

FLSA-971

July 29, 1976

This is in reply to your letter of July 12, 1976, regarding the computation of the regular rate of pay under the Fair Labor Standards Act. You state your client wishes to pay an attendance bonus as follows:

It is the policy of your client to provide hourly paid employees with paid personal time when that time is earned. This paid time is provided when earned, for any reason the employee desires, but the basic intent is to provide the employee with paid personal time when absenteeism might otherwise be necessary due to sickness, family business, or personal business. All full-time permanent hourly employees are eligible. If an employee works all of his weekly scheduled hours, including overtime hours, he will earn one-half an Attendance Bonus Hour.

Any absences during the regularly scheduled hours within the employee's workweek may not be "made up" by working additional periods outside the regularly scheduled hours. Absent days observed under the policy will be included in the base for calculation of overtime pay. The maximum number of days that may be accumulated is 40. Absences may be taken only in increments of eight (8) hours. No employee may receive pay in lieu of time off, including hours to his credit as of his termination, regardless of the reason for the termination.

According to the plan, an employee would be entitled to one day's absence, with pay, if he met the terms of the policy for sixteen weeks, which need not be consecutive.

We are of the opinion that payments made under the policy need not be included in the employees' regular rate of pay. It would appear that your client is agreeing to pay for time not worked due primarily to sickness or family business, or personal business within the basic intent of the policy (although the employee may take such earned time for any reason he desires). This is somewhat of a hybrid compensation plan in that it has some aspects of an attendance bonus and some aspects of an annual leave-vacation plan. However, on balance, we feel that it more closely resembles an annual leave plan. The Act does not require an employer to pay for hours not worked due to holidays, vacations, absences for personal reasons, and similar absences. Therefore, the employer may condition any payment for such hours on factors such as attendance for full workweeks and non-tardiness. The credit hours exchangeable for absence pay at a future time are not payments to the employee in the week in which such hours are credited. These credits merely entitle the employer to pay for absent time in future workweeks in which the non-work time may be included.

The payments for such non-work time in the workweek when they are made need not be included in the regular rate but may be excluded under section 7(e)(2) even though the tie-in with attendance and non-tardiness could be considered to characterize them as remuneration for employment.

As you know, section 548.3(e) of 29 CFR Part 548, copy enclosed, permits an employer, upon agreement or understanding with the employee, to omit from the computation of overtime certain incidental payments which have a trivial effect on the overtime compensation due. Since sixteen weeks of policy compliance is required to earn a paid absence of 8 hours, it may well be that such payments, even if they were considered part of the regular rate of pay, would fall within the example cited in section 548.305(d) of Part 548.

Sincerely,

Ronald J. James
Administrator
Wage and Hour Division

Enclosure