



FLSA2018-28

December 21, 2018

Dear **Name***:

This letter responds to your request for an opinion letter regarding whether your client's compensation plan, which pays an average hourly rate that may vary from workweek to workweek, complies with the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You state that the employer provides home health aide services to its clients in their homes. Some of its employees travel between client locations during the workday. To calculate weekly pay, the employer multiplies an employee's time with clients by his or her hourly pay rate for such work. The employer then divides the product by the employee's total hours worked, which includes both the client time and the travel time. The employer guarantees that the quotient meets both federal and state minimum wage rate requirements. You further state that "[a] typical standard rate of pay is \$10.00 per hour with a client including travel time," and that "[i]f any employee works over 40 hours (total paid hours and [travel] time) in any given workweek, they are paid time and a half for all time over 40 hours at a rate of \$10.00."

GENERAL LEGAL PRINCIPLES

The FLSA requires that covered, nonexempt employees receive at least the federal minimum wage for all hours worked. *See* 29 U.S.C. § 206(a)(1). "[I]f the employee's total wages for the workweek divided by compensable hours equal or exceed the applicable minimum wage, the employee has been paid in compliance with [§ 206]." WHD Opinion Letter FLSA2004-8NA, 2004 WL 5303036, at *2 (Aug. 12, 2004); WHD Field Operations Handbook § 30b02. The FLSA also requires that covered, nonexempt employees receive overtime compensation of at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per workweek. *See* 29 U.S.C. § 207(a)(1). Generally, to determine the regular rate of pay, an employer divides the employee's "remuneration for employment" (subject to the exclusions in 29 U.S.C. § 207(e)) by the total hours worked for the workweek. *See* 29 C.F.R. § 778.109.

OPINION

Based on the facts you provided, the employer's compensation plan complies with the FLSA's minimum wage requirements. Although an employee's average hourly pay rate may vary from workweek to workweek, the employer always ensures that the average hourly pay rate exceeds the FLSA's minimum wage requirement for all hours worked. *See* 29 U.S.C. § 206(a)(1); *U.S. v.*

Klinghoffer Bros. Realty Corp., 285 F.2d 487, 490 (2d Cir. 1960) (holding that, notwithstanding some unpaid hours worked, an employer complied with the FLSA because the “average hourly wage” exceeded the federal minimum wage).

The employer’s compensation plan, however, may not comply with the FLSA’s overtime requirements. If the employer always assumes a regular rate of pay of \$10 per hour when calculating overtime due, then the employer will not pay all overtime due to employees whose actual regular rate of pay exceeds \$10 per hour. 29 C.F.R. § 778.107. Neither an employer nor an employee may arbitrarily choose the regular rate of pay; it is an “actual fact” based on “mathematical computation.” *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 424–25 (1945); 29 C.F.R. § 778.108. That said, the compensation plan does comply with the FLSA’s overtime requirements for all employees whose actual regular rates of pay are less than \$10 per hour, as an employer may choose to pay an overtime premium in excess of the statutorily required amount. *See, e.g., Molina v. First Line Solutions LLC*, 566 F. Supp. 2d 770, 779 (N.D. Ill. 2007) (“[T]he FLSA only establishes a minimum floor that an employer is free to exceed.”); WHD Opinion Letter FLSA2006-21NA, 2006 WL 4512963, at *2 (Oct. 5, 2006) (confirming that employers may pay more than the FLSA requires).

We trust that this letter is responsive to your inquiry.

Sincerely,



Bryan L. Jarrett
Acting Administrator

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