U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2020-20

December 31, 2020

Dear **Name***:

This letter responds to your request for an opinion concerning your practice of paying overtime based on an expected number of hours worked to caregiver employees who work live-in and extended shifts of 24 hours or more for anticipated overtime hours.[1] You specifically ask whether such overtime payments are excludable from the regular rate and may be credited towards the amount of overtime pay owed under the Fair Labor Standards Act (FLSA or the Act). 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 employ caregivers who provide clients with in-home care services on a live-in basis or for shifts of 24 hours or more. A typical schedule may be 5 days per week for 120 hours or more, and providing such services requires your caregivers to spend full days in a client's home without direct supervision. You state that demand for such live-in or extended shift care services has increased during the COVID-19 pandemic because clients—most of whom are vulnerable to COVID-19 for age and health related reasons—prefer that their caregivers remain in their home to reduce contagion risks.

You state that it is difficult, if not impossible, to track the hours during which live-in and 24 hour or more shift caregivers perform compensable work, as opposed to being able to use time effectively for his or her own purposes. As such, you consider the caregivers to perform compensable work for the entire extended shift, except that you and your caregivers agree that bona-fide meal and sleep periods (of up to 8 hours per day) are not compensable. Any work-related interruptions to meal or sleep periods are tracked and counted as hours worked, and the entire sleep period is counted as hours worked if interruptions prevent the caregiver from getting the required minimum of sleep time per day.

You pay your caregivers an hourly rate plus extra compensation that is intended as overtime pay under the FLSA for all hours worked in excess of 40 in a workweek. The extra compensation is equal to one-half times the hourly rate for each overtime hour worked, as required under the FLSA. You represent that for all arrangements, a written agreement between the agency and caregiver exists, expressly outlining the specific pay structure applicable. You and the caregivers

[1] Your letter refers to payment of hours each shift at 1.5 times the regular rate as "prepayments" of overtime even though the premium is paid in the same week in which the employee works the overtime hours. Generally, prepayment of overtime refers to payments made in a week in which overtime is not worked that are then credited toward future overtime compensation. Rather, your letter indicates that you *calculate* the amount of overtime pay before your employees perform work, based on the expected number of hours worked, and then adjust that amount if actual hours are greater than the expected amount. As such, you appear to *pre-calculate* overtime payments, which is distinct from prepaying overtime.

further agree that you would pay overtime compensation based on the anticipated number of hours that the caregiver would work each workweek. If the caregiver works more hours than anticipated—for example, if planned meal or sleep periods were interrupted—you state that you supplement the prepaid compensation at a rate of one and one-half times the caregiver's hourly rate for each unanticipated hour of work over 40 in a workweek.

GENERAL LEGAL PRINCIPLES

The FLSA requires payment "at a rate not less than one and one-half times the regular rate at which [the 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). Where a worker is solely paid an hourly rate, the regular rate is equal to that hourly rate, and the overtime pay owed is equal to an additional one-half the hourly rate for each hour worked in excess of 40 in a workweek. 29 C.F.R. § 778.110(a). The regular rate must include "all remuneration for employment paid to, or on behalf of, the employee," subject to eight statutory exclusions. 29 U.S.C. § 207(e). In interpreting "remuneration for employment" and the statutory exclusions, a "'fair reading' of the FLSA, neither narrow nor broad, is what is called for." *Sec'y U.S. Dep't of Labor v. Bristol Excavating, Inc*., 935 F.3d 122, 135 (3d Cir. 2019) (quoting *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018)).

The statutory exclusion under section 7(e)(5) of the Act permits an employer to exclude extra compensation provided by a premium rate paid for certain hours worked in any day or workweek because such hours are in excess of 8 in a work day or 40 in a workweek. *See* 29 U.S.C. § 207(e)(5). Section 7(h) further permits an employer to credit any payments excludable under section 7(e)(5) towards overtime pay owed under the FLSA. 29 U.S.C. § 207(h)(2). These two provisions permit an employer to pay its overtime pay obligations through an overtime premium rate for hours worked in excess of 40 in a workweek. WHD's regulation at 29 C.F.R. § 778.202(a) explains that:

> A written or unwritten employment contract, agreement, understanding, handbook, policy, or practice may provide for the payment of overtime compensation for hours worked in excess of … 40 per week. If the payment of such overtime compensation is in fact contingent upon the employee's having worked … in excess of [40] in the workweek…, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) of the Act and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act.

The regulation at 29 C.F.R. § 778.309 further clarifies that, where an employee "works a regular fixed number of hours in excess of the statutory maximum each workweek," the employer may pay that employee, "in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked." *Id*.[2]

[2] The regulations further note that it is unlawful for an employer to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours (if any) worked—"[t]he result cannot be achieved by the payment of … a lump sum for overtime." 29 C.F.R. § 778.500(b).

Employers of workers who work shifts of 24 hours or more and live-in employees, including live-in domestic service employees, may exclude sleep time from those employees' hours worked, provided several conditions are met. For live-in employees, the employer and employee should have a reasonable agreement to exclude sleep time, the employer must provide the employee "private quarters in a homelike environment," and the employee must get reasonable periods of sleep totaling at least five hours. *See* 29 C.F.R. § 785.23; WHD Field Assistance Bulletin 2016-1 (Apr. 25, 2016). Some employees who do not qualify as "live-in" employees under the FLSA work for shifts of 24 hours or more. As to those employees, an employer may exclude up to 8 hours of the employee's sleep time from hours worked if certain requirements—similar to but distinct from those for live-in employees—are met.[3] *See* 29 C.F.R. § 785.22. Employees who work shifts of less than 24 hours may not have any sleep time excluded, even if he or she is permitted to sleep during a shift. *See* 29 C.F.R. § 785.21.

OPINION

As a general matter, extra compensation you pay caregivers for hours worked in excess of 40 in a workweek or in excess of 8 in a workday may be excludable from the regular rate as an overtime premium under section 7(e)(5) of the FLSA and credited towards your overtime pay obligations under section 7(h) of the Act in any workweek in which overtime pay is owed.[4]

To qualify as an overtime premium under section 7(e)(5), extra compensation must in fact be contingent upon working hours in excess of 40 in a workweek *or* 8 in a day. *See* 29 C.F.R. § 778.202(a). Such a premium does not need to be paid pursuant to a formal contract or written agreement, so long as it is made pursuant to some form of legitimate agreement or understanding. *Id.*; *see also* Regular Rate under the Fair Labor Standards Act, 84 Fed. Reg. 68,763 (Dec. 16, 2019). Your letter states that you and your caregivers have agreed that the caregivers' compensation for live-in and extended shifts includes an overtime premium equal to one and one-half times the hourly rate for all hours worked over 40 in a workweek. Your letter further indicates that you and your caregivers have agreed to an overtime premium equal to one-and-one-half times the hourly rate for hours worked in excess of 8 in a workday, even where the number of hours worked in a workweek is less than 40.

The pay calculation examples in your letter indicate that, when total hours worked in a workweek exceeds 40, you pay your caregivers, in addition to the hourly rate, an overtime premium equal to one-half times the hourly rate for each expected or unexpected hour worked that is in excess of 8 in a workday. In such a workweek, the overtime premiums you pay for hours worked in excess of

[3] These requirements include that (1) the employee be provided "adequate sleeping facilities," (2) she "can usually enjoy an uninterrupted night's sleep," and (3) the parties have an "expressed or implied agreement" to exclude the sleep time. 29 C.F.R. § 785.22(a).

[4] Your letter also asked whether your compensation arrangement qualified as a lump sum overtime payment under 29 C.F.R. § 778.310, and as discussed further in section 32j06 of WHD's Field Operation Handbook (FOH). Courts have held that the type of compensation arrangement you describe in your letter is not a lump sum payment, but instead an hourly premium paid based on expected overtime hours. *See, e.g., U.S. Dep't of Labor v. Fire & Safety Investigation Consulting Servs*., LLC, 915 F.3d 277, 283 n.5 (4th Cir. 2019) (explaining that 32j06 "solely applies for limited periods, where employers compensate employees with a lump sum for a special job for an estimated number of overtime hours. This provision is inapplicable for regularized work schedules that purportedly include overtime compensation." (quotation marks and citation omitted)).

8 in each day, whether expected or unexpected, may be excluded from the regular rate under section 7(e)(5) and credited towards your overtime obligations under section 7(h).[5] If a caregiver works the expected number of hours, the agreed-upon premium you provide at one-half times the hourly rate for expected overtime hours would fulfill your overtime obligation under the FLSA. If the caregiver works more than the expected number of hours, you must supplement the overtime premium with additional compensation as appropriate. Your letter indicates that you provide such supplemental compensation at a rate of one and one-half times the hourly rate for unexpected hours worked over 8 hours in a day in such workweeks, and as such, this practice appears to be consistent with the FLSA's overtime provisions.

CONCLUSION

For the foregoing reasons, your practice of paying overtime for hours over 8 in a day based on expected number of hours worked and providing supplemental pay for unexpected additional hours as appropriate is consistent with the FLSA's overtime provisions.

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
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. 552(b)(6).**

[5] You are, of course, required to track the actual number of hours worked each week and compensate employees accordingly. *See* 29 C.F.R. § 516.2(a)(6) (explaining that records must include the regular hourly rate of pay as well as the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the regular rate). Further, this letter does not address and merely assumes that other applicable requirements are satisfied, including provision of adequate sleeping facilities.