

FLSA 1206

May 13, 1987

This is in further response to your letter, with enclosures, concerning the application of the Fair Labor Standards Act (FLSA) to firefighters and law enforcement personnel who are employed by municipal governments. We regret the delay in responding to your inquiry.

The FLSA is the 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.

On January 16, the Department of Labor published final regulations, 29 CFR Part 553, which implement the Fair Labor Standards Amendments of 1985. These regulations contain rules concerning certain statutory exclusions and exemptions, recordkeeping requirements, and compensatory time provisions which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees. A copy of the regulations is enclosed for your information.

You indicate that municipal governments in a particular State are required to participate in incentive programs for firefighters and law enforcement personnel. Pursuant to these programs, which have been established by State law, firefighters and law enforcement employees receive monetary payments when they fulfill certain educational requirements. Although these programs are funded entirely by the State, eligible employees receive their "State educational incentive supplements" as a part of their regular pay from the municipal government. These incentive supplements are usually paid to firefighters or law enforcement employees who complete courses of study for a college degree at either the associate or baccalaureate level.

However, firefighters who hold positions which require either of these college degrees are not eligible for the supplemental payments. Law enforcement personnel may also qualify for these payments if they complete certain "advanced and career development training courses." You wish to know if these types of payments must be included in the employees' regular rates of pay which are used to compute overtime pay due under FLSA.

The principles for computing overtime pay based on an employee's regular rate of pay are discussed in sections 778.107 through 778.122 of 29 CFR Part 778 (copy enclosed). As stated in section 778.109, the regular hourly rate of pay is determined by dividing an employee's total remuneration, except statutory exclusions for any workweek by the total number of hours worked in that workweek. In this regard, it should be noted that the U. S. Supreme Court has held that the regular rate of pay cannot be arbitrarily chosen by the employer and/or the employee but, instead, it is an "actual fact" which is based on a

mathematical computation (Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419, 424-425).

Section 7(e) of FLSA requires the inclusion in the regular rate of all remuneration for employment paid to, or on behalf of, an employee, except the seven specified types of payments listed therein. However, the "State educational incentive supplements" to which you refer are not excludable under section 7(e) and, therefore, must be included in the employees' regular rates of pay. Furthermore, it is immaterial that the State, and not the municipal governments, is the source of funds for the supplemental payments. These payments directly affect the total compensation of the employees involved and constitute a part of their regular rates of pay which the municipal governments must use in computing any overtime pay due under FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosures