FLSA 1204

June 29, 1987

This is in further response to your letter, addressed to *** the Employment Standards Administration Regional Office, concerning the application of the Fair Labor Standards Act (FLSA) to employees of the ***. You wish to know if the *** may pay certain nonexempt employees in 12 equal installments for working during 9 months of the year. 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 a minimum wage of not less than $3.35 an hour and overtime pay of 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 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.

In your letter, you indicate that there are currently 97 nonexempt employees at *** who regularly work over 40 hours in a workweek. Most of these employees work for nine months during the school year. Their total wages for nine months are computed on an annual basis and paid to the employees in equal monthly payments. These total wages include a premium payment for weekly overtime hours worked in an amount which is predetermined for each employee. The makes *** appropriate monthly pay adjustments to the pay of any of these employees who works either less than or more than the predetermined number of hours in a particular workweek. You wish to know if this method of paying these nonexempt employees complies with the overtime pay requirement of FLSA.

The following example is based on our understanding of the pay plan to which you refer:

At the beginning of the school year in September, a determination is made that a nonexempt employee who is paid $4.87 an hour will normally work 45 hours in each workweek. A total of $231.33, including overtime pay, is computed for the employee's weekly pay, including the time and one-half premium pay for the overtime hours worked ($4.87 multiplied by 45 = $219.15; 5 (OT) multiplied by $4.87/2 = $12.18; $219.15 + $12.18 = $231.33). This weekly amount is multiplied by the number of workweeks in 9 months and then divided by 12 in order to determine the amount of the monthly installment payment ($231.33 multiplied by 39 (weeks) = $9021.87; $9021.87 divided by 12 = $751.82 (monthly payment). If, during any particular workweek, this individual works more or less than 45 hours, an appropriate adjustment is made to the employee's monthly pay. For instance, if the employee works 49 hours during a workweek in a

particular month, the Institute would pay $9.74 to this individual as premium pay for the additional 4 overtime hours worked (4 hours multiplied by $4.87/2 = $9.74). In the same way, if this employee worked only 41 hours in a particular workweek, $9.74 would be deducted from his or her pay.

The effect of the pay plan to which your refer is to delay the payment of all of the wages which have been earned by an employee in any pay period. Payment of both minimum wage and overtime compensation due an employee for hours worked under FLSA must ordinarily be made at the regular pay day for the workweek or, when the pay period covers more than a single week, at the regular payday for the period in which the particular workweek ends. Such payments 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 then may not be delayed beyond the next pay day after such computation can be made. Therefore, it is our opinion that the pay plan which is the subject of your inquiry does not comply with the provisions of FLSA.

You also refer to an Administrator's opinion of April 10, 1967, which approves 12 monthly installment payments of a 10-month salary to a certain employee. However, the position taken by the Wage and Hour Division in that letter in not applicable to the circumstances described in your inquiry. The subject of that opinion letter is a salaried employee who is exempt from the overtime pay requirement of FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosures