



FLSA2018-9

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division (“WHD”) reissue Opinion Letter FLSA2009-27. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter “for further consideration” and stated that it would “provide a further response in the near future.”

We have further analyzed Opinion Letter FLSA2009-27. From today forward, this letter, which is designated FLSA2018-9 and reproduces below the verbatim text of Opinion Letter FLSA2009-27, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.

A handwritten signature in black ink, appearing to read "Bryan L. Jarrett".

Bryan L. Jarrett
Acting Administrator

Dear **Name***:

This is in response to your request for an opinion regarding whether a year-end non-discretionary bonus based on a percentage of straight-time and overtime earnings from the preceding year complies with 29 C.F.R. § 778.210 (treatment of bonuses for purposes of computing the regular rate) if the employer excludes from the calculation payments earned by the employees throughout the year which are excludable from the regular rate under section 7(e) of the Fair Labor Standards Act.* Based on the information provided, it is our opinion that an employer may exclude previous payments properly excluded from the regular rate under section 7(e) when calculating a year-end bonus which is based on a percentage of an employee’s total straight-time and overtime earnings.

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

You describe a scenario in which an employer makes certain payments to its non-exempt employees throughout the year (such as travel expenses and discretionary bonuses) that are properly excluded from the regular rate pursuant to section 7(e) of the FLSA. At the end of the year, as part of its annual bonus program, the employer calculates the non-discretionary bonus to its employees based on a percentage of straight-time earnings and overtime earnings. In calculating the described year-end bonus, the employer excludes from the bonus calculus any payments to employees during the year that were properly excluded from the regular rate pursuant to section 7(e). You believe that the employer's approach is consistent with statutory and regulatory authority, but not with the position taken by the Department in Wage and Hour Opinion Letter WH-241 (Nov. 26, 1973), which you describe as standing for the proposition that "all remuneration for employment' must be included when calculating a percentage bonus under [29 C.F.R.] § 778.210, regardless of whether or not the remuneration was properly excluded from the regular rate under § 7(e)." You state that the letter should be rescinded because it improperly exceeds the scope of 29 C.F.R. § 778.210 and is inconsistent with the intent of section 7(e) and 7(h) of the FLSA. As discussed below, we agree that the quoted statement in Wage and Hour Opinion Letter WH-241 does not accurately describe an employer's obligation with regard to non-discretionary bonus payments or the treatment of payments properly excludable under section 7(e).

Section 7(a) of the FLSA requires that all overtime be paid at "one and one-half times the regular rate" at which the employee is employed. Section 7(e) of the Act provides that "the 'regular rate' at which the employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include" certain payments set forth at section 7(e)(1) - (7). *See* 29 C.F.R. §§ 778.108, 778.200-.224. The regulations expressly recognize that non-discretionary bonuses must be included as part of an employee's "regular rate." *See* 29 C.F.R. §§ 778.208 - 778.210. Section 778.210 illustrates that in some instances an employer's non-discretionary bonus payments may be made in a manner that properly compensates employees for their overtime without requiring additional computation:

In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required. This is not true, however, where this form of payment is used as a device to evade the overtime requirements of the Act rather than to provide actual overtime compensation, as described in §§ 778.502 and 778.503.

29 C.F.R. § 778.210. Thus, under section 778.210, a bonus paid as a predetermined percentage of an employee's straight time and overtime compensation increases the straight-time and overtime earnings by the same percentage, and thereby includes proper overtime-premium compensation without need for additional computation. Where a bonus is computed in this manner, the employee receives proper overtime compensation as an arithmetic fact. *See* 29 C.F.R. § 778.503. It is our opinion that a bonus program such as you describe satisfies the conditions set forth in section 778.210 because the same predetermined percentage would be

applied to the employee's straight time and overtime earnings. *See, e.g., Wage and Hour Opinion Letter FLSA2006-8NA (May 11, 2006); Wage and Hour Opinion Letter FLSA2006-4NA (Feb. 17, 2006); Wage and Hour Opinion Letter FLSA2004-11 (Sept. 21, 2004); Wage and Hour Opinion Letter (Feb. 5, 2001) (copy attached); Wage and Hour Opinion Letter WH-253 (Feb. 22, 1974) (copy attached); Wage and Hour Opinion Letter WH-75 (Aug. 17, 1970) (copy attached).* Wage and Hour Opinion Letter WH-241 is withdrawn to the extent that it is inconsistent with section 778.210 and the cited opinion letters.

A simple side-by-side comparison of two different pay calculations for a pay period in which an employee receives a non-discretionary bonus, one made under a bonus program using a ten percent non-discretionary year-end bonus, and the other using a contemporaneously paid ten percent non-discretionary bonus, demonstrates that the two methods yield the same result. For both scenarios, assume that the non-exempt employee earns \$10.00 an hour in straight time, works 50 hours during the week in question, and is paid a ten percent non-discretionary bonus that must be included in the regular rate and a \$50.00 discretionary bonus that may be excluded from the regular rate.

Scenario 1 (year-end bonus):

Straight-time compensation ($50 \times \$10$)	\$500.00
Overtime compensation ($10 \times \$5$)	\$50.00
Non-discretionary bonus ($10\% \times \$550$)	\$55.00
Discretionary bonus	<u>\$50.00</u>
Total compensation	\$655.00

Scenario 2 (contemporaneous bonus):

Straight-time compensation ($50 \times \$10$)	\$500.00
Non-discretionary bonus ($10\% \times \$500$)	\$50.00
Overtime compensation ($10 \times \$5.50$ [$\$550 \div 50 \times .5$])	\$55.00
Discretionary bonus	<u>\$50.00</u>
Total compensation	\$655.00

As demonstrated above, year-end bonus payments computed in this manner automatically include the overtime payments due under the FLSA. Although for simplicity we have used the example of a single work week, the same principle would apply if the method described in section 778.210 were applied to a bonus covering a longer period. Therefore, a year-end bonus program that is computed in this manner meets the requirements of section 778.210, and no additional overtime calculations or payments must be made.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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

letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also 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 that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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