

FLSA-913

March 16, 1987

This is in further response to your request of October 17, 1986, for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to a proposed method of paying employees of tree-planting contractors.

The FLSA is a Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Under the proposed method of payment, individuals who are employed as tree planters would be paid on a piece-rate basis and their earnings would be directly dependent upon their productivity. An ascending scale of piece-rate earnings, based on the tree-planter's productivity under various circumstances, would also be established. Each task would be assigned a "level of difficulty" which would be determined by such factors as soil preparation and terrain conditions. For instance, the same level of productivity would be assigned a higher piece rate under "level III" than under "level II" in recognition of the greater degree of difficulty involved. It is also stated in your proposal that all of the employees under this system would be paid at least the minimum wage of \$3.35 an hour for all hours worked.

In order to determine an employee's regular rate of pay for the purpose of computing overtime pay under the method of payment which you propose, the total piece-rate earnings for the workweek would be divided by the total number of hours worked by the employee. As explained in section 778.111 of 29 CFR Part 778 (copy enclosed), the employee's premium compensation for overtime hours worked in the workweek would then be computed by multiplying one-half of the regular rate times the overtime hours. This method of computing overtime compensation for a pieceworker complies with the requirements of FLSA.

The tree planters would also be compensated for certain expenses which they incur while performing their duties for the employer. These types of "per diem" payments for expenses are discussed in section 778.217 of Part 778. As explained in this section of the regulations, such payments are excluded, under section 7(e)(2) of FLSA, from the employee's regular rate of pay for the purpose of computing overtime pay. Payments by the employer as reimbursement for actual or reasonably approximate transportation and living expenses incurred by the employee while traveling on behalf of the employer may be excluded from the regular rate of pay. In this regard, you should be aware that, as explained in section 778.217(c) of Part 778, any payments to an employee which are disproportionately large or which obviously exceed the employee's actual (or reasonably approximate) expenses will be included in the employee's regular rate of pay.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure