



July 5, 2005

FLSA2005-4NA

Dear **Name***,

This is in response to your letter to the Baltimore Wage and Hour Division Office concerning the application of the overtime provisions of the Fair Labor Standards Act (FLSA). You ask whether a bonus paid by an employer for sale of a vendor's products must be included in an employee's regular rate for overtime, if the amount and nature of the bonus are determined by the vendor. Your letter was forwarded to this office for a reply. It is our opinion that the bonus must be included in the regular rate of pay.

You describe an employer whose employees sell products from several vendors. You state that occasionally "a vendor sponsors a bonus program relating to its products....The vendor then pays to the employer the bonus earned by each employee based upon the vendor's established formula. The employer, in turn, pays the employees the vendor's bonus." The vendor decides if and when to provide these bonuses and how to calculate the amount each employee will receive. You indicated in a conversation with a member of my staff that the vendor announces the bonus to employees prior to the employees selling the vendor's product. The employees then receive the bonuses after the services are performed for the vendor.

The regular rate of pay is deemed by section 7(e) of the FLSA, 29 U.S.C. § 207(e), copy enclosed, "to include all remuneration, for employment paid to, or on behalf of, the employee," except those specifically excluded in this section. Section 7(e)(3)(a) excludes bonuses from the regular rate of pay if "both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly." Since the vendor informs the employees of the requirements for the bonus prior to the work being performed, these bonuses are promised to the employees who meet the vendor's requirements, rather than being paid at the discretion of the employer. Additionally, 29 C.F.R. § 778.211(c), copy enclosed, states that "[b]onuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay." As the Wage and Hour Division's Field Operations Handbook (FOH) explains, extra payments from manufacturers or distributors to the sales employees of a retail establishment for selling certain items or brands are wages that must be included in the regular rate. FOH ¶ 32b07, copy enclosed. Consequently, the bonus you describe should be included in the regular rate of pay for overtime purposes.

Please note that 29 C.F.R. § 778.211(b) describes the conditions that must be met for a bonus to qualify as an exclusion from the regular rate as a discretionary bonus. It concludes by stating that "[o]n the other hand, if a bonus [based upon the quantity of sales made by an employee] were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate." The bonus you described does not satisfy this condition and must be included in the calculation of the employee's regular rate of pay.

Additionally, you ask how to calculate the bonus into the regular rate of pay. 29 C.F.R. § 778.209 and FOH ¶ 32c03, copies enclosed, provide guidance on the method of calculating the regular rate of pay when bonuses are to be included.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures:

FLSA section 7(e)
29 C.F.R. 778.209, .211
FOH ¶ 32b07, 32c03

* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).