U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-17

November 30, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning whether your client may calculate the regular rate of an employee who is paid on a piece-rate basis by dividing total earnings by the number of hours worked during the workweek, both productive and nonproductive, without having a specific agreement with the employee to utilize such calculation. This opinion is based exclusively on the facts that 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

Your client employs employees who perform unloading services (unloaders) at warehouses throughout the United States. Instead of a fixed hourly rate, your client pays the unloaders based on the number and types of trucks that they unload. Some unloaders have nonproductive waiting time during their shifts, which your client tracks as hours worked for minimum wage and overtime purposes. Your client does not pay unloaders a separate hourly rate for nonproductive waiting time.

Your client calculates the regular rate for each workweek by dividing the employee's total earnings, which include all piece-rate earnings, by the total number of hours worked by that employee during that workweek, including productive and nonproductive time. If the resulting regular rate is less than the minimum wage, your client pays supplemental compensation to bring the regular rate up to the minimum wage. In addition to the regular rate for all hours worked, your client pays each unloader an overtime premium equal to one-half the regular rate for all hours worked in excess of 40 in a workweek. Your client does not have a specific agreement with its employees regarding the above-described method of computing the regular rate and overtime pay.

GENERAL LEGAL PRINCIPLES

The Fair Labor Standards Act (FLSA) requires payment "at a rate not less than one and one-half times the regular rate at which [an employee] is employed" to all non-exempt employees for all hours worked in excess of 40 hours in a workweek. 29 U.S.C. § 207(a)(1). The regular rate is calculated for each workweek and is defined as "all remuneration for employment," except for eight statutory exclusions, divided by the number of hours worked. 29 U.S.C. 207(e); *see also Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 458 (1948) (stating that "the regular rate must be computed by dividing the total number of hours worked into the total compensation received"). For each hour over 40 an employee works in a workweek, the employee is entitled to straight time compensation at the regular rate and an additional 50 percent of the regular rate for

that hour. *See, e.g.*, *Walling v. Youngerman-Reynolds Hardwood Co*., 325 U.S. 419, 423–24 (1945).

The Department's regulation at 29 C.F.R. § 778.111(a) explains that, where an employee is paid on a piece-rate basis, the regular rate is calculated by adding together total piece-rate earnings for the workweek, plus any non-excludable supplemental pay, and dividing that sum by the total number of hours worked in the week, including both productive time and waiting time. "Only additional half-time pay is required" for each hour of overtime work because "the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked." *Id.*

Section 778.318(a) requires "nonproductive working hours" to be paid for and counted. Section 778.318(c) clarifies that this requirement is satisfied where "no special hourly rate is assigned to [nonproductive] hours [but] it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours." As an example, § 778.318(c) further clarifies that "it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours."[1] Under such a piece-rate arrangement, "the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek." *Id.*

OPINION

The facts that you have provided indicate that your client and its unloaders understand that piece-rate pay is intended to cover compensation for all hours worked, including nonproductive hours. As such, your client may divide the unloader's total earnings by the number of hours worked in a workweek, both productive and nonproductive, to calculate the regular rate, even though your client does not have a specific agreement with the employee to utilize such calculation.

As discussed above, when an employee is compensated on a piece-rate basis, the employee's regular rate is calculated by totaling earnings for the workweek from all sources: piece-rates, other sources (such as production bonuses), and any sums paid for waiting time or other hours worked (except statutory exclusions). *See* 29 C.F.R. § 778.111. This sum is then divided by the number of hours worked in the week for which such compensation was paid, including both productive and nonproductive hours, *see* 29 C.F.R. § 778.318(a), to yield the employee's regular rate for that week. *See* 29 C.F.R. § 778.111. Where an employer does not separately pay an employee for nonproductive time and intends the piece-rate pay to compensate an employee for all hours worked, both productive and nonproductive, the method for calculating the regular rate detailed in 29 C.F.R. § 778.111 is used if the parties understand that "the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive." 29 C.F.R. § 778.318(c).

As an initial matter, an understanding or agreement between an employer and employee under § 778.318(c) "need not be in writing, but rather, may be inferred from the parties' conduct."

[1] "[T]he 'agreement' section of 29 C.F.R. § 778.318 is not limited to piecework plans; the regulation specifically notes that piecework plans are offered as an example." *Douglas v. Xerox Bus. Servs., LLC*, No. C12-1798-JCC, 2015 WL 10791972, at *6 (W.D. Wash. Dec. 1, 2015), *aff'd*, 875 F.3d 884 (9th Cir. 2017).

Espenscheid v. DirectSat USA, LLC, No. 09-CV-625-BBC, 2011 WL 10069108, at *29 (W.D. Wis. Apr. 11, 2011) (citation omitted).

Courts, however, have not always been consistent regarding the content or scope of a mutual understanding requirement under § 778.318(c). For example, in *Thompson v. Capstone Logistics, LLC*, the court first stated that § 778.318(c) applies where employees "agree[] that their waiting time would be counted" as "part of the denominator" when computing the regular wage "but not independently paid." 4:15-CV-2464, 2018 WL 560407, at *5 (S.D. Tex. Jan. 25, 2018). This could be construed as requiring an understanding of the mathematical formula used to compute the regular rate. Yet in the very next paragraph, the court considered "whether the parties agreed and understood that the compensation they received for unloading trucks was intended to cover the time they spent waiting to unload." *Id.* Stated this way, the requirement may be satisfied without understanding the precise mathematical methodology (i.e., that the waiting time is counted as "part of the denominator" but "not independently paid") in how the regular rate is computed under the FLSA.

Only the latter type of understanding is needed. The mutual understanding requirement under § 778.318(c) should be interpreted to be consistent with the "clear and mutual understanding" requirement under § 778.114, which explains how to compute the regular rate where an employee works fluctuating hours from week to week and receives a fixed base salary for all hours worked. *See Espenscheid*, 2011 WL 10069108, at *29 ("It makes sense that the requirement of 'clear mutual understanding' under § 778.114(a) would be similar to the 'agreement' requirement of § 778.318(c)").[2] Section 778.114's "clear and mutual understanding" requirement "does not need to extend to the specific method used to calculate overtime pay." 29 C.F.R. § 778.114(a)(4). Rather, it is enough under § 778.114 that parties mutually understand that the fixed base salary is intended as compensation for all hours worked. *See Valerio v. Putnam Assocs. Inc*., 173 F.3d 35, 40 (1st Cir. 1999) ("The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not."). As the Fourth Circuit has explained, "Neither the regulation nor the FLSA in any way indicates that an employee must also understand the manner in which his or her overtime pay is calculated." *Bailey v. Cty. of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996). The same principle applies to § 778.318(c): it is enough that the employer and employee mutually understand that piece-rate earnings are intended to compensate the employee for all

[2] The Department believes that the *Espenscheid* court was mistaken when it stated that the mutual understanding requirements under §§ 778.114 and .318(c) exist to "[e]nsure that employees are made aware of methods of compensation that depart from the general rules of compensation under the FLSA and allow employers to compensate employees at overtime rates that are less than what would be otherwise required under the regulations." 2011 WL 10069108, at *29. Half-time overtime pay under § 778.111 for piece-rate arrangements and § 778.114 for fluctuating workweek arrangements actually follow the FLSA's generally applicable overtime compensation principle of "increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours[.]" *Youngerman-Reynolds Hardwood Co*., 325 U.S. at 423; *see also, e.g.*, *Serrano v. Republic Servs., Inc*., 227 F. Supp. 3d 768, 770 (S.D. Tex. 2017) (explaining that half-time overtime for piece-rate arrangements is consistent with the standard FLSA overtime calculation principle); *Bautista Hernandez v. Tadala's Nursery, Inc*., 34 F. Supp. 3d 1229, 1241 (S.D. Fla. 2014) (explaining that "the overtime premium, again, is simply one-half the 'regular rate'" for pieceworkers when applying the generally applicable overtime calculation principles under section 7(a) of the FLSA); 85 Fed. Reg. 34,970, 34,979 (June 8, 2020) (emphasizing "that the fluctuating workweek method does not deviate from the standard method of computing overtime pay under the FLSA").

hours worked. There is no need for an additional understanding regarding the precise method by which the pieceworker's regular rate and overtime pay are calculated.

CONCLUSION

The facts you present indicate that your client satisfies the understanding requirement described above. Here, your client does not pay an hourly rate of any sort and instead compensates employees based on the number and types of trucks they unload. Nothing indicates that your client communicated to unloaders that the compensation arrangement includes any separate pay for nonproductive hours or any other kind of supplemental pay, except as needed to satisfy the minimum wage. Nor is there any indication that your client ever paid a separate hourly rate for nonproductive hours or otherwise departed from the agreed upon piece-rate-only arrangement.[3] Accordingly, the unambiguous conclusion is that piece-rate earnings are intended to be compensation for all hours worked, both productive and nonproductive.[4] Accordingly, your client satisfies § 778.318(c)'s understanding requirement and may therefore compute the regular rate in accordance with the principles outlined in both § 778.111 and § 778.318(c), i.e., divide all piece-rate earnings by total hours worked in a workweek, both productive and nonproductive.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id*.

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M Stanton

Cheryl M. Stanton
Administrator

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

[3] Section 778.318(c) describes a situation in which "nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours." Where neither party to a piece-rate arrangement is able to identify a specific hourly rate for nonproductive time, there likely is not one.

[4] The facts you present contrast with *Espenscheid*, where the employer ambiguously explained "that an employee's 'pay plan will consist of some type of productivity, quality or piecework, component,' suggesting that the piece-rate pay is only one component of technician pay." 2011 WL 10069108, at *29. They also contrast with *Serrano v. Republic Servs., Inc.*, where the employer departed from the terms of a piece-rate plan and lacked a consistent position on the treatment of non-production time under the plan. *See* No. 2:14-CV-77, 2017 WL 2531918, at *11 (S.D. Tex. June 12, 2017).