

FLSA-758

June 4, 1984

This is an update of our May 24 response to your letter of May 9 on behalf *** Administration for ***. You request our comments concerning a proposed pay plan submitted by Mr. *** for a cook in a food service establishment.

Under the proposed pay plan submitted by your constituents, an employee who earns an annual salary of \$26,000 will receive a straight weekly salary of \$500, regardless of the number of hours worked per week. The employee will also receive a 4-week paid vacation. Because of the industry's substantial seasonal fluctuations, the employee will work as few as 20 hours during some weeks and as many as 50 hours in other weeks. In total, the employee will work approximately 2,000 hours per year which is equivalent to the usual hours by other employees. The proposed pay plan also suggests that an employer be permitted to enter into a contract with an employee whereby at the end of each year, the employer would reimburse the employee in a lump sum at the rate of 1.5 times the employee's regular hourly rate for all hours worked in excess of 2,000 hours per year.

We have considered the proposed pay plan under the provisions of the Fair Labor Standards Act (FLSA), the Federal Law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees, regardless of their method of payment (e.g., hourly, salary, commission) must be paid not less than \$3.35 an hour for all hours worked and not less than one and one-half times their regular rate of pay for all hours worked over 40 in the workweek.

Under the pay arrangement discussed in section 778.114 of the enclosed copy of Interpretative Bulletin, Part 778, an employee may be paid a fixed salary for hours that fluctuate from week to week if there is a mutual understanding between the employer and the employee that the fixed salary is compensation for all hours worked each workweek, whether few or many. In addition to the straight time salary however, the employer must receive additional overtime pay for each overtime hour worked in the week at not less than one-half times the regular rate of pay, unless the employee is otherwise exempt.

While FLSA does not require that overtime compensation be paid weekly, the general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay for the period in which such workweek ends. However, if the correct amount of overtime compensation cannot be determined until some time after the regular pay period, the requirement of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made.

The language of the Act makes it clear that neither the Wage-Hour Administrator nor employers have the authority to waive the statutory requirement for overtime compensation for hours worked in excess of 40 in the workweek. Therefore, it would not be possible for an employer to wait until the end of the year to compensate employees for those hours worked in excess of 40 a week during the year.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator