

**FLSA - 1185**

April 4, 1988

This is in further response to your letter concerning the application of the overtime compensation requirements of the Fair Labor Standards Act (FLSA) to conservation wardens employed by the Department of Natural Resources. Under the provisions of a recently negotiated collective bargaining agreement (CBA), the State of Wisconsin has agreed to implement an overtime pay system patterned after the system used by the U.S. Fish and Wildlife Service for its employees pursuant to 5 U.S.C. 5545, provided that such pay system meets the overtime pay requirements of FLSA.

You state that the overtime "premium" under the proposed pay system will be a cash payment of 10 percent of base pay when an employee works at least 6 but not more than 10 overtime hours in a biweekly period, 15 percent of base pay when an employee works over 10 but not more than 14 overtime hours, 20 percent for over 14 hours but not more than 18 hours, and 25 percent of base pay when an employee works over 18 hours of overtime in a biweekly period. It is our understanding that conservation wardens are currently paid overtime in cash in accordance with the special overtime pay exception provided in section 7(k) of FLSA for fire protection and law enforcement personnel.

The principles for computing overtime pay in cash under FLSA are discussed in Regulations, 29 CFR Part 778 (copy enclosed). Overtime pay must be paid at a rate of pay not less than one and one-half times the regular rate of pay for all hours worked in excess of the applicable statutory requirement in section 7 of FLSA. The regular rate of pay is an hourly rate which must be computed in accordance with the principles in sections 778.107 through 778.122 of Part 778. The regular rate is determined by dividing an employee's total remuneration for employment (except statutory exclusions) in any workweek (or work period) by the total number of hours actually worked by the employee in the workweek (or work period).

Under the proposed overtime plan provided by the CBA, a constant lump sum overtime "premium" would be paid even though the actual overtime hours worked could vary. For example, an employee would receive a lump sum of 10 percent of base pay whether the employee worked 6 overtime hours or 10 overtime hours in the work period. This type of overtime "premium" does not meet the overtime compensation requirements under section 7 of FLSA. As indicated in section 778.310 of Part 778, a premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium under FLSA even though the amount of money may be equal to or greater than the sum owed on a per hour basis. The plain wording of the statute makes clear that extra compensation provided by premium rates other than those described in section 7 cannot be treated as overtime premiums. See section 778.207.

Although you have patterned your proposed overtime pay system on a system used by the Federal Government, this does not mean that your proposed system meets the requirements of FLSA. Federal employees are subject to both FLSA and Title 5 of the United States Code. However, Title 5 does not apply to your employees. The Office of Personnel Management (OPM) administers the provisions of FLSA and Title 5 with respect to individuals employed by the United States (with some exceptions). In administering FLSA and Title 5 with respect to Federal employees, OPM harmonizes (in accordance with congressional intent) both statutes through its regulations (known as the Federal Personnel Manual). When a Federal employee subject to both statutes works overtime, OPM regulations generally apply the provisions of the statute most beneficial to the employee in that particular overtime situation.

We trust that the above discussion is responsive to your inquiry.

Sincerely,

Paula V. Smith  
Administrator