

**FLSA - 1172**

May 31, 1988

This is in further response to your letter asking whether or not a monthly "pool allowance" paid to employees of the City \*\*\* (the City) should be included in their regular rate of pay in accordance with the Fair Labor Standards Act (FLSA). We regret the delay in responding to your inquiry.

You indicate that the "pool allowance" is a monthly payment in excess of regular compensation which, at an employee's option, may be included as compensation for a given work period or used to offset the cost of employee benefits like health and life insurance, and an employee's uniform allowance. You correctly note that any portion of the "pool allowance" added to an employee's salary or other compensation must be included in his/her regular rate of pay. You seek to know, however, if the portion of the "pool allowance" used to pay for employee benefits, and not allocated to salary or other compensation, must also be included in the calculation of an employee's regular rate.

As noted in the Department of Labor's letter on this matter that was addressed to \*\*\*, sections 778.108 and 78.109 of 29 CFR Part 778 state that the regular rate of pay is determined by dividing an employee's total remuneration for employment in any workweek (or other work period) by the total number of hours worked. Excluded from a determination of the regular rate are the types of payment listed in FLSA section 7(e). The letter to \*\*\* accurately states that monthly "pool allowance" payments do not meet the criteria for exclusion under section 7(e).

Only the FLSA section 7(e)(4) exclusion is potentially applicable to the circumstances in which any portion of the pool allowance is used to pay for employee benefits. Section 7(e)(4) provides that "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees" may be excluded from the regular rate of pay.

Employer contributions for providing the benefits described in FLSA section 7(e)(4) may be excluded from the regular rate as long as the requirements of sections 778.214 and 778.215 are met. Pursuant thereto, the section 7(e)(4) exclusion requires the existence of a "specific plan", whose primary purpose is to provide old age, retirement, life, accident, health insurance or similar benefits. However, section 778.215 provides that "contributions must be paid irrevocably to a trustee or third person" and restricts the use of an employee's option to receive cash instead of benefits.

Unfortunately, the information provided by you does not address the specific regulatory requirements. For example, we cannot determine whether or not payment of the "pool allowance" is made directly to an employee or a third party. Therefore, unless a more detailed description of the benefit program would indicate compliance with FLSA section 7(e)(4) as interpreted by the regulations cited above, it is our opinion that any portion of the "pool allowance" used to pay for the benefits mentioned in your letter is not excludable from a recipient employee's regular rate of pay.

We trust that the above is response to your inquiry.

Sincerely,

Paula V. Smith  
Administrator