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December 22, 2016

Rick D. Roskelley
Littler Mendelson, PC
3960 Howard Hughes Parkway
Suite 300
Las Vegas, Nevada 89169-5937

Re: **Advisory Opinion of the Nevada Labor Commissioner Use of the
Fluctuating Workweek**

Dear Mr. Roskelley:

Pursuant to Nevada Administrative Code (NAC) Section 607.650, an Advisory Opinion has been requested from the Nevada Labor Commissioner concerning whether *an employer in Nevada may use the fluctuating workweek method ("FWW") to compensate a nonexempt employee, who is paid a fixed-salary for all hours worked, for overtime hours worked in excess of 40 in a week of work under NRS 608.018.*

I. **NEVADA LAW PERMITS THE USE OF THE FWW METHOD**

Nevada Revised Statutes (NRS) 608.018(2) requires that any employer pay a nonexempt employee "1 1/2 times an employee's regular wage rate" whenever the employee works more than 40 hours in a week of work. The statute is silent on what method is to be used to calculate the "regular wage rate".

Specifically, NRS 608.018(2) Compensation for Overtime, provides as follows:

An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work.

Despite the fact that the Nevada Revised Statutes are silent on this issue, the Nevada Administrative Code (NAC) does specify the method to be used to calculate the “regular wage rate” for purposes of Compensation for Overtime under NRS 608.018(2). Specifically, NAC Section 608.125(2) provides:

If an employee is paid by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, the rate of compensation for the purposes of paragraph (b) of subsection 2 of NRS 608.018 is determined by dividing the amount paid to an employee in a week by the number of hours worked by the employee during the week.

II. FEDERAL LAW PERMITS THE USE OF THE FWW METHOD

Under the Fair Labor Standards Act (FLSA):

An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such 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. (29 CFR §778.114(1)).

The FWW method has also been approved where an employee on a fixed salary is also paid commissions and bonuses. In *Lalli v. General Nutrition Centers, et. al*, No. 15-1199 (1st Cir. Feb. 12, 2016), the First Circuit Court of Appeals held that the FWW method applied to a store manager who earned a guaranteed weekly salary regardless of the hours he worked and was paid a non-discretionary sales commission that varied based on the sales he made that week. The employer in *Lalli* calculated overtime compensation for the manager by adding both salary and commissions for the week, dividing the total by the number of hours worked, and paying an additional 50% of the resulting regular rate for any hour worked in excess of 40 hours. The Court upheld this method of calculation and stated “[similarly], section 778.109 states that it is the ‘total remuneration’ (except statutory exclusions) that must be included in the regular-rate calculation, suggesting that different types of remuneration (e.g., salary plus commissions) may be combined in a compliant plan.” *Id.* at 15. The Court then concluded that these compensation arrangements comply with 29 CFR 778.114 and 29 CFR 778.118 and combination of these two permissible methods of calculation does not render the former inapplicable. *Id.* at 24.

III. FEDERAL LAW AND NEVADA LAW DO NOT CONFLICT REGARDING USE OF THE FWW METHOD

The Office of the Labor Commissioner is tasked with enforcing Nevada wage and hour laws. In particular, this office is charged with ensuring that all employees are treated fairly under the law. It is the position of the Nevada Labor Commissioner that the use of the FWW method for calculating an employee’s “regular wage rate” for purposes of compensation for overtime under NRS 608.018(2) is permissible.

NAC 608.125 and 29 CFR §778.114 are in harmony with one another. Neither Nevada case law, nor Nevada statutes specifically prohibit the use of the FWW method. In fact, NAC 608.125 should be considered the equivalent of 29 CFR §778.114. Therefore, the Nevada Office of the Labor Commissioner approves the use of the FWW method to calculate the overtime rate of a nonexempt fixed-salary employee based on the information presented. In addition, the Nevada Office of the Labor Commissioner approves the use of the FWW method to determine the overtime rate of a nonexempt fixed-salary employee that also receives commissions and/or bonuses as long as those commissions and/or bonuses are included in the weekly amount of pay when determining the employee’s “regular wage rate”.

IV. CONCLUSION

After a thorough review of all applicable statutes and authorities, it is the position of the Nevada Labor Commissioner that use of the FWW method to calculate the overtime rate of a nonexempt fixed-salary employee, or a fixed-salary employee that also receives commissions and/or bonuses, is appropriate. Therefore, National Debt Relief may use the FWW method of calculation of overtime in accordance with this Advisory Opinion.

This Advisory Opinion is based on the information presented at this time and may be subject to change based on changes in State or Federal laws and regulation, information of non-compliance, and any additional relevant information that may justify an additional review and/or interpretation of the new or additional information presented.

Should you need any additional clarification, please do not hesitate to contact me at your earliest opportunity at (775) 684-1890.

Sincerely,



Shannon M. Chambers
Labor Commissioner

Received
Linda M. ...

