

**FLSA-779**

April 27, 1988

This is in response to your letters concerning the application of the overtime compensation provisions of the Fair Labor Standards Act (FLSA) to certain employees of your client, who is engaged in chemical manufacturing. We regret the delay in responding to your inquiry.

The employees at issue work in the utilities (power plant) operation of your client's facility, which requires continuous operation 24 hours per day, 7 days per week. You indicate that the employees presently work 8-hour shifts and that the employees rotate between the three shifts over a repetitive cycle. Utilities employees have approached management with a request that your client establish work schedules under which the employees would work 12-hour shifts and under which they would receive additional consecutive days off. The proposed rotating schedule would provide four consecutive 12-hour "graveyard" shifts, four consecutive days off, four consecutive 12-hour "graveyard" shifts and so forth. The schedule would recycle each 16 weeks. Apparently, other employers operating utilities in the vicinity use such scheduling which is viewed as a benefit and conducive to recruitment, retention, and overall employee morale.

You state that about 93 percent of the affected employees have agreed to the proposal, and that your client has agreed to implement such scheduling, provided, among other things, that FLSA overtime costs would not be increased. To meet this objective, your client proposes to reduce current base hourly rate of pay by approximately 14 percent. Current base hourly rates range from \$9.64 an hour for trainees to \$15.35 an hour for senior technicians; after the 14-percent reduction, base hourly rates would range from \$8.26 to \$13.16 an hour.

Under the proposal, the affected employees will work approximately the same number of hours per year as under the current 8-hour schedule, and the employees will receive virtually identical compensation. Overtime pay at one and one-half times the reduced hourly rate will be paid for any hours worked in excess of 8 in a day, 40 hours worked in a workweek, and regularly scheduled hours on a holiday.

A "premium" rate of pay in excess of one and one-half times the reduced hourly base rate of pay will be paid for hours worked in excess of 12 in a day, hours worked on a seventh consecutive day, or any hours worked in excess of 12 hours on a holiday. In addition, certain other adjustments will be made in calculating pay for fringe benefits such as vacation, holiday, funeral leave, jury duty, sick leave, call-out pay, reporting pay, paternity leave pay, and other benefits.

You state that the employer plans to implement the 12-hour schedule indefinitely, and in any event, for not less than a trial period of 3 months. You further emphasize that the employees will be paid on the basis of the hours actually worked each workweek.

It is our opinion that the 12-hour shift schedule plan would comply with FLSA provided the specified rates constitute bona fide hourly rates. The specified hourly rates would be bona fide if they are (1) agreed to by the employees, (2) operative for substantial periods of time, and (3) not less than the applicable minimum wage required by FLSA. Under the conditions you describe, the proposed plan would appear to meet these conditions.

In summary, there is no provision in FLSA which prohibits an employer from reducing an employee's rate of pay if such reduction is bona fide and is not designed to circumvent the overtime requirements of FLSA. The establishment of rates of pay which are not less than the minimum wage required by FLA. is a matter for agreement between the employer and the employees or their authorized representatives.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of FLSA.

Sincerely,

Paula V. Smith  
Administrator