relocation expenses.

Michael tells her she doesn't have to pay the money back as long as she stays at DM Scranton for 3 years. If she leaves before 1 year, she owes DM the whole \$5,000. If she leaves between 1-2 years, she must pay DM back \$3,000. And if she leaves between 2-3 years, she must pay back \$1,000. She agrees, but doesn't sign anything.

After 6 months, Holly resigns so that she can move to Colorado and care for her dad.



QUESTIONS:

1. Is DM's policy legal?
2. Can it be enforced if it's not in writing?
3. Can DM deduct the amount owed from her final paycheck, even if it takes her down to \$0?

TUITION, RELOCATION, AND OTHER REIMBURSEMENTS

CAN WE LEGALLY GET OUR MONEY BACK IF EMPLOYEES LEAVE?

- ▶ Yes, this type of policy is legally permissible... but the harder question is, how do you enforce it?
- ▶ If the policy is in a writing signed by the employee, it can likely be enforced in contract... but be weary of relying on contract if the policy is in a handbook with a disclaimer.
- ▶ Deductions from final paychecks are permissible for non-exempt employees if the employee has expressly **authorized** (ideally, signed acknowledgement of the deduction policy) the deduction and the deduction doesn't drop the employee below minimum wage for the final pay period.
- ▶ For exempt employees, you CANNOT make deductions from the final paycheck to recoup these types of payments, because they are considered deductions based on the **quantity** of work.



TUITION, RELOCATION, AND OTHER REIMBURSEMENTS

BEST PRACTICE FOR BOTH EXEMPT AND NON-EXEMPT EMPLOYEES

1. Prepare a written Repayment Agreement for the employee's signature, documenting the terms of the repayment policy.
2. The Agreement should state that the amount being paid is a “**wage advance**” and subject to applicable withholdings (perhaps with a gross-up to meet the committed amount).
3. Include a provision in the Agreement whereby the employee authorizes a deduction/offset of his/her final paycheck in any amount necessary to satisfy all or part of the repayment obligation.



CONTROLLING OVERTIME

IS THERE ANY WAY TO NON-EXEMPT EMPLOYEES A FIXED SALARY?

Kevin, Oscar, and Angela are all non-exempt Accounting Dept. employees who are currently paid hourly.

There are periods when Accounting is very slow, but there are also times, like end-of-quarter, budgeting, and audit seasons, when Kevin, Oscar, and Angela work lots of unpredictable overtime.

In an effort to reduce personnel costs, Michael Scott comes to the Dunder Mifflin GC and asks whether DM can begin paying Kevin, Oscar, and Angela a fixed salary so that they don't have to pay so much overtime when things get busy.



QUESTION:

Does the FLSA include a lawful salary payment option for non-exempt employees?

If so, what is it called, and does it still require that we pay overtime premiums?

CONTROLLING OVERTIME

THE FLUCTUATING WORKWEEK METHOD

- ▶ The FLSA permits non-exempt employees who are paid a **fixed salary** each workweek to be paid only a “half time” OT premium instead of “time and a half” for all OT hours worked
- ▶ The theory is that the fixed salary provides ***straight-time*** compensation for **all** hours worked each week, regardless of how many, so only half-time premium is owed.
- ▶ While there is some added complexity, this method can help reduce and control OT liability.



CONTROLLING OVERTIME

THE FLUCTUATING WORKWEEK METHOD

Requirements:

- ▶ Employee must be paid on a “salary basis”; fixed salary with no deviation for quality/quantity of work performed (can’t drop below salary for <40 hours)
- ▶ “Clear mutual understanding” → written agreement preferred
- ▶ Still must keep accurate records of all hours worked
- ▶ OT premium based on “regular rate” for individual workweek, based on how many hours of work are performed; not fixed “hourly” rate.



9	5,918	109
8	3,478	413
2	1,293	41
8	2,487	115
8	2,384	112
1	1,429	63
6	1,203	44
	3,094	123
	2,094	75
	3,027	131
	7,115	1,391
		110
		263
		460
		243
		1,076
		32
		107
		131
		134
	668	372

CONTROLLING OVERTIME

THE FLUCTUATING WORKWEEK METHOD: CALCULATIONS

Dunder Mifflin pays Kevin a weekly salary of \$800 for all hours worked. Kevin works 50 hours in a workweek. How much is he owed?

Calculations:

(1) **Calculate “regular rate” for particular workweek**

Regular rate = weekly salary / total hours worked

Kevin’s regular rate = \$800 / 50 = \$16 per hour

(2) **Calculate OT “half time” premium**

Half-time premium = “regular rate” / 2

Kevin’s half-time premium = \$16 per hour / 2 = \$8 OT rate

(3) **Calculate OT compensation owed**

OT comp owed = half-time premium x OT hours worked

Kevin’s OT comp owed = \$8 OT rate x 10 OT hours = \$80

(4) **Calculate total compensation**

Total comp = weekly salary (\$800) + OT comp (\$80) = **\$880**

CONTROLLING OVERTIME

THE FLUCTUATING WORKWEEK METHOD: COMPARISON

Example: Oscar makes \$20.19 an hour. During budget season, he typically works 50 hours/week. Are you better off keeping him hourly, or paying him a fixed salary (based on a typical 40-hour workweek) under the fluctuating workweek method?

Regular OT	
Straight- time rate	\$20.19/hour
Hours	50
“Regular rate”	\$20.19
OT premium (1.5x regular rate)	\$30.29
OT comp owed (OT premium x OT hours)	$\$30.29 \times 10 = \302.90
Total compensation (straight time comp + OT comp)	$(\$20.19 \times 40 \text{ hours}) + (\$302.90 \text{ OT}) = \underline{\$1,110.50}$

VS

Fluctuating workweek	
Weekly salary	\$807.60/week
Hours	50
“Regular rate” (Salary / hours worked)	\$16.15
OT premium (0.5x regular rate)	\$8.08
OT comp owed (OT premium x OT hours)	$\$8.08 \times 10 = \80.80
Total compensation (straight time comp + OT comp)	$(\$807.69/\text{week}) + (\$80.80 \text{ OT}) = \underline{\$888.40}$

CONTROLLING OVERTIME

THE FLUCTUATING WORKWEEK METHOD: CONSIDERATIONS

- ▶ Administrative complexity
 - ▶ Must pay same salary if employee works under 40 hours
 - ▶ Smaller OT rate the more hours are worked
 - ▶ Regular rate must never drop below minimum wage
 - ▶ Some cases say hours must actually fluctuate above/below 40
- ▶ Improper deductions have big consequences
- ▶ Morale



SALARY HISTORY INQUIRIES

ARE WE STILL ALLOWED TO ASK THESE QUESTIONS?

Michael needs to hire a new receptionist after Pam leaves for art school. During Erin's interview, Michael asks Erin how much she made at her last job, with the intention of offering her just slightly above what she made in that job, even if it's less than what Pam was making.



QUESTION: Is DM legally permitted to ask about salary history (assuming we are in SC)?

SALARY HISTORY INQUIRIES

ARE WE STILL ALLOWED TO ASK THESE QUESTIONS?

- ▶ Yes, this is still permissible in SC... for now.
- ▶ This is a growing trend– currently 17 states and 19 localities prohibit salary history inquiries to some degree
- ▶ **States:** Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Jersey, New York, North Carolina, New Jersey, New York, **North Carolina (state agencies only)**, Oregon, Vermont, Washington
- ▶ Among the localities are the City of Columbia and Richland County (applicable only to applicants for city/county employment)



SALARY HISTORY INQUIRIES

ARE WE STILL ALLOWED TO ASK THESE QUESTIONS?

- ▶ The rationale of these bans is to increase pay equity and transparency and to avoid perpetuating gender-based pay inequality.
- ▶ Even though these questions are not prohibited in SC at this point, many employers are using this trend as an opportunity to re-evaluate application and hiring practices to minimize pay equity concerns.
- ▶ Alternative options to typical salary history inquiries include pre-application disclosure of pay ranges and “expectations” inquiries



QUESTIONS/COMMENTS?

Nikole Mergo

803-540-2042

nmergo@nexsenpruet.com

Jimmy Byars

803-540-2051

jbyars@nexsenpruet.com

