

**Applying Advanced Wage and Hour Law:
Salaries for *NON-EXEMPT* Employees**

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Third in an occasional series on advanced topics within wage and hour laws, this column sets out an alternative method for paying a fixed salary to non-exempt employees whose hours of service vary widely.

Previously, we unpacked two options under Oregon and federal wage and hour laws for paying overtime to salaried *non-exempt* employees. The first of these was a salary paid for a fixed number of hours to be worked each workweek. The second, often called the fluctuating workweek method, sets out an arrangement by which overtime hours are paid on the basis of a regular rate that varies with the number of hours actually worked each week.

Here we will look at something of a hybrid of the two, an arrangement often referred to as a “Belo” plan (after the Supreme Court decision, *Walling v. A. H. Belo Co.*, 316 U.S. 624, that gave rise to the current statutory authority the arrangement). A Belo plan allows employers to provide a guaranteed salary to an employee whose duties necessitate widely irregular hours from week to week.

The heart of a Belo plan is an agreement (either a bona fide individual contract or collectively bargained agreement) that (1) specifies a regular rate of pay; (2) provides for overtime of 1.5 times that regular rate for all hours worked in excess of forty; and (3) guarantees payment of a minimum amount for all work performed up to and including a fixed number of hours (not to exceed 60 in a workweek) for any week in which any work is performed.

For example, an employer may agree with an employee to a regular rate of pay of \$10 per hour for the first 40 hours in any workweek and the rate of \$15 per hour for all hours in excess of 40 in any workweek, with a guarantee that the employee will receive, in any week in which any work is performed, a salary of \$550 as total compensation for all work performed up to and including 50 hours in such workweek.

Under this agreement, if the employee worked 30 hours, he or she would receive \$550, the minimum guaranteed by the Belo plan. By the same token, if the employee worked 47 hours, he or she would likewise receive \$550; the employer would not need to compute or compensate any additional overtime. The employee would only be entitled to additional compensation if the weekly hours worked exceeded those agreed to in the Belo plan. So if the employee worked 55 hours, he or she would be entitled to \$550 for the first 50 hours worked and an additional 5 hours at the overtime rate of \$15, or \$625 for the week.

Q. Can anyone implement a Belo plan?

A. No. Belo plans are applicable only to employment situations where the duties performed require *widely irregular hours* from workweek to workweek. In fact, where an employee’s hours

fluctuate only in the overtime range, i.e., above 40 hours in a workweek, the hours would be deemed not to vary widely enough to implement a Belo plan. In addition it is important to note that this variation results from factors outside the control of the parties – the typical example is that of a claims adjuster who must meet with witnesses and claimants at their convenience. It is not sufficient to point to irregular hours that result from say an employee’s use of leave or a rotating weekly schedule imposed by the employer.

Q. Are there restrictions on the how the regular rate is set?

A. Yes. Although the rate agreed upon need not be equal to the rate previously paid, the rate cannot be less than minimum wage. In addition, because the “regular rate” must by definition reflect all compensation, other additional forms of compensation such as non-discretionary bonuses or commission earnings (which would otherwise be part of a regular rate used to compute overtime) would be incompatible with a Belo plan regular rate.

Q. Does it matter how many hours are specified in the guarantee?

A. Yes! Apart from the cap at 60 hours, the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. For example, a guaranty of pay for 60 hours to an employee whose duties necessitate irregular hours of work that cannot reasonably be expected to range higher than 50 hours would not qualify as a bona fide contract.

CAUTION: Belo plans provide employers with a lawful way to pay the same total compensation each week to a non-exempt employee who works overtime. It should be stressed, however, that the Belo plans are *only* intended for employment when the employee’s hours vary due to the nature of the work. There must be a clear, mutual understanding between the employer and employee that this method of compensation will be used. It is advisable to have the understanding in the form of a written policy provided to the employee. Under such a salary arrangement the salary will be paid in full for any workweek

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