

FLSA-619

December 12, 1988

This is in response to your letter of October 4 concerning whether certain expense reimbursement payments made by County to its district attorney investigators for operating their own automobiles on County business are excludable from such employees' regular rates of pay pursuant to section 7(e)(2) of the Fair Labor Standards Act (FLSA). Your inquiry is in reference to our letter of April 21 on this issue.

You provide additional data which shows that average out-of-pocket expenses incurred by the employees in question for operating their own automobiles on County business is \$548.68 per month. The average out-of-county miles driven per month per employee is 58 miles, which is reimbursable at the rate of \$0.24 per mile. The average monthly reimbursement paid by the County would be \$333.29 (\$320 fixed reimbursement plus \$13.92 for mileage - 58 out-of-county miles times \$0.24), which is about \$200 per month less than the average actual monthly expenses for all affected employees, or about \$100 per month less than the expenses incurred by the employee having the lowest actual monthly expenses.

Based upon the data you have provided, both the fixed reimbursement of \$320 per month provided under the agreement and the \$0.24 per mile reimbursement for out-of-county mileage driven on County business may be excluded from the affected employees' regular rates of pay pursuant to section 7(e)(2), since the total reimbursement from such payments does not exceed actual expenses incurred by affected employees for operating their own automobiles on County business.

Please note that only where an employer's reimbursement of an employee's expenses (incurred on behalf of the employer) exceeds the actual or approximate amount of the employee's expenses must the excess amount of reimbursement be included in the regular rate of pay for overtime compensation purposes. See section 778.217(c) of Regulations, 29 CFR Part 778 (copy enclosed).

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator